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THE
ATLANTIC REPORTER,
VOLUME 39,

CONTAINING ALL THE DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
Court of Chancery, and Supreme and Prerogative Courts
of NEW JERSEY; Court of Errors and Appeals and
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²Appointed pro tempore by the Governor to succeed Judge Fenn.

³Term expired May 15, 1897.

⁴Appointed May 15, 1897.

⁵Succeeded by James A. Pearce.

⁶Succeeded George M. Russum December 6, 1897.

⁷Deceased March 9, 1896.

⁸Promoted to Chief Justiceship April 1, 1896.

⁹Resigned April 1, 1893.

¹⁰Retired May 18, 1895.

¹¹Appointed May 21, 1895.

¹²Succeeds Chief Justice Doe.

¹³Appointed April 15, 1893.

¹⁴Appointed April 14, 1896.

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¹Appointed May, 1897.

COURT RULES.

SUPREME COURT OF RHODE ISLAND.

RELATING TO COURT RULES FOR DIVORCE.

[The order of the court relating to petitions for divorce, made December 12, 1893, was rescinded, and another substituted therefor, by the order of August 1, 1895.¹ The latter was amended by the order of February 1, 1896, conforming to Gen. Laws R. I. c. 1895, and, as so amended, these rules are now as follows:]

1. Petitions for divorce shall be addressed to the appellate division of the supreme court to be holden at Providence, within the county of Providence, on the first Monday in October, February and June; at Newport, within the county of Newport, on the third Monday in September and the second Monday in May; at South Kingstown, within the county of Washington, on the second Monday in November and the second Monday in April.

2. On all petitions for divorce the adverse party, if his or her residence be known, shall be notified by citation and served with a copy of the petition, three weeks at least before the return day of the citation.

3. Whenever the adverse party to a petition for divorce shall be or reside without this state, the petitioner shall annex to the petition an affidavit, in which it shall be stated where the adverse party resides, or where he was last heard from by the petitioner, and all the information and belief of the petitioner as to the place at which the adverse party may be found at the time of the filing of such petition, or that the petitioner has no information or belief as to the residence of the adverse party or where he may be found, if such shall be the fact, in which event the petitioner shall also state when and where the adverse party was last heard from.

The clerk with whom such petition and affidavit shall be filed, if the residence of the adverse party is disclosed in said affidavit, shall issue a citation to such adverse party, which citation shall be accompanied by a certified copy of the petition, and the citation shall be directed for service to any disinterested person, and shall be served by delivering the said copy of the said petition in hand to the said adverse party, whenever he may be without this state, and by reading the said citation in his presence and hearing, or by leaving the said certified copy of the said petition, with

a copy of said citation for such adverse party, at his usual place of abode without this state, which service in either case shall be made at least three weeks before the return day of such citation, and said disinterested person shall return said citation, having made oath thereon of the place where, the time when, and the manner in which he shall have made service of the said citation.

If the affidavit annexed to any such petition shall disclose that the petitioner has no knowledge, information or belief as to the residence of the adverse party, the clerk of the court with whom such petition shall be filed shall notify such adverse party of the pendency of the said petition and that he may appear and answer the same, by publishing a notice thereof for six successive weeks before the return day named in the citation issued on such petition, in some newspaper published in the county where such petition shall be pending and by sending a citation, with a copy of the petition, post paid, through the mail, directed to the adverse party at the place where the affidavit discloses that he was last heard from, if he was last heard from by the petitioner without this state.

4. From time to time during the session the court will fix a date for hearing the docket of uncontested petitions for divorce. No uncontested petition will be heard before the docket has been taken up for hearing, nor at any time except while the docket is in order.

RELATING TO PROCEEDINGS IN INSOLVENCY.

(February 1, 1896.)

1. The following forms are approved in accordance with the provisions of chapter 274 of the General Laws:

[The forms approved are the printed forms now in use in insolvency proceedings.]

2. Unless special order is made to the contrary, notice to creditors and others shall be given by publication twice a week for two weeks prior to the hearing upon the petition and shall be by publication on Mondays and Thursdays, if there is a newspaper published on Mondays and Thursdays in the county where publication is made, and so far as practicable other notices by publication shall be given on Mondays and Thursdays.

¹ For rule as originally adopted, see 34 Atl. v.

3. The newspapers in which the notices and orders provided for by chapter 274 of the General Laws are to be made are hereby designated as follows:

Providence county: Providence Daily Journal.

Kent county: If all the insolvents reside in East Greenwich, the publication shall be made in the R. I. Pendulum; if in Warwick, in the Pawtuxet Valley Daily Times; if in other towns in Kent county, in the Pawtuxet Valley Gleaner.

Newport county: Newport Daily News.

Bristol county: Bristol Phenix.

Washington county: If all the insolvents reside in North Kingstown or Exeter, the publication shall be made in the Wickford Standard; if in South Kingstown, the district of Narragansett or Richmond, in the Narragansett Herald; if in any other town in Washington county, in the Westerly Tribune. Special order may be made for cases for which provision is not hereby made.

4. The R. I. Hospital Trust Company, the Industrial Trust Company, the Union Trust Company, and all national banks located in this state, are hereby designated as depositories of the court.

5. The sum of \$50 shall be deposited with the clerk by the petitioner at the time of filing any petition in insolvency. This sum shall be applied for register's compensation and clerk's compensation and expenses in the following manner: The sum of \$30 shall be paid to the register as soon as the cause is referred to him; the sum of \$20 shall be applied by the clerk for compensation and expenses incurred in giving notices by publication and otherwise, and for issuing process, and if there be any surplus the same shall be paid over to the assignee. In involuntary petitions in insolvency, if the respondent be adjudged insolvent, the petitioner shall be allowed said sum of \$50 as a preferred claim against the insolvent estate, and if the respondent be not adjudged insolvent the amount remaining after paying clerk's compensation and expenses shall be refunded to the petitioner. In special cases the court may order additional deposits to be made.

6. The sum of \$1 shall be paid by a creditor for making out a proof of claim and administering oath thereto, and said sum of

\$1 shall be a preferred claim against the assigned estate.

RELATING TO APPLICATIONS FOR ADMISSION TO THE BAR.

(April 8, 1896.)

Committees appointed to examine the qualifications of applicants for admission to the bar shall file with their reports the answers of the applicants who have passed the examinations.

RELATING TO NOTICES TO CREDITORS OF INSOLVENTS.

(September 26, 1896.)

It is hereby ordered that the clerk give written or printed notices to all known creditors of any person or corporation who may have been adjudged insolvent upon creditors' petition, of the first general meeting of creditors for the proof of claims and election of an assignee or assignees of such insolvent, by depositing in the post office the same, post paid, to such creditor's address as shall appear by the schedule filed by the insolvent.

RELATING TO APPLICANTS FOR ADMISSION TO THE BAR.

(October 29, 1897.)

1. Applicants for admission to the bar, who shall be of good moral character and at least twenty-one years of age, and who, having received a classical education, shall have studied law two years in the office of an attorney and counsellor at law, or two years in some law school in the country and the office of an attorney and counsellor, six months of which time of study, at least, shall in all cases have been in the office of an attorney and counsellor in this state, and who shall, as a further evidence of their qualifications, have sustained a satisfactory examination by an examining committee, to be appointed by the supreme court at each term in the county of Providence, or who, not having received a classical education, shall have studied law three years and have sustained a satisfactory examination in manner aforesaid, shall be admitted attorneys and counsellors of the supreme court, and as such shall have right to practice in all the courts of this state.

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WETZEL v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 17, 1898.)

COLLISION OF CARS OF DIFFERENT LINES—INJURY TO EMPLOYEE.

Act April 4, 1868 (P. L. 58) § 1, declaring that when any person shall be injured while lawfully employed on the road of a railroad company, of which company he is not an employé, his right of action against it shall be such only as he would have if an employé of it, has no application to the case of a conductor of one street-car company injured while in his car on the track of his company by collision with the car of another company, caused by the negligent attempt of the motorman of the latter to cross in front of his car.

Appeal from court of common pleas, Philadelphia county.

Action by Washington W. Wetzel against the Philadelphia Traction Company for injury received by plaintiff, a conductor of a car of the People's Traction Company, from collision of his car while on the track of the People's Traction Company with a car of defendant company, caused by the negligent attempt of the motorman thereof to cross in front of plaintiff's car. Judgment for plaintiff. Defendant appeals. Affirmed.

Henry C. McDevitt and Thomas Leaming, for appellant. El. O. Michener, for appellee.

STERRETT, C. J. That this case involved cardinal questions of fact which the court below was bound to submit to the jury for their consideration and determination is too clear to admit of any rational doubt. It was accordingly submitted by the learned trial judge in a clear, impartial, and fully adequate charge that is beyond the reach of any adverse criticism of the defendant. After concisely and accurately instructing the jury as to the law applicable to such facts as the evidence tended to prove, he further instructed them, in the very words of defendant's first three points for charge, thus: (1) "If the jury believes from the evidence that the collision was due to the negligence of the motorman of the People's Traction Company, then the plaintiff, being the conductor of the same

company, cannot recover." (2) "If the jury believes from the evidence that the collision was due to the negligence of both motormen, then the plaintiff's right to recover is barred." (3) "The plaintiff, in order to recover in this case, must prove affirmatively that neither himself nor the motorman of the car upon which they both worked were guilty of negligence, and that the servants of the defendant company, and they alone, were negligent, and that their negligence was the proximate cause of the injury." The first clause of this proposition is more favorable to defendant company than it should have been. In making out his case, the plaintiff was not bound to prove such negative facts. *Canal Co. v. Bentley*, 68 Pa. St. 30, 33; *Bradwell v. Railway Co.*, 139 Pa. St. 404, 413, 20 Atl. 1046; *Baker v. Gas Co.*, 157 Pa. St. 593, 600, 27 Atl. 789. The verdict for plaintiff necessarily implies that the jury found in accordance with the third proposition, *supra*, "that neither [the plaintiff] himself nor the motorman of the car upon which they both worked were guilty of negligence, and that the servants of the defendant company, and they alone, were negligent, and that their negligence was the proximate cause of the injury." It also implies that the jury were unable to find the facts on which either the first or the second proposition, *supra*, is predicated, for otherwise their verdict would have been for the defendant. It follows, therefore, that under each of the three foregoing requests for instruction submitted by defendant and affirmed by the court the jury found the facts against the company. That practically disposed of its entire defense. But, in addition to said requests, the defendant, in its fourth and last point, asked the court to charge that, "under all the evidence, the verdict should be for the defendant." Refusal to give this binding instruction, and thus take the case from the jury, constitutes the only assignment of error on the record. In view of the fact, clearly and conclusively shown by the testimony, that controlling questions of fact for the exclusive consideration of the jury were presented, and had to be submitted to them, the learned judge was undoubtedly

right in refusing to charge as requested. That such disputed questions of fact were presented is evidenced by the defendant's first, second, and third points for charge, *supra*. While those and similar questions, requiring submission of the case to the jury, were clearly presented, there is nothing whatever in the record, from beginning to end, that would have warranted the court in directing a verdict for the defendant. The act of April 4, 1868 (P. L. 58), is inapplicable to any of the facts of this case. Further elaboration is unnecessary. Judgment affirmed.

(183 Pa. St. 647)

Appeal of VAN DYKE et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

ADMINISTRATORS—LIABILITY FOR INTEREST ON ESTATE FUNDS.

1. An intestate had kept an account with a bank for some time before his death, on which he was allowed interest on daily balances. Such account was continued by the administrator for several months, and then deposited to the estate's credit in his private bank, where the account ran for several years. *Held*, that the administrator was chargeable with interest.

2. The administrator was liable only for the sum which might reasonably have been obtained as interest if the account had not been transferred.

Appeal from orphans' court, Westmoreland county.

Judicial settlement of the account of M. M. Dick, administrator of the estate of James A. Dick, deceased, filed by W. S. Van Dyke and another, executors of the estate of such administrator. From a decree dismissing their exceptions to and confirming the report of the auditor surcharging said account with interest at the rate of 6 per cent. on certain funds in the hands of said administrator, and disallowing commissions charged, his executors appeal. Reversed.

D. S. Atkinson and John M. Peoples, for appellants. Gaither & Woods, for appellee.

WILLIAMS, J. James A. Dick died in July, 1886. His business was that of a private banker in the village of West Newton, where he resided. His brother M. M. Dick, who lived about three miles away, became administrator of his estate. The inventory was made up largely of customers' paper, which was held by the bank, and the liabilities were principally the balances due to depositors upon their accounts. There were a few claims against the estate, of considerable amount, that were contested, but the bulk of the estate was easily and expeditiously settled. So true was this that the administrator filed his first administration account at the end of nine months after his appointment, showing a total of assets administered upon amounting to more than \$110,000. From the settlement of this account, in April, 1887, until June, 1895, no further account was filed. At the latter

date, M. M. Dick died. The appellants are his executors. They filed the final account of their testator as administrator of James A. Dick in September, 1895, and this controversy is over the account so filed. It appears that James A. Dick had kept an account with the Ft. Pitt Bank of Pittsburg, for some time before his death, on which he was allowed a small rate of interest on daily balances. This account was continued by M. M. Dick, administrator, for several months after his appointment. He then withdrew it when the balance standing to the credit of the estate was nearly \$3,000, and deposited it in a private bank which he had started in West Newton, in the same office occupied by his brother in his lifetime, and under the direction of the same cashier. No interest was allowed upon any of the money deposited to the credit of the estate in the M. M. Dick bank, although the account ran for over eight years, and ordinarily showed a considerable balance due to the estate, reaching at times to about \$10,000. The total collections and deposits in this period reached about \$60,000, and the admitted balance due the estate was about \$900 when the account was filed by the executors of M. M. Dick. An account was kept in the same bank with Mary A. Dick, widow of James A. Dick, which really ought to be considered as part of the account of M. M. Dick, administrator. In the main, the estate appears to have been prudently and successfully managed, and the treatment of the widow to have been considerate and liberal. It is alleged, however, that the accountants should be surcharged with interest, and that their commissions should be reduced. A question is also made over the proper disposition of the costs of the proceedings. As to interest, the general rule is that one who has the custody and control of a trust fund should make such investment of it as to secure, if practicable, some income from it for the benefit of those ultimately interested in it. The funds of this estate were so invested for some months after the appointment of the administrator. They were in the Ft. Pitt Bank of Pittsburg, subject to check, but bearing interest on the daily balances in favor of the trust. Not very long after M. M. Dick organized his private bank at West Newton, he withdrew this money from the Ft. Pitt Bank, and deposited it in his own bank, to his credit as administrator. There was no impropriety in this action if the fund was not the loser because of it. If he had allowed the same rate of interest being paid by the Ft. Pitt Bank, the fund could not have been the loser. He did not do so. His bank had whatever advantage was to be derived from the account, and paid nothing for it. This was not a full discharge of his duty to the fund. For the sum which might reasonably have been obtained as interest if the account had not been transferred, and which

was lost by reason of such transfer, the accountants should be surcharged. The mistake of the auditor was in assuming that this was at the rate of 6 per cent. Such a rate is rarely, if ever, paid upon an open account which is subject to check. No such rate was paid by the Ft. Pitt Bank, nor is there any evidence tending to show that it could have been obtained from any reputable banker in that region.

Profits, as such, are very clearly not demandable in this case. The relation created between a bank and its customer by the deposit of money is that of debtor and creditor. The debt is payable on demand whenever and in whatever sums the creditor chooses. When the deposit is all withdrawn, the transaction is closed, and the depositor has no right to call on his banker for a statement of the use that was made of the money while it was in bank, or for an account of the profits that may have been made by means of it. The surcharge must rest on other principles than those invoked in support of this position. The holder of such a fund of which he has custody for years, with a considerable balance standing in its favor, owes it to those who are beneficially interested to use ordinary diligence in the effort to invest it advantageously. If he deposits it in his own bank, he should deal with it on liberal terms, as responsible banks, in the same general region, would, in the ordinary course of business, have dealt with it if permitted to have the custody of it in the same manner. The auditor seems to have been oppressed by what he regarded as an inconsistency between Robinett's Appeal, 36 Pa. St. 174, and Hess' Estate, 68 Pa. St. 454. No such inconsistency exists. In the first of these cases, the administrator had continued the business of the decedent with the stock and money that had belonged to him in his lifetime, and at the same place which he had previously occupied. We held that, under such circumstances, the profit made in the business belonged to the estate. The reason for this is perfectly apparent. In the other case the holder of the trust fund simply deposited it in bank to his own individual credit, thus clearly mingling the trust fund with his own moneys. But he made no use of the money so deposited, and received no interest upon it. He therefore made no gain from the trust fund, or from the commingling of it with his own. What was alleged was that he was a stockholder in the bank where the account was kept, and what was asked was that he should account for some supposed profit accruing to him as a stockholder from the use by the bank of the money so deposited to his credit. We declined to enter upon the investigation proposed. The accountant had made a mistake in not keeping the trust fund separate from his own, but he had not gained by the blunder, nor had the trust fund lost thereby. The assignments of error relating to com-

missions are not sustained. The evidence indicates that the proceedings on the Thomas mortgage were undertaken and conducted under the directions of the guardian, and the services rendered by M. M. Dick in relation to them related to matters of form, involving very little attention or responsibility. The decree must be set aside, and the record returned to the court below, that it may be corrected in accordance with this opinion, as to the calculation of interest on balance. We think the costs should be equally divided between the accountants and the fund.

(184 Pa. St. 93)

In re WICK ST.

Appeal of CITY OF PITTSBURG.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

MUNICIPAL IMPROVEMENTS—SPECIAL ASSESSMENTS.

The cost and damages occasioned by an expensive wall and embankment, erected in a street for the sole purpose of giving access thereto to certain private property, cannot be assessed against other private property abutting on such street.

Appeal from court of common pleas, Allegheny county.

Petition by Frederick Mugele and others to the select and common councils of the city of Pittsburg for a street improvement. The petition was granted, and from a decree sustaining exceptions to the report of the viewers, and setting aside the assessment for benefits, the city appeals. Affirmed.

Clarence Burleigh and T. D. Carnahan, for appellant. McQuiston & Will and J. M. Shields, for appellees.

PER CURIAM. This appeal is from the decree of the common pleas sustaining appellees' exceptions to the report of the viewers and setting aside the assessment for benefits, etc. The proceedings were commenced by petition to the select and common councils of Pittsburg, signed by the appellees and others, constituting a majority of property owners in interest and number abutting on Wick street, between Caldwell street and Dinwiddle street, praying for the passage of "an ordinance authorizing the grading, paving, and curbing of the above-named Wick street between the points named." In accordance with this petition, the ordinance was passed June 12, 1893, and on March 24th, following, the grade of that portion of Wick street was established by ordinance. After the contract was awarded, and a considerable portion of the work done, the ordinance of February 2, 1895, was passed, materially changing the grade as to part of the street. This does not appear to have been done for the purpose of correcting any error in the grade as previously established, or otherwise improving the street, but for the benefit of private property not on the

line of the street. The character of this re-established grade, and its pernicious effects, are very apparent. It necessitated the erection of a stone wall, in the center of Wick street, beginning on the southern line of Diana alley, and extending northerly about 130 feet, rising in height from about 2 feet at one end to 9 feet at the other. That portion of the 40 foot wide street was thus divided into two alleyways, each 11 feet wide from the wall to the curb, and each constructed at a different grade, so that at one end of the section the retaining wall in the center of the street was from 9 to 10 feet high, and at the other about 2 feet. Referring to this wall, the viewers in their report say: "The stone wall at the corner of Wick street and Diana alley was not essential to the construction of the street, but was erected along the middle of the street, dividing the same at that point . . . into two alley ways, . . . for the purpose of giving access by way of Diana alley to certain private property." Without considering in detail the character or legality of the so-called improvement resulting from the re-established double grade of part of the street, or the nature or extent of the damages and assessments for supposed benefits, it is enough to say that the cost and damages occasioned by an expensive wall and embankment, erected in the street "for the purpose of giving access to certain private property," cannot be assessed against private property abutting thereon; and for this reason, if for no other, the court wisely exercised the discretion with which it is invested in such cases by sustaining the exceptions and setting aside the assessment of benefits. There is nothing in the case that requires further comment. Decree affirmed, and appeal dismissed, at the costs of appellant.

(184 Pa. St. 108)

McGAW v. HAMILTON.

(Supreme Court of Pennsylvania. Jan. 2, 1898.)

SLANDER—PRIVILEGED COMMUNICATIONS—QUESTION FOR JURY—MALICE.

1. The question of whether the slanderous words complained of were uttered during the course of a debate in a legislative body, where there is evidence that they were not, is a question for the jury.

2. A statement made by a member of a council in discussing a claim which was in judgment against the borough, charging the claimant with having committed perjury in another matter foreign to the one under discussion, is not a privileged communication, and no proof of express malice is necessary.

3. A member of a council, in discussing a claim which was in judgment against the borough, charged the claimant with having committed perjury. *Held*, that the question as to whether the perjury charged referred to some proceeding foreign to the one under discussion, and was therefore slanderous, is for the jury.

4. The question whether an alleged slanderous statement was malicious and wanton, and actuated by motives of revenge, and designed to in-

jure the plaintiff under the cloak of a privileged communication, is for the jury.

Appeal from court of common pleas, Allegheny county.

Action by Homer L. McGaw against William J. Hamilton. Judgment for defendant, and plaintiff appeals. Reversed.

William Blakeley and William A. Sipe, for appellant. A. N. Hunter and J. P. Hunter, for appellee.

GREEN, J. This was an action to recover damages for a verbal slander. The words uttered charged that the plaintiff had sworn to a lie in a proceeding before an alderman. As they practically charged that the plaintiff had committed the crime of perjury, they were actionable per se, and implied malice. The defense was that they were spoken by the defendant as a member of a borough council, and in the course of a debate upon a matter in which the plaintiff was interested. It seems the plaintiff, who was a printer, had presented a bill for printing to a previous council, which had refused to pay it, and the plaintiff had thereupon sued the borough before an alderman, and had recovered a judgment for the amount of his bill. At a meeting of the council held on May 23, 1896, at which there was present a number of citizens in addition to the councilmen, the president of council called the attention of the members to the subject, saying that the plaintiff had recovered a judgment against the borough, and that the matter had been submitted to the borough solicitor, who had advised that the bill should be paid. The weight of the testimony was that thereupon the defendant arose, and, pointing towards McGaw, uttered the slanderous words in question. The plaintiff testified that the words were, "That man McGaw there swore to a lie at Squire Madden's office in trying this case." Mr. McCullough, the president of the council, said the words were, "That man there [turning and pointing to Mr. McGaw] had sworn to a lie before the alderman." Other witnesses swore to the utterance of the words in somewhat different language, but all of them testified that the defendant said that the plaintiff had sworn to a lie. The most of them said it was at the squire's office, or before an alderman. There was no substantial difference on this subject between the witnesses. The defendant alleged that the words were spoken in the course of a debate. But the plaintiff claimed that there was no debate in progress on this or any other subject; that there was no motion pending on this or any other subject; that there was no motion pending in relation to this particular matter; and that the words were uttered ruthlessly, and maliciously, and without any discussion. There was considerable testimony in support of this contention. All the witnesses concur that there was no mo-

tion pending. The chairman said: "After the matter had been presented by myself as chairman of the council,—I was also chairman of the finance committee,—Mr. Hamilton took occasion to rise to his feet, and object to the payment of the bill, giving as his ground that 'that man there [turning and pointing to Mr. McGaw] had sworn to a lie before the alderman.'" He further said: "There had been no motion made. The matter had just come up for discussion out of order in fact." The plaintiff also said: "As soon as the matter was mentioned, and before any motion had been made to consider the matter, he sprang to his feet, and pointed directly at me, and stated, 'That man McGaw there swore to a lie at Squire Madden's office in trying this case.'" Another witness, James Harrison, said: "Well, the president of council had brought up that bill of McGaw's, that he had got judgment before Squire Madden against the borough; and, after the president of council got through, Mr. Hamilton rose to his feet, and says, 'That man over there swore to a lie down at the alderman's office.' Q. Pointing to whom? A. Pointing towards Mr McGaw." There was more testimony of a similar character, which it is not necessary to repeat.

Now, the question whether the slanderous words were uttered during the course of a debate in a legislative body is certainly not a question of law. If it were an undisputed question of fact, the court might pronounce upon it. But here it was testified by practically all the witnesses that there was no debate in progress, and that there was no motion before the council. The substance of the evidence was that the president had merely stated to the council that the finance committee had considered the matter of the plaintiff's bill, and had referred it to the borough solicitor, who had advised that the bill be paid, when the defendant suddenly arose, and immediately uttered the slanderous words. Of course, a member of a legislative body cannot take advantage of his official position to give expression to private slanders against others, and then claim that the words were privileged, because they were spoken in the course and as a part of a public discussion of a pending measure. In 13 Am. & Eng. Enc. Law, p. 406, speaking of absolute privilege, it is said: "But this privilege is not extended to words spoken unofficially, though in the legislative hall, and while the legislature is in session." In *Coffin v. Coffin*, 4 Mass. 1, Parsons, C. J., delivering the opinion, said: "But to consider every malicious slander uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege further than was intended by the people or than is consistent with sound policy, and

would render the representatives' chamber a sanctuary for calumny." In *Bradley v. Heath*, 12 Pick. 163, Shaw, C. J., said, speaking of privileged communications: "If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform his duty, or make a communication useful and beneficial to others, the occasion will furnish no excuse." It was held in *White v. Nicholls*, 8 How. 287, that though a communication be privileged, if it be malicious, an action lies; but the plaintiff must aver and prove actual malice. Daniel, J., delivering the opinion, and remarking upon the rule as to privileged communications, said: "The privilege spoken of in the books should, in our opinion, be taken with strong and well-defined qualifications. It properly signifies this, and nothing more: That the excepted instances shall so far change the ordinary rule with respect to slanderous or libelous matter as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion." It was held in *Gray v. Pentland*, 2 Serg. & R. 23, that accusations preferred to the governor against a person in office are so far in the nature of judicial proceedings that the accuser is not held to prove the truth of them. It is excused if they did not originate in malice and without probable cause. Yeates, J., speaking of the constitutional provisions protecting free speech, etc., said: "Wherever, under the invidious mask of consulting the public welfare, he renders the investigation of the conduct of a public officer the mere vehicle of private malevolence, and a jury on the trial shall be fully satisfied that the publication was wanton and malicious, and without probable cause, he has no pretensions to escape unpunished." In commenting upon this case in *Briggs v. Garrett*, 111 Pa. St. 404, 2 Atl. 513, Mr. Justice Paxson said: "It was not contended in that case, nor do I know that it has been in any other, that a man may use the cloak of a privileged communication as a cover for malice and falsehood." In the same case he defined a privileged communication thus: "A communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon a reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself as in the ordinary case of libel. Actual malice must be proved before there can be a recovery." At the conclusion of the opinion in *Conroy v. Times*, 139 Pa. St. 334, 21 Atl. 154, our Brother Mitchell said: "As a result, we are of opinion that, where the publication charges an indictable offense, the presumption of inno-

cence is prima facie evidence of falsity and want of probable cause, and sufficient to put defendant to proof of the facts to support his claim of privilege. It follows that this case should have been allowed to go to the jury."

From the tenor of the foregoing authorities it follows that, even in the recognized cases of absolute privilege, it is not enough that the slanderous words were uttered in a legislative hall, or in a court of justice, to establish a claim to absolute immunity. A further reference must be had to the circumstances, and to the occasion of the particular occurrence, before that question can be determined. We have already alluded to the testimony as bearing upon the question whether the words were uttered in debate upon a pending motion. The weight of the evidence on that subject is in the negative, and hence its solution would have to be referred to the jury. But a slight further reference to the testimony will tend to elucidate another aspect of the subject. The words used charged the plaintiff with having testified to a falsehood in a judicial proceeding before a magistrate. What had such a charge as that to do with the pending matter? There was no question of the personal fitness of the plaintiff for a pending appointment to office before the council. He had recovered a judgment against the borough in an adversary action for a demand. The claim had passed to judgment. The words spoken by the defendant did not connect the alleged perjury with that action. If they were uttered as to some other proceeding, they were clearly foreign to any matter before the council; and in that event the utterance was clearly outside the pale of privileged communications in any aspect of the subject, and no proof of express malice would be necessary. Who is to determine that question? Manifestly the jury alone. But, even if they did refer to the testimony of the plaintiff delivered on the trial of that case, how does it result, as a matter of law, that they came within the limitations of an absolute privileged communication? The question as to the justice of the claim was not before the meeting. It had passed into judgment, and the borough solicitor had advised the payment of the judgment. Upon the mere announcement to that effect, the defendant immediately uttered the slanderous words in question, when no motion was pending and no debate was proceeding. Was the utterance malicious and wanton, and designed to injure the plaintiff, under the cloak of a privileged communication? Who is to determine the question? Surely not the court, as a matter of law. There was other evidence, as to a cause of angry dispute between the plaintiff and defendant in relation to the building of a town hall, as to which they were upon opposite sides. There was also some evidence of threats made by the defendant against the plaintiff. Was the defendant actuated by motives of revenge and

malice on that account in uttering the words in question? All these things were for the jury, and the case should have been submitted to them under all the evidence. We are of opinion that it was error to withdraw the case from the jury. Judgment reversed, and procedendo awarded.

(184 Pa. St. 35.)

SEMPLE v. CALLERY et al.

(Supreme Court of Pennsylvania. Jan. 3, 1896.)

TRIAL—COMPETENCY OF WITNESS—RELEASE OF INTEREST—PRELIMINARY QUESTION—CONVERSION—LIMITATIONS.

1. Under Act May 23, 1887 (P. L. 158), providing that a person incompetent to testify as a witness because of interest may become fully competent "by a release or extinguishment, in good faith, of his interest, upon which good faith the trial judge shall pass as a preliminary question," whether such release has been executed in good faith is a question preliminary to the question of competency, and its determination by the court is final.

2. Where the time for delivery of bonds under a contract was extended by agreement, so that the seller kept them in his possession, the fact that he improperly converted same to his use will not permit him to plead limitation as a bar, without showing that the buyer had notice of the fraud.

Appeal from court of common pleas, Allegheny county.

Action by Marion Semple, executrix of the will of William Semple, deceased, against James D. Callery and William V. Callery, executors of the last will of James Callery, deceased. From a judgment for the plaintiff, defendants appeal. Affirmed.

Geo. C. Wilson, Wm. D. Evans, and M. W. Acheson, Jr., for appellants. Johns McCleave and D. T. Watson, for appellee.

FELL, J. The court, at the time a witness was called, heard testimony on the question of the good faith of an assignment by which the witness had divested himself of all interest in the controversy, and permitted him to testify. At the close of the testimony the court was requested to submit to the jury the same question on which it had passed, and to instruct them to disregard the testimony of the witness if they found that the assignment had not been made in good faith. The sixth section of the act of May 23, 1887 (P. L. 158), provides that a person incompetent to testify as a witness because of interest, may become fully competent "by a release or extinguishment, in good faith, of his interest, upon which good faith the trial judge shall pass as a preliminary question." It was not intended by this provision to make the decision of the court subject to review by the jury, and to change the long-established rule of evidence that it is the province of the court finally to decide preliminary questions of fact upon which the admissibility of testimony depends. Whether a release has been executed in good faith is a

question preliminary to the question of competency, and as such it is decided as a preliminary question; but its decision is not preliminary merely to a second decision by the jury. The competency of a witness as to questions of both fact and law is to be determined by the court.

The remaining assignment relates to the refusal of the court to affirm the defendant's second point, and to direct the jury that there could be no recovery because of the bar of the statute of limitations. The transaction does not appear to have been closed so as to give a right of action more than six years before the bringing of the suit. The time of the delivery of the bonds was extended by agreement, and the seller was allowed to retain them, to be used by him as collateral. This agreement remained in force until his death. The defendant cannot now take advantage of the fact that the bonds had not been used in accordance with the agreement, but had been improperly converted without proof that the buyer had notice of the deception practiced. *Hughes v. Bank*, 110 Pa. St. 429, 1 Atl. 417. The judgment is affirmed.

(124 Pa. St. 116)

BALDWIN v. VON DER AHE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS—DAMAGES.

1. In malicious prosecution, where two successive juries agreed on substantially the same verdict in favor of plaintiff, which appears to have been acquiesced in by the trial court, such verdict will not be disturbed.

2. A charge as to the weight of evidence is properly refused.

3. In malicious prosecution, it is proper to refuse to limit the damages to compensation, where the evidence justifies submission of the question of punitive damages.

Appeal from court of common pleas, Allegheny county.

Action by Mark Baldwin against Chris Von Der Ahe. From a judgment for plaintiff, defendant appeals. Affirmed.

J. S. & E. G. Ferguson, for appellant.
O'Brien & Ashley, for appellee.

PER CURIAM. This action of trespass for malicious prosecution was twice tried by jury, and each trial resulted in a verdict for substantially the same sum in favor of the plaintiff. The case depended on questions of fact, which were clearly for the consideration of the jury, and it was accordingly submitted to them by the learned trial judge in a fair and impartial charge, in which six of the defendant's nine points, including his request for instructions as to "advice of counsel," etc., were affirmed. The remaining three points were rightly refused. In one of them the court was in effect requested to instruct the jury as to the weight of the evidence. This, as the learned judge

very properly said, was a question for the jury. In view of the evidence properly before the jury, they could not have been directed to find for the defendant; nor should the amount recoverable as damages have been limited by the court to mere compensation. The evidence was quite sufficient to justify submission of the questions of probable cause, malice, and damages, compensatory or punitive; and as to the manner in which these questions were submitted the defendant has no just reason to complain. In view of the fact that two successive juries have agreed upon substantially the same verdict, which appears to have been acquiesced in by the trial court, it is unreasonable, as well as useless, to urge upon us a revision of the verdict. There is nothing in either of the specifications of error that requires further notice. Judgment affirmed.

(123 Pa. St. 575)

POTTER v. NATURAL GAS CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—QUESTIONS FOR JURY—EVIDENCE—INSTRUCTIONS.

1. In an action against a natural gas company it appeared that plaintiff was driving, in the night, along a highway; that one wheel scraped an iron gas pipe, which, it was alleged, defendant had permitted to remain on the wagon track; that the mare he was driving took fright, and kicked over the cart; that plaintiff's knee was badly injured, probably by a kick by the mare. *Held*, that the question whether defendant's negligence was the proximate cause of the injury was for the jury.

2. It appeared that the pipe had been laid along the fence running parallel with the road, where defendant had a right to lay it, and that in some manner it had been moved over on the track. There was evidence that it had been there for some time. *Held*, that the question of defendant's negligence was for the jury.

3. Where it appeared that plaintiff knew the pipe was in the road, the question of contributory negligence was for the jury.

4. Evidence showing the nature of the obstruction; that witness' horse, a few weeks before plaintiff's accident, had taken fright at the noise made by a scraping wheel on said pipe; and that his horse was a very quiet one,—was relevant and admissible.

5. Evidence that the pipe had been displaced, and was seen in the roadbed soon after it was laid, and that witness had passed there about once a week until after the September immediately preceding the accident in November, and it was still on the road, was admissible.

6. Plaintiff could testify that up to the time of his injury he had no knowledge of any other person coming into collision with the pipe, it appearing that he knew the pipe was on the road, and defendant claiming that because of such knowledge he was guilty of contributory negligence.

7. Where defendant offered evidence that plaintiff's mare was a vicious animal, and that its owner had not used her, it was proper to permit plaintiff to show, on rebuttal, that the reason the mare was not used by such owner was because he had other horses, and had not work enough for all.

8. The court charged that plaintiff was admittedly injured by the kick of his mare; that the burden was on him to show that this act was

caused by defendant's negligence; and that he had offered evidence that the natural result of leaving the pipe in the road was to frighten horses, because a vehicle would probably strike it. *Had* not open to the objection that the effect was to permit the jury to find that defendant's negligence resulted in plaintiff's injury, from evidence not offered for that purpose, when the preceding instruction was that the testimony that other vehicles had struck the pipe, and the horses had in consequence taken fright, was admitted only to show that the situation of the pipe was such that, if an iron tire scraped it, the sound was sufficient to terrify the ordinary horse.

Appeal from court of common pleas, Washington county.

Action by W. G. Potter against the Natural Gas Company of West Virginia for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

David Sterrett, C. C. Sterrett, and Boyd & E. E. Crumrine, for appellant. Parker & McIlvaine, for appellee.

DEAN, J. On November 1, 1895, in the evening, the plaintiff, a school teacher, in East Finley township, Washington county, was driving home from his school in a one-horse, two-wheeled Canton cart. In going along the highway the right cart wheel struck and scraped a two-inch iron pipe at the side of the road. The mare he was driving took fright, jumped to one side, and kicked over the front of the cart. Plaintiff was thrown backward out of the cart, and the mare ran away. He was seriously injured, his kneecap being broken into three pieces. The pipe was part of a feed line, laid by defendant, from a gas well in the township to its main, about a mile distant. At the point on the public road where the accident happened a cut through a ridge, at right angles to the road, had been made for the roadbed, which last, at the surface or wagon track, was 8 feet 6 inches. The gauge of plaintiff's cart wheels was 5 feet 2 inches. The defendant had laid its pipe on the bank above the cut, close to a post and rail fence, within about two feet horizontally from the track on the highway, but the height of the bank above it. Either from the effect of changes of the weather on iron, or by physical force, the pipe at this point had been moved from its original position, and was thrown, in a curve, out from the fence, and down into the cut, so as to be over on the wagon track about a foot. It was shown that this had been the situation of the pipe for at least some weeks, and perhaps months, before the accident. Plaintiff, alleging his injury was caused by defendant's negligence in permitting the pipe to remain on the highway, brought suit for damages. At the trial in the court below the statutory right to lay the pipe along the fence at the side of the highway was conceded. Plaintiff averred, however, that it was defendant's duty to keep it there, and,

having wholly failed in this duty, it was negligent. There was some conflict in the evidence as to the exact location of the pipe in the highway when the cart struck it. As plaintiff admitted that he had traveled the road almost daily, it was urged by defendant he was either negligent in driving on a to him known obstructed road, or else negligent in not exercising care to avoid the obstruction, by keeping further from it. The court submitted to the jury four questions: (1) Did the evidence show the company negligently permitted the pipe to remain displaced, so as to endanger travel on the highway? (2) Was this negligence the proximate cause of plaintiff's injury (the broken kneecap), or was it the not reasonably to be foreseen action of a vicious, easily frightened animal? (3) Was the accident in any degree attributable to plaintiff's negligence? If these three questions were answered in plaintiff's favor, then, (4) what damage did he sustain? The verdict was for plaintiff in a sum of \$1,178.75, and we have this appeal by defendant.

Eighteen errors are assigned. The seventh to thirteenth, inclusive, allege error in not directing a verdict for defendant, and in submitting to the jury the evidence as to whether the alleged negligence, if proven, was the proximate cause of the injury. A careful perusal of the testimony satisfies us the case was one for the jury, as the learned trial judge put it. In no view of the evidence would he have been warranted in peremptorily directing a verdict for defendant. Just what were the facts tending to show negligence by defendant was not beyond controversy, and, if established, the inference that defendant claimed should be drawn from them did not necessarily follow. Did the noise occasioned by the scraping contact of the iron tire cause the fright? Was this fright the natural and probable result of such a circumstance, or was it one incapable of ordinary foresight? Was the kick of the mare the last in the rapid succession of events, part of a natural whole, so linked together that the kick was not an independent intervening cause? Was the animal an exceptional one in habits, and therefore one the defendant was not bound by ordinary care to prepare for? These and other inferences were all for the jury. If the pipe, with knowledge of defendant, had been in the middle of the road, and a stranger had in the dark driven over it, wrecked his vehicle, and sustained personal injury, there would have been but one reasonable inference,—negligence on part of defendant. If the displacement of the pipe, unknown to defendant, had been caused by an extraordinary storm, or by malice, immediately before the accident, there could have been but one reasonable inference,—no negligence on part of defendant. But, under the peculiar and disputed circumstances here testified to, it was certainly a case, both on the facts and

inferences from them, for the jury; and all our cases, from *Hoag v. Railroad Co.*, 85 Pa. St. 298, down to *Wilson v. Railroad Co.*, 177 Pa. St. 512, 35 Atl. 677, invariably so decide. Just how the plaintiff's knee was injured was for the jury; but, assuming it to be the fact, as is highly probable, that it was from an immediate kick by the frightened animal, then, taking into view the usual character and habit of the horse when affrighted, was that a natural or probable result from the negligently misplaced pipe? The question is not whether defendant ought to have foreseen the kick, but could it have reasonably foreseen the fright? That the animal will then commit some unforeseeable act, dangerous to the driver or to those within reach of him, is almost as certain as that he will mend his pace at a stroke of the whip. As is said in *Railroad Co. v. Hope*, 80 Pa. St. 373: "The practical knowledge and common sense of the jury, applied to the evidence, steps in to determine whether the injury is the real proximate result of the negligence, or, by reason of intervening or independent causes, must be regarded as too remote, and the result not within the probable foresight of the party whose negligence is alleged to have produced it." All the points raised by these seven assignments of error touch the same question. The instruction was clear, and is sustained by all our cases. Therefore they are overruled.

The fourteenth to eighteenth assignments, inclusive, complain of error in the instruction as to contributory negligence. Counsel for defendant in his fourth written point, in effect, asked the court to charge peremptorily that plaintiff was guilty of contributory negligence, and therefore could not recover. This request was based on the assumption that plaintiff knew the pipe line was there, and that by ordinary care he could have avoided striking it. The plaintiff did know it was there. Whether from that fact ordinary care dictated he should walk to his home from the school house, or drive miles around on some other road to reach it, in view of the nature of the obstruction, were questions for the jury; and whether taking his usual and direct road home, by his usual method of travel, he could have avoided the pipe by ordinarily careful driving, was also for the jury. One who deliberately chooses an obviously dangerous way, which by a little inconvenience he may avoid, is held to be guilty of contributory negligence. But the nature of this peril, and whether it could reasonably have been avoided, and whether care in driving was exercised, were all questions for the jury. Except in his refusal to peremptorily instruct for defendant, the learned judge gave to the jury, in substance, exactly the charge asked for by defendant in its written points. The ninth and tenth prayers were affirmed in the language presented, the court at the same time very properly calling attention, how-

ever, to the undoubted law that plaintiff was bound only to exercise ordinary care. The instruction as to what constituted negligence on part of defendant, the distinction between remote and proximate cause, and also what would constitute contributory negligence on part of plaintiff, was unexceptionable.

The first, second, third, fifth, and sixth assignments are to the rulings of the court on offers of evidence by plaintiff.

As to the first assignment: Against objection by defendant, the court permitted a witness, W. B. Smith, to testify as showing the nature of the obstruction; that his horse, a few weeks before the accident to plaintiff, had taken fright at the noise made by a scraping wheel on this pipe; and that his horse was a very quiet one. It was a relevant inquiry as to whether the pipe, in the position it occupied on the road, as averred by plaintiff, was dangerous to travelers by horse and vehicle. Those who traveled the road were qualified to testify from actual observation. It might not have excited fear in an ordinarily gentle animal. If it had that effect on such an animal, it was part of plaintiff's case to prove it. If his animal was an exceptionally timid one, easily frightened by sounds which did not disturb the ordinary horse, the defendant was not bound to foresee the danger and guard against it. In this view, the evidence was admissible.

As to the second assignment: The court permitted a witness, R. B. Plants, to testify, against defendant's objection, that the pipe had been displaced, and was seen by him in the roadbed soon after it was laid; that he had passed there about once a week until after the September immediately preceding the accident in November, and it was still on the road. This was clearly evidence for two purposes: First, that the jury might infer, in view of the other evidence, if out of place for a long time, and until two or three weeks before the accident, no change had taken place when that occurred; and, second, that, if observable by the ordinary highway traveler for this length of time, defendant must have known it. There was no error in admitting this testimony. The testimony of Clark Post, which is the subject of the third assignment, was to the same effect, and for the same reasons was properly admitted.

The fifth assignment is to permitting plaintiff to testify that up to the time of his injury he had no knowledge of any other person coming into collision with the pipe. The purpose evidently was to meet the charge of contributory negligence. If the place where the accident occurred was very dangerous, and known to be so by plaintiff, it tended to support this charge. If he was ignorant of its peculiarly dangerous character, that fact, at least in some slight degree, tended to weaken the charge. While his testimony in this particular was of slight

weight, it nevertheless was for the jury, and was properly admitted.

The sixth assignment is to the admission of the testimony in rebuttal of Jennie McNay, against defendant's objection. It appeared from the evidence that plaintiff had purchased the mare from witness' father. Defendant had offered evidence tending to show the mare was an unbroken, vicious animal, and that the owner, who had reared her, had not used her. The plaintiff attempted to show by the witness the reason the mare was not used was because her father had 16 or 17 other horses, and had not work for all. This was competent evidence in rebuttal, and it was right to admit it.

The fourth assignment is to a part of the general charge. The court, in substance, stated to the jury that the plaintiff was admittedly injured by the frantic kick of his mare; that the burden was on him to show this act was caused by the negligence of the company. To successfully bear this burden, he had offered evidence tending to show that the natural and probable result of leaving the pipe in the road was to frighten horses, because a vehicle would probably strike it. Immediately preceding this statement the court had plainly instructed the jury that the testimony tending to show other vehicles had struck the pipe, and the horses had in consequence taken fright, in no way tended to prove plaintiff's vehicle had collided with the pipe, and he had in consequence been injured, but that the evidence was admitted only for the purpose of showing that the situation of the pipe was such that, if an iron tire scraped it with force, the sound was sufficient to terrify the ordinary horse. Appellant's counsel argues, from a half paragraph picked out from the charge, not accompanied by the preliminary caution of the judge, that the effect was to permit the jury to find the essential fact, that defendant's negligence resulted in plaintiff's injury, from evidence not offered and not admissible for that purpose. But, taking all the court said on that subject, there is no reason to assume the jury was influenced in finding the main fact from evidence admitted to prove another. Therefore the fourth assignment of error is overruled.

The case was well and ably tried on both sides by counsel in the court below. The charge of the court was full, clear, impartial, and without even technical error. The verdict, in view of the finding of fact, is certainly not excessive. Therefore the judgment is affirmed.

(183 Pa. St. 623)

JOHNSTON et ux. v. YOUGHIOGHENY RIVER COAL CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

INJURY TO EMPLOYEE—NONSUIT.

In an action against a master to recover for personal injuries, where the evidence shows that

the injuries were the result of accident, a compulsory nonsuit should be granted.

Appeal from court of common pleas, Westmoreland county.

Action by John Johnston and Margaret Johnston, his wife, against the Youghiogheny River Coal Company to recover for the death of plaintiffs' son, alleged to have been caused by defendant's negligence. From an order refusing to take off a judgment of compulsory nonsuit, plaintiffs appeal. Affirmed.

J. R. Spiegel, M. N. McGeary, Paul H. Gaither, and Cyrus E. Woods, for appellants. Robbins & Kunkle and Petty & Friend, for appellee.

PER CURIAM. The only question presented by this record is whether the court below erred in "denying plaintiffs' motion to take off the judgment of compulsory nonsuit." Our examination of the testimony has led us to the conclusion that the sudden and much to be lamented death of plaintiffs' son was accidental, and, so far as the evidence tends to show, ~~not~~ the result of any negligence on the part of the defendant company. The right to recover depended, not upon the dangerous character of the machinery or appliances used by the company in the prosecution of its business, but upon whether, in the construction or operation of the same, it was guilty of any negligence which was the proximate cause of the young man's death. We find nothing in the testimony that would have justified the court in submitting any such question as that to the jury, and hence there was no error in refusing to take off the nonsuit. Judgment affirmed.

(188 Pa. St. 344)

GRIER et al. v. NORTHERN ASSUR. CO.
(Supreme Court of Pennsylvania. Jan. 3, 1898.)

JUDGMENT—RES JUDICATA—PLEADING—COMPLAINT—CONSTRUCTION—INSURANCE—ACTIONS ON FIRE POLICIES—SUFFICIENCY OF EVIDENCE—LIMITATIONS BY TERMS OF POLICY—AMENDMENT.

1. Where an amendment to a complaint is improperly allowed, it is error to refuse to charge that there can be no recovery on the amendment, on the ground that the amendment, having been allowed, is *res judicata*.

2. In an action on a fire policy for \$2,000, an amended statement of plaintiffs' claim set forth the policy and its terms, and the destruction of the property by fire, and a loss of \$7,000. It alleged that after the fire a dispute arose, the insurance companies denying all liability; that after investigation defendant agreed to pay in settlement \$2,000, but subsequently refused to pay, and plaintiffs sued to recover \$2,000 and interest. *Held*, that the amendment did not set up a cause of action on the agreement to settle independent of the policy, so that the conditions of the policy as to the time of bringing action would not apply.

3. Where plaintiffs, in an action on a fire policy, cannot recover on their original complaint, because of violation of the terms of the policy,

an amendment, after the time limited by the policy for bringing an action thereon, setting up a new cause of action by alleging a promise by defendant to pay notwithstanding such violation, is not allowable, where the time elapsed since such promise exceeds the time within which the policy requires an action to be brought.

4. It appeared that plaintiffs had violated the terms of the policy so as to disentitle them to recover thereon, but they alleged defendant promised to pay notwithstanding such violation. The testimony was all in parol, and consisted of alleged declarations of defendant's agent, which he positively denied. It was contradicted by disinterested witnesses, and was of a vague and uncertain character. *Held*, that the evidence as to such alleged promise was insufficient.

Appeal from court of common pleas, Clearfield county.

Action by Grier Bros. against the Northern Assurance Company on a fire insurance policy. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Thos. A. Davies, Thos. H. Murray, and Allison O. Smith, for appellant. A. L. Cole, David L. Krebs, and Wm. Paterson, for appellees.

GREEN, J. The plaintiffs' original statement of their cause of action was filed July 9, 1894, and set forth a policy of fire insurance made January 16, 1893, on a building, for \$2,000, a subsequent loss by fire, and a consequent liability to pay the loss on the part of the defendant company, and a refusal to pay. The defendant filed an affidavit of defense, July 31, 1894, alleging that the plaintiffs had violated one of the conditions of the policy by keeping prohibited articles on the premises insured. On the 29th of July, 1895, and before the trial of the cause, the plaintiffs asked and obtained leave to file an amended statement of their cause of action, and the same was accordingly filed on August 1, 1895, after objection and exception on the part of defendant. On the trial of the cause the plaintiffs elected to proceed upon the amended statement, and the cause was tried upon that pleading. The objection to the application to file an amended statement was that it introduced a new cause of action, and could not be allowed, because, by the terms of the policy, no suit or action could be brought for the recovery of any claim until full compliance by the insured with all the preceding requirements of the policy, nor unless commenced within 12 months next after the fire. It was contended for the defendant that there could be no recovery by the plaintiffs, because the amendment was not made until after the limitation upon the right of action had closed. A point to that effect was submitted by the defendant, but was refused by the court, and this refusal is one of the errors assigned.

As we regard this ruling as very material to the plaintiffs' right of recovery, it becomes necessary to examine critically the amended statement of cause of action, in order to determine whether it can be sustained. It

opens with a statement of the policy, describing its terms, and the contract of insurance thereby made between the parties. It then sets forth the destruction of the building insured by fire on the 11th of January, A. D. 1894, and the consequent loss to the plaintiffs of \$7,000. It then sets out other insurance to the amount of \$17,000 on the stock contained in the building, and other insurance on the building, amounting, with the insurance in this policy, to an aggregate of \$5,000, designating the present policy as "No. 10,155, being the policy upon which this action is brought." The amended statement then further alleges that, after the fire, a dispute arose with the defendant and all the other companies as to the plaintiffs' right to recover the insurance money, "the defendant companies denying all liability, alleging that prohibited articles, to wit, gunpowder and dynamite, were kept on the premises, in violation of the terms of the said several policies"; that after several visits were made by the adjuster of the defendant and other companies for the purpose of adjusting the loss and arriving at a settlement, and after fully investigating the facts connected with the dispute, finally, on April 7, 1894, the defendant company, by its adjuster and the representatives of the other companies, agreed to settle and adjust the loss under the several policies, and did settle and adjust the same, by agreeing to pay 60% per cent. of the face of the policies on the merchandise insured, and by paying in full the loss on the building. The amended statement further adds that the defendant company agreed to pay the full sum of \$2,000 on the policy in suit, which they subsequently refused to pay, and therefore the plaintiffs brought the present suit, and claimed to recover the sum of \$2,000, with interest from the 7th day of April, 1894. The important question arises, can such an amendment be made, or, if allowed, can it be enforced, against the objection of the defendant, after the expiration of the time for commencing an action on the policy?

The learned court below refused the first point of the defendant on this subject, because the amendment had been allowed, and was therefore *res adjudicata*. It is very clear that, if the amendment was improperly allowed, it gained no strength because of its allowance, and therefore the question was still an open one whether there could be any recovery notwithstanding the amendment had been granted. The answer to the point was therefore erroneous, unless the amendment was properly granted and a right of recovery arose under it. The doctrine that a new cause of action can not be introduced, or new parties brought in, or a new subject-matter presented, or a fatal and material defect in the pleadings be corrected, after the statute of limitations has become a bar, is so familiar to the profession, and has been declared by this court, and by the

courts of last resort of many other states of the Union, so frequently, that an extended review of the authorities is quite unnecessary. It cannot be essential to do more than determine whether this case comes within the line of the very numerous decisions on this subject. A point has been suggested by the learned counsel for the appellees that because the action must now be regarded as being founded upon the agreement to settle, and not upon the policy, and there is no prohibition of such an action in the policy, the limitation of the policy is not applicable, and hence there could be no valid objection to the allowance of the amendment. We are very clear that this contention cannot be sustained, for manifest reasons. While the alleged undertaking is new, it is neither independent of, nor separated from, the original cause of action. The policy of insurance still remains as the foundation of the action. The plaintiffs' claim would have no force, in fact no legal existence, without the policy, and there could not possibly be any recovery without the maintenance and enforcement of the liability thereby created. If there was no contract of insurance, there was nothing upon which to found a liability to pay anything whatever, and the alleged promise to pay, by reason of the settlement, necessarily is built upon, and grows out of, the contract liability created by the policy. It is an agreement, and it must necessarily be an agreement, to determine what amount of liability exists under the policy. The essential foundation of any liability is the obligation imposed by the contract of insurance, and it is nothing else than this. The plaintiffs claim to recover \$2,000 insurance money, because the defendant contracted to pay that amount by an executed contract of insurance. The defendant, not denying the contract or the relation thereby created, says the plaintiffs cannot recover on the contract because they fatally violated its conditions. The plaintiffs reply that the defendant nevertheless promised to pay after knowledge of the breach. While this is a new undertaking, not contained in the policy, it cannot be separated from the policy or from its terms and stipulations, but must be enforced, if enforced at all, with a full reference to the original contract itself, and to its fundamental and indispensable conditions. Thus, there must have been a preceding contract of insurance, its terms must have been specifically defined, the amount to be paid must have been fixed, the loss must have been incurred, and the relations must have been ascertained and defined just as closely and accurately, in order to enforce the alleged new undertaking, as to enforce the original contract itself. It follows that the policy is indissolubly connected with the new engagement, and must be regarded as a part and parcel of the entire liability which the plaintiffs propose to enforce. Hence we find that it is set out in the amend-

ed statement, and forms a necessary part thereof, as well as in the original statement. But the undisputed facts of the case are such as to prevent a recovery under the original statement, and the learned court below so instructed the jury, and very properly. The evidence of the violation of the express terms of the policy was overwhelming, and was not in the least degree contradicted, and the plaintiffs showed their appreciation of this situation by abandoning the original statement and proceeding alone upon the amended one. Under this statement, a new and additional engagement is averred, upon which it is claimed a right of recovery can be enforced. This alone characterizes the new engagement as vital to a recovery. Its materiality, therefore, cannot be questioned. Without it there can be no recovery. But this new engagement is only brought within the cognizance of the court and jury by means of an amendment. It was never asserted at any earlier stage of the proceedings. If no action had been brought upon the policy until the time when the amendment was asked for, as a matter of course, an action then brought would have been barred by the limitation of the contract. How, then, can a right of action be created by an amendment which could not have been enforced by an original action, then brought for the first time? It is impossible. In the sense of the new engagement being a new cause of action, it is only in legal life when it is proposed. But it is proposed too late. A right of the defendant to plead the bar of the contract is taken away if the amendment is to prevail, and under all the authorities, as will be presently seen, such a right cannot be taken away by means of an amendment. If the original statement had contained the new engagement, precisely as it now appears in the amended statement, there could have been no recovery, if the action had not been commenced until the time the amendment was made. Hence it follows that as an amendment it can have no more force than it could have had if embraced in the original statement.

Out of the great mass of decisions to be found in the reports of this and other states upon this subject, a few only need be selected to illustrate the foregoing principles. In *Dearie v. Martin*, 78 Pa. St. 55, a claim was filed against a husband and wife without setting forth the coverture. The property belonged to the wife, and the lien was defective in not setting forth the coverture. The court said: "If the claim on which the *scire facias* issued was radically defective, it was no lien on the wife's property, and the defect was not cured by the replication to her plea of coverture. The replication cannot be treated as an amendment of the claim, and, if it could be, it was too late to amend after the statutory period allowed for filing the claim. If the claim was fatally defective, it was as powerless to continue the lien for which the law provides as if

it had never been filed." In *Wright v. Hart's Adm'r*, 44 Pa. St. 454, Lowrie, C. J., said: "It is admitted that the plaintiff below could not amend his declaration so as to introduce a new cause of action, and this is especially true where the new cause is so old as to be barred by the statute of limitations." In *Smith v. Smith*, 45 Pa. St. 403, the court said: "We cannot sustain the mode in which the case was tried. It was error to allow the plaintiff to add a new count for another slander or for a different cause of action after the right of action for that had been barred by the statute of limitations." In *Trego v. Lewis*, 58 Pa. St. 463, it was said: "Undoubtedly the court will never permit a party to shift his ground or enlarge its surface by introducing a new and different cause of action, especially when, by reason of the statute of limitations, or an award of arbitrators, or for some good reason, it would work an injury to the opposite party." In *Kaul v. Lawrence*, 73 Pa. St. 410, the court said: "The legislature has gone far to prevent the loss of a trial and delay by amendments even to the form of the action, and the courts have seconded the effort to reach the merits of the cases, and prevent a failure of justice through technicalities. * * * In doing this, it is our duty, however, to see that amendments are not made in a manner to deprive the opposite party of any valuable right." In *Kille v. Ege*, 82 Pa. St. 102, it was said: "Amendments depriving the opposite party of any valuable right shall not be allowed; hence, when the name of a person was added as plaintiff in ejectment after suit brought, it was held that if, at the time of the amendment, the title of the new party was barred by the statute of limitations, he could not recover. * * * It follows, therefore, that although the defendants in error were substituted without objection, yet they thereby acquired no rights relating back of their substitution. As to them the action commenced when their names were put on the record." The principle of this case is directly applicable to the present contention. At the time when the amendment was asked for, to wit, July 25, 1895, there was no right of action of any kind for the loss, under the express terms of the policy. The grant of the amendment did not, and could not, give to the plaintiffs a right of action earlier than that date, but on that date all right of action to recover under that policy was gone, and it could not be restored by means of an amendment. To permit a recovery, in such circumstances, would be to deprive the defendant of a valuable right already vested, which will not be permitted. In *Tyrrill v. Lamb*, 96 Pa. St. 464, which was an action of covenant upon written articles for the sale of land, which was sought to be changed to assumpsit by amendment,—an allowable amendment, under our act of May 10, 1871 (Purd. Dig. 100),—Mr. Justice Mercur, delivering the opinion, said: "It was too late to commence and maintain a new action based on the alleged agreement with Martin. The right of the defendants to interpose

a plea of the statute of limitations was to them valuable. This amendment could not deprive them of that right. The form of action having been changed does not prevent us from declaring now its effect." In *Furst v. Association*, 128 Pa. St. 183, 18 Atl. 341, we said: "This amendment (a change of name) was allowed by the court below, but only after objection and exception by the defendant. It is difficult to see how this amendment could have helped the plaintiff's case, as the statute was a complete bar at the time it was made, and it is perfectly well settled that amendments will not be allowed when they deprive the opposite party of any rights." Applying the principle to this case, its relevancy will be directly seen. At the time the amendment was proposed there was no right of action on the policy for the recovery of the loss, because it was especially so contracted by the parties as a part of the policy. The right of the defendant to plead this defense against any proposed amendment that might be offered could not be taken away by that means, and hence the amendment could not be sustained. The alleged promise to pay was made on April 7, 1894, and therefore was more than 12 months old when the amendment was applied for. Its purpose was to confer a right to recover under the policy. But no action to recover the loss sustained under the policy could at that time be maintained, and hence no amendment which sought to create such a right could be allowed. The alleged promise to pay was itself barred as a cause of action, being insufficient to that end, because of the express prohibition of the contract. The promise cannot be separated from the thing promised, and, as the thing promised by the policy was the payment of money for a loss by fire, a promise to pay that money is a thing forbidden as a cause of action, unless an action is brought to enforce it within 12 months from the date of the policy, or, if regarded in the sense most favorable to the plaintiffs, 12 months from the time the promise was made. This amendment cannot abide either of these tests, and hence it cannot be permitted to have any effect as against the defendant. In *Knox v. Hilty*, 113 Pa. St. 430, 11 Atl. 792, we reaffirmed all our previous decisions in this class of cases, and applied the same doctrine, and for the same reason, to a scire facias on a mechanic's lien issued against a husband for work and labor done upon a house. After judgment against the husband, and execution issued, the court below permitted an amendment to be made striking off the judgment, introducing the wife as a defendant upon an allegation that she was the real owner of the property, and amending the claim of lien by introducing her name therein as owner in place of her husband's. A judgment having been recovered against the wife, the case was removed to this court, and was promptly reversed by us without a venire. We said: "On September 8, 1885, when the amendment was made, eight months had expired from the completion of the building. It

is needless to argue that at that time no valid lien could have been filed against the wife, the statutory period of six months for filing liens having fully expired." It was contended that, under our act of June 11, 1879 (P. L. 122), amendments were expressly allowed, in mechanic's lien cases, by adding the names of other parties to conduce to justice and a fair trial on the merits; but we said: "There is nothing in this act which in the least degree gives sanction to the idea that the time for filing a lien may be extended beyond the six months by way of amendment, or that any person may be thus introduced against whom no right to file a lien existed when the amendment was made. If the legislature had any such purpose in view, they certainly would have said so." The fundamental principle of the decision was that, after the time limited for bringing an action had expired, no amendment would be permitted against any one which would allow a recovery on the lien. Just so here. When the amendment was asked for all right of action to recover the loss insured against by this policy was gone, because such was the agreement of the parties. The amendment proposed to introduce a new cause of action by averring a promise to pay, notwithstanding the violation of the policy and its consequent avoidance. In *Knox v. Hilty* it was the introduction of another party against whom the lien was good; in this case it was the introduction of another promise by the defendant, but the promise was then more than 12 months old, and could not be a cause of action, on account of the prohibition of the contract. Hence the amendment was too late, and should not have been allowed.

A contrary decision has recently been made by the court of errors and appeals of New Jersey (*Tille Co. v. Drinkhouse*, 36 Atl. 1034) in a mechanic's lien case. Entertaining, as we do, the highest respect for the learning and ability of that court, we are constrained to say that, in our opinion, the decision was in direct hostility with all the decisions of this court in similar circumstances and upon the same question, and we therefore cannot regard it as of any authority. It is also equally hostile to all the decisions of the courts of last resort in many of the states. A fatal defect existed in the plaintiff's claim of lien, because it did not conform to the statutory requirements, and that was so held by the supreme court of the state. An amendment was then asked for, long after the bar of the statute had closed on the claim, and it was allowed. The allowance was sustained because, as we understand the opinion, defects in dates could be supplied by amendment for the reason that the original dates "were sufficiently explicit for all practical purposes," and it was too clear to require discussion that "such a change is embraced within the terms of a statute authorizing amendments 'in matter of substance as well as in matter of form.'" As the supreme court had previously decid-

ed that the defects in dates were so material that there could be no recovery on the lien, it is not easy to perceive the force of the reason assigned for disregarding the necessary legal consequence of absolute invalidity. The learned court also held that, as the statute allowed amendments to be made at any time before judgment, the amendment in question could be sustained, although at the time of its allowance no action could have been maintained upon the lien in its original condition, and the consequence of the amendment was to deprive the defendant of the right to plead the statute. If an amendment must be sustained because it is applied for at any time before judgment, the distinction between good and bad amendments would be abrogated, if only the time requirement is observed. The objection to the amendment was on its merits. The plaintiff, by his own dereliction in not conforming to the statutory requirements, had failed to bring his claim within the operation of the mechanic's lien law, and therefore he never had any lien. He had no lien, and therefore he had no right of action, either when the lien was filed, or when the amendment was asked for. If the amendment was allowed, he was for the first time clothed with a right of action, at a time when the statute was a peremptory bar to any action, and it is not possible to cite a solitary authority holding that this could be done. It took away a valuable right which had already vested fully in the defendant, to wit, the right to plead the statute, and every authority that can be found decides that this cannot be done by means of an amendment. To this contention there is no answer in the opinion. The point is not even stated. The remark that the authorities cited were not pertinent cannot satisfy the inquiring mind. The doctrine of the case is, of course, the law in New Jersey, but we could not possibly permit such doctrine to obtain any lodgment in our system of jurisprudence.

The decisions in the other states are so numerous that a review of them is not essential, but a reference to one or two, which seem to be more particularly analogous, will be instructive. Thus, in *Crofford v. Cothran*, 2 Sneed, 492, the action was assumpsit upon two duebills, without seal, dated June 1, 1847, and due from date. The statute of limitations had been pleaded. The plaintiff, at July term, 1853, asked leave to amend by changing the form of action to debt, which was granted. At the time the amendment was granted the form of action, as amended, was barred by the statute, more than six years having then elapsed. The court below held that the amendment related back to the commencement of the action, which was within the statutory period. The supreme court reversed that decision, holding that, although the proposition was generally true, it was not so where oppos-

ing rights had accrued before the amendment, and that, the right to plead the statute having accrued before the amendment was granted, it was a bar to the action, which the amendment did not remove. The court said: "We are not to suppose that the legislature, in providing a method whereby one party might be relieved in some degree against the consequences of his own ignorance or negligence, intended to deprive the other party of the benefit of any legal defense, the right to which had become perfect and absolute before the time of the application for such amendment. * * * It may be conceded that in general, and for most purposes, the amendment will relate back to the day on which the original process was sued out; but this fiction of relation will not be allowed to obtain where it would work injustice to the adversary party by destroying or taking from him the benefit of an existing legal defense to the action. In a case, therefore, where the time of the commencement of the action may become important in reference to the statute of limitations or other matter of defense, the effect of an amendment changing the form of action must be restricted to the time when, from the record, it appears to have been granted. From that time only can, in such case, the plaintiff be regarded as *rectus in curia*." The foregoing opinion is a most precise statement of the true reasoning that pertains to the subject. The amendment proposed was a mere change in the technical form of action, and, of course, would have been allowed if made in time. But, when the statute had become a bar, it was because of that fact, it was for that reason, that the amendment could not be granted. It deprived the defendant of a valuable right which had become vested, and for that reason could not be allowed. It is of no consequence, and it is no answer, to show that the amendment was a proper one and authorized by the statute of amendments. That is not the point in dispute. The real question is, can such an amendment be granted after the bar of the statute of limitations has closed on the claim? This was the vice in the New Jersey case, *supra*. The learned judge delivering the opinion proceeded to show that the amendment was proper to be made under their statute of amendments, and argued that such an amendment would do no injustice to the defendant, because it simply added the dates of delivery of the materials and work, and that, by implication from the words of the statute, the lien, if filed in time, was only gone if there was a willful or fraudulent misstatement of the matters required to be inserted. All this may have been true, but it had no application to the real point in issue, which was that, although the original claim of lien was filed in time, yet, being fatally defective, it conferred no right of action, and that, while such a right of ac-

tion might have been conferred if the amendment had been asked before the statute of limitations had closed on it, it could not be done after that event. That was the real contention, but it was not considered. The reasoning was that, because the statute did not invalidate the lien by express words on account of defective statements, the defects might be remedied by amendment at any time. But it is not by force of any statute that amendments out of time are rejected, but by the common-law principle that it ought not to be done after an adverse right had accrued. It was because the claim of lien was in its very inception fatally defective, in that it never complied with a certain statutory requirement, and hence never had a legal existence. And so, in the present case, if the amendment had been applied for while the right of action was running, it might properly have been granted, but after the right of action had ceased under the contract it could not be done. Because there could be no recovery on the policy alone, the right to recover could not be created by an amendment which was not solicited until after the right to recover for the loss was barred by the contract of the parties. Other cases affirming the same principles are *Bank v. Shoemaker*, 117 Pa. St. 94, 11 Atl. 304; *Flatley v. Railroad Co.*, 9 Heisk. 230; *Willink v. Renwick*, 22 Wend. 608; *Cogdell v. Exum*, 69 N. C. 464; *Shaw v. Cock*, 78 N. Y. 194; *Jeffers v. Cook*, 58 Cal. 147; *Seibs v. Engelhardt*, 78 Ala. 508; *Miller v. McIntyre*, 6 Pet. 61; *People v. Judge of Wayne Circuit Ct.*, 27 Mich. 164; *People v. Judge of Newaygo Circuit Ct.*, Id. 138; *Hills v. Ludwig*, 46 Ohio, 373, 24 N. E. 596; *Judson v. Courier Co.*, 26 Fed. 705; 15 Am. & Eng. Enc. Law, p. 178; *O'Neill v. Hurst*, 11 Phila. 171. Numerous other cases hold the same doctrine.

Upon the whole case, we are of opinion that the amendment, not having been asked for or made until after the bar of the contract had closed on the claim, should not have been allowed. As our views upon this subject are fatal to the plaintiffs' claim, it is not necessary to consider the other assignments of error in detail. We may, however, add that a careful reading of the testimony satisfies us that there was an entire insufficiency in the character and amount of the testimony to defeat the express provisions of the policy as to the alleged promise to pay the loss on the buildings. It was all in parol; it consisted of alleged verbal declarations of the agent, Kuester, which he positively and emphatically denied; it was neither clear, precise, or indubitable; it depended almost entirely upon the testimony of the plaintiffs; it was contradicted by the testimony of a number of disinterested witnesses; and it was of a vague, indefinite, and uncertain character. The authorities that, upon such testimony,

express provisions in policies of insurance, prohibiting parol waivers, cannot be avoided, are very clear and emphatic. *McFarland v. Insurance Co.*, 134 Pa. St. 590, 19 Atl. 796; *Insurance Co. v. Weiss*, 106 Pa. St. 26; *Insurance Co. v. Brown*, 128 Pa. St. 391, 13 Atl. 389; *Hocking v. Insurance Co.*, 130 Pa. St. 179, 18 Atl. 614. There was no proof of an actual, distinct, and definite agreement on the part of Kuester that the loss on the building should be paid. The argument in support of the plaintiffs' contention on this subject is made out largely of inferences and implications from facts and declarations, most of which are disputed. This is not enough. We sustain the 1st, 2d, 7th, 8th, 10th, 11th, 12th, and 13th assignments. Judgment reversed.

(183 Pa. St. 625)

In re STULL'S ESTATE.

Appeal of MOREHOUSE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

MARRIAGE—CONFLICT OF LAWS.

A marriage between citizens of Pennsylvania celebrated in Maryland, whither the parties went to evade the Pennsylvania law (Act March 13, 1815; *Purd. Dig.* p. 688, pl. 29, § 91) prohibiting marriage with the paramour, during the life of the injured wife or husband, by one guilty of adultery, is void in Pennsylvania, to which state the parties immediately returned, though there is no such prohibition in Maryland.

McCollum, Mitchell, and Fell, JJ., dissenting.

Appeal from orphans' court, Washington county.

Application of Ada Morehouse for letters of administration on the estate of Richard H. Stull, deceased. From the decree of the orphans' court dismissing her appeal from the denial of the application by the register of wills, petitioner appeals. Affirmed.

R. W. Irwin, for appellant. Boyd & E. E. Crumrine, for appellee.

GREEN, J. The question at issue in this case arises upon the application of a woman, claiming to have been the lawful wife of the decedent at the time of his death, to have letters of administration upon his estate granted to her. The letters were refused by the register and orphans' court, on the ground that the petitioner was not the lawful wife of the decedent, and hence was not entitled to them. Briefly, the facts were that the decedent, Richard H. Stull, was married to Hannah M. Lewis, who still survives. In February, 1894, the wife obtained a decree of absolute divorce from him, on the ground that he had committed adultery with one Ada Widdup. On April 5, 1894, the decedent and the said Ada Widdup, both being citizens and inhabitants of Pennsylvania, went to Cumberland, in the state of Maryland, and were united in marriage. They at once returned to Pennsylvania, and there lived and cohabited as man and wife on the farm of

the decedent, in Washington county, until his death, on June 11, 1895. They had no children, but there was one child, a son, Samuel A. Stull, by the first marriage. It was admitted and found in the court below, and is now conceded on the argument in this court, that the decedent and Ada Widdup, his paramour, with whom he had committed adultery, went into Maryland, to be there married, for the express purpose of evading the law of Pennsylvania which prohibits a marriage with the paramour during the life of the injured wife or husband. It is also conceded that by the law of Maryland there is no such prohibition, and that under that law the marriage was lawful. The question arising is, was the applicant the lawful wife of the decedent at the time of his death? She subsequently married one Morehouse, and now bears his name.

Our act of March 13, 1815 (*Purd. Dig.* p. 688, pl. 29, § 91), provides as follows: "The wife or husband who shall have been guilty of the crime of adultery, shall not marry the person with whom the said crime was committed during the life of the former wife or husband; but nothing herein contained shall be construed to extend to or affect or render illegitimate any of the children born of the body of the wife during coverture." Section 10 disables a guilty wife, who after the divorce cohabits with her paramour, from alienating any of her lands and tenements, and avoids such conveyances if made. By the ninth section it will be perceived there is an absolute prohibition of any subsequent marriage between the guilty person and the paramour during the life of the former wife or husband. It forbids the marriage relation to be contracted in the most general terms. The guilty party "shall not marry the person with whom the said crime was committed." A personal incapacity to marry is imposed. The necessary meaning of this language is that they shall not marry at all, in any circumstances, or at any time, or in any place, so long as the injured party is living. So far as the purpose and meaning of this statute are concerned, it is of no consequence where such subsequent prohibited marriage takes place. The relation itself is absolutely prohibited, and hence is within the operative words of the statute, without any reference as to where the marriage occurs.

It is now necessary to notice the other environments which affect the case. Both the parties to the prohibited marriage were citizens of Pennsylvania, domiciled on her territory, both before and after the marriage, and were only absent long enough to have the ceremony performed. They continued to reside together in Pennsylvania until the death of the husband. The woman resides here still. She never acquired any rights as an inhabitant of the state of Maryland, and can and does not now claim any right of that character. She is now claiming, not only the protection of our law, but a special privilege

and right, accorded only to lawful wives under the intestate law of Pennsylvania, to wit, the right to have administration of the estate of her alleged husband. In this respect the case is different from many of the cases cited in the paper books, and the difference is against her claim. Here, she, being now and at all times a citizen of Pennsylvania, subject at all times to its laws and its policies, having committed a direct and positive violation of one of those laws, which relates to and immediately affects the very application she now makes, solicits a decree from an orphan's court of Pennsylvania, giving her property rights and a right of administration, on the specific ground that she acquired those rights, if she acquired them at all, in consequence of a violation of the law of Pennsylvania; and she asks this decree, as she only can ask it, by the importation and actual enforcement of the law of a foreign state, within our own territory, and in our own judicature, when that law is contrary to the express terms of our own law, and contrary to the manifest and settled policy of our commonwealth. Moreover, it is expressly conceded that the parties left the territory of Pennsylvania, and entered that of Maryland, for the very purpose of evading the law of Pennsylvania which prohibited their marriage. We do not think that any of the cases cited for the appellant contain so many elements of invalidity as this.

There is no question as to the general rule that a marriage which is valid by the law of the place where it is solemnized is valid everywhere. Of course, even this general rule has its exceptions, where the particular marriage is contrary to good morals or public policy, or to the positive statutes of the country where it is sought to be enforced. But where a man and woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals and contrary to public policy, leave their domicile, and enter another, for the express purpose of violating the law of their domicile in this respect, the case is highly exceptional, and the great weight of authority is against the validity of such a marriage in the place of their domicile. There have been conflicting decisions upon the question, but very few of them sustain the validity of the relation where it has been assumed for an intended evasion of the law of the domicile and is contrary to good morals. The fact of such an intended evasion has been repeatedly recognized as the basis of invalidity when otherwise validity would have been declared. Thus, in a noted case in Tennessee (*Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305), decided in 1889, the same question precisely as in this case was raised, to wit, a marriage in Alabama between a man and woman domiciled in Tennessee, who had been guilty of adultery, and, after a divorce had been obtained in

Tennessee on that ground, the guilty husband and his paramour went to Alabama, and were married, and at once returned to Tennessee. They were indicted in Tennessee for lewdness, and were convicted and sentenced, and appealed to the supreme court, claiming that the marriage, being lawful in Alabama, must be held lawful in Tennessee. In the latter state the statute prohibited such marriages in almost the very words of our own act of 1815, to wit: "When a marriage is absolutely annulled, the parties shall be severally at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed, during the life of the former husband or wife." In an elaborate opinion the supreme court sustained the sentence, and held the Alabama marriage to be void in Tennessee. In view of the close analogy of the case to the one we are considering, some citations from the opinion will be appropriate: "The marriage, being prohibited by statute, is void if solemnized in this state." "Does the rule that a marriage valid where solemnized is valid everywhere make the second marriage in Alabama in this case valid?" "Marriage is an institution recognized and governed to a large degree by international law prevailing in all countries, and constituting an essential element in all earthly society. The well-being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property, alike demand that one state or nation shall recognize the validity of marriages had in other states or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise." The opinion further holds that the rule that a marriage valid where solemnized is valid everywhere has its exceptions, to wit: "(1) Marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; (2) marriages which the local law-making power has declared shall not be allowed any validity either in express terms or by necessary implication. * * * This [second] class may be subdivided into two classes: First. Where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of domicile of the parties, even where they have left their own state to marry elsewhere for the purpose of avoiding the laws of their domicile. Second. Cases which, prohibited by statute, may or may not embody distinctive state policy as affecting the morals or good order of society. * * * Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of

the state concerning the morals and good order of society, to that degree which will render it proper to disregard the *jus gentium* of 'valid where solemnized, valid everywhere.' * * * If, as we have seen, the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the courts would hold such valid here; but if the statutory prohibition is expressive of a decided state policy, as a matter of morals, the courts must adjudge the marriage void here, as *contra bonos mores*. * * * Now, believing, as we do, that the statute in question, which we are called upon to construe in the case at bar, is expressive of a decided state policy, not to permit the sensibilities of the injured and innocent husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, or the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of evading our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto as upon the inherent right of the rule itself."

The foregoing reasoning is satisfactory to us. It invokes practically three distinct ideas, to wit: (1) That the foreign marriage is contrary to the positive statute of the domicile; (2) that it is contrary to the public policy of the government of the domicile, in that it offends against the prevailing sense of good morals among the people there dwelling; and (3) it was contracted for the express purpose of evading the positive law of the domicile, and is therefore to be regarded as a fraud upon the government and people of the domiciliary residence. The combination of these three objections seems to be most fatal to the validity of the marriage thus contracted. The writer is disposed to regard each one of them as fatal. Instances of invalidity from each source in other matters than foreign marriages are not at all uncommon, but it is not necessary to pursue them in the books, as it would involve unnecessary labor and space. There is abundant authority for their application in the marriage cases. Perhaps the most conspicuous case of the effect of mere statutory prohibition is the *Sussex Peerage Case*, 11 Clark & F. 85, which prohibited any marriage of any descendant of King George II. without the previous consent of the king. A marriage having been contracted at Rome between a son of George II. and a lady who was a British subject, without the royal consent, a question arose as to the validity of this marriage, which was submitted to

the judges of the house of lords. Chief Justice Tindal, delivering the opinion, said: "The statute in question does not enact an incapacity to contract marriage within one particular country and district or another, but to contract matrimony generally and in the abstract. It is an incapacity attaching to the person of A. B., which he carries with him wherever he goes. But, as a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is as clearly within the prohibitory words of the statute as the incapacity to contract in England." "The prohibitory words of the statute were general: 'That no one of the persons herein described shall be capable of contracting matrimony.' " "Here, again," said the chief justice, "the words employed are general or more properly universal, and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated. * * * It is certain that an act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such was its intention." Lord Campbell said: "I have no doubt that it is competent to the British legislature to pass a law making invalid the marriage of particular British subjects all over the world; * * * and I am clearly of opinion that the intention is sufficiently testified by the language which has been employed." While the words used in this British statute related only to particular persons, they were specific in prohibiting any marriage between such persons, and for that reason it was held that the prohibition was general, and applied to any marriage, no matter where it was contracted. The same principle applies, as we have heretofore indicated, to the prohibition in the case at bar. It applies to any marriage, no matter where it may be celebrated, and as the parties were, and continued to be, citizens of Pennsylvania, it applied to them. In *Brook v. Brook*, 9 H. L. Cas. 212, another celebrated English case, where a man had married his deceased wife's sister, contrary to a British statute, the parties having gone to Denmark for that purpose, where such marriages were lawful, Lord Chancellor Campbell said: "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, if the contrary is forbidden by the law of the place of domicile, as contrary to the law of religion or morality or any of its fundamental institutions." And, again: "If a marriage is absolutely forbidden in any country, as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier, and entering

another state, in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and, immediately returning to their own state, to insist on their marriage being recognized as lawful." Upon the foregoing authorities, there is no doubt as to what the law is in England on this subject. It seems to us that these decisions are founded upon impregnable reasoning, which cannot be answered; and these decisions apply with the greatest force to the case in hand, for in those cases the statutes did not prohibit marriages involving immoral considerations, but here the subsequent marriage is a sort of reward for the prior adulterous intercourse, and the subsequent cohabitation is distinctly offensive to all good citizens. The conclusion of invalidity is immensely strengthened by considerations of the greatest force.

In North Carolina, in the case of *Williams v. Oates*, 27 N. C. 535, involving the same principle and almost the same facts, a similar decision was reached as in the Tennessee case *supra*. A husband and wife domiciled in North Carolina were divorced for the wife's adultery. Afterwards the wife and a man (a third person), both also so domiciled, to evade the law of North Carolina, which prohibited her from marrying again, went into South Carolina, and were there married, according to the law of that state, and immediately returned to North Carolina, where they lived together as man and wife until the husband died, intestate. It was held that the second wife was not the lawful widow of the deceased, and was not entitled to an interest in his estate, the law of the domicile controlling the relation. In *Marshall v. Marshall*, 2 Hun, 238, decided in 1874, the facts were that the plaintiff, Marshall, in 1858, was divorced from his then wife, on the ground of his adultery. The parties to the divorce were then domiciled in New York. In 1866 the husband and another woman, both then residing in New York, went to Philadelphia, to be married there, intending to return immediately to New York. They were married in Philadelphia, the first wife still living, and returned to New York, as intended. It was held that the second marriage was absolutely void, on the ground that "if citizens leave their own country, and contract a marriage abroad, such marriage being forbidden by the law of the country of their residence, but allowed by the country where it is contracted, and being celebrated with an intent to resume, and followed by an actual resumption of, their old residence, the validity of the contract is to be determined by the law of the domicile." It is true that this case was afterwards overruled in the case of *Van Voorhis v. Brintnall*, 86 N. Y. 18, decided in 1881; but, as neither of the decisions is binding upon us, we much prefer the ruling in *Marshall v. Marshall*. It is also true that in *Inhabitants of Medway v. Inhabitants of Needham* (1819) 16 Mass. 157, a contrary decision was made, in the case of a

marriage between a mulatto and a white woman, which was solemnized in Rhode Island, where it was not unlawful. It was held valid in Massachusetts, where such marriages were prohibited although the parties were domiciled in Massachusetts, and immediately returned there. The marriage was not questioned because it was contrary to good morals, but only because it was contrary to the words of the Massachusetts statute. The decision, however, expressly excepted the case of incestuous marriages or others that "would tend to outrage the principles and feelings of all civilized nations," and hence is of scarcely any weight in the present contention. It was followed with reluctance in *Putnam v. Putnam*, 8 Pick, 433, but it was held to be doubtful of application in *Inhabitants of West Cambridge v. Inhabitants of Lexington*, 1 Pick. 506, if the husband had come into Massachusetts to claim any marital rights, "upon the ground that the marriage upon which he founded his claim was contracted in violation of the laws of this state, and that it was contrary to good policy, as well as detrimental to the public manners, that he should be allowed to enforce such claim."

It is proper to observe that the leading text writers on the "Conflict of Laws" express the same conclusions as embodying the latest and best doctrine upon this subject. Thus, in *Story, Conf. Laws*, § 86, it is said: "But we are not therefore to conclude that every marriage by and between British subjects in foreign countries will be held valid because it is celebrated according to the laws of such countries. On the contrary, where the laws of England create a personal incapacity to contract marriage, that incapacity has in some cases been held to have a universal operation, so as to make a subsequent marriage in a foreign country a mere nullity when litigated in a British court." Section 87: "Indeed, the general principle adopted in England in regard to cases of this sort appears to be that the *lex loci contractus* shall be permitted to prevail, unless where it works some manifest injustice, or is *contra bonos mores*, or is repugnant to the settled principles and policy of its own laws." In section 112, quoting from *Lord Robertson in Ferg. Mar. & Div.* 397-399, it is said: "But a party who is domiciled here cannot be permitted to import into this country a law peculiar to his own case which is in opposition to those great and important public laws which our legislature has held to be essentially connected with the best interests of society." In a footnote to section 118, the author quotes from 1 *Burge, Col. Laws*, pp. 188-191, as follows: "The law which prohibits persons related to each other in a certain degree from intermarrying, and declares their intermarriage to be null, imposes on them a personal incapacity quoad that act; and that incapacity must continue to affect them as long as they retain their domicile in the country in which that law prevails. The resort to another country, where there was no such

prohibitory law, for the mere purpose of evading the law of their own country, and with the intention of returning thither when their marriage had taken place, cannot be considered a change of their former domicile, or the acquisition of a domicile in the country to which they had resorted. They must therefore be regarded as still subject to the personal incapacity imposed by the law of their real domicile." In Whart. Conf. Laws, § 159, the writer says: "But when persons domiciled in a state where these prohibitions are in force are married without domicile, in violation of such prohibitions, in a state where there is no opposing legislation, the parties visiting the latter state for this purpose, will the former state recognize the validity of the marriage? The first point for the court of such a state to determine on such an issue is whether the prohibition of such marriages is part of the distinctive policy of the state. If so, the court, acting on the reasoning already given, must hold that persons domiciled in such state cannot evade its law by going to another state, and then returning to live in the home state in a union that state condemns. And so it has been ruled on several occasions,"—citing *Kinney v. Com.*, 30 Grat. 858; *Williams v. Oates*, 27 N. C. 538; *State v. Kennedy*, 76 N. C. 251; *Scott v. State*, 39 Ga. 321; *Dupre v. Boulard's Ex'r*, 10 La. Ann. 411.

Upon the whole case, we consider that the weight of authority is against the validity of the marriage we are now considering; and, upon well-settled principles, we are convinced that it should not be sustained. The decree of the court below is affirmed, and the appeal is dismissed, at the cost of the appellant.

McCOLLUM, MITCHELL, and FELL, JJ., dissenting.

(184 Pa. St. 55)

SHARPSVILLE FURNACE CO. v. ALLEGHENY BESSEMER STEEL CO.

(Supreme Court of Pennsylvania. Jan. 8, 1893.)

SALES—ACCEPTANCE OF GOODS—QUESTION FOR JURY.

In an action for the price of 11 car loads (840 tons) of pig iron sold by N. for plaintiff, it appeared that 6 car loads were delivered in October, and 6 on November 5 and 6, 1890, and that all delivered in October was to be paid for, one-half on November 10th, and the other half on November 25th. On November 10th defendant sent a voucher to N., embracing all the iron delivered under the order to that date, deducted the freight paid, and paid one-half the price, without any notice that the iron was rejected. When the voucher was given by defendant, on November 25th, credit was claimed for the amount of the former settlement by deducting the 340 tons from 1,167 tons settled by previous voucher. In a settlement sent to plaintiff by N. on said date no allusion was made to the 340 tons, except as being "tons over limit in sulphur, and held subject to our order." N.'s bookkeeper (defendant's principal witness) testified he never heard any complaint as to quality until November 25th; that he did not receive

the analysis until some time afterwards, though he asked for it several times; and that the first correspondence with plaintiff in regard to it was a letter from N. to plaintiff reporting an offer for the iron. Other testimony showed that, when defendant received the iron, it was sampled and analyzed, and then unloaded on defendant's property. Defendant claimed that, as soon as the report of analysis came in, it unloaded the iron, and piled it up by itself, and thereafter held it subject to N.'s order. *Held*, that the question whether defendant accepted the iron was for the jury.

Appeal from court of common pleas, Allegheny county.

Action by the Sharpsville Furnace Company against the Allegheny Bessemer Steel Company for the price of certain pig iron sold and alleged to have been delivered to and accepted by defendant, the sale being made by Nimick & Co. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Johns McCleave and D. T. Watson, for appellant. W. B. Rodgers, for appellee.

GREEN, J. As it seems to us, the controlling question in this case is whether there was an acceptance or rejection of the iron by the defendant. The defendant's order to Nimick & Co. was entered on or before October 18, 1890, as appears by letter of that date from Nimick & Co. to defendant. The deliveries under the order were made October 25th, 2 cars; October 27th, 2 cars; October 29th, 1 car; November 5th, 4 cars; November 6th, 2 cars,—in all, 340 tons. The entire delivery was completed at the yard of the defendant company on November 6, 1890. By the terms of the order, all the iron delivered in October was to be paid for, one-half on November 10th, and the other half on November 25th. On November 10th, the defendant, then being in receipt of all the iron, sent a voucher to Nimick & Co. which embraced all the iron delivered under the order up to that date, deducted the freight which had been paid on all the iron, and paid the one-half of the price of the iron which was due on November 10th. No notice was given by the defendant that any of the iron was rejected for any reason whatever, nor that it was held subject to the order of Nimick & Co. When the voucher was given on November 25th following, credit was claimed for the amount paid at the former settlement by deducting the number of tons, 340, from an aggregate of 1,167 tons, which had been settled for by the previous voucher, and crediting Nimick & Co. only with the price of the whole 1,167 tons, less the 340 tons. All of this appears in a settlement sent by Nimick & Co. to the plaintiff on November 25, 1890. In this paper no allusion is made to the 340 tons, except as being "tons over limit in sulphur, and held subject to our order." There was no statement showing what the analyses were as to sulphur, or that any such tests had been made, and the only communication that was made to the plaintiff was from Nimick & Co. in the manner stated. No in-

formation was given as to what had been done with the iron, and nothing was said as to whether it had been rejected. Charles H. Scott, the bookkeeper of Nimick & Co., who conducted the transaction, and attended to the books and correspondence of the firm, and was the principal witness for the defendant, after having testified that the terms of sale required the payment of one-half the price of the iron on the 10th, and the other half on the 25th, of the month following the delivery, was asked, on cross-examination: "Q. And according to these vouchers, and according to these payments, the defendant in this case paid the first payment, the one-half of the cost of this iron in controversy, on the 10th of October (November)? A. Yes, sir. Q. Without any objection as to the quality of the iron. And was there a word said by them, any complaint made by them, as to the quality of that iron, until the 25th of November? A. I never heard of any." The witness further testified that he did not receive the analysis till some time after November 25th, though he asked for it several times, but the first correspondence in regard to it did not take place till March 4, 1891, and that was a letter from Nimick & Co. to plaintiff, in which they reported an offer of \$15 per ton for the iron from Carnegie & Co. The other testimony showed that when the iron was received by the defendant it was sampled and analyzed, and was then unloaded on the defendant's property. They alleged that it was held, subsequently to that, subject to the order of Nimick & Co. The defendant does not appear to have sent any word or notice of any kind to the plaintiff in regard to the iron, and its communications were only with Nimick & Co. It was not until March 12th, following, that plaintiff received the analysis of the iron. On the other hand, the defendant contends, and gave evidence to prove, that it had the iron analysed as soon as it arrived, and, when the report of the analysis came in, it unloaded the iron, and piled it up by itself, and thereafter held it subject to the order of Nimick & Co.

It will be seen, at once, that a most serious question as to the acceptance or rejection of the iron by the defendant was raised. The court submitted this question to the jury, who found for the plaintiff, and therefore must necessarily have found that the iron was accepted. Of course, if such was the fact, the liability of the defendant followed. In reviewing the action of the court on this subject, and the comments contained in the charge, we do not discover any error. After explaining the subject of delivery in the aspects developed by the testimony, and the right of the defendant to reject the iron if it was not up to the standard of the contract, and the effect of some correspondence in regard to a subsequent sale of it, and of the action of the plaintiff in relation thereto, the court said to the jury: "I say

I leave to you to determine whether it was a delivery and an acceptance or a rejection. The lot of iron came from Sharpsville, in Mercer county, and was shipped according to agreement, and was in the cars. I wouldn't say that they couldn't analyze it on the cars, or couldn't analyze it off the cars, and hold it in the yards, because it is a bulky article, and the cars might be demanded elsewhere. I leave that question as to whether or not it was a delivery and acceptance, and whether, after everything was settled properly and reasonably between them, that they long afterwards disputed it." This was really the leading and most important question in the cause. It was also a controlling question, because, if there was a delivery and acceptance, the defendant's liability resulted as a matter of law. A considerable part of the testimony related to the chemical analyses of the iron, but the testimony on that subject was very conflicting, and was not at all satisfactory. The variations in the results reached were very confusing, and as this whole matter related to the right of the defendant to reject the iron, rather than to the question whether it did reject it in fact, the subject was of minor importance, as contrasted with the other question, whether it did actually reject or accept this iron. We think there was ample testimony to sustain a verdict for the plaintiff on this subject, and hence we do not feel disposed to question its propriety, or to resist the logical consequence of the finding. It is a question of fact, and the verdict disposes of it. While there are some things in the charge which are fairly subject to criticism, we do not think they are of sufficient consequence to affect the result. The assignments of error are not sustained. Judgment affirmed.

(184 Pa. St. 102)

RUSSELL et al. v. ROCK RUN FUEL-GAS CO. et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

CORPORATIONS—TRANSACTIONS WITH STOCKHOLDERS—GOOD FAITH.

1. A person who might, at the inception of a corporation, be deemed the promoter, cannot, after the corporation has been in existence, organized, and operated by a board of directors for more than a year, be considered as such, so as to then hold him to a promoter's fiduciary liability in dealing with the corporation.

2. A person who, although not an agent or director of the corporation, by his position as a large, if not majority, stockholder, exercised a controlling influence on the company, must show that transactions between the company and himself, by which he profited, were fair.

3. An action by a stockholder of a corporation operating gas wells to have a receiver appointed, and have certain stock and cash paid by the company to another stockholder, for gas wells and pipe lines, restored, over and above the amount actually paid by him therefor, on the ground that the board of directors had recklessly made the purchases at exorbitant prices, and were entirely under the control of such stockholder, who was a large, if not a majority, stock-

holder, and had long experience in the business, cannot be sustained where there is nothing to show that such stockholder made a wrongful use of his legitimate influence, and all the directors testified that they had acted for what were deemed the best interests of the corporation.

Appeal from court of common pleas, Allegheny county.

Bill by Charles T. Russell and others against the Rock Run Fuel-Gas Company and others, praying for a receiver and other relief. From a decree for defendants, plaintiffs appeal. Affirmed.

J. S. & E. G. Ferguson, for appellants. Knox & Reed and Edwin W. Smith, for appellee Rock Run Fuel-Gas Co.

DEAN, J. John A. Snee, being the owner of gas wells and a small pipe line in Jefferson and Mifflin townships, Allegheny county, on August 26, 1893, entered into a contract with the Campbell Glass Company to supply it with 576,000 feet of gas per day for a period of five years. Without the right of eminent domain, he had secured by contract a right of way for his pipe line for a short distance, but was hampered for want of power to extend it. To obviate this, he procured the incorporation of a gas company, under the act of 1885. To comply with the law, he induced five of his friends, Owings, Rindfus, Boyd, McGrew, and St. John, to join him in the application for charter, and in articles of association wherein they were named directors. The capital stock was \$1,000, whereof Snee paid the 10 per cent. required by law. On October 30, 1893, the capital stock was increased to \$75,000, being 1,500 shares, of par value of \$50. The name of the corporation was the "Rock Run Fuel-Gas Company." On the same day of the increase of the capital of the corporation, Snee proposed to sell to the company, at the price of \$50,000, certain wells and pipes, as well as the contract to supply the glass company, the amount to be paid him in stock of the company at par. At the same time, his wife, Mrs. Kate A. Snee, proposed to sell to the company a certain well owned by her, for \$10,000, the price also to be paid in the stock of the company at par. Both propositions were accepted by the company, through its board of directors. Again, on January 6, 1894, the company, on his offer, bought from him certain rights of way and pipe, for the sum of \$8,081.55, of which \$81.55 was paid in cash, and the remainder in stock of the company at par. On November 3, 1893, as a result of prior negotiations, Charles T. Russell, this appellant, purchased and received a transfer from Snee of 800 shares of the stock. At a stockholders' meeting held in January, 1894, the first directors were re-elected. At the next annual meeting, in January, 1895, through dissensions among the stockholders, there was no election, and the old directors held over for another year. Soon after the company commenced operations, it was discovered that it was unable to supply the gas required by the

contract with the Campbell Glass Company. Snee, on October 29, 1894, had become the owner of another well, known as "Dean No. 1"; and, to add to the capacity of the company, it purchased from him this well, at the price of \$6,500, payable, cash, \$1,500, and stock of company at par, \$5,000. In December following, with the same object in view, he sold the company another well, known as "Morgan No. 1," at the price of \$7,000 cash. The capacity thus increased enabled the company to fill its contracts, up until November, 1895, when the supply again fell short. Snee then procured other wells,—Wylie and Bickerton,—made a contract with the Morris Beatty Steel Company to supply it with gas, and sold the new wells and the contract to the gas company for \$40,000, taking, in payment, stock of the company. Thereupon, at the suggestion of Russell, for himself and other stockholders, this bill was filed against Snee and the company, averring, among other facts: (1) That the board of directors was entirely under the control and influence of Snee, and at his instance, in entire disregard of the interests of the company and other stockholders, had recklessly and negligently purchased from him, at exorbitant prices, the Morgan well, Dean well, Wylie and other wells, also parts of pipe lines; the aggregate price paid being \$53,000, while in fact they were worth but \$18,200. (2) That, at the time of said sales, said Snee had knowledge of the small value of the wells; yet in fraud of the company, with the knowledge of the directors, the sales were made. (3) That, at the organization of the company, it was promised and agreed by Snee that he would procure wells, and use his best efforts to promote the success of the company at the cost of the same to him; that the wells sold by him to the company were purchased by him for it under this understanding. The prayers of the bill were that (1) a receiver be appointed; (2) that Snee be directed to restore to the company the cash and stock received by him, less the cost of the purchase by him, or the fair and reasonable value thereof; (3) general relief. To this the company made answer, denying all material averments of the bill, and alleging the property purchased was a necessity to the company in its operations, and that the prices paid were fair and reasonable, and that all the transactions were of benefit to all the stockholders. Snee also answered, denying all fraud and overreaching, all undue influence exercised by him over the board of directors, and alleging the prices received for the property were fair, and less than he could have obtained from others at the time of sale.

On the issue thus made up, the court below heard the testimony. The facts, in addition to those already stated as found by the court, were that Russell, this appellant, knew at the time he purchased his stock that the incorporation of the company had been procured by Snee, and he knew also of the property that Snee proposed to sell to

the company in payment for the stock, part of which stock he was to get; that the property transferred by Snee to the company was necessary to its operations; that the Morgan and Dean wells, sold to his company for \$13,500, cost Snee but \$2,310, and were not in fact worth half the price paid by the company; that the property put in for the original stock was not worth more than half the price put upon it; that at a stockholders' meeting in January, 1896, a majority, by vote, etc., ratified the purchase at the price paid; that the evidence establishes that, the purchases were made by the directors recklessly, and without examination; nevertheless, they were not made collusively with Snee, nor does the evidence show corruption or fraud; that while Snee was a large stockholder, and the dominating power in the company, yet there is nothing in the evidence to indicate that he acted corruptly, or unduly persuaded or even discussed the transactions with the directors; that the company at first paid large dividends, but, as the gas supply rapidly fell off, no dividends have been paid since July, 1894.

On these facts, the court concludes, as matter of law: (1) That Snee occupied no fiduciary relation towards the company or fellow stockholders. (2) Being only a stockholder, he had the right to sell his property to the company at such price as the company was willing to pay, there being no fraud practiced by him, actually or constructively. The decree therefore was that the bill be dismissed, at plaintiffs' costs.

The appellant argues on the single assignment of error that the findings of fact should have impelled the court to an altogether opposite conclusion of law; that, Snee being the original projector of the corporation, and its dominating power, although nominally only a stockholder, he could not sell to the corporation property at a profit. Rice's Appeal, 79 Pa. St. 168, is relied on as sustaining this view. It will be noticed that no complaint is made in the bill as to the original transaction by which Snee and his wife sold to the company, for \$60,000, the property with which it commenced operations; nor could there well be by Russell, this plaintiff, who was an experienced oil operator, and had full knowledge of the property and the bargain when he was negotiating for and bought his stock. The contention turns on the transactions specified in paragraphs 1, 2, and 3 of the bill, which aver reckless purchases, at exorbitant prices, of the Dean, Morgan, Wylie, and Bickerton wells, and certain pipe lines connected with these wells. These properties were purchased, it is alleged, for \$53,000, when they were not worth exceeding \$18,200. All these purchases were made after the company had been in operation more than a year. On the nominal price paid in stock of the company at par, Snee's profits were large. The mental process by

which the learned judge of the court below arrived at the conclusion that the profit was enormous does not, however, seem clear to us. It is this: Natural gas is of very uncertain production. These wells purchased by the company may very soon become exhausted. Therefore the price paid was too high. But look at the other side: The purchaser, a gas company, pays for these wells, which are to form a large part of its future supply, almost wholly with its own stock. Necessarily, if the wells are worthless, the stock based on them is of no greater value; and, while the difference between the actual cost to Snee and nominal price received may indicate some profit, it does not by any means follow that the real profit is the difference between the cost and the nominal price. The fact is, from this testimony, that the whole business is uncertain. In the first five months of the company's existence it paid a profit of 2 per cent. a month on its capital stock. Then some of the wells gave out, and profits ran down to nothing. Then, on the purchase made of the Wylie and Bickerton wells, in October, 1895, the net receipts again ran up to \$1,000 per month, and the production, contrary to all experience, is increasing. It is apparent that the value of a gas well and the value of gas stock are speculative. The value of both depends on the unknown. But, assuming Snee made a profit, he was a stockholder, and, as such, he had a right to deal with the corporation as if at arm's length. This is conceded by counsel for appellant, and also by Rice's Appeal, *supra*, as a general proposition; but it is argued that Snee was the promoter of this corporation, and its dominating power. As to being a promoter, that position, at the date of the sales complained of, no longer existed. That question might have been raised as to the property transferred at the inception of the enterprise, but it is not. The company was promoted into existence, organized, and operated by its board of directors more than a year before the last purchases. Whatever he might have been at first, he was not then a promoter. It is evident, however, that Snee was a large, if not a majority, stockholder at the date of these purchases. He was also a gas operator, of great experience in the business, and doubtless exercised a controlling influence in the company. He was not an agent, but simply, by his position and experience, wielded large powers. We assume, therefore, he comes within the scope of Rice's Appeal, *supra*. He must show the transactions by which he profited were, under the circumstances, fair. There is no evidence that he sought to influence the board or a single director. Every one of them testified he never attempted to do so, and that each had acted for what he deemed the best interests of the company. If he was not an agent or officer to purchase for the company, as the undisputed evidence

shows he was not,—if he made no wrongful use of the legitimate influence his long experience and superior knowledge of the business would naturally give him,—then the plaintiff has no case. We think the decree of the court below was right on the facts. It is therefore affirmed, and the appeal is dismissed, at costs of appellant.

(184 Pa. St. 66)

ZAHN v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

RAILROAD RIGHT OF WAY—BOUNDARY.

A lawful entry, appropriation, and exclusive occupancy for 21 years by a railroad company for a right of way, of land not exceeding the width of the lawful limit, settle the boundary of the easement, there being no monuments or survey to indicate the extent of the original taking.

Appeal from court of common pleas, Allegheny county.

Action by William A. Zahn against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

William Scott and George B. Gordon, for appellant. A. Leo. Weil and Charles M. Thorp, for appellee.

DEAN, J. This suit is an ejectment for a strip of land along the line of defendant's railroad, in what is now the borough of Ingram, Allegheny county; the land claimed by plaintiff being 185 feet long and 37 feet wide, measuring from the center of the railroad bed. It is now occupied by defendant, with its tracks, and a siding at the station. In 1853 the land was part of a tract of 100 acres owned by James Flannegan, in what was then Chartiers township, Allegheny county. The plaintiff shows title by successive conveyances from Flannegan, so far as Flannegan had title to the disputed piece. The defendant claims that the land was appropriated in 1853 for railroad purposes, under right of eminent domain, by its predecessor in franchise, the Pittsburg & Steubenville Railroad Company, and since that time has been occupied for railroad purposes. It appears from the record, on 27th of August, 1853, that Flannegan, the then owner of the 100 acres, presented his petition to the then district court of Allegheny county, setting forth, as owner, that the railroad company, under the act of 1849, had entered upon his land, and appropriated a part of it for a railroad, without his consent; that they had not been able to agree upon compensation for the damages; and therefore he asked that seven viewers be appointed to assess his damages. The court appointed the viewers, who went on the premises, had several meetings, at which they heard testimony, and made report to the court, 5th November, 1853, that the railroad company had taken and occupied of Flannegan's land 3 acres and 102

perches; that this was tillable and pasture land, but there was also included, in this, part of a slaughter-house yard, garden, and orchard; and that, further, a valuable spring had been destroyed. They therefore assessed his damages at \$2,900. The court confirmed the report nisi. The railroad company then filed exceptions, which in the main complain that the damages allowed were grossly excessive; the testimony showing that the land was worth only \$200 per acre at the very highest, while the sum allowed showed it had been valued by the viewers at more than \$900. At the argument of the exceptions, Flannegan filed a written stipulation to accept the \$2,900 awarded by the viewers, in full for the 3 acres 102 perches of land taken, as shown by a plot made by N. Patterson, one of the viewers, and filed; and, further, he agreed to discharge the railroad company from all damages by reason of its filling up and covering land adjoining the railroad, to the extent of 2 acres 181 perches. The court thereupon overruled the exceptions, and confirmed absolutely the report of the viewers; embodying, however, in and making the written stipulation of Flannegan part of its decree. This, however, was of the court's own motion, the railroad company not consenting thereto. Judgment was entered against the company for the \$2,900, from which the company took a writ of certiorari to the supreme court, and the judgment was affirmed per curiam. No question touching the present contention was raised on the certiorari.

The source of the dispute now arises from the map filed by N. Patterson, one of the viewers. If no map had been filed, the conclusive presumption would have been, after this lapse of time, that whatever portion of land the company had entered upon and occupied in 1854, within the limit of its rights to appropriate under the act of 1849, was the land embraced in the viewers' report and the court's decree, in the statutory proceeding for damages. Under that act it had a right to appropriate not to exceed 60 feet in width, except where it might take more at deep cuttings, high embankments, or places selected for sidings, turn-outs, depots, engine or water stations. At that early day in railroad building, when land was far less valuable than now, but little care was taken by either owners or railroad corporations in defining with accuracy the limits of the appropriation. The damage resulted in most cases, not so much from the quantity of land taken, as from a steam railroad being run and operated through a cultivated farm. The 5 or 10 acres appropriated out of a 100-acre farm was but a small part of the damage sustained, and could be easily computed. The expense and interruption, in the pursuit of his peaceful avocation, by the new method of carrying, was the most grievous complaint of the farmer. By the act referred to, the corporation had power to survey, ascertain, locate, fix, mark, and determine the quantity appropriat-

ed; but this was seldom done, while it is almost the invariable and undoubtedly the far better practice, in later years, for the company's engineers to map and file of record, as part of the proceedings, a plot of the land taken. In such case as the last, no question like unto the one before us could arise. The company would be estopped by its own definition from enlargement of the original appropriation. The landowner could not encroach on the easement for which, by the judicial record, he had been compensated. Here, if the company, by survey, did fix, mark, and determine the area of land within the statutory limit of its right, no survey or plot of it was filed in the proceedings. The quantity of land which the company is allowed to appropriate is not determined by the viewers. It is no part of their duty to fix the lines of the appropriation. The company, under its right of eminent domain, surveys and appropriates the land within the limits fixed by the statute, and points out the boundaries. The viewers assess the damages for the land taken according to the boundaries thus fixed by the company. In the case before us, one of the viewers filed a map made by himself. There is no evidence that the company had any hand in making this map, or that it was made from stakes or lines pointed out by those representing the company. On the trial of the case, in the opinion of the learned judge of the court below, the issue turned on the question solely of what land was included in the boundaries of the Patterson map. On that theory the evidence was submitted to the jury, who found for plaintiff, and we have this appeal by defendant, assigning eight errors. In the view we take of the law, all of them may be discussed under two heads: (1) What effect should be given to the map filed? (2) What effect, under the evidence, should be given the plea of the statute of limitations?

The map does not indicate with even approximate certainty the extent of the original appropriation. There is not a single course, distance, or width given of the land for which damages are awarded. It shows the courses and distances of the outside lines of the Flannegan farm; then a narrow strip in white, diagonally for 2,459 feet across it; then, along this strip, irregular patches, colored in pink and blue, without a measurement to one of them. Flannegan presented his petition for the appointment of viewers, after the company had entered under the statute, which gave it a right to appropriate 60 feet in width. He did not specify in his petition what quantity the company had taken. The viewers went upon the land, and, after observation and testimony, reported the quantity at 3 acres 102 perches. This would make a strip 60 feet wide the whole length of the road through the farm. The plaintiff's theory was that the Patterson map limited defendant to a width of 10 feet, or 5 feet on each side of the center line of its road. There were expert witnesses

—engineers—called on each side, whose testimony, on the one hand, tended to show that the map established the theory of plaintiff as to the extent of appropriation; on the other hand, that of defendant. But the very fact that their testimony was in conflict showed the impossibility of defining with certainty the boundaries by this map. As we understand it, the purpose of a map of this character is to show clearly the particular land taken. If it be capable of flatly contradictory interpretations, then of itself it creates uncertainty. The opinion of the learned judge of the court below, who heard the evidence on this point, may be gathered from this excerpt from his charge: "The presumption apart from any evidence is that the railroad company took 60 feet, and it devolves, in that view of the case, upon the plaintiff, to show that which would indicate that the railroad company did not take that much. They claim that is done by the plot filed in the proceedings in the district court. That is a matter for you. Witnesses have been called. Some of them say this plot is so vague and indeterminate that you cannot tell anything about it. If you find that to be true, the presumption of the law prevails, that the railroad company has sixty feet; the burden devolving on the plaintiff to show that the company took less than they were entitled to under the law." In this view of the case, the extent of defendant's appropriation was determined by a map from its face uncertain, and not made certain by petition for viewers, decree of the court, by expert inspection, measurements, or computation. Although filed of record, the map was valuable as a record of the rights of neither party. There is in fact no designation of record showing the boundaries of the original appropriation. It shows but one thing with verity, viz. the general course or route of the road through the Flannegan farm. This being the case, how shall the boundaries or extent of the appropriation be established? We think actual occupation of the land, in the exercise of the right of domain. What was the extent of its occupation? The decree of the court states that Flannegan, in consideration of the damages, had agreed to release 3 acres and 102 perches, as shown by the report of the viewers and the diagram, and, further, all claims on account of filling up and covering 2 acres and 181 perches adjoining the railroad. On the same day, Flannegan filed his release, in which are these words: "The said ground so taken and occupied embraces and includes a double track or switch throughout a great portion of its length, or the whole thereof." It is undisputed that, at the date of the view, the railroad company had begun work, and that it prosecuted it continuously for six or seven years, when it commenced running its cars by a single track on a roadbed graded much wider than necessary for the one track. A line of telegraph was put up on the side now owned by plaintiff, 30 feet from the center of the track, and the poles remain as they were

originally planted. James McCabe, holding under Flannegan, and predecessor in title of the land claimed by plaintiff, laid out part of his land in lots, and in 1868 recorded a plot of the lots. On this plot he excludes from his lots the roadbed, 60 feet wide. In 1871 and 1872 the company put down another track, within the 60 feet, also a siding, making three tracks. Hackmeister, the immediate grantor of this plaintiff, fixed his eastern boundary by the west side of the railroad company's right of way. There is no assertion of a boundary which encroaches on defendant's occupancy. Therefore the undisputed facts show that, whether the appropriation was marked upon the ground prior to the view, there was an actual claim to an appropriation, then of over five acres, which Flannegan, by his release, conceded. In 1866 the telegraph line was put up 30 feet from the center, and in 1872 practically three tracks were laid.

The evidence shows, then, without dispute, an actual occupancy by defendant, for a longer period than 21 years before suit brought, of a strip of land through the Flannegan farm, at least 60 feet wide. While the verdict in the case appears to us vague, it is certain enough, if the judgment stands, to indicate to the sheriff, on a writ of hab. fa., that he must deliver possession to plaintiff of very nearly one-half the land which defendant has occupied for more than the statutory period. We think there was error in permitting the jury to so find from this evidence. The learned judge of the court below thought that "the logic and the inference and the necessary result" of the opinion of this court in *McClinton v. Railway Co.*, 66 Pa. St. 404, are that railroad corporations can acquire no right by an adverse possession of 21 years. While not questioning the correctness of this conclusion when drawn from all that was said in that case, nevertheless, as a precedent, we adopt the reasoning of it only so far as it vindicates the point decided, and that was in the language of Agnew, J., who rendered the opinion: "Can a railroad company, without a grant, release, or legal appropriation, enter upon any man's land *nolens volens*, and then bar his re-entry by an adverse possession of six years?" The answer was it could not; and, following what was said to its logical conclusion, the same answer would perhaps, though not necessarily, be given where the corporation set up a defense of 21 years' adverse possession. In several cases since, notably that of *Keller v. Railroad Co.*, 151 Pa. St. 67, 25 Atl. 84 (opinion by the present chief justice), the cases (among them, *McClinton v. Railway Co.*) are very fully considered, and it is held that the general limitation act of 1713 applies only to common-law actions; and, further, that a statutory limitation of six years to actions for damages against railroads was in violation of section 21, art. 3, of the constitution. Therefore the law as to the six-years statute of limitation in a proceeding for damages against a railroad company may be considered as set-

tled. We are not inclined to at present make further inquiry, because it is wholly unnecessary here. Without dissenting from the conclusion as to where the logic of *McClinton v. Railway Co.* would lead, we are very sure neither the facts nor the logic of that case fit the one before us. This is an ejectionment,—a common-law action. The entry was by grant, release, and appropriation,—all three. The defendant was not an intruder without right when it entered on Flannegan's land, in 1853. It entered under the authority conferred by the commonwealth for a public purpose. It did appropriate; did compensate, under all the forms of a well-defined statutory proceeding. Besides, the owner executed a formal release. It was in no sense of the word an intruder on Flannegan's farm, but entered by authority of law, with the right to appropriate a strip the length of its road through the farm, not exceeding 60 feet, unless certain specified purposes required more. Its mere entry and occupancy of the land for 21 years did not invest it with title to an easement that it possessed beyond controversy, by its lawful entry and compensation made at the foot of a judgment, under the statute, to the owner; but, as no monuments on the ground erected at the date of the entry have survived, to now indicate the extent of the original taking, and no survey on record or elsewhere serves to define the boundaries, they must be determined by the extent of the actual occupancy. And, while we do not decide that a trespass by a railroad corporation for 21 years would bar the owner from re-entry, yet we do decide that a lawful entry, appropriation, and exclusive occupancy for the period of 21 years, of land not exceeding the width of the lawful limit, settle forever the boundary of the easement. A natural person can, by a trespass, accompanied by open, notorious, exclusive, adverse possession for 21 years, bar the owner. Still, he must define his boundaries, and show an actual occupancy up to them. An artificial person, the creature of statute, it is argued, can acquire no right or title to an easement, except by entry in the mode authorized by statute. Concede this; yet it has entered lawfully. It can define the extent of a lawful appropriation by marks on the ground, by maps of surveys filed of record, or by actual occupation for 21 years.

We are of the opinion: (1) That the Patterson map is so indefinite that the boundary of the original appropriation is no more certain with than without it; (2) that the actual occupation of the land by defendant for a period of more than 21 years, to the extent of that occupation, fixes, with certainty, its right; (3) that plaintiff can recover no land within the boundaries so occupied. The claim of plaintiff being for land within the lines of defendant's actual occupancy, it follows he cannot recover, and the court should have so instructed the jury. What we have said in effect disposes of all the assignments of error. The judgment is reversed.

In re FLEMING'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 3, 1893.)

WILLS—CONSTRUCTION—INTENT—DISCRIMINATION
AS BETWEEN CHILDREN—INTEREST—
WAIVER OF BENEFITS.

1. Testator gave his son the privilege of purchasing, after the death of testator, the latter's interest in the business owned by them as partners, at a reduction of 20 per cent. from its valuation, to be determined by appraisement. In a codicil testator, after reciting that, on consideration, it appearing to him that the good will of the business was of so much value that he ought not to give his son the additional advantage of the 20 per cent. reduction, revoked the clause granting such privilege, but still allowed the son to take his interest at the appraised valuation. Testator distributed his other property equally among his other children. *Held*, that testator intended to discriminate in favor of the son as to the business.

2. The will also provided that, if the son's share of the personal estate bequeathed should not be sufficient to pay for testator's interest in the business, the executors should give him a reasonable time, not to exceed five years, in which to make payment therefor, and any amount remaining unpaid at the end of such time should be deducted from his share of the real estate devised. The son was one of the two executors. *Held*, that testator intended that the payment was not to be due until the expiration of five years, and hence no interest was chargeable before such time.

3. Payments made by the son before the end of the five years, money being needed to satisfy a mortgage, and for other purposes directed by the will, the son always denying liability for interest, did not constitute an admission of liability on his part to pay before that time.

4. Neither did an agreement of the son with the other executor to take the property at the appraised valuation, to pay therefor on the terms of the will, and to collect the accounts, the son to be given credit for those which he could not collect within five years, constitute an admission of present liability.

5. Nor was a present liability admitted by the son's giving a judgment note payable one day after date, and expressing on its face that it was merely collateral security for the appraisement.

Appeal from orphans' court, Allegheny county.

Partial accounting of Robert F. Shannon and George S. Fleming, executors of the will of Joseph Fleming, deceased. From a decree surcharging him with a certain sum, George S. Fleming appeals. Reversed.

W. B. Rodgers and Henry R. Ewing, for appellant. William Yost, for appellee.

DEAN, J. Joseph Fleming, a dealer in drugs in Pittsburg, and possessed of a considerable estate, some weeks before making his will, on October 30, 1889, took his son, this appellant, into partnership in the business, selling to him a fourth interest, and himself reserving three-fourths. In less than six months thereafter, on May 15, 1890, the father died, leaving children, besides George, the appellant, four daughters. He appointed the son, George, and Robert F. Shannon, a son-in-law, executors of this will. The third item of it is as follows: "I have recently admitted my son George S. Flem-

ing as a partner in my business at No. 412 Market St., Pittsburg (wholesale and retail dealer in drugs, etc.). Should he develop fairly good business qualities, and be willing to continue the business after my death, I desire that he should have the privilege of doing so; and in that event, and for that purpose, I direct that a fair and just inventory and appraisement of my interest in said firm or business be made, as provided in our articles of co-partnership, and that George shall be permitted to take and purchase the same at a reduction of twenty per centum from such valuation; and, further, if his share of my personal estate which I bequeath to him in this should not be sufficient to pay for said stock and interest, I direct that a reasonable time be given him by my executors to make payment therefor, such time not to exceed five years, however; and, if he should then fail or neglect to meet his payments, I direct that the sum or sums so remaining unpaid shall be deducted from his share of my real estate herein devised to him, and be added to the shares of his sisters in such real estate." By a codicil dated January 29, 1890, he modified the bequest thus: "I, Joseph Fleming, the above-named testator, do hereby make and declare the following codicil to my above-written will: Upon further consideration, it appears to me that the good will of the drug business referred to in the third item of my said will is of so much value, and my son's present opportunities for making money are so good, I ought not to give him the additional advantage of a twenty per cent. discount on the stock. I therefore hereby revoke that clause in said item which allows him to take the said stock, etc., at a discount of twenty per cent. from the valuation thereof, and I now will and direct that my son, George, be allowed to take said stock, etc., at the valuation that shall be placed thereon by the appraisement made as in said third item provided." An appraisement of the father's interest in the drug business was made as directed, immediately after his death, no account being taken of the good will. It amounted to \$48,902.05, and George accepted it at that valuation. The reasonable time, not exceeding five years, which George was by the will to have for payment, was not otherwise fixed by the executors. He, however, made large payments from time to time, commencing soon after the appraisement, and up to the filing of this fifth account, October 2, 1896, the balance then unpaid of the principal was but \$13,145.05. In filing his account as executor, George charged himself with no interest on the appraisement of the drug business. On exceptions filed, the court below surcharged him with interest from 21st of June, 1890, the day of appraisement, on the balances remaining unpaid of the purchase money. The appellant admitted he was answerable

for interest on any balance due at the end of five years, but contended that under the will he had five years to pay the principal, and during that time no interest should be computed. Because the court below did not sustain his contention, we have this appeal.

If the intent of the testator, with regard to charging interest on the appraisement, can be ascertained with reasonable certainty from the will, that intent must control. If we cannot find the intent from that instrument, then, to determine the liability, we must adopt the rules of law applied in like or analogous cases. The learned judge of the court below was of opinion that the will clearly disclosed a general intent to equalize his gifts among all the children; but that, if George be exempted from payment of interest, then he is to that extent benefited, the other children discriminated against, and the intent defeated,—that is, the general intent to equalize would fail, because a particular intent was assumed, in the absence of any words in the will warranting the assumption. If the intent to equalize the whole estate be clear, the conclusion ought to follow, for the intent to favor the son, by exempting him from payment of interest, it may be conceded is not beyond all doubt. But in proportion as the evidence pointing to a particular intent to discriminate makes prominent that intent, that pointing to a general intent to equalize the distribution is of course weakened. As we read this will, the evidence of an intent to favor the son decidedly outweighs that in favor of an intent to equalize. The testator, in the body of the will, positively expresses an intention to discriminate in favor of George. On the 30th of October, 1889, the date of the will, when the son had been but a short time his partner, he says: "Should he develop fairly good business qualities, and be willing to continue the business after my death," then a fair valuation of the property is to be made, and "George shall be permitted to take and purchase the same at a reduction of twenty per cent. from such valuation. This is an express indication of favor, by giving to George, for 80 cents, that which, at a "fair valuation," is worth a dollar. But it is argued that by the codicil, made three months afterwards, the testator shows an abandonment of that intention. We think not. It only shows that, on reflection, he discovered that, inadvertently perhaps, by the terms of the bequest, there would be a practical deduction of 40 per cent. instead of 20. He says: "Upon further consideration, it appears to me that the good will of the drug business referred to in the third item of my will is of so much value, and my son's present opportunities for making money are so good, I ought not to give him the additional advantage of a twenty per cent. discount on the stock." Evidently, he supposed the good will was not an appraisable asset of his estate, or that it passed to George as surviv-

ing partner on dissolution, by his own death, of the partnership. On reflection, he realizes its value. He had built up a large business as a merchant. He knew the value of a good will, and doubtless believed it would add 20 per cent. to the "fair and just inventory and appraisement of the stock." He therefore revokes the gift of 20 per cent., not with a view to take that much from George, to make him equal with his sisters, but that George may not, in effect, get 40 instead of 20 per cent. Taking the words of the will and codicil together, and in view of the subject of the bequest, we think there was an almost plainly-expressed intent to still discriminate in favor of the son with reference to the bequest of the drug business.

Starting with the fact, then, that the father did intend to favor George in this purchase, what construction shall be put upon the direction as to time of payment and the date from which interest should be computed? He says: "If his share of my personal estate, which I bequeath to him in this, should not be sufficient to pay for said stock and interest, I direct that a reasonable time be given him by my executors to make payment therefor, such time not to exceed five years, however; and, if he should then fail or neglect to meet his payments, I direct that the sum or sums so remaining unpaid shall be deducted from his share of my real estate herein devised to him, and be added to the shares of his sisters in such real estate." It is a settled rule that interest is not demandable until the money is due, unless the instrument stipulates otherwise. It is due whenever a liquidated sum of money is unjustly withheld, and interest is compensation to the creditor for wrongful delay by the debtor. It is unnecessary to cite authorities for so familiar a rule. The testator, clearly, did not expect the son to pay this large sum out of the profits of the drug business, for he expressly subjects the son's share of the personalty to the payment in the first instance, and, if that be not sufficient, then the amount is to be paid out of his share of the realty. The personalty barely sufficed to pay testator's debts, a contingency probably apprehended by him, and the amount remaining unpaid is therefore secured or charged on the son's share of the realty. But the intent is clear the son should not be embarrassed by an immediate demand for the debt, as if it were due, for, if the personalty be absorbed by his own debts, the son cannot pay. In that event, reasonable time is to be given, not exceeding five years. Then, if anything remains unpaid, it is to be deducted from the son's share of the realty. If there had been personalty exceeding testator's debts, undoubtedly the son's share would, under the express terms of the will, have been immediately applicable to the payment of the appraisement, and to that extent it would have been from that time due and payable. There was no per-

sonalty, however, for the son, and therefore payment was to be made within a reasonable period, not exceeding five years. In the mind of the testator five years was not an unreasonable time for payment, and no compulsory payment was intended within that period, if there was no personalty out of which to make payment; but, after the expiration of that time, payment could be compelled out of the son's share of the realty. This is not a contract for purchase, as in the cases cited by appellee, where the vendee goes into possession, and equity presumes interest is to be paid on the purchase money, although not so stipulated, because of the benefit arising to the vendee from possession. It is a bequest by a father to a son of a valuable business, at a price to be fixed by disinterested appraisers, the testator specifying the sources of payment, and the time within which payment is to be made. A less time could have been determined on by the legatee and the executors. Of these last, the legatee was one out of two. The other could not, of himself, have determined that a less time than five years was reasonable, for the testator has said that five years was that reasonable time. He has therefore fixed the date the money was due and payable. Until the expiration of that time, it was not wrongfully withheld, and no interest, until then, was demandable.

It is argued that the son, by payments within the five years, gave to the will appellee's construction of it. In view of the surroundings of the parties and the condition of the estate, we think this has but little significance. Robert F. Shannon, the other executor, states that he very often demanded money from George on the bequest; that money was needed to satisfy a mortgage, and for other purposes directed by the will, and George frequently made payments. He admits, however, George always denied any liability for interest. Why should not the son and executor, jointly interested in the estate with his sisters, do everything in his power to relieve the estate from incumbrances, if he was able to aid it? If he partly anticipated payment of his own debt at some loss to himself, it was not, in view of the circumstances, such improbable conduct as could be construed into an admission of legal liability. It is further argued by appellee that the agreement by which the son accepted the business at the appraisal was a construction of the will against his present contention. The agreement, it seems to us, is evidence in his favor. By it he agrees with Shannon, the other executor, that he accepts the property at the appraisal, and will pay for the same "upon all the terms and conditions allowed by Joseph Fleming, deceased, in his will." Not a word is said about the money being due presently, or within a period less than five years,—the word "interest" is not mentioned in it; but there is a distinct recognition of that period as a controlling one for time of collec-

tion of the partnership debts, thus: "This agreement being made on condition that I (George S. Fleming) am to use all reasonable endeavor to collect all the outstanding bills and accounts receivable of said firm, and those which I am unable within five years to collect I am to be allowed a credit for on final settlement." The judgment note for \$50,000, payable one day after date, expresses on its face it was merely collateral security for the appraisal, under the terms of the will of Joseph Fleming. It was, in fact, an additional security to the amount of it, not provided for in the will, because by means of it a levy could have been made on any property owned by him other than his share in the real estate. He gave it voluntarily, for the will did not exact it. It is no more an admission of present liability than the agreement already referred to. The testator, by long years of indefatigable toil and assiduous attention, had accumulated wealth, and built up a large and prosperous business. Like most aged men in similar circumstances, he was doubtless desirous of perpetuating, as far as he could do so, this business, and at the same time have the family name connected with it. Hence, in addition to paternal affection for his only son, he sought to gratify his family pride by such favorable provision in his will as would insure the son's continued success. He, in effect, bequeathed to him the store and good will at a price below their fair value. He then, apparently to guard against impairment of capital, directed that the son should not be compelled to pay within a period of five years. He seeks to protect the son's possession of the old-established business stand by a prohibition against high rent for 15 years, and that the son should have the first right to become owner of the building, at a not excessive valuation. We think, taking the whole will, in view of the surroundings, the testator intended to discriminate in favor of his son as to this part of the property; and while there is, as to all his other property, an intent to equalize distribution among his children, he did not so intend as to this bequest. We are of opinion the court erred in surcharging him with interest before the expiration of the five years, and the surcharge is directed to be stricken from the account, costs of appeal to be paid by appellee.

(124 Pa. St. 33)

IN RE FLEMING'S ESTATE.

Appeal of SHANNON.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

CONTRACTS—CONSTRUCTION.

1. A son, who was also a partner of his father, agreed, after the latter's death, to take his interest in the firm business, property, and accounts, to assume the payment of all bills and accounts payable, and to pay a certain sum for the same, he to be allowed credit on such sum, on the final settlement, for all accounts which he

might be unable to collect. Among the accounts payable was a draft drawn upon him by a near relative, which had been accepted by the firm, as an accommodation to the relative, and not in the regular course of business of the firm, to the knowledge of the son. Afterwards he was obliged to pay the draft. *Held*, that he was not entitled to credit for the amount on the sum he agreed to pay.

2. He was not entitled to credit for a note which the firm had indorsed with his knowledge, which he afterwards had to pay.

3. He was not entitled to credit for an uncollectible note due the firm, which was omitted from the list of assets when the agreement was made.

Appeal from orphans' court, Allegheny county.

A partial account of George S. Fleming and Robert F. Shannon, executors of the will of Joseph Fleming, deceased, was filed in the orphans' court. Exceptions of Robert F. Shannon thereto were dismissed, and he appeals. Reversed.

William Yost, for appellant. W. B. Rodgers and Henry R. Ewing, for appellee.

DEAN, J. This appeal, though touching another matter, is from the same decree as that from which George S. Fleming appealed, and in which opinion is this day handed down (39 Atl. 27). It will be noticed, in the statement of facts in Fleming's Appeal, the son, George, accepted the bequest at the appraisal made, by directions of his father's will, of his (the father's) interest in the drug business of the partnership of Fleming & Son. In the written acceptance, George S., the son, agrees as follows: "I agree to take the interest of Joseph Fleming at the time of his death in the firm of Joseph Fleming & Son, including store, fixtures, book accounts, and bills receivable, and to assume the payment of all bills and accounts payable of said firm at the valuation fixed thereon * * * by the appraisers, and to pay for the same the sum of \$48,992.05; * * * this agreement being made upon condition that I am to use all reasonable endeavor to collect all the outstanding accounts receivable of said firm, and those which I am unable within five years to collect I am to be allowed a credit for on final settlement." In adjudicating the account of George S. Fleming, as executor, the court allowed him credit for a draft, of which the following is a copy: "\$1,485. Pittsburg, April 9th, 1890. Six months after date pay to the order of ourselves fourteen hundred and eighty-five dollars, value received, and place to the account of Fleming Bros. To Joseph Fleming & Son, Pittsburg, Pa. Accepted: Joseph Fleming & Son." Indorsed: "Fleming Bros." On the face of this paper it was a debt of Fleming & Son, for it was a bill drawn on and accepted by them. George S., in acceptance of his father's interest in the business of Fleming & Son at the appraisal, says: "I agree to assume the payment of all bills and accounts payable of said firm." Fleming Bros. were near

relatives of Fleming & Son. They were also in the drug business, became embarrassed, and requested of Fleming & Son an acceptance of this draft, as an accommodation, for the reason that it would be more readily discounted in bank if it bore the appearance of money payable to, and not money payable by, them. When the draft came due, Fleming Bros. had failed. In the meantime Joseph Fleming, of Fleming & Son, had died, and the surviving partner, George S., paid the draft. The acceptance of Joseph Fleming & Son, on the face of the bill, was written by George S. He admits that he knew of the existence of this obligation at the time he accepted the interest of his father at the appraisal. He says he then hoped Fleming Bros. would take care of it. The learned auditing judge was of opinion this draft does not come within the spirit of the agreement of George S. to assume the payment of "all bills" and accounts of Joseph Fleming & Son. We do not see why. True, it was no part of the drug business to become accommodation acceptors for financially weak relatives, but they could do this sort of business if they chose. The father suggested the acceptance. The son protested, but finally assented, and wrote it; then, afterwards agreed in express terms, in writing, to assume payment of all bills of Joseph Fleming & Son, as part of the payment of the value of the father's interest in the drug business, when he knew this accepted bill was outstanding and unpaid. While it may not have been within the spirit of the co-partnership agreement in the drug business, it was, under the circumstances, certainly within both the letter and spirit of George S. Fleming's agreement to pay all bills of the partnership. We think the court below erred in not sustaining the exception to allowance of this amount to the executor, and appellant's first assignment of error is sustained.

The auditing judge also allowed credit to the executor for a \$400 judgment note, as follows: "\$400. October 8th, 1889. One day after date I promise to pay, to the order of Joseph Fleming & Son, four hundred dollars, without defalcation, value received, with interest. [Then follows a warrant of attorney, under seal, to confess judgment.] [Signed] Willis Whiting." To this appellant also excepted, and the court below dismissed the exception. In his adjudication the learned auditing judge says: "In the valuation of the business, George S. Fleming was charged with certain bad accounts, with right to credit for certain specified items in case they should prove uncollectible. This note was accidentally omitted. Had it been good, Mr. Fleming should have been charged; being bad, and having been paid by him, he should have credit." By the report, these reasons given, certainly, do not justify the ruling. Whether the note was omitted by accident or from other cause

from the appraisalment is immaterial. It was omitted, and Fleming was not charged with it as an asset. As he was not charged clearly, he was entitled to no credit for having paid. But, as a business transaction, it is incomprehensible how he could have paid a judgment note of Whitting, obligor, and Fleming & Son, obligees. Those to whom a note is payable do not pay it. They may cancel or destroy it, thus relieving the obligor from payment, but do not pay themselves what by writing is owing to themselves. But the note was still in possession of the obligees, not canceled, and by one of them laid before the auditor as an existing obligation. While the reasons for the allowance are wholly unsatisfactory, the question still remains, was the allowance warranted for any other good reasons? To answer this involves an examination of the evidence, and an ascertainment of the origin of the note. It appears, from the testimony of George S. Fleming, there had been in the service of the partnership a young man, Willis Whitting, who desired to set up in the retail drug business for himself, and, if he did so, he would probably become a customer of Fleming & Son, who were wholesalers. He was without means, so Fleming & Son, as accommodation indorsers, indorsed his note for \$400, on which he procured a discount in bank. At the time of the indorsement he delivered to the indorsers, as collateral security, this judgment note for \$400. Whitting started in business in a small way, and bought goods on open account, from time to time, of Fleming & Son, but in less than a year failed. In the meantime the discounted promissory note fell due, and was frequently renewed, with the same indorsers. Before it fell due the last time, on October 20, 1890, Whitting's failure occurred. Then George S. Fleming paid it. On the 27th of May, 1890, when the appraisalment of the father's interest in the firm was made, this liability as accommodation indorsers on a \$400 note in bank was an outstanding liability of the partnership. The judgment given as collateral security, in possession of the partnership, was, under the circumstances, a partnership asset. The appraisers of the father's interest in the partnership made out two lists,—one of assets, the other of liabilities. The judgment note here presented is not in the list of assets, and, of course, George S. Fleming is not charged with it. Whether the outstanding accommodation indorsement is in the list of liabilities, as it ought to be, we do not know, for neither party has printed this list in the paper books, nor do they even state whether this liability appeared there. The list was, however, before the auditing judge as part of the evidence. The probabilities are that it appeared there because it was known to exist by the surviving partner. The partnership books showed a memorandum of it. He presented to the ap-

praisers the books and papers of the partnership, showing assets and liabilities. It was his interest to present outstanding indorsements, for then this would be included in the list of liabilities, and be deducted from the gross assets, thus reducing the appraisalment by that amount. He then knew, as surviving partner, that he would probably have to pay this obligation for the firm. If it was in the list of liabilities, George S. Fleming has been already paid; if not in that list, the indorsement was a partnership liability, for he admits he knew and took part in the transaction at the date the judgment note was given as collateral, and that he renewed the indorsement in the firm name, after his father's death. It then became a debt owing by the firm, the same as the accommodation acceptance for Fleming Bros., heretofore referred to, which by the written acceptance of the bequests, dated June 21, 1890, he agreed to pay. It cannot be allowed as a credit in the executor's account, on the reason given by the learned auditing judge. It should not be allowed, for the reasons now given. Therefore appellant's first and second assignments of error are sustained, and the decree, so far as it allows these credits, is reversed. In the view we have taken, the other assignments of error become unimportant. Let the account be restated in accordance with this opinion. It is further directed that costs be paid by appellee.

(184 Pa. St. 124)

IN RE MCAULEY'S ESTATE.

Appeal of ASH et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

TRUSTS—DECLARATION.

An instrument signed by M., and reciting, "By the request of my dear brother, my house * * * is to be sold at my death, and the proceeds to be divided between" two certain charitable institutions, is a sufficient declaration of trust, as against the heirs of M., as to property which her brother devised to her with such request.

Appeal from orphans' court, Allegheny county.

Accounting by A. M. Byers, administrator of Mary McAuley, deceased. From a decree dismissing exceptions to the audit of the account, John E. Ash, executor of Julia A. Ash, deceased, and others, appeal. Affirmed.

D. F. Patterson, C. W. Jones, J. R. Sterrett, J. M. McBurney, and Wm. M. Watson, for appellants. Thos. Patterson, for appellee Pittsburgh & Allegheny Home for the Friendless. H. & G. C. Burgwin, for appellee Home for Aged Protestant Women.

GREEN, J. Miss Mary McAuley was the actual and undoubted owner in fee of the property in question, in her own right alone, from the death of her sister, in 1871, until

and at the time of her death, on January 6, 1886. As such owner, she had the absolute right to make any lawful disposition of the property she might choose, and none could question her right. She chose to make a declaration in writing respecting the property, which was not valid as a will, but which, if it was competently expressed as a trust, certainly had legal efficacy to that end, because it was not in contravention of any legal or equitable rule. If, therefore, the paper expresses with a sufficient meaning an intended execution of a private trust to which she considered herself subject, we cannot understand how any other persons can be permitted to interfere for the purpose of defeating the trust in order to get the property for themselves. The trust was a matter of her own concern, and the manner of its execution, if in all respects legal, cannot be questioned by third persons. Thus, it is a matter of no consequence whether there is proof of an affirmative character that this thing, or that thing, or the other thing, was done, or omitted to be done, unless such thing was essential to the legal efficacy of the paper to do what was sought to be done by it. Hence, as it seems to us, the only question which requires serious consideration is whether this paper is a legally adequate expression of a purpose to effectuate a trust which this lady desired to execute. Its words are as follows: "By the request of my dear brother, my house on Duquesne Way is to be sold at my death, and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women. [Signed] Mary McAuley." What do the terms of this paper import? The words are of the plainest and simplest character, and express with clearness and force that, by the request of the lady's brother, a certain property, to wit, "my house on Duquesne Way," is to be sold at her death, and that the proceeds of the sale are to be divided between two charities that are named. Each one of the following individual topics is plainly expressed in apt words, to wit: (1) A request by her brother to her to do that which the paper purports to do; (2) a sale of the described property, the house on Duquesne Way; (3) a division of the proceeds of the sale (4) between the Home of the Friendless and the Home for Protestant Women. It must now be remembered that this is not a proceeding against an unwilling trustee, who resists the execution of the trust. On the contrary, it is the case of a trustee endeavoring to execute the trust, and for that purpose declaring in writing, signed by herself, what the trust is, and directing its execution. If this paper had been more fully and formally written out, reciting that her deceased brother (naming him) had made a will devising to her the property in question, and had requested her to direct its

sale after her death, and that the proceeds be divided between the two charities (naming them), and had thereupon, in execution of the trust so created, thereby directed the sale of the property to take place at her death, and the division of the proceeds to be made between the two charities named, it could not for a moment be questioned that this was a perfectly good execution of the trust. The purpose of execution, and the reason for it, would have been more minutely expressed, but that is all. The words of the paper do actually contain all the elements that would have appeared had it been fully written out as suggested. As to the request of her brother, the trustee not only admits, but declares, it, and declares also that the property is to be sold in consequence of the request. These are the more important ingredients of the trust, and they are fully asserted in the paper. As to the contention that there is no affirmative testimony that her brother ever communicated the request to his sister, and no proof as to when he did so, the answer is twofold: First, that it is no concern of these exceptants; and, second, as she recites a request in the paper, the necessary implication is that it must have been made to her by him during his life, and that she at least considered that it was obligatory on her conscience. All the rest of the paper is too clear to require any comment. It directs the sale of the property after her decease, and the division of the proceeds between the two charities named, and the paper is thus absolutely complete in all its essentials, as a perfect declaration of a specified trust.

Soon after the death of Miss McAuley, a litigation in the circuit court of the United States for the Western district of Pennsylvania was instituted by some of the heirs who were non-residents. It was duly proceeded with to a final decision in that court, and was terminated there by an opinion and decision of Mr. Justice Acheson, which is reported in 37 Fed. 302. It was subsequently held by the supreme court of the United States that the federal courts had no jurisdiction as to the land, but they sustained the circuit court in holding that the paper signed by Miss McAuley was good and valid as a declaration of trust. In the course of the opinion of Mr. Justice Acheson, a very accurate and comprehensive definition of a trust arising in this mode was given, in the following words: "It is a settled principle that if a testator make a devise in terms absolute, but upon a private understanding had with his devisee, whether by the latter's express promise or his assent implied from his silence, that he will apply the devised estate to some purpose designated by the testator, a trust arises which a court of equity will enforce, unless unlawful in itself." It seems to us that this is a perfectly correct description of this species of trust, and it is so broadly stated that it will embrace almost, if not quite, all the circumstances

which, being proved by competent testimony, will give rise to a trust of this nature. In most of the cases the proceeding is adverse to the alleged trustee, seeking to compel him to execute a trust which he denied and contested. In all such cases the expressions by the courts were adapted to the character and state of the testimony, as bearing upon the main question as to the existence of the trust. For instance, the ordinary case is where a devise or bequest was made to one generally upon the faith of an express promise by him that he would hold or apply the subject of the trust to the use or for the benefit of some other person. Usually such trusts are sought to be established by verbal testimony to the fact of the promise, or by verbal declarations of the alleged trustee; and in all these cases the rule is stated that the evidence must be clear, precise, and unequivocal; that the heir cannot be disinherited except by express words or necessary implication; that verbal wills cannot be made to pass title to real estate; and that parol trusts of title to land cannot be created unless in very peculiar and exceptional circumstances. In all these various classes of cases, very cautious and well-considered limitations are made by the courts, upon the right to have the trust established; but in the present case those controversies do not arise, and the decisions which deal with them are not applicable.

As an illustration, the case of *Irwin v. Irwin*, 34 Pa. St. 525, is cited for the appellants with much confidence, as being in hostility with the ruling of the court below declaring the trust in this case. An examination of that case shows that there never was any written declaration of trust, but it was alleged that Judge Irwin had by a letter, which was not produced, induced his brother Samuel to emigrate from Ireland, where he was living, to Pennsylvania, promising, if he did so, he would give him the land in controversy. Samuel did remove to Pennsylvania. Judge Irwin died, and left a will, which did not give the land to Samuel, but did give it to his (the judge's) son James in fee. Both Samuel and James having died, the heirs of Samuel brought an ejectment to recover the land in question; some 300 acres, on the ground that James held it as a trustee ex maleficio for Samuel, upon a promise to his father that he would so hold it. On the trial the trust was sought to be established by proof of verbal declarations, both by Judge and James Irwin, that a letter or letters had been written to Samuel containing the promise, which the plaintiffs contended should be treated as a note in writing. The next stage of proof was that Judge Irwin had made a parol gift of the land to Samuel. Much testimony, all verbal, on both these points, was given; but the court below, sitting as a chancellor, charged the jury that the evidence was not sufficient to make out a case for specific performance; that a mere design on the part of Judge Irwin to convey the land to Samuel

would not be sufficient to create a trust; but that if this design was made known to James by the judge, and if he communicated to James that Samuel should have the land when he came over from Ireland, and if James agreed to accept the devise, and to carry out the trust in favor of Samuel, then he would be a trustee for Samuel, and his refusal to do so would be a wrong on Samuel, which would take the case out of the statute of frauds. The charge also stated that a state of facts which would establish such a trust must be by an agreement made before the date of the will, and might be proved by parol, but must be proved by evidence which was clear, satisfactory, certain, and unambiguous. Such a charge was appropriate in such a case, but the facts of that case have no analogy to the facts of this. The same line of remark is applicable to the other cases cited. Here there is a written declaration of the trust, signed by the trustee, who not only does not resist the trust, but affirms it, and seeks to execute it. The only question is therefore whether the paper is a legally sufficient declaration of the trust, and we are very clear that it is. The leading cases in Pennsylvania are *Hoge v. Hoge*, 1 Watts, 163; *Church v. Ruland*, 64 Pa. St. 432; *Hoffner's Estate*, 161 Pa. St. 331, 29 Atl. 33; and there are many others.

We do not think it necessary to extend the discussion. There is no real controversy as to what the law is, and it is only important to make a correct application of the law to the actual facts which are peculiar to this case. The proper explanatory testimony was given, showing the will of James McAuley, identifying the property as having been obtained under his will, explaining what the charities were, and giving their correct names. The conclusion followed under the necessary construction to be given to the words of the paper. There is no mystery about it, and there ought not to be any confusion as to the principles which control it. The written declaration in question was found in a pocket-book in the bottom of an old trunk of the deceased, and among other papers relating to the estate of Miss McAuley's deceased brother. It bore the manifest marks of age upon it, and it was conceded on the argument that it was much older than the 30-day limit imposed by law upon charitable bequests. The decree of the court below is affirmed, and the appeal is dismissed, at the cost of the appellants, and record remitted for further proceedings.

(184 Pa. St. 137)

PERRET et al. v. PERRET.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

WILL—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE—ADMISSIBILITY OF EVIDENCE—DECLARATIONS OF BENEFICIARY—APPEAL.

1. A son had lived with his parents until after he was 40 years old, working for them in a

seven-acre garden, without any remuneration but his board and clothing. He and his mother had a violent misunderstanding, and the mother, after saying that she would have her husband make a will that night cutting the son off without a cent, immediately sent for an attorney, and a will was made that evening by the father, giving his whole property to the mother, and, in case he survived her, to his daughter. Although he had frequently declared that he intended to equally divide his property between his only daughter and said son, the son's name was not mentioned in the will. Five days after making the will, the father died of senility. The wife possessed great influence over the husband, and, at the time the will was made, he was weak, both mentally and physically. After she had made the threats, the mother stayed with her husband until the lawyer came, insisting that the will should contain the provisions it finally did contain, and she was present while the will was being drawn. *Held*, that the jury was justified in finding that the will was the result of undue influence.

2. Mere comments by the court on the aspects of testimony which was not at all in dispute are not cause for reversal.

3. In an action to set aside a will for undue influence, the age and physical condition of the testator are proper subjects for the jury.

4. In an action to set aside a will for undue influence, the declarations and acts of the beneficiary charged with exerting the undue influence are admissible, where the will was in accord with such declarations.

Appeal from court of common pleas, Allegheny county.

Action by Sarah Perret and Eliza Perret against Henry Perret to test the validity of a will. From a judgment for defendant in the court of common pleas, plaintiffs appeal. Affirmed.

L. K. & S. G. Porter and John N. Dunn, for appellants. Thos. M. & Rody P. Marshall, for appellee.

GREEN, J. This proceeding was an issue certified from the register of wills of Allegheny county to the court of common pleas No. 1, to try the question of undue influence exerted upon the testator, Michael Perret, by his wife and daughter, in the making of his last will. The plaintiffs are the widow and daughter of the testator, and the defendant is his only son. The will in question was executed on the 11th day of February, 1896, and the testator died on the 17th day of the same month. The precept included a charge of mental unsoundness, but on the trial that issue was practically abandoned, and the case was tried before the jury on the question of undue influence. By the terms of the will, the whole estate of the testator was given to his widow absolutely, and, in case she died before the testator, it was all given to the daughter absolutely. Nothing was given in any event to the son. There were but two children,—the daughter and the son. In no event could any part of the estate come to the son. The verdict of the jury was in favor of the defendant, and therefore against the will. The important assignments of error are to the refusal of the court to give binding instructions to the jury in favor of the plaintiffs, and the practical ques-

tion in this court therefore is, was there sufficient evidence of undue influence to submit the question to the jury? If there was, the court below was not in error in refusing these requests. In order to determine the propriety of these assignments, therefore, it will be necessary to recur to the testimony in some detail.

It was fully proved on the trial, and not at all denied, that the defendant lived with his father and mother until he was over 40 years of age; that, during all the time after he was old enough to work, he worked incessantly and continuously for his parents, who conducted the business of market gardening on the property of the father, which consisted of a small tract of land, containing about seven acres, and was situated on California avenue, in the city of Allegheny. It was also testified by himself that he received no wages during all that time, and had nothing but his board and clothing for his service. Some two or three years before his father's death, he married, and brought his wife home to live with him. It was proved without contradiction that his mother and sister disliked his wife greatly, and there was a continued state of wrangling and quarrelling on that account, which culminated, according to the defendant's testimony, in his being put off the premises with his wife. Things came to such a pass between the defendant and his mother that cross prosecutions for assault and battery resulted, and the cases were heard in the criminal court, and resulted in sentences that each party should pay costs. On the day that this occurred, the mother and son met in the sheriff's office for the purpose of paying the costs; and at this point the testimony commences, with proof of the declarations and acts of the mother, which it is claimed resulted in the alleged undue influence which procured the execution of the will in question.

Hans Leibrich, who lived in part of the house occupied by Michael Perret, was at the trial and in the sheriff's office, and out in the hall of the building. He was asked: "Q. What did Sarah Perret say to Henry, if anything, in the hall after the case was tried? A. She came out to Henry at the side of the elevator, and she says: 'Henry, what have you done? You have sworn falsely, and you shall see this evening. Your father have to make a will, and have to cut you out without a cent. I fix you everything. I fix you.'" This occurred on the 11th of February, the day the will was made. The witness, having stated that they then went down to the sheriff's office, was asked: "Q. What did Mrs. Perret say to Henry down there? A. She repeated about the same. She went up to him, and says: 'I fix you now. You swore false. You shall have not one cent. I go home to your father, and he shall fix you out. I fix you.' Q. Even after Henry left, did she keep muttering down

there? A. Yes, sir; all the time she was angry about the whole thing. Q. What did she tell you to do that day, immediately after or during the time you were in the sheriff's office? A. She sent me to Lawyer Dunn. I shall go to Dunn to tell him that she shall come up and make a will for Mike. Michael Perret shall make a will, and he shall come as notary public. And I went to Dunn." The witness then said he went to Dunn's office, and delivered his message, and then he and his wife rode in the street car, going home, and on the car Mrs. Perret again said: "Now, I will fix that Henry. He make me that trouble, and swears false. I fix him for that. He will be cut out without a cent." "Q. That was the burden of her conversation? A. Yes, sir; that was all the conversation,—fix Henry now, and she got the control of her husband, and she wants to fix him now; he will be cut out without a cent." After they reached the house, he said the old man was there, sitting by the fire, and lying on the lounge, and he was "dead sick," and died five days after. He was asked: "Q. Did she say anything to her husband when she went into the room? A. Yes, sir; she told him all about it,—that Henry was false swearing. She told him, and Eliza was in there, and they have control of the old man, and say: 'Dunn is coming here. Dunn is a notary public, and makes the will, or bring a will, and you have to shut Henry out without a cent; not to give him a cent, or we shut you out of the house.'" "Q. What reply did Michael Perret make to the folks, Eliza Perret and Sarah Perret, when they told him, unless he made a will, they would put him out? A. He says: 'Never mind. Take all of it. You haven't got enough. You want all.' Q. What did Miss Eliza Perret say to her father, if anything, when they arrived home, and in the presence of Sarah Perret? A. They are both talking together. One time Eliza talk, and another time old Mrs. Perret talks, and says have to cut Henry out; he swears false, and he is against his mother; 'you have to cut him out.' Q. What else did they say? A. They say, 'Lawyer Dunn comes out this evening at 8 o'clock, and witnesses come here, and you have to make that will to shut Henry out without a cent.'" Mrs. Perret denied all this conversation, and she also denied all the other conversations to a similar effect testified to by other witnesses; and Mr. Dunn said he came because he was notified by Charles Hartman, and not by Leibrich. This raised a question of credibility, which, of course, was for the jury.

As to the declarations made by Mrs. Perret, there was a large amount of additional testimony, some of which was as follows: Mrs. Katie Leibrich, the wife of the last witness, said she was out in the hall of the court house on the day of the trial. She was asked: "Q. What, if any, threats did Mrs. Perret make to Henry out in the hall? A. Yes, sir; she said to him: 'Just wait, Henry. I will fix

you because you swore falsely.' Q. Did she say when she would fix him? A. That night. Q. What did she say as to how she would fix him? A. About the husband, she make his will, and Henry should receive nothing. Q. Did she repeat those threats down in the sheriff's office? A. Yes, sir." She also said she went down in the car with her husband and Mrs. Perret, and that "Sarah Perret sent my husband to Mr. Dunn," and that she repeated the threats several times in the car. She was asked: "Q. When you arrived at home at Perret's, what, if anything, did Sarah Perret say to Michael Perret? A. After myself and my husband came to the house, she said to Michael Perret: 'You must make your testament. You must make your testament; and Henry Perret shall not receive a cent.' That Mr. Dunn was coming, and he must make his will, or he would have to go out of the house. Q. Who would have to go out of the house? A. Michael Perret. * * * Q. Did this annoy the old man, or appear to worry him? A. He was worried, and he says, 'God damn it; let me rest.' * * * Q. How long did they keep this up at the old man, telling him he should make a will like this? A. Until night,—until Mr. Dunn and Mr. Hartman came." Miss Anna Hilke, a sister of Henry Perret's wife, said she was present at the trial in court, on the 11th of February, 1896, and was in the hall upstairs. She was asked: "Q. Did you hear Mrs. Sarah Perret make any threats to Henry out in the hall after the trial? A. Yes, sir; she made a threat in the hall, and also in the sheriff's office. In the hall she just said she would disinherit him,—cut him off without a cent; and, when she got down in the sheriff's office, she added to it she would fix him for it, and 'I will fix you to-night without a cent. I will cut you off.' She said that in the sheriff's office, and she also said it up in the hall. She was very angry, because she lost the suit with Henry about some boards he had taken up for kindling wood, and that is how she happened to say it. * * * Q. Do you remember how she shook her finger? A. She shook her finger nearly every time she said it. She said, 'I will fix you to-night.' When she got downstairs, she said, 'I will cut you off to-night without a cent.'" William Tyler, another witness for defendant, a street commissioner, said he was present in the court house on the day of the trial, and saw the parties in the sheriff's office. In answer to a question, he said, "I noticed her calling Henry a lot of words. She shook her finger at him, and said, 'Never mind, Henry; I will cut you off this very night without a cent.' That is all I heard." He also said she was in an angry manner when she said this. Mrs. Jennie Hays, another witness for defendant, said she was present at the trial, and was out in the hall, and down in the sheriff's office with the parties, and heard Mrs. Perret talk to her son. She said: "Sarah Perret came up to her son, and she said, 'Never mind,

Henry; I will fix you for this. I will have your father cut you off without a cent.' And, again, when they had paid off the costs in the sheriff's office, she testified that Mrs. Perret "turned around to Henry, and says, 'You made me pay all this money out, and I will cut you off to-night without a cent. * * * It is your fault I have this money to pay.' * * * She was very angry. * * * She was very much excited."

There was more testimony of the same kind which it is not necessary to repeat. It is enough to know that on that very night the old woman did precisely what she said she would do. Mr. Dunn and the witnesses came to the house. They went with the old man upstairs. A will was there written and signed, and it did do exactly what the old woman said it should,—cut Henry off without a cent. It was drawn in a rather unusual manner, so as to accomplish that object without fail. It provided that, if the testator survived his wife, the whole estate should go to his daughter. Although Mrs. Perret vehemently denied using these expressions at all, or any of them, the testimony giving all the particulars was altogether too great to leave any reasonable doubt upon that subject; and it is not to be wondered at that the jury refused to believe her, and gave credence to the defendant's witnesses on that subject. Reflecting upon the character of the testimony, as being sufficient to warrant a finding of undue influence, it must be conceded that it was the very kind of evidence to establish that fact. By all the testimony it appeared that the testator was in an extremely enfeebled condition. He was very old, excessively weak, and by numerous witnesses it was testified that he was silly, childish, wandering in his conversation, quite ill physically, so much so that he died in five days after, and the physician who attended him certified that he died of senility. There was also testimony that he was very much afraid of his wife, and had not sufficient will power to resist her importunities. Moreover, in all the declarations she made, she herself proclaimed that she was going to have the will made so as to cut Henry off, and without a cent; and she instinctively, and as a matter of course, assumed that she had the mastery over her husband, and that he would do whatever she demanded of him to do. And the testimony of Mr. Leibrich and his wife, if believed, brought the wife's intervention and urgency down to the very moment of the execution of the will, so that her power was exerted directly over the testamentary act. It is very seldom, indeed, that proof of undue influence is brought so very closely and emphatically to the very factum of the will. To withdraw such testimony as is found in abundance in this case from the jury would have been the gravest error, and could not be thought of for a moment. The evidence that it was not the will the old man wanted to make was quite considerable from other sources. It was prov-

ed by a number of witnesses that he had frequently expressed himself as well pleased with his son and his long service for him, and that he repeatedly said to different witnesses that he was going to divide his estate equally between his two children, illustrating his meaning to several of the witnesses by saying that he was going to divide just as he would cut an apple in two halves, giving a half to each child. In every respect we consider that the whole of the testimony conforms fully to the legal requirements of this class of evidence, and it is not at all surprising that the verdict was in favor of the son. We are entirely satisfied with it, and have no desire to disturb it, being convinced that it was a just and righteous verdict, sustained by ample testimony.

The first three assignments of error are dismissed. The proposition contained in the defendant's first point is copied literally from the ruling of this court in *Wilson v. Mitchell*, 101 Pa. St. 495, and was therefore properly affirmed. The fourth assignment is dismissed. The fifth assignment has no merit whatever, and is dismissed. We cannot possibly discover any error in the sixth, seventh, eighth, ninth, tenth, and eleventh assignments. They were mere comments by the court upon aspects of the testimony which were not at all in dispute, and the comments were entirely appropriate under the evidence. They ruled nothing, and did not purport to. The whole subject was left to the jury. Of course, the age and physical condition of the testator were proper subjects to be considered by the jury. We think it was not only the right, but the duty, of the court, in explaining such a case to the jury, to do just as the learned judge below did. The charge was very fair and altogether impartial, and the whole determination of the controversy was left entirely to the jury. There was, as there should have been, a careful and minute definition and explanation of the subject of undue influence, so that the jury might have a full and accurate comprehension of it, and as to the kind and character of evidence necessary to sustain such an accusation. We see nothing erroneous in any of the language of the court on these several matters, and the assignments are therefore dismissed.

As to the twelfth assignment, in relation to the declarations and acts of Sarah Perret as to what she would do, and what she did actually do, in procuring the will to be made as it is, it would be strange, indeed, if these should be excluded. She was the very person who was charged with having exercised the undue influence, and her declarations were of her own purpose to do that very thing,—to have Henry cut off without a cent, by means of a will which she would procure her husband to make. And this was followed up by actual and undisputed proof that that very thing was done, and at the very time she said she would have it done, to wit, the same night. And now we have before us that very

will, actually made on that same night, and actually cutting Henry off from every possibility of getting a single penny of the estate; and yet we are asked to exclude evidence of her acts and declarations in producing that result. Most certainly we will do no such thing. The ingenuity displayed in accomplishing her object is something remarkable. If the will had nothing more in it than a gift of the whole estate to the wife, and then she had died before her husband, intestate, Henry would have received one-half the estate as heir of his mother. But even that possibility was excluded by the next provision in the will, giving the whole estate to the daughter in case the wife died before her husband. The evil purpose—the positive malignity—of the woman could not be more strongly indicated than by this provision. And that, too, against her only son, who had contributed by his daily and unrequited toil for 25 years to the support and maintenance of both his parents. It is doubtful if so gross a case of unnatural malevolence of a mother to a son can be found in the books. The principles and authorities cited in support of the twelfth assignment have nothing to do with this subject, and they are altogether inapplicable. The assignment is dismissed. Judgment affirmed.

(133 Pa. St. 397)

DARRAGH et al. v. BIGGER et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

WITNESSES—COMPETENCY—INTEREST—ACTION ON NOTE—EVIDENCE.

1. On trial of an action by a firm composed of M. and S., brothers, against administrators, to revive a judgment against defendants' intestate and another, a written agreement was produced, which, after reciting that M. was indebted to the firm to a greater amount than S., and S. was willing to accept M.'s interest in the present suit in full satisfaction of S.'s interest in the indebtedness of M. to the firm without recourse, etc., and thus close their individual accounts with the firm, declared that the said M. "hereby releases and extinguishes his interest in said judgment as completely and entirely as though he had never in any manner" been connected with it. *Held*, that the instrument was an assignment, and not a release or extinguishment, within Act May 23, 1887, § 6, providing that a witness incompetent under clause (e) of section 5 by reason of interest shall become fully competent for either party by a release or extinguishment in good faith of his interest, upon which good faith the trial judge shall decide as a preliminary question.

2. Even if a mere assignment of his interest will qualify a witness under the statute, one made by a party to a controversy, only for the purpose of enabling him to sustain the suit by his testimony, is not made in that good faith which the statute intends.

3. In an action against administrators and B. on a note, where the only issue was as to the genuineness of decedent's signature, plaintiff's books, showing a charge against decedent and B., were not relevant.

4. Nor was a letter from decedent, referring to a note, relevant, where it was dated nearly five years after the note in suit, and did not re-

fer to it in any way which could be said fairly to identify it.

Appeal from court of common pleas, Beaver county.

Scire facias by M. Darragh & Co. against John Bigger and P. H. Stevenson to revive a judgment on a note, in which there was a judgment for plaintiffs by default. Afterwards the death of defendant Stevenson was suggested, and Elizabeth Stevenson and another, administrators of his estate, were substituted, the judgment was opened, and said administrators were permitted to make defense. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

For prior report, see 33 Atl. 273.

J. F. Reed and R. S. Holt, for appellants.
John M. Buchanan, Wm. A. M'Connel, and David K. Cooper, for appellees.

MITCHELL, J. M. Darragh was prima facie incompetent as a witness, both as a surviving party to the contract in action and as having an adverse interest to defendants' decedent. But, after some uncertainty on the point, it was said by the present chief justice in *Dickson v. McGraw*, 151 Pa. St. 98, 24 Atl. 1043, that the disqualification depends, "not only on the fact of being a remaining party, but having an adverse interest, and even such parties may be made competent by disclaimer of title [that case being an ejectment] and by release or extinguishment of interest in the event of suit." And in *Tarr v. Robinson*, 158 Pa. St. 60, 27 Atl. 859, it was held that *Dickson v. McGraw* "has settled the construction of the act of 1887," notwithstanding *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. 566, and some others of the earlier cases. The present question, therefore, is narrowed down to whether M. Darragh had made himself competent in the manner required by the act of 1887. Section 6 of that act provides that "any person who is incompetent under clause (e) of section five by reason of interest, * * * shall become fully competent for either party by a release or extinguishment in good faith, of his interest, upon which good faith the trial judge shall decide as a preliminary question." The plaintiffs were M. Darragh and S. H. Darragh, composing the firm of M. Darragh & Co., and their claim was upon a note payable to the firm. At the trial a paper was produced containing an agreement by which, after reciting that M. Darragh was indebted to the firm to a greater amount than S. H. Darragh, and S. H. Darragh was willing to accept M. Darragh's interest in the present suit in full satisfaction of his (S. H. D's) interest in the indebtedness of M. D. to M. D. & Co. without recourse, etc., and thus close their individual accounts with the firm, the said M. Darragh "hereby releases and extinguishes his interest in said judgment as completely and entirely as though he had never in any manner whatsoever been connected therewith." It is apparent that this

instrument, the substance of which is given thus fully, although the words "release and extinguish" are used, is neither a release nor an extinguishment, but an assignment. It is not a release, as it is not made to the party against whom the claim is asserted, nor for his benefit; and it is not an extinguishment, for the full claim is still in existence with no change but a transfer to one of the claimants. The words used in the statute, if taken in their strict meaning, would require that the witness' interest in the subject should be effectually terminated, not only as to himself, but as to the other party against whom he is about to testify. This result is fully implied in the words "release" and "extinguishment." An assignment is altogether different. It terminates the claim only so far as the witness himself is concerned, leaving it in full force as to the party charged by it. The distinction is very forcibly expressed by Lowrie, J., in *Haus v. Palmer*, 21 Pa. St. 296, in reference to qualification of a legatee by assignment of his legacy: "These principles do not include the case of a devisee or legatee assigning his claim in order to prove the will on which his claim depends, for no one is bound to accept a benefit thrown upon him by testacy or intestacy, and, if he rejects it, he is without interest; whereas one who assigns the benefit first accepts it, and then, if he wants to be a witness, gets clear of it for a reward proportioned to the distinctness of the testimony which he is expected to give. Our law does not punish champerty as a crime, but it does not encourage it, nor by its very rules expose people to the temptation of perjury or subornation of it." If the act of 1887 had stopped with the words "release or extinguishment" it is clear that a witness excluded by section 5 for interest could not qualify himself by an assignment. But the statute adds the requirement that the release shall be in good faith, of which the court shall judge as a preliminary question. A release or extinguishment given to the adverse party must, in its nature, be absolute, and could hardly be other than in good faith. The language of the act therefore would seem to imply some latitude in the sense in which those words were used. It is not necessary, however, to decide at present whether any mere assignment of his interest will qualify a witness under the statute, because we regard it as clear that an assignment by a party to a controversy, made only for the purpose of enabling him to sustain the suit by his testimony, is not made in that good faith which the statute intends. In *Post v. Avery*, 5 Watts & S. 509, it was held that an assignment of a cause of action, the motive of which was to qualify the assignor as a witness, would be treated as colorable only, and ineffective for the purpose. Without entering into the labyrinth of contentions and distinctions to which that famous case gave rise, its substantial principle is right, that an act of a party, which increases his legal

rights at the expense of another, must affirmatively appear to have been done with other motive than to evade the law. The general purpose of the act of 1887 was to open the mouths of all witnesses so far as it could be done with that regard for equality which justice demands. If both parties are living, both may be heard, notwithstanding their interest; if one be dead, equality shall be maintained by excluding the other from the stand. No rule on this subject has ever been successfully formulated in language which will invariably and under all circumstances produce equality, or do complete justice, but the act of 1887 approximates to that end as nearly as has yet been reached. Hence it makes provision to some extent for exceptional cases, and, among them, the case of an interested witness who divests himself of his interest. But it requires that the parting with the interest shall be done in good faith, and this means that it shall not have been done merely to evade the disqualification of the law. In the present case the witness did not release or extinguish his interest, but merely assigned it. The assignee was his partner and brother, joint party with him to this suit; and the assignment was not made until the case was at issue, and on the very eve of trial. It is impossible to resist the conclusion that its real purpose was to evade the law, and to give the plaintiffs' claim that advantage against the dead man's estate which the statute intends to prohibit. The judge committed no error in excluding the witness.

The other assignments of error are to the exclusion of plaintiffs' books, showing a charge against decedent and one Bigger, and a letter from decedent referring to a note. Neither item of evidence was relevant. The only issue before the court was the genuineness of the decedent's signature. Had the issue been on a plea of non assumpsit, the books would have been competent evidence, but merely to show that Bigger and Stevenson owed a debt to plaintiffs did not tend to show that Stevenson executed this note. So, as to Stevenson's letter. It was dated nearly five years after the note in suit, and fails to refer to it in any way which can be said fairly to identify it. The letter, if admitted, would be no more than a basis on which the jury might guess that it referred to the note in suit. Judgment affirmed.

(133 Pa. St. 602)

DUMBACH v. BISHOP et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

RESULTING TRUSTS — EVIDENCE — WITNESS — COMPETENCY.

1. The evidence in a suit by one against her deceased husband's heirs to establish a resulting trust in lands of which he died seised, on the ground that they were paid for with her money, and that he agreed to have title put in her name, must be sufficient to satisfy not only the jury, but the court also, sitting as a chancellor.

2. Act 1891 (P. L. 287), giving competency to a surviving party to a thing or contract in action to testify to any relevant matter, though it may have occurred before the death of the other party, if such relevant matter occurred between him and another person, who may be living at the time of the trial, and is competent to and does testify against such surviving party, or if such relevant matter occurred in the presence or hearing of such other person, applies to a case where the surviving party was wife of the deceased party, unless she is disqualified on the ground of confidential communications; Act 1887 (P. L. 158) having relation only to living husbands and wives.

Appeal from court of common pleas, Butler county.

Ejectment by Catherine Dumbach against Annie Bishop and others. Judgment for plaintiff. Defendants appeal. Affirmed.

A. T. Black, W. H. Lusk, and Lev McQuiston, for appellants. J. D. Marshall, for appellee.

GREEN, J. Two questions only are raised on this record,—one that the evidence is not sufficient in character or quality to create a resulting trust, and the other, the competency of the plaintiff as a witness. In regard to the first, the well-established rule of long prevalence is that the testimony in its entirety must be sufficient to satisfy not only the jury, but the court also, sitting as a chancellor; and, if it is deficient as to the latter, it must be withdrawn from the jury. This being the undoubted rule in this class of cases, it is only necessary to investigate the testimony to learn whether it conforms to the standard. It must be observed that there is no question of purchasers or of creditors involved in the issue. The plaintiff is the widow of John Dumbach, in whose name the legal title to the land in dispute was held, and the defendants are her own children. The latter claim title by descent from their father, and their mother claims that the land was bought for her, at her own instance, and was paid for by her, and with her own money, and that she, therefore, has a valid equitable title to the land by way of a resulting trust. There is, of course, no question as to the sufficiency of her title, if the facts in evidence are such as to establish it, tested by the rule heretofore stated. The land in dispute consists of two lots, Nos. 17 and 19, in Stewart's plan of lots in the borough of Evans City, 45 feet by 140 feet each. The deed for these and two other lots—Nos. 13 and 15—was made on June 10, 1890, by Martin Wahl to John Dumbach. The plaintiff claims that the consideration for the two lots 17 and 19 was \$800, the whole of which was furnished and paid by her. The witnesses in support of the claim are Louisa Dumbach, one of the defendants, and a daughter of the plaintiff, and the plaintiff herself. There were some preliminary negotiations for the purchase of the lots conducted by William Bishop, one of the defendants, the husband of a daughter of the

plaintiff. On this subject Louisa Dumbach testified as follows, in reply to a question asking her to state the conversation between her father, her mother, and Bishop: "The first was that Bishop wanted father to buy a lot and build a house, and father told him to go and see if he could get the lots from Mr. Stewart. So father told him to go and buy two, and then mother came in, and said to go and buy two for her. Mother said she would pay for two and father said he would pay for two, and the deed was to be made in mother's name for all." Afterwards the witness said Bishop brought a deed, and being asked, "Q. When were the lots paid for?" she answered: "A. When he brought the deed. Q. Who paid Bishop the money? A. Mother. Q. Who paid for the two three hundred dollar lots? A. Mother. Q. What was to be the price of the first two lots,—the one the house is on and the one next to it? A. I don't remember. Q. Was there any price mentioned, in your presence, for any of the lots? A. Yes, sir. Q. What was the first to cost? A. Four hundred dollars. Q. And the next? A. Three hundred dollars. Q. Which two lots was it arranged your father was to pay for? A. The four hundred dollar one and the one next to it. Q. Which was your mother to pay for? A. The next two. Q. Which lots, if any, did your mother pay for? A. For the two next to the school house. Court: The two farthest away from the four hundred dollar lot? A. Yes, sir. Q. Did you see the money paid? A. Yes, sir. Q. Who paid the money? A. Mother. Q. Did you know of your mother having money of her own? A. Yes, sir. Q. Where did she get the money she paid for these lots with? A. From her sister's estate. Q. Who had that money, or part of it, borrowed from your mother? A. Father. Q. And had he paid it back? A. Yes, sir. Q. What money did he pay it out of. A. Bonus money. Q. Do you know of your father paying that money back? A. Yes, sir. Q. Was it before the lots were purchased? A. Yes, sir. Q. Was it a long time or a short time before? A. Not very long before. Q. Do you know whether it was out of that money that your mother paid for these two lots? A. Yes, sir. Q. Do you know whether your mother kept your father's money also? A. Yes, sir. Q. Do you know whether she kept it separate from her own? A. Yes, sir. Q. Did she pay all the money? A. Yes, sir. Q. Did she pay for the first two lots out of her own or your father's? A. Out of father's. Q. Did your mother know anything about the deed being in your father's name? A. Yes, sir. Q. Did your mother make any objections to it? A. Yes, sir. Q. What did your father say in reply? A. He said he would make a different deed, and he didn't get it done. Court: Did he say to whom he would make the other deed? A. To mother." On cross-examination she was asked: "Q. You say your mother paid all of the money? A. Yes, sir. Q. There

was part of the money out of your father's money and part out of your mother's? A. Yes, sir. Q. Where did your mother keep that money? A. In the pocketbooks. Q. Keep it in separate books? A. Yes, sir. Q. Do you know which one was his? A. Yes, sir. Q. How much was taken out of his? A. Seven hundred dollars. Q. And how much out of her own? A. Six hundred dollars." It had been previously proved that on the settlement of her guardian's account she was entitled to receive \$783.24, and her guardian, Henry Knouf, testified to the payment by him to her of several sums of money, one of which was \$288, besides what he paid her as guardian. This \$288 was her share of the dower money which was payable at the death of her grandfather's widow. It was paid to the plaintiff by Henry Knouf, who had accepted the land of his father upon proceedings in the orphans' court in partition. He testified also that she was entitled to receive another sum of \$130 out of his brother's estate at the death of his second wife. While he did not see that money paid to her, he testified positively that she did get it. He testified to another sum of \$200, which was loaned to her husband, but which he says was passed to her. He did not know how much she received from her sister's estate, but Louisa Dumbach testified that the \$600 which was paid for the two lots in dispute came from the estate of her sister. There was, therefore, an abundance of testimony, and uncontradicted, to show that the plaintiff had received from other sources than her husband much more than enough money to pay for the two lots in dispute. The testimony of Louisa Dumbach, if believed by the jury, was entirely sufficient to make out all the requirements necessary to establish a resulting trust. It was direct, positive, certain, unambiguous, clear, and satisfactory on the important questions as to the possession of the money, and also as to its payment. As to the amount of money, and the sources from which it was derived, there was no contradiction. As to the payment of the money, Louisa Dumbach said it was paid by her mother, and the only witness in contradiction, William Bishop, said it was paid by Mr. and Mrs. Dumbach, without individuating the particular person who handed over the money. This is not a contradiction of Louisa Dumbach's testimony, but rather a corroboration of it, inasmuch as she specifically names the one person who actually paid it over, and he does not contradict that statement. It is true, he testifies that the money was paid at his house, in Evans City, while she says it was at her mother's house, but that is of minor importance, since it only concerns the place of payment, and not the fact of payment, which is the really serious matter in controversy. Moreover, two witnesses say there was another payment of \$800, which took place at the house of Bishop, at which the same persons were present, and the jury

may well have reconciled the minor contradiction as to place by considering that the witness had confounded the two places as to this particular payment. But the testimony of Louisa Dumbach was not the only testimony on the subject. The plaintiff was herself examined as to a conversation which Bishop testified was conducted when she was present with her husband. Being asked to give an account of that conversation, she said: "He [Bishop] came there, and wanted Mr. Dumbach to buy a lot,—that was the first; and he said the Stewart lots was laid out and Mr. Wahl had them bought; and Mr. Dumbach says, 'You go and buy two,' and I told him to buy two for me. Mr. Dumbach had said to make the deed in mother's name, and I says, 'You can buy the other two, and I will pay for my own;' and the lots was all made in one deed to Mr. Dumbach. * * * And he went and bought the lots, and brought the deed to our place, and we read the deed, and I said, 'That is not made as it should have been;' and Mr. Dumbach says, 'We will fix that.' He told me just to go and pay the money, and I paid him. It was paid in our back room, for the lots, for I wasn't away from home. Q. How is that? Was it paid at two different times? A. No, sir, it was all paid at once, in our house. Court: Mr. Bishop says when he went to buy the lots you gave him some to pay on them? A. There was no money paid the first time, when he bought the lots. He brought the deed before any money was paid. The only money paid in his house was the eight hundred dollars that he was to pay for the building. Court: She may state who gave the money the first time. A. I handed it to him. He got it all at once when he brought the deed. Q. Was there any of the purchase money paid, as testified to by Mr. Bishop, at his house, in Evans City? A. No, sir. Q. What money was that? A. That was the time he was building. He paid eight hundred dollars. He was living in the Ash house." Mrs. Bishop simply testifies that she was present when the deed was handed to her father, and the purchase money paid, and that she does not recollect of any person being present but Mr. and Mrs. Dumbach and Mr. Bishop and herself. She does not say at what place this occurred. Mr. Kline testified that Mr. Dumbach told him at one time that he had paid to his wife some money which she got from her sister. In view of the condition of the testimony as to various matters, it would not have been possible to withdraw the case from the jury. As the credibility of the witnesses was somewhat involved, though not upon the more important matters in controversy, it was the proper function of the jury to deal with that particular subject. But we are not able to say that we are dissatisfied with the verdict. The court below approved it, and, we think, correctly. It is almost impossible to conceive that the story of the plaintiff and her daughter was a pure in-

vention, and that the money which they testified was the money of the plaintiff, and was paid by her, was not her money, and was not paid by her. They are plain, simple-minded people, to whom the fabrication of such a scheme of fraud and falsehood cannot possibly be imputed consistently with any testimony in the cause, and we could not feel the least justification in making any such implication. So far as we are concerned, sitting as chancellors reviewing the testimony, we feel obliged to say that we do not discredit or doubt the testimony of the plaintiff and her daughter, and with that conviction we could not sustain the first assignment of error.

The second assignment raises the question of the competency of the plaintiff as a witness to testify to the conversation which was given in evidence by Bishop for defendants as having taken place in the presence of the plaintiff and her husband and with him (Bishop). The plaintiff was not called in chief, but, after Bishop had testified to this particular conversation, and said that the plaintiff was present, she was called in rebuttal, and was admitted as a competent witness for that purpose by the court below, under the authority of the act of 1891. P. L. 287. In this there was no error. The very purpose of the act was to enable persons situated precisely as this plaintiff was to testify to matters which occurred in the presence of the dead party to a thing in action, and any other person, where such other person has already testified on the trial to the facts occurring in the presence of all. The act gives competency to a surviving party to a thing or contract in action to testify "to any relevant matter although it may have occurred before the death of said party, or the adjudication of his lancy, if, and only if, such relevant matter occurred between himself and another person who may be living at the time of the trial, and may be competent to testify and who does so testify upon the trial against such surviving or remaining party, or against the person whose interest may be thus adverse, or if such relevant matter occurred in the presence or hearing of such other or living or competent person." It seems to us that these precise elements of competency are present in this case. The plaintiff is the surviving party to the thing or contract in action, her husband who held the adverse interest is dead, Bishop is the competent witness who testifies on the trial to a transaction which occurred when he, the plaintiff, and her husband were together. Having so testified adversely to the plaintiff, the act declares that the surviving party may in just that concurrence of circumstances testify to the relevant matter in question. The act is, of course, general, and applies to all persons, without any mention of persons affected by the marital relation. It may be conceded that such persons might not be included within the incapacitating provisions of the act if they were otherwise incapacitated by reason of the special relation. But on that subject the au-

thorities are very clear that, the death of one of the parties having dissolved the relation, only confidential communications passing between the parties while the relation continued are excluded. The act of 1887 relates only to living husbands and wives, and makes no provision in the case of the death of either. The clauses "b" and "c" of the fifth section, are the ones that apply to this relation. Clause "c" says nothing about it. Hence the general authorities applicable, without any reference to the act of 1887, are the ones which control the present question. Thus, in *Cornell v. Vanartsdalen*, 4 Pa. St. 364, we ruled that a widow of a decedent, against whose estate an action was brought by a tenant, who claimed to recover on the common counts, and for repairs made to the leased premises, was competent to testify to what took place between her husband and the tenant at various settlements which had been made between them. We held that the competency of the widow depended on the rule of confidential communications. Rogers, J., delivering the opinion, said: "The great object of these rules being to secure domestic happiness by prohibiting confidential communications from being divulged, the rule is the same to that extent, even though the other party is no longer in being, or has even been divorced, and married to another person. The rule is the same in its spirit and extent as that which excludes confidential communications made by a client to an attorney. And, in analogy to this rule, it is held that the wife, after the death of the husband, is competent to prove facts coming to her knowledge from other sources not by means of her situation as wife, notwithstanding they relate to the transactions of her husband." The same ruling was made by this court in *Homan v. Homan*, 12 Wkly. Notes Cas. 86. In *Robb's Appeal*, 98 Pa. St. 501, a servant preferred a claim before an auditor, in the distribution of a decedent's estate, for services rendered to the decedent in his lifetime, and called the widow to testify in support of her claim. She was admitted as a witness, after objection to her competency, in the court below, and we sustained her competency. The present chief justice, delivering the opinion, said: "It is contended that on grounds of public policy the widow of the decedent was incompetent to testify to the contract on which appellee's claim for wages is based; that the disqualification incident to coverture continued after the death of her husband, and is not limited to what occurred in their confidential intercourse, but extends to all facts and transactions which came to her knowledge during their marital relations. While the principle thus broadly stated has sometimes been recognized, the better and more generally received opinion is that the disqualification is restricted to communications of a confidential nature, and does not embrace ordinary business transactions and conversations in which others have participated." After stating that the court below admitted the widow's testimony to conversations be-

tween her husband, herself, and the appellee, which resulted in a contract of hiring, the opinion proceeds: "These conversations, as shown by the testimony, are not, in any proper sense of the term, confidential communications, and there was, therefore, no error in permitting the witness to testify." In *Stephens v. Cotterell*, 99 Pa. St. 188, we said (Mercur, J.): "The mere fact that Mrs. Stephens was called to testify against the interest of the estate of her deceased husband did not make her incompetent. She is competent to testify to facts which came to her knowledge otherwise than through the confidential relations existing between her and her husband. Such were the facts here, and she was, therefore, competent." In the present case there is no question that the matters testified to by the plaintiff were not confidential communications. They were not matters imparted to the plaintiff by her husband, but were acts and conversations between herself and her husband and a third person, Bishop. The case of *Johnson v. Watson*, 157 Pa. St. 454, 27 Atl. 772, has no relevancy whatever. That was an action of replevin, in which the husband was plaintiff and the title of the wife to the goods was set up against him. We held that, "as the issue stood upon the record when the jury was sworn and on the trial, it was between plaintiff and his wife." This presented nothing but the plain case of a husband testifying against his wife, as to which the rule of the common law is not changed, but confirmed, by Act 1887, § 5, cl. "c." In the present case it was not claimed that the wife was competent as a general witness but only by way of rebuttal, under the special circumstances provided for in the act of 1891, and in that case she was clearly competent. There was no such question in *Johnson v. Watson*. Judgment affirmed.

(183 Pa. St. 405)

COMMONWEALTH v. PEOPLE'S TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

TAXATION—CAPITAL STOCK OF CORPORATION—SETTLEMENT OF ACCOUNT—POWER OF ACCOUNTING OFFICERS—BASIS OF APPRAISEMENT—AVERAGE SELLING PRICE—HOW ASCERTAINED—SALES—WHAT CONSTITUTES—EVIDENCE.

1. In appraising the capital stock of corporation for taxation, the average selling price of the shares of stock during the tax year should be taken as the basis, and not the average amount paid in by the shareholders on their stock during the year.

2. The average selling price of shares of stock, as a basis for taxation of the capital stock of a corporation, is properly ascertained by multiplying the number of shares sold in the open market during the tax year in each transaction by the price of said transaction, and dividing the sum of the proceeds of all the sales by the whole number of shares sold.

3. Where a corporation during the year issues additional shares of stock which are of much greater value than par, and allots such shares to the then shareholders in proportion to their holdings at par of the amount paid in, such

shares should not enter into the computation in ascertaining the average selling price.

4. Where there have been no sales of shares, and there is no evidence of their value, they should be appraised at the amount paid in on the same.

5. In proceedings to settle an account of a corporation for a tax on its capital stock, it appeared that during the tax year it had issued additional stock. One of its officers made an affidavit that the new shares of stock were not subscribed for, "but were sold outright by the company, at \$25 per share, that being the par value of the amount paid in," and that "the holders of the existing shares were permitted to acquire the new shares in the proportion of one share of new stock to every four shares of old stock." Held, that the fair inference from such statements was that the shares were allotted to the stockholders in proportion to their holdings at par of the amount paid in, and that the shares were not sold on the market.

6. Where the settlement by the auditor general and state treasurer of the account of a corporation for tax on its capital stock does injustice to the commonwealth, such officers can resettle the account within a year from the date of the first settlement.

Appeal from court of common pleas, Dauphin county.

Appeal to the court of common pleas by the People's Traction Company from the settlement by the auditor general and state treasurer of its account for tax on its capital stock. From a judgment in favor of the commonwealth, the People's Traction Company appeals. Affirmed.

The findings of fact and opinion of the court of common pleas are as follows (Simonton, P. J.):

"This is an appeal from a settlement made by the auditor general and state treasurer, April 26, 1896, against the corporation defendant, for tax on capital stock for the tax year 1894. It was tried by the court without a jury, as provided by the act of April 22, 1874, and, on the testimony and documentary evidence, we find the following facts: (1) The defendant is a corporation of the state of Pennsylvania, incorporated March 6, 1893. Prior to the beginning of the tax year 1894, it had issued 100,000 shares of capital stock, of the par value of \$50 each, on which part of the par value had been paid, leaving them subject to calls for the balance due. At various times during the tax year, additional amounts were paid in on 159,153 of these shares, until \$25 in all had been paid on each share. No more than \$6.25 per share has ever been paid on the remaining 847 shares. On September 13, 1894, defendant issued to its stockholders, in proportion to their ownership of shares at that date, 39,910 additional shares, of the par value of \$50 each, on which the stockholders paid in \$25 per share, receiving certificates showing that the shares were subject to calls for the additional \$25. (2) In December, 1894, defendant's president and treasurer, having first taken the oath prescribed by law, made a report to the auditor general, which stated, *inter alia*, that defendant's total authorized

capital stock was \$10,000,000, divided into 200,000 shares, of the par value of \$50 each, and that 199,910 shares had been issued, on 199,063 of which \$25 each had been paid, and on the remaining 847 shares \$6.25 each. They also reported that the amount of capital so paid in, which was taxable for the tax year 1894, was \$3,113,667.97; that the gross earnings during the year were \$247,813.89, all of which had been expended in payment of rents, salaries, necessary repairs, and interest accrued during the year, leaving no net earnings; and that the average price of sales of stock during the year was \$41%; and that defendant owned shares of stock in other corporations, which paid the tax upon their respective capital stocks, \$4,992,827. And they accompanied this report with an appraisal, in which they stated as follows: 'We have estimated and appraised the average capital stock of said company at its actual value in cash, as follows, viz.: — shares, at — dollars and — cents per share, amounting in the whole to \$5,150,953.35.' (3) This appraisal was not made by estimating the shares which had been issued at their actual value in cash, but, assuming that shares on which \$25 had been paid were shown by the average price at which they had sold for during the year to be worth \$41%, the amount of the appraisal was fixed at a sum which bore the same proportion to \$3,113,667.97—which was assumed to be the average amount taxable during the year—that \$41% bears to \$25, the amount thus arrived at being \$5,150,953.35. (4) The auditor general accepted this report and appraisal, and settled an account June 18, 1895, for tax thereon, deducting the value of the shares of the capital stock of other corporations upon which the taxes were paid by those corporations, and charged defendant with a tax at the rate of five mills on \$158,126.35, amounting to \$790.63, which was paid by defendant. (5) Afterwards, on April 28, 1896, believing that the former account was settled on an erroneous basis, owing to the wrong principle on which the report and appraisal had been made, the auditor general resettled the account against defendant, charging it with a tax on 199,063 shares at the rate of \$56.75 per share, that being the highest price of sales of stock between the 1st and 15th days of November, 1894, amounting to \$11,296,825, and on 847 shares at \$50 per share, amounting to \$42,350, the total being \$11,339,175, which, after there was deducted therefrom \$4,992,827, the value of shares of other companies, left taxable \$6,346,348, the tax upon which, at the rate of five mills, amounted to \$31,731.74, upon which defendant was entitled to a credit of \$790.63, for tax already paid, which the auditor general, no doubt inadvertently, failed to allow. And from this settlement the appeal now before us was taken. (6) The testimony produced at the

trial includes a certificate of certain computations made by agreement of the parties by an officer of the Commonwealth Guarantee, Trust and Safe-Deposit Company, of Harrisburg, which states, inter alia: 'If the average is to be obtained by multiplying the number of shares sold in each transaction by the price of said transaction, adding together the number of shares and also the total proceeds of all the sales at the exchange, the result thus obtained shows the total number of shares sold from Nov. 6, 1893, to Nov. 3, 1894, to have been 325,442, and the aggregate of all sales at the stock exchange to have been \$16,441,114.27. This aggregate, divided by the number of shares sold, shows a result of \$50.52 per share.' There were, as we already show, 39,910 shares distributed by the company to its shareholders at \$25 per share; but as this was a distribution, and not a sale, and as the evidence shows that the shares at the time this distribution was made were of much greater value than \$25 each, we do not think these ought to enter into the computation, and we therefore find that the value of each share between the 1st and 15th of November, 1894, was \$50.52.

"Discussion: We think the report and appraisal made by defendant's president and treasurer was made on a wrong basis, and resulted in an incorrect settlement by the accounting officers. After reporting the number of shares of stock issued, if all were not issued before the beginning of the tax year, and an apportionment of the tax was asked for on this account, the report should have shown the date during the year when the additional shares were issued. This it did not do, but, instead, it gave the dates when the several installments upon the shares were paid during the year, which was of no consequence, as whatever influence this could have upon the appraisal was involved in the selling price of the shares from time to time, from which the average price during the year was obtained. And, in making the appraisal, the president and treasurer did not appraise the stock at so much per share, but appraised the average amount of the money paid in. This was incorrect and misleading, and the settlement made on the basis of this appraisal did injustice to the commonwealth. The accounting officers were therefore well within the limit of their authority and duty in resettling the account, as this was done within a year from the date of the first settlement. But in this resettlement the tax should have been apportioned on the appraised value of the 39,910 shares for the portion of the tax year remaining at the date of its issue, and the appraised value of the shares should have been fixed at \$50.52 per share, instead of \$57.75. And as there were no sales of the 847 shares on which only \$6.25 had been paid, and no evidence was given of their value, we think it

equitable to appraise them at that amount.

"We therefore reach the following conclusions of law: (1) The settlement made by the auditor general and state treasurer on June 17, 1895, was incorrect, and the amount of tax charged therein was much less than the amount justly due from defendant to the commonwealth. (2) The auditor general and state treasurer had full authority to make the resettlement of April 29, 1896, and said settlement is valid and binding on defendant, except as modified herein. (3) The commonwealth is entitled to recover from defendant a tax at the rate of five mills on the dollar of the actual value of its capital stock, as follows, viz.: For the whole tax year 1894, on 159,153 shares, at \$50.52 per share; on 39,063 shares, at the same rate per share for the proportion of the tax year remaining on September 13, 1894, when said shares were issued; and on 847 shares for the whole tax year, at \$6.25 per share; less \$4,992,827, invested in shares of other corporations. (4) The prothonotary is directed to enter judgment in favor of the commonwealth, and against the defendant, for the amount of the tax which shall be found due when properly calculated upon the basis stated in the foregoing conclusion, if exceptions be not filed within the time limited by law."

Defendant's exceptions: "This case having been tried by the court, without a jury, as provided by the act of April 22, 1874, defendant, agreeably to the provisions of said act, files the following exceptions to the findings of the court: (1) The learned court erred in not including in its sixth finding of fact the whole of the certificate of computations made, by agreement of the parties, by an officer of the Commonwealth Guarantee, Trust and Safe-Deposit Company, of Harrisburg, which said certificate is as follows, viz.: 'I hereby certify that, as requested, I have made certain computations from the sales of the capital stock of the People's Traction Company as said sales appear in a certain affidavit made by Charles O. Kruger, on the fifth day of December, 1896, in the case of the Commonwealth of Pennsylvania vs. People's Traction Company, No. 619, commonwealth docket, 1896, in the court of common pleas of Dauphin county, for the purpose of ascertaining the average price of said sales. Taking the sales at the Philadelphia Stock Exchange by themselves, if the average is to be determined by taking the highest sale and the lowest sale, adding the two together, and dividing the result by two, the average thus obtained is \$41.37½ per share. If the average is to be obtained by multiplying the number of shares sold in each transaction by the price of said transaction, adding together the number of shares and also the total proceeds of all the sales at the exchange, the result thus obtained shows the total number of shares sold from November 6, 1893, to November 3, 1894, inclusive, to have been 325,422 shares, and the aggregate of all sales at the stock exchange to have been

\$16,441,114.27. This aggregate divided by the number of shares sold shows a result of \$50.52 per share. If the average is to be ascertained by including, not only the shares sold at the Philadelphia Stock Exchange, but also the 39,910 shares sold by the company itself at \$25 per share, then the total of all the shares is 365,332 shares, and the aggregate price for which all said shares were sold \$17,438,864.27. This aggregate divided by the number of shares sold shows a result of \$47.73 per share. I believe the foregoing computations to be correct.' (2) The learned court erred in that portion of its sixth finding which reads as follows: 'There were, as already shown, 39,910 shares distributed by the company to its shareholders, at \$25 per share; but as this was a distribution, and not a sale, and as the evidence shows that the shares at the time this distribution was made were of much greater value than \$25 each, we do not think these ought to enter into the computation; and we therefore find that the value of each share between the 1st and 15th of November, 1894, was \$50.52,'—the fact being, as shown by the undisputed testimony, that 'the new shares issued by the company were not subscribed for, but were sold outright by the company, at \$25 per share, that being the par value of the amount paid in.' (3) The learned court erred in not finding as a fact, which clearly appears from the undisputed testimony in the case, that 'there was upon the stock exchange a good deal of speculation in this company's shares, as may readily be seen from the wide and violent fluctuations in price. Furthermore, the transactions upon the stock exchange represent many more thousand shares of stock than were actually transferred upon the books of the company during said year. The gross receipts of the company during the year were \$247,813.89, while its expenses, including interest, amounted to \$249,264.51. The company was incorporated March 6, 1893. It paid no dividends in either 1893 or 1894. The value of the stock depended to a large extent upon the future success of the company, and upon the success of the People's Passenger Railway Company, in whose shares the capital stock of the People's Traction Company was largely invested. There was nothing in the character of the property and assets of the business of either company up to that time to indicate intrinsic value in the capital stock of the People's Traction Company largely in excess of the amount which had been paid in upon each share, and no more than \$25 had been paid in on any share.' (4) The learned court erred in not taking into consideration the 39,910 shares of stock sold by the company at \$25 per share. (5) The learned court erred in not finding the fact, as requested in No. 4 of defendant's request for findings of fact, that 'during the tax year 1894 there was a great deal of speculation in defendant's shares, the transactions at the Philadelphia Stock Exchange aggregating 325,422 shares, or nearly twice as much as the entire capital

stock of the company. Taking the highest sale and the lowest sale, adding the two together, and dividing the result by two, the average thus obtained is \$41.37½ per share, for \$25 paid shares.' (6) The learned court erred in not finding the fact, as requested in No. 6 of defendant's request for findings of fact, that 'the actual value in cash of defendant's capital stock, not less than the average price which said stock sold for during said year ending with the first Monday of November, 1894, did not exceed \$41½ per share for \$25 paid shares, or a premium of 65½ per cent.' (7) Under all the circumstances of the case, the learned court erred in not taking into consideration the 39,910 shares of stock sold by the company at \$25 per share, in determining the average price of sales of stock. (8) The learned court erred, as a matter of law, in not finding that, under the facts of this case, the proper method of determining the average sales of stock was by taking the highest and lowest sales during the year, and accepting the mean thereon as said average. (9) The learned court erred in its first conclusion of law, as follows, viz.: 'The settlement made by the auditor general and state treasurer on June 17, 1895, was incorrect, and the amount of tax charged therein was much less than the amount justly due from defendant to the commonwealth.' (10) The learned court erred in its second conclusion of law, as follows, viz.: 'The auditor general and state treasurer had full authority to make the re-settlement of April 29, 1896, and said settlement is valid and binding on defendant, except as modified herein.' (11) The learned court erred in its third conclusion of law, as follows, viz.: 'The commonwealth is entitled to recover from defendant a tax at the rate of five mills on the dollar, of the actual value of its capital stock, as follows, viz.: For the whole tax year 1894 on 159,153 shares, at \$50.52 per share; on 39,063 shares, at the same rate per share, for the proportion of the tax year remaining on Sept. 13, 1894, when said shares were issued; and on 847 shares for the whole tax year, at \$6.25 per share; less \$4,992,827, invested in shares of other corporations.' (12) The learned court erred in its fourth conclusion of law, as follows, viz.: 'The prothonotary is directed to enter judgment in favor of the commonwealth, and against the defendant, for the amount of tax which shall be found due when properly calculated upon the basis stated in the foregoing conclusion, if exceptions be not filed within the time limited by law.' (13) The learned court erred in finding and holding to be taxable a valuation of the shares of defendant's capital stock, instead of a valuation of its tangible property and assets, and its franchises, between the 1st and 15th days of November, 1894. (14) The learned court erred in directing judgment to be entered in favor of the commonwealth, and against defendant. (15) The learned court erred in not directing judgment to be entered in favor of defendant."

Rulings of the Court on Defendant's Exceptions:

"Exception 1: We have included in the sixth finding of fact all of the certificate made by agreement of the parties which we consider pertinent. The whole certificate is in the record, and this exception is sustained to the extent that we hereby refer to said certificate, and make it a part of our sixth finding."

"Exception 2: This exception is overruled. The new shares were not sold on the market, but were taken by the then shareholders at par of the amount paid in, the market price being at that time much above par. It is true that the defendant's treasurer stated in his affidavit: 'The new shares issued by the company were not subscribed for, but were sold outright by the company, at \$25 per share, that being the par value of the amount paid in.' But he also said: 'The holders of the existing 160,000 shares were permitted to acquire the new shares in the proportion of one share of new stock to every four shares of old stock.' The fair inference from these statements is that which we have drawn, namely, that the shares were allotted to the stockholders in proportion to their holdings at par of the amount paid in. When proof of facts is tendered in the form of an affidavit, we cannot be bound to accept the affiant's inferences involved either in the language or in the form of the affidavit, but must be at liberty to draw such inferences as the facts seem to us to warrant."

"Exception 3: The third exception is overruled. Much of the matter quoted in this exception is opinion and inference, and all of it is irrelevant, as the average selling price of the shares was conclusive evidence of the actual value of the capital stock."

"Exception 4: The fourth exception is overruled, for the reasons stated in overruling the second exception."

"Exception 5: The fifth exception is overruled, because it does not adopt the proper mode of ascertaining the average selling price."

"Exception 6: The sixth exception is overruled."

"Exception 7: The seventh exception is overruled, for the reasons given in overruling the second exception."

"Exceptions 8, 9, and 10: The eighth, ninth, and tenth exceptions are overruled."

"Exceptions 11 and 12: The eleventh and twelfth exceptions are overruled."

"Exception 13: This exception appears to have been inserted by mistake."

"Exceptions 14 and 15: The fourteenth and fifteenth exceptions are overruled, and the prothonotary is directed to enter judgment in favor of the commonwealth, and against defendant, in accordance with the opinion heretofore filed, when the amount has been properly calculated in accordance with said opinion."

"The defendant's counsel excepts to each,

of the foregoing rulings, and at his request exceptions sealed."

M. E. Olmsted, for appellant. Henry C. McCormick, Atty. Gen., and John P. Elkin, Dep. Atty. Gen., for the Commonwealth.

PER CURIAM. Defendant company's appeal to the court below, from the account settled by the auditor general and state treasurer for tax on capital stock for the year ending first Monday of November, 1894, was tried by said court without a jury, under the provisions of the act of April 22, 1874; and, on the facts there found, final judgment was entered in favor of the commonwealth. From that judgment the defendant appealed to this court, and assigned 15 errors, some of which relate to findings of fact, and others to conclusions of law. The learned court's findings of fact, conclusions of law, and rulings on defendant's exceptions (of which the judgment is predicated) are fully set forth in the record, and need not be recited here. Our consideration of these and other portions of the record, in connection with the specifications of error, has satisfied us that the judgment should not be reversed or modified. We find no error in any of the findings of fact, or in the legal conclusions drawn therefrom by the learned president of the common pleas; nor do we think that any of the questions presented by the record require further notice than has been taken of them by him. We therefore affirm the judgment on his findings of fact and conclusions drawn therefrom, as set forth in his opinion, etc., sent up with the record. Judgment affirmed.

(184 Pa. St. 41)

MESSNER et al. v. ELLIOTT.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

WILLS—CONTEST—EVIDENCE—TESTAMENTARY CAPACITY—INSTRUCTIONS—WITNESSES—COMPETENCY—EXAMINATION—LEADING QUESTIONS.

1. In determining testamentary capacity, the facts as to business transactions of a testator are of much more value than witnesses' opinions.

2. But little weight is to be attached to the opinion of witnesses who state that testator was not competent to transact business, when they show that they had dealings with him at the very time at which they state that he was incompetent.

3. On an issue awarded to contest a will on the ground of incapacity and undue influence, one of contestant's points was that if H., the executor named in it, was active in procuring its execution, and he and his family derived considerable benefit from it, and he was the business adviser of testatrix, the presumption would be that he brought undue influence to bear, and the burden was on contestees to rebut such presumption. *Held*, that it was not error, in affirming such point, to add that, where the devise was attributable "solely" to confidential relationship, undue influence might be presumed, and the burden was then on contestees to rebut the presumption.

4. A point by contestant was that if testatrix had a daughter, her sole natural heir, who

received no benefit under the will, and the principal part of the estate was given to strangers, these facts threw a strong suspicion on the validity of the will, and strong proof of capacity and volition were required to sustain it, and slight proof of undue influence or fraud to set it aside. *Held*, that it was not error to answer that the court was not willing to affirm the point as stated; that the jury had all the facts before them; that the dispositions in the will were not made to strangers, in the sense that they were made to persons for whom testatrix had no interest; "that the Heaths were not strangers to a woman who was the widow of a Heath," and M., who lived with her for 1½ years before her death, and lived with her and her husband for several years, on the farm, ought not to be regarded as a stranger.

5. Where the making and execution of the paper are not denied, testamentary capacity and absence of undue influence are presumed.

6. Where there was no evidence that the beneficiary solicited the bequest, or wrote the will, or procured it to be written, or that his advice was sought or taken, it was not error to charge that intimate friendly relations between testator and the beneficiary, such as living with him and managing his business, do not import undue influence, or shift the burden of proof from those who allege it.

7. It was not error to charge that if the evidence showing mental incapacity is joined with acts showing that testatrix was under the control of others, to the exclusion "of all individuality, all thought and action on her part," then it points to both testamentary incapacity and undue influence.

8. In the contest of a will made March 15, 1892, on the ground of incapacity and undue influence, a physician testified for contestant that he had attended testatrix in May, August, and September, 1891, and from January to March, 1892. *Held*, that it was not error to exclude as immaterial, a question asking what her condition was in March, 1892, when witness left her, and after January, 1892, as compared with her condition a year before, when he first attended her.

9. It was not error to exclude, as too general, a question to a witness who was an intimate friend and frequent visitor of testatrix, asking, "What was her custom about the use of opium?"

10. It was not error to exclude, as immaterial, evidence as to whether the witness had any conversation with testatrix as to certain beneficiaries "being there in the house."

11. It was not error to exclude evidence by deceased's sister that she "tried, time after time, to get her to quit using the stuff, but she could not talk sensibly about it."

12. And it was not error to exclude evidence that "she said they were tormenting her to make a will," and that "I did not ask her who was tormenting her."

13. Evidence that "they all lived on" testatrix's means, and one of the beneficiaries "worked very little,—but a few days at a time,"—was not admissible.

14. Evidence by a sister of testatrix that: "After she took her bed, she did not talk sensibly. I cannot recollect what foolish things she said or did,"—was not admissible.

15. Papers showing a business transaction by testatrix from two to five months before the will was made, were admissible.

16. And a receipt of testatrix, dated about 11 months before her will, was admissible.

17. It was not error to permit persons acquainted with testatrix, and who had business transactions with her during the time contestant claimed her mind was affected, to give their opinions as to her competency to transact business, and as to whether her conversation was rational, etc.

18. In a will contest, the question, "Will you state whether or not at any time she was not

able to converse with you?" (referring to testatrix) was not objectionable, as leading.

19. And the question, "On that occasion did she seem to be under the influence of liquor or any drug?" was not leading.

20. Nor was the question, "How was her conversation, Mr. D.,—connected or disconnected?" leading.

Appeal from court of common pleas, Allegheny county.

Issue awarded between Amanda Messner and others, plaintiffs and proponents, and Mary S. Elliott, as defendant and contestant, to determine the validity of the alleged will of Elizabeth Amanda Heath, deceased, executed on March 15, 1892. There were verdict and judgment sustaining the validity of the will, and contestant appeals. Affirmed.

The assignments of error are as follows:

(1) The court erred in its answer to plaintiffs' third point, which point and answer are as follows: "In determining testamentary capacity, the facts as to business transactions of a testator are of much more value than the opinions of witnesses." Answer: "This point is affirmed."

(2) The court erred in its answer to plaintiffs' fourth point, which point and answer are as follows: "But little weight is to be attached to the opinions of witnesses who say that the testator was not competent to transact business, when in fact these witnesses state that they had dealings with her during the period in which she was incompetent, and who further say that she was incompetent to transact business at the very time at which they transacted business with her." Answer: "This point affirmed."

(3) The court erred in its answer to the defendant's sixth point, which point and answer are as follows: "If the jury find that Saml. J. Heath, the executor named in the will, was active in procuring its execution, and that he and his family derived considerable benefit from the will, and further find that the said Saml. J. Heath was the business adviser of the testatrix, and as such had the opportunity to influence her in the making of her will, the presumption would be that undue influence was brought to bear on the testatrix by him, and the burden would be on the plaintiffs to rebut this presumption." Answer: "This point is affirmed. Where the devise is attributed solely to confidential relationship, it may be presumed that undue influence was brought to bear on the testatrix, and the burden is then cast upon the plaintiffs to rebut this presumption."

(4) The court erred in its answer to defendant's seventh point, which point and answer are as follows: "If the jury find that the testatrix had a daughter, who was her sole natural heir, and who received no benefit under her will, and that the principal part of the estate was given to strangers, these facts throw a strong suspicion on the validity of the will; and, under these circumstances, strong proof of capacity and volition are required to sustain it, and slight proof of undue influence or fraud to

set it aside." Answer: "I am not willing to affirm this point as stated. I am not willing to say what degree of suspicion is thrown on the validity of the will by the facts stated, nor to say that the will is to be set aside by slight proof of undue influence or fraud. You have all the facts before you by which you are to determine the validity of the will, and that by the weight of the testimony submitted to you. I do not think that the dispositions of the will are made to strangers, in the sense that they are made to persons for whom the testatrix had no interest or personal connection. The Heaths were not strangers to a woman who was the widow of a Heath; and Amanda Messner, who lived with her for a year and a half before her death, and who lived with her and her husband for several years on the farm, ought not to be regarded as strangers to the testatrix."

(5) The court erred in charging the jury: "The making and executing of the paper not having been denied, testamentary capacity and the absence of undue influence are to be presumed; and such presumption stands until overcome by the weight of testimony."

(6) The court erred in charging the jury: "There is no evidence that the beneficiary solicited the request, or wrote the will, or procured it to be written, or that his advice was sought or taken. In such a case, intimate friendly relations between the testator and the beneficiary, such as living with him, and nursing him, and managing his business, do not import undue influence, or shift the burden of proof from those who allege it."

(7) The court erred in charging the jury: "The evidence, however, which tends to show mental incapacity, if joined with acts that tend to show that the testatrix was under the will and control of others, to the exclusion of all individuality, all thought and action on her part, then the evidence points to both testamentary incapacity and undue influence,—with as much probability to one as to the other. (To which instructions and answers the defendant excepts, and, at his instance, bills sealed.)"

(8) The court erred in sustaining plaintiffs' objection to the following interrogatory to Dr. Hart, a witness for defendant. The witness, having testified that he attended Mrs. Heath in May, 1891, in August and September, 1891, and again from January to March, 1892, was asked: "Q. Now, Doctor, what was Mrs. Heath's condition in March, 1892, when you left her, and after January, 1892, as compared with her condition a year before, when you first attended her? (Objected to as immaterial. Objection sustained and bill sealed.)"

(9) The court erred in sustaining plaintiffs' objection to the following interrogatory to Margaret Belsar, a witness for defendant: The witness, having testified that she was an intimate friend and frequent visitor at Mrs. Heath's house, was asked: "Q. Did she, or did she not, say anything about anybody being at her to make a will? (Objected to as leading. Objection sustained and bill sealed.)"

(10) The court erred in sustaining plaintiffs' objection to the following interrogatory to Margaret Belsar, a witness for defendant: "Q. Well, why didn't you sleep? (Objected to as leading and immaterial. Objection sustained and bill sealed.)"

(11) The court erred in sustaining plaintiffs' objection to the following interrogatory to Margaret Belsar, a witness for the defendant: "Q. What was her custom about the use of opium? (Objected to as too general a question. Objection sustained and bill sealed.)"

(12) The court erred in sustaining plaintiffs' objection to the following interrogatory to Margaret Belsar, a witness for defendant: "Q. Did you have any conversation with Mrs. Heath as to the Messners being there in the house? (Objected to as immaterial. Objection sustained and bill sealed.)"

(13) The court erred in sustaining plaintiffs' objection to the following interrogatory to Philip O'Hara, a witness for the defendant. The witness, having testified that Mrs. Heath was generally under the influence of whisky or opium, was asked: "Q. Will you state whether or not at any time she was not able to converse with you? (Objected to as leading. Objection sustained and bill sealed.)"

(14) The court erred in sustaining plaintiffs' objection, and excluding the following portion of the deposition of Julia Culp, sister and near neighbor of Mrs. Heath, a witness for the defendant, namely: "After she took her bed, she did not talk sensible. I cannot recollect what foolish things she said or did." (Objected to. Objection sustained and bill sealed.)"

(15) Also the following portion of deposition of Julia Culp: "I tried, time after time, to get her to quit using the stuff, but she could not talk sensibly about it. (Objected to. Objection sustained and bill sealed.)"

(16) Also, the following portion of deposition of Julia Culp: "She said they were tormenting her to make a will. * * * I did not ask her who was tormenting her. (Objected to. Objection sustained and bill sealed.)"

(17) Also, in excluding the following portion of deposition of Julia Culp: "They all lived on Mrs. Heath's means. Messner worked very little;—but a few days at a time. (Objected to. Objection sustained and bill sealed.)"

(18) The court erred in sustaining the plaintiffs' objection, and in excluding the following portion of deposition of John S. Lytle, a witness for defendant: "Q. Do you know whether she became more addicted to the use of whisky in the last years of her life? (Objected to.) Ans. Well, I thought she did. (Objection sustained and bill sealed.)"

(19) The court erred in sustaining the objection of plaintiffs, and in excluding the following portion of deposition of John S. Lytle, a witness for defendant. The witness, having testified that he paid \$500 to Mrs. Heath, laying the money on her breast,

was asked: "Q. Well, anything further? A. Mr. Messner came up on the train with me that evening, and said he had the money along that I paid to Mrs. Heath to give to Saml. J. Heath. Mr. Messner came as far as Calamity, and got off there. He said to me that he sent the money up with Mr. Heath's daughter. (Objected to, and stricken out, and bill sealed.)"

(20) The court erred in overruling the defendant's objection, and admitting the following testimony of F. R. Storer: "Q. On that occasion, did she seem to be under the influence of liquor or any drug? (Objected to as leading. Objection overruled and bill sealed.) A. Not that I could notice."

(21) The court erred in overruling the defendant's objection, and admitting the following testimony of E. P. Douglass: "Q. Mr. Douglass, from those interviews, and that business transaction, I wish you would state whether, in your opinion, she was competent to transact business or not? (Objected to because the period of time is too remote from the time of the making of the alleged will, and because witness has not shown sufficient knowledge to enable him to testify on the subject, and the testimony is incompetent. Objection overruled and bill sealed.) A. I thought, from my conversation with Mrs. Heath at that time, that she was a woman who was amply able to take care of her affairs."

(22) The court erred in overruling defendant's objection, and admitting the following testimony of E. P. Douglass: "Q. How was her conversation, Mr. Douglass,—connected or disconnected? (Objected to as leading. Objection overruled and bill sealed.) A. I didn't see any difference between her conversation and that of the ordinary client that comes in and wants a job of that kind done."

(23) The court erred in overruling defendant's objection, and admitting the following testimony of W. S. Fenton: "Q. How did she converse? In a connected manner, or disconnected? (Any conversation in the early part of 1881 objected to as immaterial and irrelevant. Objection overruled. There was much testimony prior to that time as affecting her condition. Bill sealed.) A. In my opinion, she talked very intelligently. I thought she was an intelligent woman."

(24) The court erred in overruling defendant's objection, and admitting the following testimony of W. S. Fenton: "Q. What is your opinion as to her ability to transact business? (Objected to. The witness is not competent to give an opinion, not having laid sufficient grounds. Objection overruled and bill sealed.) A. I thought she was perfectly competent to transact business; and, if required, shall I give the reasons why? Q. I think you might. A. Because she fully understood. By Mr. Petty: I object to the gentleman going into the matter again. By Mr. Rodgers: I ask the

court to allow the witness to finish his answer. (Objection overruled and bill sealed.) A. She fully understood the business,—the purpose I was there for,—for to get her return of moneys at interest; and she gave it to me, and fully understood it was necessary to be qualified, and led me to understand that she understood business."

(25) The court erred in overruling defendant's objection, and admitting the following testimony of J. M. Shoaf: "Q. Well, then, Mr. Shoaf, what was your opinion as to her ability to transact business? A. Well, what business? (Objected to. Objection overruled and bill sealed.) A. I thought she was perfectly competent to transact the business I was doing with her, or I wouldn't have done business with her."

(26) The court erred in overruling defendant's objection, and admitting the following testimony of Thomas Reynolds: "Q. Now, then, Mr. Reynolds, I wish you would state what your opinion was and is as to her ability to transact business? (Objected to as incompetent. The witness has not shown sufficient knowledge to pass an opinion. Objection overruled and bill sealed.) A. I think she was perfectly competent to transact business."

(27) The court erred in overruling defendant's objection, and admitting the following testimony of Thomas Reynolds: "Q. And how was it as being rational? (Objected to. Objection overruled and bill sealed.) A. I considered her conversation rational."

(28) The court erred in overruling defendant's objection, and admitting the following testimony of John A. Lewis: "Q. Well, Mr. Lewis, what is your opinion as to her ability and competency to transact business? (Objected to as incompetent. The witness has not shown sufficient knowledge to enable him to give an opinion. Objection overruled and bill sealed.) A. I considered her competent to transact that business."

(29) The court erred in overruling defendant's objection, and admitting the following testimony of James B. Gray: "Q. And what was your judgment as to her competency to attend to business? (Objected to as incompetent. Objection overruled and bill sealed.) A. She seemed to understand everything, as far as I was able to judge. Was a clear and bright and sensible—a very sensible—woman."

(30) The court erred in overruling defendant's objection, and admitting the following testimony of Saml. J. Heath, and Exhibit No. 3, referred to: "Q. Mr. Heath, I hand you Exhibit No. 3; and you may state if that exhibit was found among the papers that came into your possession. A. Yes, sir. Q. Do you know anything personally in relation to that transaction? A. I do not. Q. Did Mrs. Heath tell you anything about it? A. No, sir. (Exhibit No. 3 offered in evidence. Objected to as incompetent and irrelevant. Of-

fered for what purpose?) By Mr. Rodgers: Offered for the purpose of showing a business transaction. By the Court: What is the date? By Mr. Rodgers: The 16th of January, 1892. (The offer is objected to as incompetent and irrelevant. Objection overruled and bill sealed. Exhibit read to jury.) By Mr. Petty: Let me ask him a question about that receipt: I just want to ask him if Mr. Hoffman is here. A. He is."

(31) The court erred in overruling the defendant's objection, and admitting the following Exhibit S offered by plaintiffs: "Q. I hand you Exhibit S, and ask you if you found that among Mrs. Heath's papers? A. I did. Q. Have you any knowledge in relation to that transaction? A. None at all. By Mr. Rodgers: I offer Exhibit S for the same purpose as the preceding offer,—to show she had business transactions. (Objected to as incompetent and irrelevant.) By the Court: What is the date? By Mr. Rodgers: April 22, 1891. Receipt dated July 18, 1891, which would be the date of the transaction. Either June or July. I cannot tell which. (Objection overruled and bill sealed. Exhibit read to the jury. Exhibit S is a bill dated the 22d April, 1891, of John Abner Hoffman & Co., received for 1½ bushels clover seed. Received June 19, 1891. Received payment. J. D. Hoffman & Co.")

(32) The court erred in overruling the defendant's objection, and in admitting the following exhibit offered by plaintiff: "Q. I show you Exhibit U, being three bills attached together. Did you find those bills among her papers? A. I did. I offer these bills of N. F. Finley, dated October 9, 10, and 16, respectively, 1891. (Objected to as incompetent and irrelevant. Objection overruled and bill sealed.)"

(33) The court erred in overruling defendant's objection, and admitting the following testimony of Samuel Finley: "Q. Now, in regard to the question I asked you as to your opinion as to whether she was competent to transact business. (Objected to as incompetent, and because it is too remote from the time of making the alleged will, and because the witness has not shown sufficient knowledge to enable him to testify on the subject. By the Court: I think it is within the time in which they say she was affected. Objection overruled and bill sealed.) Q. Was she competent to transact business? A. Well, there was nothing about her that led me to believe otherwise. She came in as any other customer would, and there was nothing in her conduct or manner to indicate otherwise. She seemed to be able to take care of herself in the matter of prices, etc.; and there was nothing unusual in her behavior at all, one way or another."

(34) The court erred in overruling defendant's objection, and admitting the following testimony of James Wilson: "Q. And what was and what is your opinion as to her being competent to transact business? (Objected to as incompetent. Objection overruled and

bill sealed.) A. Just the same as any person, I think. I could not see any difference at that time."

(35) The court erred in overruling defendant's objection, and admitting the following testimony of James F. Kemp: "Q. What was your opinion as to her competency to transact business? (Objected to because the date is too remote, and because witness has not shown knowledge. Objection overruled and bill sealed.) A. I think she was competent."

(36) The court erred in overruling defendant's objection, and admitting the following testimony of Wm. Seibert: "Q. What was your opinion as to her competency to transact business? (Objected to as incompetent, witness not having sufficient knowledge to pass an opinion. Objection overruled and bill sealed.) A. Yes, sir; I believe so."

(37) The court erred in overruling defendant's objection, and admitting the following testimony of G. F. Meyer: "Q. What was your opinion as to her competency to transact business? (Objected to as incompetent and irrelevant. The witness has shown no knowledge to justify him in giving an opinion. Objection overruled and bill sealed.) A. I think she was entirely competent. Q. And what as to her ability to understand business, so far as there was any business transacted between you? (Objected to as before. Objection overruled and bill sealed.) A. I think she had a very clear idea of the nature of business."

B. B. Petty, for appellant. W. B. Rodgers, for appellees.

PER CURIAM. This issue was awarded to determine the validity of a paper purporting to be the last will of Elizabeth A. Heath, which was contested on the grounds of testamentary incapacity and undue influence. The evidence, which is quite voluminous, involved questions of fact, which were necessarily for the jury; and the case was accordingly submitted to them, with instructions which, on the whole, appear to be adequate, and free from any error that requires a reversal of the judgment. There was no error in affirming plaintiff's third and fourth points, recited in the first and second specifications, nor in the qualified answers given to defendant's sixth, and seventh points, recited in the third and fourth specifications. In view of the facts which the testimony tended to prove, and the form in which these points were presented, the answers were not improper or erroneous. Considered in their relation to other portions of the charge, the excerpts recited in the fifth to seventh specifications, inclusive, are free from substantial error. The subjects of complaint in the remaining 30 specifications are the learned judge's rulings on questions of evidence referred to therein, respectively. A careful consideration of these has not convinced us that either of them should be sustained. In conducting the trial of cases such as this,—passing upon the relevancy of evi-

dence, the order of its admission, the mode of examining witnesses, etc.,—very much must be left to the sound discretion of the trial judge. It is incumbent on the party complaining not only to point out technical error, but to satisfy us that he or she was prejudiced thereby. Innoxious error is no ground of reversal. A careful consideration of this record has not satisfied us that there is any such error therein as would justify a reversal of the judgment. A detailed discussion of the very numerous specifications of error is unnecessary. It would consume much time to no useful purpose. Judgment affirmed.

(183 Pa. St. 443)

CORCORAN v. NEW YORK MUT. LIFE INS. CO.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

LIFE INSURANCE—ASSIGNMENT OF POLICY—NOTICE—WAIVER OF CONDITIONS—QUESTIONS FOR JURY—RIGHTS OF ASSIGNEE.

1. The secretary of a life insurance company directed an assignee of a policy to communicate with the company's general agent in regard to his assignment and notice to the company, and the assignee then sent the policy and assignments to said agent's office by messenger. The papers were presented to a clerk, who examined them, and appeared to make entries in a book, and then returned the papers to the messenger. *Held*, that whether there was a waiver of a provision in the policy that the company would take no notice of any assignment till it had been furnished with a duplicate or certified copy thereof, was for the jury.

2. Whether said assignee was misled by what transpired in such agent's office was a question of fact, in the determination of which the jury could consider a letter written afterwards by the assignee to the insured, in which he said, if the note secured by the assignment was paid soon, "the affidavit to the assignment will not be necessary."

3. Where a life insurance policy is assigned to an indorser for the insured as security, and the indorser transfers the assignment to the creditor to secure the same debt, the title vests in the latter so as to enable him to hold the policy as collateral security for the debt, and to sustain an action on the policy.

4. Where a life insurance policy is assigned to the indorser of the insured's note as security, a renewal note is not an extinguishment of the former, so as to destroy the assignment, and cause the policy to revert to the assignors without formal reassignment.

Appeal from court of common pleas, Somerset county.

Action by Frances Corcoran, for use of W. H. Dill, for use of S. B. Philson, against the New York Mutual Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The assignments of error are as follows: "The learned court erred in the charge and the answer to points, viz.: First assignment: In that part of the charge appearing between brackets, on page 16, which was as follows: 'If the fact shall be found as the defendant contends, the insurance policy which was assigned to Dill to secure his claim could not be by him assigned to Philson as collateral for

another and different debt. If, however, the debt was the same, and was represented by different notes, one of which was merely a renewal of the other, the debt remaining unpaid, the collateral security was not released, for in that case there was merely a substitution of another creditor in the place of Dill, and the liability of the policy to answer for that debt continued.' Second assignment: In the answer to plaintiff's first point, which was as follows: '(1) That, Frances Corcoran and James Corcoran having made an unconditional assignment of the policy to W. H. Dill on the 13th October, A. D. 1890, and the said Dill having, on 10th March, 1892, assigned, transferred, and set over said policy to S. B. Philson, all the right, title, interest, and property in said policy vested in Philson to the extent of the claim for which he held it as collateral security.' Ans. 'This is true if the debt for the security of which it was assigned to Dill was the same as that for which it was thereafter assigned to the plaintiff. If not the same, it is not correct.' Third assignment: In the answer to plaintiff's second point, which was as follows: '(2) That, Frances Corcoran and James Corcoran having so assigned said policy to Dill, and as there is nothing in the assignment nor in the evidence to show that Mr. Dill was not the owner of said policy at the time of the assignment to Philson, or that he had no right to transfer the same, the said Frances Corcoran would be estopped from denying the title of Philson to said policy, and the defendant cannot avail himself of such defense in this action.' Ans. 'Affirmed, subject to what has just been said in the preceding point relative to the identity of the indebtedness.' Fourth assignment: In the answer to defendant's third point, which was as follows: '(3) If the jury find that the assignment to W. H. Dill was made as collateral security, then the burden rested on the plaintiff to show the amount for which it was to be a collateral security, and, if he has failed to show the amount, there can be no recovery by either Philson or Dill, inasmuch as the evidence shows the company paid Mrs. Corcoran, the beneficiary, the full value.' Ans. 'This is correct unless you find that the debt owing Dill and Philson, respectively, was the same, though represented by different notes, the one being a renewal of the other, in which event the plaintiff is entitled to the benefit of the collateral.' Fifth assignment: In the answer to the defendant's fourth point, which was as follows: '(4) That on all the evidence the note executed on June 21, 1891, was a novation and extinguishment of the note made at the time of the assignment of the policy, and thereby destroyed the assignment, so that the policy reverted and inured to Frances Corcoran without formal re-assignment.' Ans. 'Refused.' Sixth assignment: In the answer to the defendant's seventh point, which was as follows: '(7) That, if the jury find that the time at which Gardill presented the policy, with assignments at-

tached, at the Philadelphia office, was in the spring of 1892, about the 5th of April, and that S. B. Philson afterwards, on 7th June, 1892, wrote to Corcoran on the subject of assignment of the policy and said in the letter, "If it is paid soon, the affidavit to the assignment will not be necessary," then they are warranted in finding that what was said and done in the Philadelphia office to Gardill by the clerks had not induced Philson to rest on what there occurred, and did not actually waive presenting a duplicate or certified copies.' Ans. 'Whilst we decline to affirm this point unqualifiedly as written, it is evidence tending to establish the conclusion mentioned, and is to be considered by you, in connection with the evidence relating to what occurred at the Philadelphia office, in determining the question whether the plaintiff rested on what had there taken place, and was thereby lulled into a sense of security, or whether he did not rely upon the alleged waiver.' Seventh assignment: In the answer to the defendant's eleventh point, which was as follows: '(11) Assuming that all that was said and done in the Philadelphia office, as testified to in this case by Gardill, is true, it is nevertheless insufficient to establish a waiver of the requirements in the policy to deliver to the company a duplicate or certified copy of the assignments at the Philadelphia office.' Eighth assignment: In the answer to the defendant's twelfth point, which was as follows: '(12) That on all the evidence the verdict should be for the defendant.' Ans. 'These points present pure questions of law, unmixed with any disputed fact, and we reserve them for future determination, if required, on suitable motions for that purpose.' Ninth assignment: In refusing to order judgment to be entered in favor of defendant non obstante veredicto on the reserved points 11 and 12 of the defendant."

Wm. J. Baer, for appellant. Kooser & Kooser and Koontz & Ogle, for appellee.

WILLIAMS, J. This case was here one year ago, and is reported in 179 Pa. St. 182, 36 Atl. 208. It was sent back for a new trial, which has now been had, and is again in this court on appeal. The questions raised and decided when it was here in 1897 are not again presented, as the learned judge appears to have followed the rules laid down by us at that time. Another question is raised, however, and upon substantially the same facts that were presented on the former trial. The defendant company issued a policy upon the life of James Corcoran in 1877. It was payable to his wife, Frances Corcoran, if living, at his decease. He died in 1894. She survived him, and not long after his death made the requisite proofs, alleged loss of the policy to excuse her failure to produce it, and received payment of the insurance money from the company. In February, 1896, Philson brought this suit as the assignee and owner

of the policy. On the trial he presented the assignment of the policy by James and Frances Corcoran to W. H. Dill as collateral security for the payment of a note for \$2,500, which Dill had indorsed for Corcoran, and which had been discounted by Philson's bank. This note was not paid at maturity, and the indorser assigned the policy over to Philson as security for the note so held by him. The company replied to this showing that it had paid the insurance money to the payee named in the policy, and without notice of Philson's claim. It also set up and relied on the stipulation in the policy that provided "this company will not take notice of any assignment of this policy until a duplicate or certified copy thereof shall be delivered to the company at its principal office," and proved by its clerks and bookkeepers that no such duplicate, or certified copy had ever been furnished to the company. Philson did not allege that he had filed a copy of the assignment with the company, but set up a waiver of a strict compliance with the rule, and an acceptance of the production and exhibition of the assignment in the office of Mr. Lambert, the general agent of the company in Philadelphia, as a sufficient notice of its existence and character. In support of this proposition, he proved that the secretary of the company directed him by letter to communicate with Mr. Lambert in regard to his alleged assignment, and notice thereof to the company, and that soon after, viz. April, 1892, he sent the policy and the assignment of Corcoran and wife to Dill, and of Dill to himself to the office of Mr. Lambert, by a messenger, for examination. He further proved that the papers were presented to a clerk in the office in the absence of Mr. Lambert, who took and examined them, walked a short distance to a book, in which he appeared to make entries, and then returned to the messenger, and handed the papers back to him. From this testimony he asked the jury to find that the filing of a copy had been waived, and that the company undertook to note the assignment for its own protection, and return the original papers to the owner. The present contention of the appellant is that the effect of this evidence was for the court, and that the jury should have been given a binding instruction as to its sufficiency or insufficiency to support a finding that strict compliance with the conditions in the policy had been waived. The rule that separates the province of the court from that of the jury is pretty well defined. If the evidence is direct, certain, presenting no question of credibility, and leaving no sufficient ground for inconsistent inferences of fact, the court may be asked to instruct the jury as to its legal effect. But if it is uncertain, if it depends on the credibility of witnesses, and if there is room for drawing from it different inferences of fact, it must go to the jury. They must clear up the doubts, settle questions of credibility, draw the correct inferences, and give final shape to the findings of

fact. In this case the construction of the letters and other writings was for the court. They were not ambiguous in any particular. But just what was done in the office of Mr. Lambert when Philson's messenger presented the policy and assignments for examination, what impression was made on the mind of the messenger and of Philson by the conduct of the clerk, and what was the purpose of the clerk representing Mr. Lambert at the time, and what he did, are not questions of law, but, upon the rule already stated, are questions of fact, upon which the jury should pass. This is the controlling question in this case, as it now stands, and we think the learned judge decided correctly when he submitted all the evidence relating to this subject to the jury. We see no error in the answer to the plaintiff's first point. If Dill, the indorser, transferred the assignment of the policy to Philson to secure the same debt to secure which it had been assigned to him, we think the title rested in Philson, so far as that was necessary to enable him to hold the policy as collateral security for the debt, and to sustain this action. The fourth and fifth assignments are also overruled. The learned judge would not have been right if he had instructed the jury that the renewal note executed on June 21, 1891, was an "extinguishment of the note made at the time of the assignment, and thereby destroyed the assignment, so that the policy reverted to Frances Corcoran without formal reassignment." The assignment, if made to secure the debt, is being used for the purpose intended by the assignors, and in a proper way. The answer to the defendant's seventh point is unobjectionable. Whether Philson was misled or not by what transpired in Mr. Lambert's office was a question of fact in the determination of which the letter written by Philson to Corcoran in June, 1892, was to be considered, and to be given such weight as the jury thought it entitled to. Upon a consideration of all the assignments of error, the judgment is affirmed.

(183 Pa. St. 563)

**MORRIS v. STATE MUT. LIFE ASSUR.
CO. OF WORCESTER, MASS.**

(Supreme Court of Pennsylvania. Jan. 3,
1898.)

**INSURANCE—ACTION ON LIFE POLICY—EVIDENCE—
APPLICATION—SUICIDE.**

1. In an action on a life policy, defendant offered in evidence a paper consisting of one sheet folded so as to make four pages. The first or outside page had the indorsement, "Application," followed by an index to the contents. The second page was headed, "Application for Insurance in the" defendant company; and following this were eight consecutively numbered interrogatories to the insured, all answered in writing. Below these was a stipulation, signed by the applicant, that the foregoing answers and statements, and also those made to the company's medical examiner, were true. The third page was headed, "Medical Examiner's Report," and consisted of printed interrogatories and written answers from 9 to 41,

inclusive. *Held*, that the whole paper was the application, and inadmissible, within the act of 1881, requiring all life policies which refer to the application to contain or have attached, copies of the application, and providing that, unless so attached, the application shall not be received in evidence.

2. Where a life policy is silent as to suicide, it will not for such act be avoided as against the wife of insured, who is the nominated beneficiary.

Williams and Mitchell, JJ., dissenting.

Appeal from court of common pleas, Venango county.

Action by Louise Morris against the State Mutual Life Assurance Company of Worcester, Mass., on a life insurance policy. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. S. & M. G. Ferguson and James Denton Hancock, for appellant. F. W. Hays, C. I. Heydrick, and C. Heydrick, for appellee.

DEAN, J. On January 13, 1894, defendant issued to plaintiff, on the life of her husband, Louis Morris, a policy of insurance, in the sum of \$25,000. The term of the policy was 27 years; the annual premium, \$1,305. The husband died on the 29th of March, 1894. His widow made due proof of his death as required by the policy, and made demand on the company for the amount of the insurance. The company refused payment: (1) Because the assured had committed suicide, which was a risk it had not assumed in its contract, there being in the application this stipulation: "That self-destruction; sane or insane, within two years from the date of said application, is a risk not assumed by the company in said contract of insurance." (2) That the applicant, to the following question in the application: "Have you used, or do you use, tobacco, chloral, opium, or other narcotics?" answered, "No," which answer was wholly false; and the insured, in his application, had agreed that his statements in his application, and those made to the medical examiner of the company, were true, and part of the consideration of the contract. (3) That to the question, "Is any application for other insurance now pending or contemplated?" the applicant answered, "Yes; Equitable, \$25,000;" that he further answered that he had an application pending in the Aetna Insurance Company for \$25,000; which answers were false and misleading, and so intended to be by the insured, for within 30 days thereafter, including the two policies named, he obtained upwards of \$200,000 insurance; and at that time he had actually pending, with two other companies (the Penn Mutual of Pennsylvania, and Mutual Life of New Jersey) applications for policies. (4) That to a question of the medical examiner, "Have you had any severe injury?" the insured answered, "No," whereas in fact he had been seriously injured in a railroad accident, and also by being run over by a wagon. (5) That he had answered that he had not been attended by a physician for

any ailment since childhood, whereas he had been attended by a physician the year before, for a serious ailment. This plaintiff, the beneficiary in the policy, brought suit, and defendant filed an affidavit of defense, averring, in substance, the foregoing facts, and on the issue thus made up the case went to trial before a jury. The plaintiff offered in evidence the policy. The offer was objected to by defendant on the ground that it did not include the application, which, by the policy itself, was partly the consideration and contract, the two constituting the written contract. The court sustained the objection. Thereupon plaintiff offered the policy with that part of the application containing eight questions and answers thereto indorsed thereon. This was objected to by defendant because not accompanied by the report of the company's medical examiner, which it was argued also formed part of the consideration of the contract, and was referred to in the application. The court overruled the objection, and the policy, with so much of the application as was indorsed thereon, was read to the jury. To this ruling an exception was sealed for defendant. This evidence was followed by the company's receipt for the first annual premium, and by the preliminary proofs to the company of the death of insured, and plaintiff rested. The defendant then offered in evidence the medical examiner's report, which was not indorsed on or attached to the policy. To this plaintiff objected on the ground that not being attached to the policy as required by the act of 11th of May, 1881, it was inadmissible as evidence. The purpose of the offer, as stated by defendant's counsel, was to show that the insured, in order to obtain the policy, made false statements as to his health, physical condition, and as to the attendance of a physician; and that his undertaking, as part of the contract, that his answers should be full and true, was broken. The offer was overruled; the court saying: "We are of the opinion that the paper offered constitutes a part of the application of the insured, and not being itself attached to the policy, nor a copy thereof, as required by the statute, it is inadmissible." To this ruling an exception was taken by defendant. Other offers were made, but they were all subject to the same objection, and were overruled. The case then went to the jury, on the admitted facts, the contract on the face of the policy, death of insured, and preliminary proofs to the company. Under the instructions of the court, there was a verdict for plaintiff in the amount of the policy, and defendant appeals, assigning twelve errors. They are all determined by an answer to the one question: Was the application admissible under the act of 1881?

The policy is as follows: "Number 33,900. Amount, \$25,000. Premium, \$1,305.00. Term, 27 years. This policy of assurance witnesseth, that the State Mutual Life Assurance Company of Worcester, in consideration of

the representations made in the application for this policy, which are hereby made a part of this contract, and of the payment of the sum of thirteen hundred and five dollars, and of the payment of a like sum on or before the 30th day of January in each year during the term of this policy, does insure the life of Louis Morris, of Washington county, of Washington, and state of Pennsylvania, in the amount of twenty-five thousand dollars, for the term of twenty-seven years, and does hereby promise to pay said amount at its home office in Worcester to the person whose life is hereby insured, or his assigns, on the 30th day of January, A. D. 1921, or, in the event of his death prior to said date, to pay said amount to his wife, Louise Morris, her executors, administrators, or assigns, upon satisfactory proof of the death of the insured, after deducting therefrom all indebtedness to the company. This policy shall be incontestable after two years from the date of its issue, provided the premium shall be paid as agreed." This is the whole of the contract before the jury; for that part of the application indorsed on the policy and read was afterwards stricken out by the court, leaving the case stand for plaintiff on the policy as quoted. The act of 1881 is as follows: "All life and fire insurance policies * * * which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company either as forming part of the policy or contract between the parties thereto, or having any bearing upon said contract, shall contain or have attached to said policies correct copies of the application as signed by the applicant, and the by-laws referred to, and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence in any controversy between the parties to, or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

The first question is, what constituted the application? It seems to us that there can be but one answer to this, from a mere inspection of the paper. It is one sheet of paper, with the contents inscribed and printed on three of the pages. The first or outside page reads thus: "No. 33,909. Application. State Mutual Life Assurance Co. of Worcester. Louis Morris, Washington, Pa. Amount, \$25,000. Date, January 30th, 1894. Term, 27 years. Age, 52. Premium, \$1,305.00. Occupation, Manager and Superintendent Refining Co. Agent, J. D. Bigger. Approved January 29th, 1894. A. G. Bullock, Pres." This is what appears as the outside indorsement on the first page of the folded paper. The brief indorsement, "Application," with what follows, is not the application, but indexes or points to the contents within as the application, which will be disclosed when the paper is unfolded. On opening it, the second page is headed thus: "Application

for Insurance in the State Mutual Life Assurance Co. of Worcester, Mass." Then follow eight consecutively numbered interrogatories to the insured, all answered in writing. Then follows this stipulation: "I, the applicant for insurance, do hereby agree that the foregoing answers and statements, and also those made to the company's medical examiner, are true and full, and are offered as a consideration of the policy contract, which shall not take effect until the first premium shall have been paid during my life and good health." Dated January 28, 1894, and signed by the insured. Then follows the medical examiner's report, on the third page, headed, "Medical Examiner's Report," which is made up of printed interrogatories and written answers from 9 to 41, inclusive. It will be noticed that the number on the second page ended with 8. These go on consecutively, commencing in the examiner's report with 9. But the defendant itself, in its affidavit of defense, in effect averred that the medical examiner's report formed part of the application, thus: "Said plaintiff, in the statement filed in this case, has not set out a full copy of the policy of insurance sued upon. That attached to the said policy, and forming part thereof, is a copy of the application of Louis Morris, the assured, for the said policy of insurance referred to; and in and by the said application the said Louis Morris did agree, *inter alia*." Then follows an averment of false representation as to Nos. 5, 6, and 7 of that part of the application on second page, and Nos. 11, 12, and 15 of the medical examiner's report on third page; that is, in the omitted application the insured made six false representations, three of them to the agent, and three to the examiner; the defendant itself making no distinction between the second and third pages of the paper, and terming the whole the "application." The whole paper is clearly the application, and was properly so construed by the court below. The defense, without it, as against the wife, the beneficiary in the policy, was hopeless, for the policy, by its express terms, is issued "in consideration of the representations made in the application for this policy, which are hereby made a part of the contract." Not being attached to the policy, it could not be read in evidence by defendant. If not read, then nothing stood between plaintiff and the verdict she got.

It is maintained, however, by appellant, that, even if the application be excluded, nevertheless suicide avoided the policy, and there could be no recovery; therefore the court erred in not admitting evidence as to the cause of death. *Runk's Ex'rs v. Insurance Co.*, 28 U. S. App. 612, 70 Fed. 954, and 17 C. C. A. 537, is cited as sustaining this contention. It is there decided that it is a fundamental condition of the contract, although the policy is silent on the subject, that the insured, while sane, will not voluntarily destroy his life. That, however,

is not this case. We are not called upon to decide what would have been the effect on the contract if the policy itself had been payable to the insured, or to his personal representatives. This was payable to his wife, who had an interest in his life; and she in fact paid the first premium, by lifting the note given by him for it. In *Gibbons v. Gibbons*, 175 Pa. St. 475, 34 Atl. 846, and *Matlack v. Insurance Co.*, 180 Pa. St. 360, 36 Atl. 1082, we have decided that the insured cannot defeat the gift to his wife by a fraud upon her, or by collusively forfeiting it for nonpayment of premium, and then having a new one issued to another beneficiary. The point before us has not been directly decided in this state, but has been in other states. In *Fitch v. Insurance Co.*, 59 N. Y. 557, the court says: "The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch [the insured], but of his wife and children. Although they were bound by his representations, and any fraud he may have committed, in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy." This case is followed in *Darrow v. Society*, 118 N. Y. 537, 22 N. E. 1093. We are clearly of the opinion, that the weight of the authority is to the effect that, where the policy is silent as to suicide, it will not for such act be avoided, as against the wife of deceased, who is the nominated beneficiary. We have had occasion to apply the act of 1881 in many cases, since its passage. In *Association v. Musser*, 120 Pa. St. 389, 14 Atl. 157, we said (Paxson, C. J., rendering the opinion): "The act of 1881 was but the exercise of the clearly-recognized power of the state to regulate the mode by which contracts shall be made and proved. It is a wise and beneficent act, founded upon sound reasons of public policy. It affords protection to persons who insure their lives or property, and can injure no company conducted upon honest business principles." Again, in *Lenox v. Insurance Co.*, 165 Pa. St. 575, 30 Atl. 941, we again said (Mitchell, J., delivering the opinion): "It is well known that the evil aimed at in this legislation was the custom of insurance companies to put in their blank forms of application long and intricate questions or statements, to be answered or made by the applicant, usually in very small type, and the relevancy or materiality not always apparent to the inexperienced, and therefore liable to become traps to catch even the innocent unwary. The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and, if it contained errors, have them rectified before it became too late." To the same effect are *Hebb v.*

Insurance Co. (Pa. Sup.) 20 Atl. 837, and *Insurance Co. v. Oberholzer*, 172 Pa. St. 223, 32 Atl. 1105. So that the construction of the act of 1881 is settled by a number of carefully considered judgments. If the act seems to work injustice to this appellant, it is not real, but only apparent. All any suitor can demand of a court is justice according to law. The law, in justice to all insurers, directs all companies to attach to their policies a copy of the application. Failing in this, a penalty is imposed. To hold otherwise in a particular case would be in the teeth of the law, for it makes no exception because of a particular hardship. We see no reason why this company should be exempt from the penalty for its gross neglect to obey the plain injunction of an act of assembly. All the assignments of error are overruled, and the judgment is affirmed.

WILLIAMS, J. (dissenting). The act of assembly on which this judgment is made to rest was intended to protect the insured against technical and unconscionable defenses made by the insurance companies, by setting up conditions, exceptions, and provisions to which the attention of the insured had never been called. Such defenses were without merit, and operated unjustly, as a general rule. Its operation ought not to be extended beyond the mischief to be remedied, and its own legitimate purpose. The opinion of the majority seems to me to be an extension of the application of this statute beyond its letter and its spirit, to the exclusion of a meritorious defense against an obviously fraudulent claim devised and executed by the insured. I cannot concur, therefore, in this judgment.

MITCHELL, J., concurs in this dissent.

(184 Pa. St. 334)

LAUTNER et al. v. KANN.

(Supreme Court of Pennsylvania. Jan. 8, 1896.)

**WITNESSES—CREDIBILITY—MEASURE OF DAMAGES
—BREACH OF CONTRACT—APPEAL—
HARMLESS ERROR.**

1. The credibility of a witness is for the jury, and they are not bound to accept his statements because he is unimpeached and uncontradicted by other witnesses.

2. An incorrect instruction as to the measure of damages for breach of contract was harmless error where the jury found that there was no contract.

3. Where there is a failure to deliver goods according to the contract, the measure of damages is the difference between the contract price and the market price at the time of the failure.

Appeal from court of common pleas, Allegheny county.

Action by Joseph Lautner and another, executors of the estate of A. Holstein, deceased, against W. L. Kann. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. Schoyer, Jr., S. B. Schoyer, and William Kaufman, for appellant. J. S. & E. G. Ferguson and Cohen & Israel, for appellees.

FELL, J. The action was on a book account for goods sold. The defendant attempted to establish, as a set-off to the plaintiffs' demand, a claim for damages for breach of a contract to furnish other goods, and at the trial the main question was whether the contract alleged by the defendant had been made. The contract set up was oral, and the only witness called to establish it failed to define its terms with clearness or accuracy. The court left it to the jury to determine whether a contract had been entered into, and, if so, what were its terms. This action of the court is assigned as error, and the appellant contends that as the credibility of the witness had not been attacked, nor his statement contradicted by other witnesses, the court should have determined whether a legal contract had been entered into. This position is not tenable. The credibility of a witness is for the jury, and they are not bound to accept his statements because he is unimpeached and uncontradicted by other witnesses. He may impeach and contradict himself on the witness stand, or the jury may believe that he is honestly mistaken. His manner, the motive or bias, the inherent improbability of his story or the want of accurate recollection, may discredit his testimony and justify a jury in disregarding it altogether. The question is for the jury, and not for the court. Different contracts were set up, a general contract to sell the whole product of the tannery of certain kinds of leather, and subsequent independent contracts based on the acceptance of specific orders. If there was a breach of these contracts, no date could be fixed by the court which could furnish a standard of price for the assessment of damages, as the breaches occurred at different dates. If there was a failure to deliver, the measure of damages was the difference between the contract price and the market price at the time of the failure. But, as the jury found that no contract had been made, the defendant was not harmed by the instruction given, and it is useless further to consider the subject. The judgment is affirmed.

(184 Pa. St. 180)

**PITTSBURGH & B. TRACTION CO. v.
MONONGAHELA BRIDGE CO.**

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

CONTRACTS—RIGHT TO PAYMENTS.

A traction company which furnished a bridge company with funds to reconstruct its bridge, so as to allow the traction company to run its cars thereon, with agreement that said money be considered payment of fees in advance, with provision for settlement at end of 40 years of any balance, cannot recover of the bridge company, any of such amount advanced, because of the fact that a city purchases all the stock of the bridge company.

Appeal from court of common pleas, Allegheny county.

Action by the Pittsburgh & Birmingham Traction Company against the Monongahela Bridge Company. Judgment for defendant. Plaintiff appeals. Affirmed.

The opinion of the court below is as follows:

"Without entering into detail as to the powers of the plaintiff and defendant under their respective charters, it is sufficient to say that under the facts agreed upon, and herewith returned and made a part hereof, they were fully authorized by their charters to do all the acts and to enter into all the agreements involved in the disposition of this case. The contracts between the defendant and plaintiff were admittedly such as they could make, and, in pursuance thereof, the defendant reconstructed its bridge so as to provide a good and sufficient passage or roadway, to enable cars to cross upon double tracks, propelled by electricity or traction, according to the plans and specifications made part of said contracts. Under said agreements the plaintiff was to furnish the money to defendant with which the defendant was to pay the cost of reconstruction, not exceeding \$185,000, to wit, \$50,000 to be deposited by the plaintiff to defendant at the time of the execution of the contract; an additional installment of \$50,000 to be deposited in like manner upon three days' notice in writing from the treasurer of defendant, 'in order to meet the payments for said reconstruction,' etc., and to be checked out and used for that purpose by said treasurer of the party of the first part. And the money thus paid by said party of the second part (plaintiff) is to be in payment of tolls in advance for crossing said bridge by the cars of said party of the second part, and, being advanced, is to bear a rebate, drawback, or interest at the rate of 5 per cent. per annum, to commence to run as soon as the cars are in operation and running over the bridge; but this money advanced as tolls, and the rebate, drawback, or interest thereon, is to be recouped or offset and liquidated by tolls, in the following manner: 'The tolls shall be 7½ cents for a single trip or passage,' etc. Then follows a provision that the tolls shall aggregate not less than \$15,000 per annum for 7 years, and \$17,000 thereafter during the term of the contract, and another in reference to settlements every six months. The agreement then declares: 'Sixth. It is understood and agreed that this contract shall expire at the end of 40 years from this date, and, if the amount expended for reconstruction is not then fully extinguished by reason of increased revenue from said tolls, the unpaid portion shall be canceled.' The cost of the reconstruction of the bridge by defendant exceeded \$200,000. The plaintiff fully complied with its portion of the contracts, and have ever since been using said bridge as provided for in said contracts, and the defendant has also fully carried out its

part of the same, and now avers that it is willing and able to continue to do so. It appears, however, that in April, 1893, the city of Pittsburgh purchased and paid for the entire capital stock of the bridge company (and that the same, except 13 shares, which is in the name of 13 of the officials of the city, having one share each, is now held in the name of said city), subject to the rights arising under said contracts, and also a mortgage upon the bridge itself. Of course, whether there was an agreement to that effect in terms or not, the city, in purchasing the stock as it did, would take it subject to the obligations of the bridge company arising under the agreements referred to.

"The question now arises, has the plaintiff a right to recover back a portion of the money advanced by it to the defendant? The amount (if anything) is admitted to be \$152,583.31, with interest from 12th of April, 1893. It may possibly be that the franchisees of the defendant company are no longer in existence, and that all the city gets by the purchase of the stock is nothing more than she would have gotten under condemnation proceedings under the act of assembly, and that in fact there is no bridge company, except the one from which the city purchased, but, if so, how can it affect the case in favor of plaintiff? It sues defendant as the rightful corporate company. We cannot inquire, so far as I can see, what right we have to inquire into who constitute the stockholders. A judgment against the company would be good against whoever owns the stock, and the question as to whether there is any longer a corporation vested with the franchises of the Monongahela Bridge Company cannot be tried in this proceeding. The simple question appears to be whether the defendant, assuming it to be to all intents and purposes the Monongahela Bridge Company, having all its charter rights, and being bound by its contracts, is liable to refund plaintiff the money claimed by it. Of course, if any set of individuals had purchased the stock, the claim would have no force whatever; and I do not see how we can here treat this as any other than the ordinary sale of all the stock of a corporation by one set of owners to another. Whether or not, under condemnation proceedings, where the actual value of the bridge and its franchises could have been taken, the lien of the mortgage, and all other contract rights would have devested, and, if so, the right of parties interested to be compensated out of the fund, is apart from anything involved in this case, and is not entitled to our consideration. The act contemplates acquisition by agreement, and there seems to be no restriction upon the city making its own terms. And even if we treat this as a purchase by the city of the corpus of the bridge only, without the franchises belonging to the company, passing by the sale, it seems to me that the plaintiff would have no right to recover in this action. So, whether we

treat this as a case against the legally constituted Monongahela Bridge Company, of which the city is the stockholder, or as substantially a suit against the city as the purchaser of the mere physical structure pertaining to the bridge, I am of opinion that plaintiff cannot recover, and therefore is entitled to judgment against plaintiff in favor of defendant, with costs of suit. The points of law submitted by the defendant are all affirmed."

J. S. & E. G. Ferguson and A. W. Duff, for appellant. James H. Beal, Clarence Burleigh, and D. T. Watson, for appellee.

PER CURIAM. By agreement duly filed, trial by jury was dispensed with, and the decision of this case submitted to the court below, under the provisions of the act of April 22, 1874 (P. L. 109). A careful consideration of the record has convinced us that the general conclusion reached by the learned president of the common pleas is correct, and hence there was no error in entering judgment in favor of the defendant. In any view that can be reasonably taken of the facts, the plaintiff company was not entitled to recover. We find nothing in any of the questions involved in the specifications of error that requires special notice. Judgment affirmed.

(184 Pa. St. 354)

WETTENGEL v. GORMLEY et al. (two cases).

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

OIL LEASES—DEVISE OF LAND—RIGHTS AND LIABILITIES OF DEVISEES.

1. During the term of an oil lease of three contiguous farms, embracing 600 acres, the lessor died, having devised the farms to three different persons. The lease provided that all its conditions should extend to the parties' heirs, executors, and assigns. *Held*, that each devisee was entitled to share in the royalties in the proportion that the land devised to him bears to the whole tract, though the wells were all on one farm.

2. In such case the loss of rental value of one of the farms, caused by operation of the wells, should be deducted from the three devisees in proportion to their ownership of the surface.

Appeal from court of common pleas, Allegheny county.

Two actions, heard together,—one by Albert C. Wettengel, guardian of Annie Lockhart and other minors, against James T. Gormley and others; and the other by Annie B. Wettengel against the same defendants. From the decree, plaintiffs appeal. Modified.

J. S. & E. G. Ferguson, for appellants. J. McF. Carpenter, for appellees.

WILLIAMS, J. These cases depend upon the same question. The parties were before us on that question in 1893, and the case is reported in 160 Pa. St. 559, 23 Atl. 934. It is frankly conceded by counsel for defend-

ants that, if the rule laid down in that case is to be adhered to, it rules these. In deference to the decided views of the learned judge of the court below, and the earnest request of counsel, we have listened to what is substantially a reargument of *Wettengel v. Gormley*, 160 Pa. St. 559, 28 Atl. 934, and have undertaken to re-examine the reasons on which our decision in that case rests. The facts upon which the controversy arises are in no doubt, but need to be stated, in order that the precise point in question may be seen. In July, 1888, James Gormley was the owner of three contiguous farms, containing, together, nearly 600 acres of land. He made an oil and gas lease of the 600 acres, as a single body, to Tomlinson, for the term of 15 years, reserving a royalty of one-eighth part of the oil produced. This lease gave Tomlinson the exclusive right to bore and operate for oil upon the entire 600 acres during the term of 15 years, and bound him to conduct operations under the lease in such manner as to interfere as little as possible with operations by the lessor and his tenants in the cultivation of the surface. It closed with a stipulation providing that "all conditions between the parties hereto shall extend to their heirs, executors, or assigns." The legal operation of this lease, as between the lessor and the lessee, "their heirs, executors, or assigns," was to sever the leasehold from the freehold estate. Thereafter the exclusive right of access to the oil-bearing stratum was in the lessee, whose duty it was to develop and operate the leasehold estate for oil and gas. The exclusive right to cultivate the surface, subject to the easement created upon and over it in aid of the operations of the lessee, was in the lessor and his tenants. A sale of the freehold to any person having notice, actual or constructive, of the lease, would have been subject to its provisions, and would in no way have impaired the rights or interest of the lessee. The purchaser would have taken just the estate his vendor was competent to convey, and he would have held it subject to the terms of the lease in every particular. The estates were separate, independent, and in independent hands. The one was personal,—an estate for years. The other was real,—a fee simple. The right to receive or demand the rent was a chose in action, that would fall, under our intestate laws, to the personal representative of a decedent. The heir could not disturb or interfere in any manner with the production of oil or gas, pending the settlement of the estate of the testator, or with the collection of the royalties. But Gormley made a will, by the terms of which he severed the 600 acres into three tracts or farms, and devised one of these to each of his three children. They took the title precisely as the testator held it, subject to all the provisions of the lease. As between themselves, the division of the surface was absolute; but, as to the holder

of the leasehold, each took the part devised to him, subject to the common burden, which had been put upon the entire body of the land as a single, undivided tract, containing 600 acres, more or less. As the lease covered all the land, so the rent may be said to issue from each and every part of it. The royalties belonged to the owners of the 600 acres, and not to the owner of any subdivision of it. But, as we have seen, the royalties were personal. They were not disposed of by Gormley's will. They were not even referred to in it. The intestate laws must, in such case, be looked to for the disposition of this very considerable part of his estate. The children hold, together, all the acreage that is covered by the lease, and each should receive such share of the royalty as his or her share of the land bears to the whole tract covered by the lease. It does not matter in what acre or hundred acres the wells may be situated. The royalties are not payable by the acre, nor by the farm, into which the surface may be divided, but upon the total production, whenever, within the 600 acres, the production may take place. There is no escape from this proposition. The cleaver of the testator, applied by the terms of his will for the division of the lands between his children, made a clean-cut separation of the shares of each down till the leasehold was encountered. There its descent was arrested until the term created by the lease expires. When that occurs, its downward course will be instantly resumed, and the severance of the freehold and its minerals will be complete. The further reflection bestowed upon this question has in no sense shaken our confidence in *Wettengel v. Gormley*, 160 Pa. St. 559, 28 Atl. 934. We adhere to it.

There is, however, one new question raised in these cases. It is whether the injury done to any one of these devisees upon whose surface the wells may happen to be, should not be borne, as the benefit is shared, in equal proportions, by the three devisees of James Gormley. The learned judge of the court below so held. He found, as a fact, that the injury done the defendant in the reduction of the rental value of his part of the 600 acres was \$200 per annum, and had been for three years prior to his decree; and he found, as a conclusion of law, that this sum of \$600 for three years' loss upon rentals should be deducted from the royalties before division. This conclusion we are not disposed to disturb. It is equitable in its operation. But the defendant has his share of the benefit arising from the production of the oil, and should bear his share of the loss of rental resulting from its production. As to the finding that "it will require time and expense, depending largely upon the number of wells that may have been drilled," to restore the surface to a proper condition after the lease has ended, we see

no reason to doubt that the learned judge is correct; and it may be that the sum he fixes upon, viz. \$200 per well, will be required for this purpose, but it is certainly not demandable now. The lease has some years to run. Meantime the defendant will be fully reimbursed for any loss he sustains because of the operations under it by the allowance for loss of rental resulting from such operations. The cost of repairing injuries to the realty can be considered when the time for entering on such repairs approaches. The decree requiring an account for royalties is affirmed. The calculation should be modified to meet the requirements of this opinion. The \$600 loss of rental should be deducted from the three devisees in proportion to their ownership of the surface, and the cost of repairs omitted from the calculation until such time as the approaching termination of the lease makes it possible intelligently to consider the subject.

(124 Pa. St. 339)

IN RE COWAN'S ESTATE.

Appeal of DU BOIS.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

ESTATE OF DECEDENTS—PRESENTING CLAIMS—FINDINGS OF FACT.

1. The proviso to Act March 29, 1832, § 19, declaring that when there shall be insufficient assets to pay all decedent's debts the orphans' court shall appoint creditors to adjust the proportions of the assets among the creditors, "provided, * * * that no creditor who shall neglect or refuse to exhibit his account * * * within 12 months after public notice * * * in * * * newspapers published in the county in which letters testamentary * * * may have been granted," is directory merely; and a decree for distribution is properly opened to let in a belated creditor, who lived at a distance, and had no knowledge of the proceedings to audit, where other creditors have no superior equity.

2. Findings of fact, especially where involving credibility of witnesses, will not be disturbed unless manifestly erroneous.

Appeal from orphans' court, Allegheny county.

Accounting by Margaret A. Cowan, executrix of William G. Cowan, deceased. From the decree in the matter of the audit of the account, John E. Du Bois, a claimant against the estate, appeals. Affirmed.

Geo. L. McCleary, A. V. D. Watterson, and A. B. Reid, for appellant. John S. Robb and Wm. H. McClung, for Samuel Crawford.

DEAN, J. William G. Cowan, of Allegheny county, died on 25th of May, 1895, leaving, to survive him, a widow, Margaret A. Cowan, a son, John L., and a minor daughter, Nannie. On the 17th of September, 1894,—about eight months before his death,—he made his will. Evidently he believed himself then to be possessed of a considerable estate, for he gave to his wife, Margaret, all his personal property and his residence. To his daughter, Nan-

nie, he bequeathed the sum of \$5,000, to be paid her when she attained her majority. He then gave all the residue of his estate to his wife and son, John, to be equally divided between them, and appointed them executors of his will. As it turned out, the estate was largely insolvent. For some time before his death, he had been in partnership with his son in a wholesale lumber business in Pittsburg. On his death his widow and son continued the partnership in the old firm name of William G. Cowan & Son, but a new set of books was opened, and all the transactions of the new firm were kept in the new books, whether they related to the old or new indebtedness. Printed notices were mailed to all having dealings with the old firm, announcing the death of the senior partner; that John, the surviving partner, would adjust the partnership accounts; and that a new partnership had been formed by Mrs. Cowan and her son for the continuation of the business. Notice of the granting of letters testamentary, in the usual form, was duly given by publication in the Pittsburg Dispatch once a week for six successive weeks from the 13th of June, 1895. Before the death of the father, W. G. Cowan & Son had delivered to Samuel Crawford promissory notes amounting to \$2,210.58. They also owed him a balance on open account of \$1,551.08. The notes given by the old firm were paid. The open account was closed by delivering to Crawford notes of the new firm. The old firm had also entered into a contract, on 8th of March, 1895,—more than two months before the father's death,—with D. Wheeler, of Reynoldsville, for the purchase of over 2,000,000 feet of lumber in stock at Reynoldsville, at the price of \$7.50 per 1,000, board measure, free on board cars, the lumber to be shipped, as ordered by Cowan & Son, to be paid for by two notes in advance, each of \$1,000, at three and four months; these to be credited on first shipments, and thereafter the shipments to be paid for monthly with three-months notes. At the death of William G. Cowan, the old partnership owed Wheeler on this contract \$4,312.32, for which Wheeler held four \$1,000 three-months notes not yet due. The balance—\$312.32—stood as an open account. The first two notes for the advance payment were paid at maturity. The other two were taken up with notes of the new firm, and these were several times renewed in part, and part paid. Wheeler continued the shipments up until after August, 1895, his total shipments being 1,800,000 feet, and the contract price of same \$14,474.90, of which amount, as before noticed, \$4,312.32 had been shipped in the lifetime of W. G. Cowan. The claim of this appellant is on judgment 295, October term, 1896, for \$1,812.18, against W. G. Cowan, deceased, and the amount is not contested. He alleges the Crawford claim should be wholly, and the Wheeler claim in large part, treated as debts of the new firm, and are not entitled to share in this distribution. The new firm failed about March, 1896, and is conceded to

be altogether insolvent. Whatever may have been the value of the interest of William G. Cowan in the old firm on 25th of May, 1895, by the action of the executors and surviving partner, in blending the accounts of the old with those of the new firm, that value seems to have wholly disappeared. On 10th of October, 1896, in obedience to a citation, Margaret Cowan, one of the executors, filed her first and final account, showing a balance for distribution of \$4,088.90. This was made up of \$200 personal property, and \$4,500, an interest of decedent in another partnership, from which was deducted the ordinary expenses of administration. On November 21, 1896, John L. Cowan, her co-executor, also filed his first and final account. He charges himself with receiving \$56,751.04. This is made up of cash on hand, \$726.30; bills receivable, \$3,892.08; accounts receivable, \$4,352.66; cash from partnership interest of decedent in Seifert, Cowan & Hamilton, \$4,500; interest in Cowan, Ahlers & Co., \$4,800. He then claims credit for \$56,850.33, leaving a balance due him of \$108.20. Exceptions were filed to both accounts, and, after notice to creditors, Margaret's was audited by Judge Over on January 19, 1897, and decree entered January 25, 1897. By this decree, after paying expenses of audit, and all proven claims of creditors, there was a balance of \$663.90, which was awarded to Nannie J. M. Cowan, the minor daughter, on account of her legacy. Neither the Crawford nor Wheeler claim was laid before the auditing judge at this hearing. He directed that the schedule amounts be paid the distributees, unless an appeal was taken within 20 days. Within that time, on February 3, 1897, Wheeler presented his petition to the court, praying that the decree be opened, and that he be allowed to prove his claim. The petition set out an indebtedness of W. G. Cowan & Son, the old firm, unpaid, of \$2,287.71; that petitioner was a resident of Reynoldsville, Jefferson county; that he had had no notice of the filing of the executor's account, nor of the audit; that the first knowledge he had of the adjudication was the final decree. A citation was awarded to the executors and other creditors to appear and show cause why the decree should not be opened, to which answers were made by the executrix and Du Bois, this appellant, averring the estate was not indebted to Wheeler, and further denying his right to come in on the fund after audit and final decree, because he had not delivered to the executors, within 12 months from publication of issue of letters testamentary, a statement of his claim. Afterwards, on April 13, 1897, Crawford presented a similar petition, to which a like answer was made by the executrix and creditor. The auditing judge, after hearing, opened the decree and passed on the claims. His action was founded on a rule of the orphans' court, as follows: "Exceptions may be filed by leave of court to any adjudication of audit, within twenty days after such adjudication shall have been entered." As Wheeler's petition was

presented within the 20 days, and Crawford's while proceedings were pending on that petition, the learned auditing judge was of opinion that, although Crawford and Wheeler had neglected to exhibit their claims to the executors within 12 months, and to lay them before the auditing judge, this arose from the failure of the executors to file a correct inventory showing assets, and from ignorance as to an audit for distribution; and, while deciding that the claims of creditors already adjudicated and allowed could not be affected because of the proviso to act of March 29, 1832, nevertheless legatees were not protected by that act, and that, as concerned the award of the balance—\$663.15—to the daughter, they were entitled to share pro rata in that sum, and so decreed. The act invoked is as follows: "Whenever there shall not be sufficient assets to pay all the debts of the decedent, it shall be the duty of the orphans' court having jurisdiction, upon the application of the executor or administrator to appoint auditors to settle and adjust the rates and proportions of the assets to and among the respective creditors according to the order established by law. Provided, nevertheless, that no creditor who shall neglect or refuse to exhibit his account to the executor or administrator within twelve months after public notice given in one or more newspapers published in the county in which letters testamentary or administration may have been granted, * * * and continued for four [now six] consecutive weeks, shall be entitled to receive any dividend of such remaining assets." Laws 1831-32, p. 194, § 19.

The decree was made July 24, 1897. Exceptions were filed by Wheeler and Crawford to the adjudication, alleging error in not distributing the whole fund pro rata among all the creditors. On hearing before the court in banc, it was decided, Hawkins, P. J., delivering the opinion, that the proviso to the act of 1832 did not bar Wheeler's and Crawford's claims to share pro rata in the whole fund; saying: "No case has been found in which failure to notify the administrator has been made a ground of refusal to allow a claim presented at the audit, and it would be strange, indeed, if such case had been found. On the death of a debtor, his estate passes into the grasp of the law for the purpose of administration and distribution; and his creditors, like any other suitors, are entitled to their day in court, and to judicial sanction. The sole object in requiring notice to be given administrators, is to enable them to ascertain the status of claims with a view to the audit. Their duties are ministerial, not judicial. If it be apparent that no injustice will result from failure to give notice to them, there is no reason for the exclusion of the creditor from sharing in the distribution. Forfeitures are odious to equity as to law. There is an established principle that where, as here, the thing to be done may as well be done after as before the time prescribed, where it is a matter of manner, or

der, or convenience, rather than of substance, the courts assume the legislative intent to have been merely directory. *Dwar. St. 222.* This is a clear and concise summing up of the view we take of the law on the question, and the proper construction of the proviso to the act of 1832. The case relied on by the auditing judge as holding otherwise (*Mitchell's Estate, 2 Watts, 88*) does not itself stick to the letter of the act. True, in that case the money had not been actually paid out, but the assets had been marshaled and distributed, and the subject referred to auditors for a special purpose. The court held, under the facts of that case, that the demand of the creditor was not in time, because it had not been exhibited to the administrator within 12 months, as required by the act of 1794; but in so deciding, says: "We would not wish it to be understood that, if a claim is made to the administrator after the expiration of twelve months, but before an audit, a creditor would be postponed. That, although within the letter, would perhaps be a hard construction of the act." Then in the latter part of the opinion the real intent of the act is announced in these words: "This is not strictly an act of limitation, but a direction made for the benefit of administrators." The same construction is given the act by Judge King, in *Smith's Estate, 1 Ashm. 352*, thus: "The object of the act was to secure the administrator of insolvent estates from further liability to creditors after they have distributed the assets according to law. * * * If the notice required by the act has been given, and any creditor neglects to exhibit his account, and the assets are apportioned and distributed before notice of his claim, his remedy against the administrator is gone forever. The law is but an act of limitation, intended to protect the administrator after he has distributed the fund in the time and manner prescribed by law." Therefore, as long as the personal representative, for whose protection the proviso was enacted, is not prejudiced, it will seldom happen that equity will not permit the bona fide creditor to come in on the fund. Admit the full force of the rule that the law favors the vigilant creditor, it does not follow that the lax one is to be outlawed in a distribution of the assets of a decedent's estate, which the law declares shall be distributed among all the creditors, merely because he is not vigilant. Speedy distribution is to be favored, but this must be had with due regard to the circumstances where, as here, the inventory showed only trifling assets; where the creditors resided remote from the court of adjudication; where the law required publication only in a newspaper published within the county; where no portion of the fund had—at least legally—been paid out under the first order of distribution. The court below was clearly right in holding that Wheeler and Crawford were not too late in presenting their claims. The orphans' court

doubtless may, on the facts presented, even where the fund is still in court, refuse to open a decree for distribution. Where the belated claim, on its face, is not a meritorious one; where a vigilant creditor, at great trouble and expense, has succeeded in swelling the assets of an insolvent estate, and has had his claim passed on, and award made, then the negligent creditor, with knowledge of the proceedings, before the money is actually paid out, comes in, and asks to share pro rata in the fruits of the other's vigilance,—the orphans' court, as a court of equity, may well decline to open the decree. But there is nothing like that in this case. The status of the claim of all creditors under the law was fixed as of the date of decedent's death. All then had an equal claim to the property from which this fund was realized. No one of them lost his right in the distribution, unless by his supineness or negligence, and now to assert it would prejudice some other right, or occasion inconvenience and loss to the personal representatives. And this has been the uniform course of the decisions in this court since *Mitchell's Estate, supra*, and an experience of more than 20 years on the bench satisfies us that it has been the uniform practice of the orphans' courts of the state. The proviso is directory, is only a rule of administration, and should be relaxed to reach the equities of all the creditors, as long as such relaxation prejudices not the representative, and disregards no superior equity of a particular creditor.

All the authorities cited tending to show that, if laches or negligence on the part of the creditor appear, the court will not open the decree, do not apply to these facts. The auditing judge refused to find negligence on part of these creditors. He assumed as a fact they were ignorant of the existence of the fund, and had neither notice nor knowledge of the audit. If they had known of a fund for distribution, and had knowledge of the audit, and then neglected to lay their claims before the auditing judge, an entirely different question would have been presented. Under such circumstances, no court of equity would have been moved to open the decree.

The court below sustained the exception to the decree of the auditing judge, and directed a pro rata distribution of the fund among all the creditors, including Crawford and Wheeler. When their claims were admitted, the insolvency of the estate was demonstrated, and the *Du Bois* judgment, instead of being paid in full, was awarded, along with other creditors, only about 32 per cent., and thereupon he brings this appeal, assigning 13 errors, which, in substance, may be reduced to 3: (1) The court erred in not holding the claims of Crawford and Wheeler were barred by the proviso to the act of 1832; (2) in not finding as a fact that there had been a novation by consent of the parties, whereby Crawford and Wheeler had

released the old firm from all obligations, and had accepted the new one as their debtors; (3) the court erred in not computing in the distribution the sum of \$4,000 paid by John L. Cowan, one of the executors, to Wheeler, and which sum the executor took credit for in his account filed. As to the first,—that the court erred in its construction of the act of 1832,—we have already expressed our opinion, and concur with the court below in its judgment on that question. All the assignments bearing on it are overruled. As to the second,—the alleged novation, whereby the debt of the old firm was extinguished, and by agreement of the parties was assumed by the new one,—there is much evidence tending to establish this allegation. Some of it is scarcely explicable on any other theory. Yet all writings and the witnesses were before the auditing judge, and he falls to find that Crawford accepted the new firm as his debtor, and finds that Wheeler did not, except as to deliveries of lumber after August 24, 1896. While the correctness of this finding of fact is doubtful, we cannot say there is manifest error. There is evidence to sustain it, especially that of the two creditors, corroborated to some extent by the testimony of the surviving partner, John L. Cowan. But the conduct of the parties, and the accounts and writings, are very significant to the contrary. Nevertheless we will not overrule on a finding of fact, especially one involving the credibility of witnesses, unless it be manifestly erroneous. As to the third assignment of error, alleging that \$4,000 paid Wheeler, for which John L. Cowan claims credit in his account as executor, should in this audit be computed as paid Wheeler on his claim, we can only say that account is not before us. This is an appeal from a final decree of the account of Margaret A. Cowan. Nor does it appear that John's account as executor has ever been finally adjudicated, nor that he ever settled, as surviving partner, the partnership accounts. It is very clear that John should not have a credit as executor for the amount of the pro rata allowed on the balance in the hands of Margaret A. Cowan. It is equally clear whatever money was paid Wheeler by the surviving partner, after the death of his father, on a debt of the father's, should be computed as paid on his claim against the estate. It is impossible, however, in the absence of an adjudication of John's account as executor, to determine what money is properly to be credited as a debt of the father's. Much of the confusion in these accounts arises from the neglect to compel a full settlement by John, the surviving partner, of the partnership accounts first, and thereby determining the value of the father's interest in that partnership. Starting with this either as an asset or liability in the account of John as executor, there could not have arisen the present complication. If there be any ground for complaint raised by

this third assignment, it can be heard and adjudged in the final hearing on John's account as executor, and it ought to be disposed of there. The assignments of error are overruled, the appeal dismissed, and the decree of the court of September 28, 1897, is confirmed absolutely. Costs to be paid by appellant.

(184 Pa. St. 325)

POWERS v. RICH.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

ATTORNEY AND CLIENT—ACTION BY ATTORNEY FOR SERVICES—INSTRUCTIONS—APPEAL—REVIEW—HARMLESS ERROR.

1. In an action by an attorney on a contract for his services, only a part of which he was allowed to perform, it was harmless error to admit evidence of what plaintiff would have earned had he been permitted to complete his contract, where the court, in its charge, ruled that he could only recover the value of the services actually performed before his discharge.

2. In an action by an attorney on a contract for his services, only a part of which he was allowed to perform, the court left to the jury the questions as to whether there was a contract, and, if so, what was the value of the services actually rendered before its termination. There was evidence on both points, and the charge indicated plainly the judge's view that plaintiff's claim on the basis of what he actually did was excessive. *Held*, that defendant had no ground of complaint.

Appeal from court of common pleas, Allegheny county.

Action by Charles L. Powers against Abraham L. Rich on an alleged contract for the services of plaintiff as an attorney at law to conduct certain litigation, only a part of which services plaintiff was permitted to perform. From a judgment for plaintiff, defendant appeals. Affirmed.

M. A. Woodward, for appellant. Johns McCleave, for appellee.

MITCHELL, J. There is nothing in any of the assignments of error which would justify us in reversing this judgment. The first three are to the admission of evidence of what the value of plaintiff's services would have been had he been allowed to conduct to the end the litigation which he commenced. Whether this evidence was relevant or not depends on the true rule for the measure of damages where an attorney who is employed to conduct a suit is discharged without cause before the end of the litigation. On this point there are very respectable authorities that put him upon the same plane as other agents or employés rendering personal service, and allow him full compensation for what he would have earned had he been permitted to complete his contract. But the learned judge below ruled otherwise, and, though he at first admitted some evidence on that point, yet in the charge he ruled directly and emphatically that plaintiff could only recover the value

of the services he actually performed before his discharge. The judge was not asked to strike out this testimony, though it is plain that he would have done so on request; and the contrary rule for this verdict was so clearly and positively given to the jury that they could not have been misled. As it could not therefore have done the appellant any harm, it is unnecessary for us to consider it further.

The remaining assignment is to the charge practically as a whole. This left to the jury two questions: First. Was there a contract by defendant to pay for plaintiff's services? And, secondly, if so, what was the value of the services actually rendered before termination of the employment? As there was evidence on both points, and the charge indicated very plainly the judge's own view that plaintiff's claim on the basis of what he actually did was excessive, we fail to see what the appellant has to complain of. The jury did not go beyond the evidence, and, if they were too liberal in their allowance, it was for the court below rather than for us to say so. Judgment affirmed.

(184 Pa. St. 161)

FRENCH et al. v. PITTSBURGH VEHICLE & HARNESS CO. et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

RECEIVERS—PERSONAL LIABILITY—ACCOUNTING—CREDITS.

1. A receiver sold goods of the insolvent estate soon after appraisal, to a firm of which it was, at the time, understood he was to become a member after he was released from the receivership, and of which he was a member at the time of the audit of his account as receiver. *Held*, that the account was properly surcharged with the difference between the appraised value of the goods and the amount for which they were sold, in the absence of any sufficient explanatory evidence on the receiver's behalf.

2. An order of court authorizing a receiver to sell a certain leasehold required the purchaser "to assume the ground rent on the premises from the date of the sale." There were subsequent proceedings to substitute another in lieu of the original purchaser. *Held*, that the receiver was not entitled to credit for the amount paid as rent from the date of sale until the substitution of the purchaser.

Appeal from court of common pleas, Allegheny county.

Bill by Philo N. French and others against the Pittsburgh Vehicle & Harness Company for a receiver. The court appointed Armund C. Hess receiver, who sold the property of the defendant, and filed his report. From a decree dismissing his exceptions to and confirming the auditor's report, Hess appeals. *Affirmed*.

That part of the auditor's findings of facts relating to the Williams leasehold, sold by the receiver, is as follows: "On 24th October, 1893, the receiver was granted an order to sell the Williams leasehold at public sale, to be approved before consummation. On

17th November, 1893, it was offered at public sale, and El. G. Ferguson bid \$50 upon the terms of 'the purchaser assuming the uncompleted contract for the building partly erected by Murphy & Hamilton, and to assume the ground rent on the premises from the date of sale.' Receiving the same bid in another week, and no other, the receiver presented his petition to court on 25th November, 1893, to that effect, and was granted an order to make sale and assignment on the terms aforesaid. On 9th December, 1893, the receiver presented a petition, setting forth that he was in error in his former petition in stating that the purchaser, Mr. Ferguson, had agreed to assume the uncompleted contract with Murphy & Hamilton. On the contrary, it was desired to cancel the said contract, leaving the purchaser to erect such building as he desired, and that Mr. Ferguson had requested him to make the sale and assignment to Murphy & Hamilton, and 'that thereupon said Ferguson was ready to deliver the said contract canceled, together with satisfaction of all claims of Murphy & Hamilton against the company, except that Murphy & Hamilton would retain all payments made to them by the company'; and 'praying that the former sale be vacated and order granted to sell to Murphy & Hamilton on the aforesaid terms,' which was granted as prayed for. The receiver has not accounted for the \$50 purchase money for this leasehold. In addition to the rent paid by order of court on the Williams lease, the receiver paid \$3,140.96, being \$1,657.63 for taxes and water rent and delinquent tax collector's commission for 1893, which were by the lease part of the rent, and \$1,483.33 monthly rent on said property from 1st October, 1893, to 11th December, 1893, the date when the receiver transferred lease to Murphy & Hamilton. The amount of rent paid from date of sale to date when written transfer was made was \$447.83. The receiver did not complete payment of \$1,875, allowed by order of court, until 3d January, 1894; the said additional sum of \$3,140.96 was not paid until after the sale of the lease to Murphy & Hamilton. In his petition for the sale of the Williams leasehold, the receiver represented to the court that the rent thereon was \$7,500 per year, when including the taxes, which were part of the rent, it was more than \$9,000 per year."

That portion of his conclusions of law relating specifically to the same subject is as follows: "And the Williams leasehold was sold to Murphy & Hamilton by the terms of which Murphy & Hamilton's whole claim for the construction of the building on it was wiped out. This may be perhaps fairly enough argued as best for the trust, even under the drain on the fund by the heavy payments of rent and taxes. There being doubts as to what course was really best to pursue, the receiver's acts must be regarded, as said before, with indulgence. The conduct required of a trustee is that of an ordi-

nary man; that of one having common skill, prudence, and caution. *Neff's Appeal*, 57 Pa. St. 96; *Fahnestock's Appeal*, 104 Pa. St. 46. And in the handling of the leaseholds there was nothing shown to warrant the auditor in finding that the receiver plainly failed in this requirement. In the sale, however, of the Williams leasehold to Murphy & Hamilton, the terms were the assumption of rent by them from the date of sale. Instead of this, the receiver paid rent to the day of delivery of the assigned leasehold. The rent amounted to \$447.33, and he is surcharged therewith. The consideration of the sale to Murphy & Hamilton was \$50, and, not being accounted for, is surcharged also."

J. H. Baldwin, James W. Collins, and Samuel McClay, for appellant. A. V. D. Watterson and A. B. Reid, for appellees.

STERRETT, C. J. The subjects of complaint in this appeal are certain surcharges against the appellant, Armand C. Hess, receiver of the defendant company, made by the learned auditor, and approved by the court below. It is proper to say, in limine, that appellant was not surcharged for any loss arising from mere error of judgment. Exceptions to his account, embracing errors of judgment only, were dismissed by the auditor, as appears by his report. Other exceptions of a graver character were sustained by both auditor and court; and a careful examination of the record clearly shows that the appellant has not been treated by them with undue severity. The uncontradicted evidence as to his sale to the Pittsburgh Cycle Company proves the existence of facts and circumstances which justly imposed on him the burden of proving that the transaction was one of fair dealing, and that the price was not inadequate. Mr. Pepper, a member of the purchasing firm, testified that "at the time of the purchase from Mr. Hess (the appellant), in November, 1893, it was understood that he (Hess) was to become a member of the Pittsburgh Cycle Company after he was released from the receivership. He afterwards became a member, and is so now." Appellant himself testified: "As to the firm of Pepper & McGowan (trading as the Pittsburgh Cycle Company), it was formed in the latter part of November, 1893. It consisted of Pepper and McGowan, with the understanding that they were to employ me at a salary of \$1,200 a year, and later (as soon as the Vehicle and Harness Co. was wound up) to admit me as a partner." The rule prohibiting trustees from purchasing at their own sale, without previous permission, applies with much force to a transaction such as this. The learned auditor accordingly surcharged appellant with the difference between the appraised value of the goods and the amount for which they were sold, as aforesaid, to the Pittsburgh Cycle Company soon after the appraisal was made.

In the absence of any sufficient explanatory evidence, on behalf of appellant, he has no just reason to complain of this.

As to the allowance claimed by appellant for bicycles included in the inventory, but which he alleged were left for repairs only, and did not belong to the assignor company, the auditor rightly held that the claim for allowance was not substantiated. The clerks by whom the inventory and appraisal were made were not called to testify, although they were in the city at the time of the hearing. In view of all the circumstances disclosed by the evidence, the credit claimed was properly disallowed.

The credit claimed for payment on the Williams lease was also properly disallowed. The order of court authorizing the sale of the leasehold required the purchaser "to assume the ground rent on the premises from the date of sale." The purpose of the subsequent proceedings on this lease was not to authorize a second sale, but to substitute another, in lieu of the first purchaser, on the same terms, as appears from the fact that the first purchaser joined in the petition expressly requesting such substitution. Further discussion of the questions involved in this appeal is unnecessary. They are all destitute of merit, and none of the specifications are sustained. Decree affirmed, and appeal dismissed, at appellant's costs.

(184 Pa. St. 156)

SCHOOL DIST. OF BOROUGH OF DUKESNE v. PITTS et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

SCHOOL TAXES—JUDGMENT AGAINST COLLECTOR—STATUTES—CONSTITUTIONAL LAW.

1. Though Act May 8, 1854 (P. L. 617), to which Act April 11, 1862 (P. L. 474), is a supplement, is repealed, in so far as it provides for appointment of a collector of school tax, by Act June 25, 1885 (P. L. 187), providing for election of borough and township collectors to collect county, borough, township, school, poor, and other taxes, Act 1862, § 13, authorizing the filing by the board of directors or controllers of a school district, within a year from the delivery of the duplicate of school tax to the collector thereof, of a certificate stating the amount of the tax due and unpaid by the collector, the same to be entered on the docket by the prothonotary, with the effect of a judgment against the collector and his sureties, is not repealed by Act 1885, as the latter act does not undertake to provide a complete system for the collection of taxes, different from and independent of the method provided in the former act; Act 1885, § 11, providing that "the accounts of collectors of taxes shall be settled by township or borough auditors, * * * and he shall state a separate account for each different tax collected by him," not being in conflict with said section 13.

2. Act April 11, 1862, authorizing the filing of a certificate by the directors or controllers of a school district, stating the amount of the tax due and unpaid by the collector, which, being entered on the docket by the prothonotary, shall have the effect of a judgment against the collector and his sureties, does not contravene Const. art. 1, § 4, providing: "Trial by jury

shall be as heretofore and the right thereof remain inviolate,"—trial by jury not having theretofore existed in such case.

Appeal from court of common pleas, Allegheny county.

Proceeding by the school district of the borough of Duquesne, under Act April 11, 1862, § 13, resulting in judgment for it against Arthur B. Pitts and others. From decree striking off the judgment, on petition of said Pitts, the school district appeals. Reversed.

Charles B. Payne, for appellant. Jos. R. McQualde, for appellees.

STERRETT, C. J. This appeal is from the decree striking off the judgment against the defendant Arthur B. Pitts and his sureties, entered on certificate filed by the plaintiff school district under section 13 of the act of April 11, 1862 (Purd. Dig. p. 338, pl. 35), which reads as follows: "The secretary of any board of directors or controllers may at any time within one year from the delivery of the duplicate of school tax to the collector thereof, file a certificate signed by the president and attested by the secretary in the office of the prothonotary * * * stating the amount of said tax due and unpaid by said collector at the date thereof; and it shall be the duty of the prothonotary to enter the same on his docket, which certificate shall, from such entry, have the same operation and effect as a judgment of said court against said collector and his sureties; and execution may be issued thereon, in like manner as in judgments, for the amount remaining unpaid at the date of said execution." As set forth in the defendant's petition, the grounds upon which the court was asked to strike off the judgment were that an injustice had been done defendant and his bondsmen by entering said judgment, and that the same was not done in good faith, nor in the exercise of a sound discretion on the part of the school board; that the entry of the judgment "was without warrant of law, the said act of assembly having been altered and repealed by subsequent legislation, and that any such law as the act aforesaid, if not repealed, is unconstitutional and void; that as yet the auditors of said borough have not passed upon the accounts of said collector, as provided by the act of June 25, 1885 (P. L. 189)." On these vague and indefinite averments, a rule to show cause was granted, and afterwards made absolute, "without prejudice to plaintiff's right to sue on the collector's bond." In such a case as this, at least a brief opinion should be filed, but it does not appear that this was done, or any reason given by the court below for thus summarily striking off the judgment depriving plaintiff of its lien on the land of the collector and his sureties, and remitting it to a personal action on the bond. It was not even averred that the amount of the judgment was not due and owing by defendant to plaintiff, nor was it averred wherein the plaintiff had not acted "in good faith," or exercised "a sound

discretion." The only questions that are even suggested are the invalidity of the judgment and irregularity of its entry. If the thirteenth section of the act of 1862, above quoted, was in fact supplied or repealed by subsequent legislation, the action of the common pleas was not improper; but, if it was not, the court was in error, and the decree should be reversed and the judgment reinstated.

The contention is that it was impliedly repealed by the act of June 25, 1885 (P. L. 187). If that be so, it must be because the two enactments are so totally repugnant that they cannot both stand. Our consideration of the acts discloses no such antagonism. The act of 1885 provides for the annual election of borough and township tax collectors to collect the several county, borough, township, school, poor, and other taxes, except that road taxes may be worked out as theretofore. So far, therefore, as the act of 1854, to which the act of 1862 is a supplement, provided for the appointment of a collector of school tax, it has been repealed by the act of 1885. But the last-named act does not undertake to provide a complete system for the collection of taxes, different from and independent of the method provided in the act of 1854. On the contrary, the act of 1885 recognizes and expressly makes use of the machinery of the act of 1854. In section 4, the several school and other authorities empowered to levy taxes, etc., are required to issue duplicates to the collectors so elected. The school taxes are assessed under the provisions of sections 28-30, and other sections of the act of 1854. Section 10 of the act of 1885 provides that "exonerations may be made by the authorities and, in the same manner as heretofore." The method of exoneration, as to school tax, is provided in section 31 of the act of 1854. For these and other reasons, we think the act of 1885 does not repeal the prior legislation by providing a new and complete system for the collection of taxes, different from and independent of theretofore existing provisions. It has not been shown, nor do we think it can be, wherein the provision, in section 13 of the act of 1862, for filing a certificate and entering judgment against the tax collector and his sureties is in conflict with the later enactment. The provision of the act of 1885 which is supposed to be in conflict with the thirteenth section of the act of 1862 is section 11, which provides: "The accounts of collectors of taxes shall be settled by township or borough auditors of the proper township or borough, and he shall state a separate account for each different tax collected by him." There is nothing in this that interferes with the reasonable operation of section 13 of the act of 1862, the primary purpose of which was security and protection of the school district by means of a lien against the real estate of the collector and his sureties. After the act of 1885, as well as before, exonerations are to be made by the several authorities, and in the same manner as before. As to the execution that may be issued on the

judgment against the collector and his sureties, the court will control that, as was done in this case, pending the consideration of any alleged legal or equitable defense. If accounts settled by the auditors show amounts different from those named in the certificate of the school board, the court will not fail to limit the execution accordingly. The acts under consideration, taken together, form a complete and harmonious system for the security and collection of the school fund, and present no points of antagonism that will interfere with their proper enforcement.

The further contention that the thirteenth section of the supplement of 1862 is unconstitutional scarcely requires a passing notice. The right to trial by jury is not guaranteed by the constitution in every case. The language of section 6 of article 1 is: "Trial by jury shall be as heretofore and the right thereof remain inviolate." In *Moore v. Houston*, 3 Serg. & R. 169, an act providing for fines inflicted for breach of military duty, without right to trial by jury, was adjudged constitutional. So, also, trial of contested elections by the court (*Ewing v. Filley*, 43 Pa. St. 384), and summary convictions (*Byers v. Com.*, 42 Pa. St. 69). See, also, *Rhines v. Clark*, 51 Pa. St. 96; *Haines v. Levin*, *Id.* 412. Generally speaking, the legislature may provide any system of settlement or trial without coming in conflict with the provision of the constitution, if trial by jury did not exist in such case theretofore. *Van Swartow v. Com.*, 24 Pa. St. 131, and cases above cited. This is such a case.

The decree striking off the judgment is reversed, and wholly set aside, at the costs of the defendants, and said judgment is fully reinstated.

(184 Pa. St. 222)

IN RE KREBS' ESTATE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

ACTIVE TRUST.

A will providing that testator's property be divided in equal shares among his children, with the condition that G. "shall only receive the interest of his share, or as much as in times of sickness or accident my executor will give him to meet his wants," creates an active trust as to his share, by reason of the discretion vested in the trustee.

Appeal from orphans' court, Allegheny county.

In the matter of the estate of Michael Krebs, deceased. Petition of George Krebs to revoke the decree in partition, appointing the safe-deposit and trust company trustee for petitioner, and to direct said trustee to pay him all money in its hands belonging to him, was dismissed, and he appeals. Affirmed.

The opinion of the court below is as follows (Hawkins, P. J.):

"The question involved in this matter is whether or not an active trust was created

by the will of Michael Krebs, in respect of the share given to his son George, in the following clause: 'Fourth. It is my will that after the death of my beloved wife, Dorothy Krebs, all the property, real and personal, then left by her, shall be divided in equal parts or shares between my children, with the condition that the money loaned to George Krebs shall be deducted from his share, and with the condition that George J. Krebs shall only receive the interest of his share, or as much as in times of sickness or accident my executor will give him to meet his wants.' This share was allotted in partition to a trustee without objection, and is now held in trust; but it is insisted that this was a mistake, and the court is asked in the present proceeding to declare the trust executed.

"It is insisted that, because there was in the first instance an absolute devise and no gift over, George J. Krebs took in fee. If this was all, the conclusions must be conceded; but it leaves out of view the condition attached that he should 'only receive the interest of his share, or so much as in times of sickness or accident the executors may give him to meet his wants.' 'No principle,' said Mr. Justice Strong, in *Re Sheet's Estate*, 52 Pa. St. 257, 'is better settled than that if the testator, in one part of his will, gives to the person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a lesser interest only, the prior gift is restricted accordingly. Subsequent provisions will not avail to take from an estate previously given qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define the estate given, and to show what without them might be a fee was intended to be a lesser right.' Applying this principle, what was the intent here? There is no doubt of an intent to vest absolutely in George J. Krebs a beneficial estate; but did the discretionary power vested in the executor create a valid restraint upon its use? If this implied an active trust, it did. The creation of a trust, whether temporary or continuous, is entirely consistent with the devise of an absolute beneficial estate. It is not contradictory of the estate, but a mere qualification of its use, and only establishes a new and consistent relation. *Ivory v. Burns*, 56 Pa. St. 300. An impression seems to have somehow arisen that, because there is no gift over, there can be no trust; but a gift over is simply a circumstance to be taken into consideration in ascertaining the quantity of the beneficial estate, and is just as consistent with the existence of a trust as if words of inheritance had been used. All the authorities go to show that there may be an absolute beneficial estate consistently with a temporary or continuous trust. The test of the validity of a trust is a lawful purpose, legally declared, and its duration, measured by the accomplishment

of such purpose. Apt illustrations of this principle are coverture and spendthrift trusts. Thus, in *Berg's Appeal*, 186 Pa. St. 113, 30 Atl. 1022, it was insisted that the testator had used language in the first instance which created a fee simple in the clearest and most unequivocal terms; but, because this clause was coupled with the exclusion of the husband, it was held that 'the use was absolute, and a trust for coverture only.' So, in *Millard's Appeal*, 87 Pa. St. 457, where trustees were directed to pay the income to testator's nephew, and, in their discretion, the corpus, from time to time, and there was no gift over, the court said that the plain intent was to give 'the entire beneficial interest to his nephew, * * * and at the same time prevent the fund from being wasted through idleness or intemperance,' and thereupon gave the fund to the personal representatives of the nephew then deceased. So, on the other hand, in *Sheaffer's Appeal*, 8 Pa. St. 38, where the interest of a fund was given for life to testator's widow without a gift over, the trust was sustained, although the next of kin were held entitled in remainder. The difficulty in the cases has been, not in the existence of power, for that is conceded, but whether or not the language employed was enough to create an active trust. There runs through all of them, however, these distinguishing characteristics: that there shall be substantial duties attached to the use of an estate which require that the legal title be vested in the trustee. Its creation does not depend upon any particular form of words, but upon the plain intent. Among the recognized classes of such trusts is that in which it is left to the discretion of the trustee to withhold or give specified donees trust property. If there be a condition precedent to the devise that the trustee shall exercise his power, no interest will pass to the donee until the power be exercised in his favor; and, if the trustee refuses or neglects, the gift cannot be enforced by the courts, unless it be shown that he was influenced by improper motives. *Hill, Trusts*, 489. Thus, in *Pink v. De Thulsey*, 2 Madd. 157, a legacy was given 'under the condition hereinafter written,' and in a subsequent part of the will the executor was authorized to give 'the principal in case he should deem it advantageous to the legatee.' The trust was sustained. So, in *Keyser v. Mitchell*, 67 Pa. St. 473, where an absolute discretionary power was given a trustee over the income, it was held that the donee had nothing until this discretion was exercised. The same principle was recognized in *Millard's Appeal*, *supra*. The result of the cases in respect of those trusts which are not executed by the statute of uses is concisely stated in *Perry, Trusts*, § 305, thus: 'If any agency, duty, or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised or duty performed by the trustee in apply-

ing the rents to a person's maintenance, or in making repairs, or to preserve contingent remainder, or to raise a sum of money, or to dispose of the estate by sale, in all these and in other and like cases the operation of the statute is excluded, and the trusts or uses remain mere equitable estates. So, if a trustee is to exercise any discretion in the management of an estate, or in the investment of the proceeds or the principal, or in the application of the income, or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division, or until a request for a conveyance is made,' it is obvious that title in the trustee is essential to the exercise of the discretionary power to withhold or give an estate. In *re Marshall's Estate*, 147 Pa. St. 77, 23 Atl. 391.

'Tested by these principles, solution of the question involved here is easy. The executors are in plain terms invested with discretionary power to withhold or give the trust estate. While there is in the first instance an absolute gift, it is coupled with restraint in the manner of its use. The devise is expressly made 'with the condition of that George J. Krebs shall only receive the interest of his share, or as much as, in times of sickness or accident,' the executors 'will give him to meet his wants.' The testator seems, as was said in *Re Hibb's Estate*, 143 Pa. St. 217, 22 Atl. 882, to have foreboded the thriftless character of his son, and therefore substituted the discretion of the trustee as to the manner of use of the estate; and the direction to deduct the money which the testator had loaned George from his share suggests the reason for the declaration of trust in respect of the residue which immediately follows. The plain and lawful purpose was to prevent his son from coming to want; and for this it was essential that title should be in the trustee. The trust was therefore active, and the petition must be dismissed. The case of *Silknitter's Appeal*, 45 Pa. St. 365, upon which petitioner's counsel mainly relied in argument, is plainly distinguishable from this. All that was decided there was that the direction as to interest was not sufficient to overcome the force of the prior absolute gift (In *re Ritter's Estate*, 148 Pa. St. 577, 24 Atl. 120); while here there was an imperative discretion vested in a trustee to withhold or give the estate which made the trust essentially active.'

J. S. & E. G. Ferguson, for appellant. Henry A. Miller, for appellee.

PER CURIAM. There is no error in the decree from which this appeal was taken. The question presented by the record has been so satisfactorily and exhaustively considered by the learned president of the orphans' court that further discussion is unnecessary. On his opinion the decree is affirmed, and appeal dismissed, at appellant's costs.

(184 Pa. St. 364)

LAKE ERIE GAS, COAL & COKE CO. v. PATTERSON et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

LEASE OF LIFE ESTATE.

A lease for a term of years of land in part of which, as shown by the lease, the lessor had only a life estate, is not terminated by his death, possession of the premises during the term of the lease being guarantied; all covenants being made binding on executors, administrators, and assigns, and the guaranty being made good by instrument executed by the remainder-men.

Appeal from court of common pleas, Allegheny county.

Bill by the Lake Erie Gas, Coal & Coke Company against James E. Patterson and others. Decree for defendants. Plaintiff appeals. Affirmed.

The following is the opinion of the court below (Kennedy, P. J.):

"The purpose of the bill filed in this case is to have declared void and canceled a certain agreement entered into between Alexander McClure and the Youghiogheny & Ashtabula Coal & Coke Company, dated May 27, 1882, and an accounting between the estate of said Alexander McClure, who is now deceased, and the plaintiff, who has succeeded to the rights of the said Youghiogheny & Ashtabula Coal & Coke Company under said agreement, as also the restraining of the defendants from all actions or proceedings against defendants for or on account of said agreement.

"The facts found are as follows, viz.: (1) By agreement dated May 27, 1892, Alexander McClure leased to the Youghiogheny & Ashtabula Coal & Coke Company, for the term of twenty years, from July 1, 1882, all the coal owned by him in fee, or in which he had a life interest, situated in Elizabeth township, Allegheny county, containing about four hundred acres, and also the surface of a piece of land situated in said township, containing about seventy acres; the said lessee agreeing to mine and remove therefrom not less than one million bushels annually, and pay a rental or royalty therefor. (2) That said lease or agreement was subsequently assigned by the said Youghiogheny & Ashtabula Coal & Coke Company to the Union Coal & Coke Company, whose name was changed to the Lake Erie Coal & Coke Company, the plaintiff in this bill, which plaintiff company assumed the obligations of the said agreement, and continued to mine and remove coal from said premises, and pay rental or royalty therefor until the death of the said Alexander McClure, which occurred November 23, 1896. (3) That among other obligations in said agreement assumed by the plaintiff was a covenant 'to drive a continuous entry from the point where the opening made, designated as a main entry, which, as the mining progresses, shall be continued or extended to the back or furthestmost part of

the coal hereby leased.' (4) That the 'back or furthestmost part of the coal' so leased was a tract containing about ninety-six acres, which the said Alexander McClure owned in fee; and between that tract and the balance of the coal and surface leased, and in which the said Alexander McClure had only a life estate, was a tract of land containing about fifty acres, owned by the Youghiogheny River Coal Company, its title thereto having been acquired by deed from William P. Fergus et al., dated August 26, 1887, through which the said entry must pass in order to reach the ninety-six acre tract. (5) That, the Youghiogheny River Coal Company being the sole owners of the stock or property of the plaintiff company, its ownership of the fifty-acre tract of land mentioned in the fourth finding of fact is, for the purposes of this case, the ownership of the plaintiff company. (6) That the plaintiff, in the lifetime of Alexander McClure, drove the entry referred to in the third finding of fact above continuously from the main entry to and into the ninety-six acre tract of coal before mentioned as the 'back or furthestmost part of the coal leased,' in accordance with the provision of the lease or agreement above quoted, running through the fifty-acre tract, owned, as before found, for the purposes of this case, by the plaintiff. (7) That the said Alexander McClure died testate, and his executors, two of the defendants in this bill, and the other defendants herein, who are the devisees under his last will and testament, and also the remainder-men of the coal in which he had a life estate, leased as aforesaid, and being all of the parties interested in the property leased under the agreement aforesaid, having joined in the execution of an instrument in writing to the plaintiff, assuring it (the said plaintiff) that it would not be dispossessed of the said leased premises, and agreeing to protect it in the possession thereof, to the full end of the term of said lease, and to execute any and all papers and assurances necessary to secure it in the possession of said premises. (8) The agreement or lease aforesaid contained the following provision: 'The said party of the first part hereby guaranties peaceable possession of the premises hereby leased during the term of this lease, and agrees and binds himself that, if the said party of the second part should be legally dispossessed thereof, to pay and reimburse the said party of the second part for all improvements made upon the said demised premises by them.' (9) That, by the recitals of the lease, the plaintiff had knowledge that the lessor, Alexander McClure, was only a tenant for life of a portion of the leased premises. (10) That of the coal leased, in which the said Alexander McClure owned only a life estate, nearly all has been mined and removed, there remaining thereof unmined only about seventy acres, of which about thirty acres is solid coal, about eleven acres lies under

streams or runs, and must be left there permanently, and the balance is in pillars and entries; and the coal owned by said McClure in fee, viz. the ninety-six acre tract, only a small portion, to wit, about one acre, has been mined and removed, and in the mining and removal of all of said coal and the entry aforesaid driven by plaintiff has been used. Upon the map offered in evidence, marked 'Exhibit 1,' the unmined coal is indicated in white or light color, and the portions mined and removed are shaded.

"The plaintiff claims that, upon the death of Alexander McClure, it was legally dispossessed of the leased premises, the lease canceled and made void, and it (the said plaintiff) released from the performance of its covenants, and, under the terms thereof, entitled to compensation for improvements erected as made by it upon said premises, and an accounting with the estate of Alexander McClure; while the defendants maintain that the lease is such a contract as survives the death of Alexander McClure, can be carried out by his executors, and that, all the parties interested in the leased premises having joined in the assurance to plaintiff of possession to the full end of the term of said lease, it is bound to perform its covenants. It will be admitted that technically, upon the death of the lessor, that portion of the demised premises which he held for life would revert instantly to the remainder-men, owners of the fee. Indeed, this seems to have been in the minds of the parties at the time of the execution of the lease, which was for twenty years; and, in order to prevent damages accruing to the lessee by reason of its dispossession before the expiration of the term through the death of Alexander McClure, the clause was inserted which has been quoted in the eighth finding of facts above, their intention seeming to be that if the lessor could in any way secure peaceable possession to the lessee of the whole premises, although he owned a portion of them only for life, until the end of the term of twenty years no claim for damages would arise in favor of the lessee. But, while it is true that ordinarily the death of the lessor terminates the lease, 'the whole question in each case is one for construction, and must depend upon the intentions of the parties.' *Billings' Appeal*, 106 Pa. St. 558. In the absence of anything showing a different intention, we would be forced to the conclusion that this lease terminated at the death of Alexander McClure. In this lease, however, we have the provision quoted in the foregoing findings of fact, viz.: 'The said party of the first part hereby guarantees peaceable possession of the premises hereby leased, during the term of this lease, and agrees and binds himself that, if the said party of the second part should be legally dispossessed thereof, to pay and reimburse the said party of the second part for all improvements made upon the said demised premises by

them.' And we have also the further provision that 'all covenants herein bind executors, administrators, and assignees,' which while in itself and by itself is of no special significance, but, taken in connection with the other provisions quoted, there is shown plainly an intention of the parties that if the said lessor, through his executors, administrators, and assigns, should in any way secure the peaceable possession guaranteed, the lease would be binding upon the parties to the full end of the term thereof, and only in case of actual dispossession would the lessee be entitled to compensation for its improvements, and no other damages. The plaintiff claims it was dispossessed by operation of law, but it was not actually dispossessed. On the contrary, all the parties interested have assured it peaceable possession for the full term of the lease, not asking any new or additional consideration, but only that it continue to perform the obligations of the lease to the end of the term thereof, as it seems plain, from the instrument itself, was the intention of the parties, provided it shall have the peaceable possession guaranteed to it.

"The plaintiff claims that the contract is in its nature entire, and that, failing in part by reason of the lapse of McClure's life estate, it (the plaintiff) has a right to repudiate the whole contract. This is answered by a reference to the clause guarantying possession of all of the premises, which guaranty being made good, it is not equitable to recognize any right to rescind the entire contract by reason of the technicality mentioned. In this connection it must not be forgotten that nearly all the coal in which Mr. McClure had a life estate has been mined and removed by plaintiff, only a small portion remaining, and most of that required to be left permanently, and that all of the balance of the coal to be operated under the lease was owned by McClure in fee. This furnished a strong reason in equity for refusing to permit the plaintiff to now have the contract declared void.

"It is insisted that another company owning the tract intervening between the coal owned by the lessor in fee and that in which he had only a life estate, through which intervening tract the entry for the removal of the coal owned in fee must pass, the contract must fail, by reason of the inability of the lessor to provide a mode for the removing of the coal; but this is completely answered by the fact that the owner of the fifty-acre tract, the Youghiogheny River Coal Company, and the plaintiff are one and the same company; and, as has been found, the ownership of said tract by the former company is, for the purposes of this case, the ownership of the plaintiff company.

"The conclusions are that the plaintiff is not entitled to the relief prayed for, and that the bill must be dismissed, at the costs of complainant. It may be gravely doubted

that the plaintiff has any standing in equity to maintain this bill, which seems to be an application for relief from the performance of its own obligation. It is plain that, in case of an action at law by the defendant for the recovery of rental or royalty from plaintiff under the lease, it could set up the matters contained in the bill as a defense to said action; and it is equally plain that, in case of an attempt by plaintiff to remove its fixtures from the premises, the defendants could file their bill to restrain it; but the right of plaintiff to file this bill is not so clear. This question, however, has not been raised. On the contrary, both sides have requested the court to entertain jurisdiction of the bill as filed, and dispose of the question upon its merits, which has been done, without passing upon the question of jurisdiction suggested. Let a decree be drawn in accordance herewith."

Petty & Friend, for appellant. J. S. & E. G. Ferguson and Jacob H. Miller, for appellees.

PER CURIAM. A careful consideration of this record has not convinced us that there is any error in the court's findings of fact or conclusions of law. The case appears to have been carefully considered, and the questions necessarily involved have been rightly decided. We find nothing in either of the specifications that requires special notice or discussion. The decree is affirmed, on the opinion of the learned president of the common pleas, and the appeal is dismissed, at appellant company's costs.

(184 Pa. St. §10)

In re MURPHY'S ESTATE.

Appeal of KURTZ et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

WILLS—CONSTRUCTION—LAPSED LEGACY—CHARITABLE REQUESTS—WHEN VOID FOR UNCERTAINTY—EXECUTORS—POWERS.

1. A bequest of the residue of an estate "to be divided among such benevolent, charitable, and religious institutions and associations as shall be selected by my executors," is not void for uncertainty.

2. Where a testator named his wife as one of the executors, and gave the residue of his estate, after her death, to such charitable institutions "as shall be selected by my executors, or their successors," the sole surviving executor had the power to designate the beneficiaries.

3. Testator gave his wife, among other bequests, 150 shares of railroad stock, with the request that if, one year after his decease, the value of his estate had not materially decreased, she would make "the following distribution of" the railroad stock. He then directed the balance of his estate to be divided among certain charitable institutions. Testator survived his wife. *Held*, that the lapsed legacy to the wife fell into the residue.

Appeal from orphans' court, Allegheny county.

Audit of the account of William A. Robinson, executor of the estate of William R.

Murphy, deceased. From the decree of distribution, Ann M. Kurtz and others appeal. Affirmed.

The opinion of the orphans' court is as follows:

"William R. Murphy died testate on the 18th of April, 1896. By his will, dated July 12, 1894, he made the following provisions for his wife, who died prior to him, to wit, on September 29, 1895. 'Second. I will and bequeath to my wife, Matilda T. Murphy, the sum of five thousand (\$5,000) dollars, and one hundred and fifty (150) shares of the stock of the Pennsylvania Railroad Company; also all my household furniture, my pew in the First Presbyterian Church of Pittsburg and my lot in the Allegheny Cemetery,—these bequests with the provisions made in clause third, to be in lieu of her dower and statutory interest in my estate. To this provision in my will I add, however, the following request: That if, at the expiration of one year after my decease, the value of my estate has not materially decreased from the appraiser's estimate, then she would of her own free will and accord make the following distribution of the above-named Pennsylvania Railroad Company stock: To my nephews J. W. Murphy, J. M. Kurtz, and Daniel Cooper, twenty (20) shares each; to my nieces Annie Murphy, Elizabeth Kurtz, Lucy Randall, and Martha Crane, ten (10) shares each; to my nephews James M. Cooper (son of Wm. M. Cooper), Frank Cooper, and William M. Cooper (sons of Daniel Cooper), to my niece Fannie Cooper (daughter of Daniel Cooper), and to James M. Kurtz, in trust for his children, ten (10) shares each. Third. The rest and residue of my estate, of every kind, I give and bequeath to David Robinson, his heirs and assigns, in trust, however, for the following purposes: To invest and reinvest the same in such securities as he shall deem safe, and the net income and profits thereof to pay to my wife, Matilda T. Murphy, during the term of her natural life, and at her decease the principal sum of said residuary estate, to be by said trustee paid as follows.' He then gave certain pecuniary legacies, and provided as follows in the last paragraph; '(6) The balance of my estate, after the payment of the above legacies and the collateral inheritance tax on them, to be divided among such benevolent, charitable, and religious institutions and associations as shall be selected by my executors, or their successors. It is my will that, should there be a deficiency in my estate, the above legacies shall abate proportionately, save that I wish those to the boards of foreign missions and home missions to be paid in full, and free from any tax. I appoint David Robinson and my wife, Matilda T. Murphy, executors of my will, without bonds, no bonds to be required of them as trustees of the residuary estate.' David Robinson having died prior to testator, he, on February 7, 1895, by codicil, appointed William A. Robinson as trustee and executor,

instead of said David Robinson, deceased. William A. Robinson, as surviving executor, filed this account, and by writing filed made the following distribution of the residue of the estate: 'To the Home for Aged Protestant Women, at Wilksburg, Pa., five hundred dollars; to the Passavant Memorial Home for Epileptics, Rochester, Pa., five hundred dollars; to the trustees of Washington and Jefferson College, at Washington, Pa., for permanent funds, one thousand dollars; to the trustees of the Western Theological Seminary of the Presbyterian Church, in Allegheny, Pa., in aid of fund for establishing a chair of sacred rhetoric and elocution, one thousand dollars. The balance of the said estate to be divided into four equal parts, one of said parts to be given to each of the following institutions, namely: To the Homeopathic Medical and Surgical Hospital and Dispensary, of Pittsburg, Pa., for permanent funds, one of said four parts; to the Allegheny General Hospital, in Allegheny, Pa., for permanent funds, one of said four parts; to the trustees of Washington and Jefferson College, at Washington, Pa., for permanent funds, one of said four parts; and to the Presbyterian Hospital, of Pittsburg and Allegheny, Pa., for permanent funds, one of said four parts.' It is claimed by the next of kin (1) that the bequest in the residuary clause is void for uncertainty; (2) that the surviving executor had not the power alone to designate the beneficiaries; (3) that the lapsed legacy to testator's wife did not fall into the residue.

"In Domestic & Foreign Missionary Society's Appeal, 30 Pa. St. 435, it was said that, 'In the case of a will making a charitable bequest, it is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects.' Such discretionary power here is vested in the executors; but it is contended, upon the authority of *Morice v. Bishop of Durham*, 9 Ves. 399 (where the bequest was for such objects of benevolence and liberality as the trustee in his discretion should most approve), and other English cases, that, as the bequest here is for benevolent as well as charitable uses, it is void for uncertainty. In *Witman v. Lex*, 17 Serg. & R. 88, Gibson, C. J., in commenting upon *Morice v. Bishop of Durham*, said that such a gift would probably be upheld in Pennsylvania; but there have been no cases cited of our supreme court directly in point. There are, however, from other states. In *Saltonstall v. Sanders*, 11 Allen, 446, Mr. Justice Gray sustained a trust 'for the furtherance and promotion of good morals, and in aiding objects and purposes of benevolence and charity.' On page 468 he said: 'The decisions of the English courts since our Revolution are of no binding authority on this court, and upon such a question as the interpretation of the word "benevolence," as connected with "charity," of no particular

weight when opposed to the well-settled meaning of the words in our own law.' And on page 470: 'Whatever, therefore, may be the meaning in the law of Massachusetts of the word "benevolence" by itself, there can be no doubt that, when used in connection with "charity," it is synonymous with it.' A still stronger case is *Rotch v. Emerson*, 105 Mass. 431, where a gift to trustees, 'to be by them applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropical purposes, at their discretion,' was sustained as a charitable bequest. In *Goodale v. Mooney*, 60 N. H. 528, the following bequest was sustained: 'I place the remainder of my property in the hands of my executors, to be distributed by them, after my decease, among my relatives and for benevolent objects.' On page 534 the court said: 'In many cases the word "benevolent" has been coupled with "charitable," or some equivalent word, or has been mentioned in connection with such public institutions as to show an intent to make it synonymous with charity. They are also synonymous in their ordinary meaning.' See *Webst. Dict.* It seems, then, that the word 'benevolent' as used by the testator, is to be construed as synonymous with 'charitable,' and the residuary bequest is, therefore, not void for uncertainty. But it is contended that William Robinson, as the sole surviving executor, had not the power to designate the beneficiaries under the residuary clause. If the power were incident to the persons of the executors, and not the office, this position would, perhaps, be well taken. The testator provided that the selection of the beneficiaries should be made 'by my executors or their successors.' The distribution of the residuary estate was not to be made until after the death of his wife; and it is not probable he anticipated that the beneficiaries would be designated until then, and his wife, as executrix, would not, therefore, take part. The word 'successors' appears to indicate that he intended the power of selection should be exercised by the persons filling the office after his wife's decease; and the power seems to be annexed to the office, and not the person. In *Perry, Trusts*, § 499, it is said: 'The question is whether the donor reposed a personal trust and confidence in the trustees appointed, or whether he reposed the power in whomsoever might in fact fill the office of trustee.' And in *Hill, Trustees*, 489: 'Where the power is annexed to the office of trustees, and one or more of the trustees refuse to accept the trust, it is settled that those who accept may exercise the power.' We think the surviving executor had power to designate the beneficiaries, and, as they are all charitable to some extent, his designation is valid, and distribution must be made accordingly. The legacy to his wife was given to her absolutely, coupled with a suggestion that under certain contingencies she should give the Pennsylvania Railroad stock to certain per-

sons. The words are merely precatory, created no trust, and did not in any way qualify the absolute gift to her. The legacy lapsed by reason of her death before the testator, and, as the will contains a general residuary clause, and it is evident it was the intention of the testator to dispose of his whole estate, the lapsed legacy falls into the residue, and must be distributed, as part of it, to the beneficiaries designated by the executor. *Gray's Estate*, 147 Pa. St. 67, 23 Atl. 205; *Powell's Estate*, 138 Pa. St. 322, 22 Atl. 92; *In re Reimer's Estate*, 159 Pa. St. 212, 23 Atl. 186."

John Wilson, for appellants. Cohen & Israel, for appellee Allegheny General Hospital. A. M. Todd and Thomas Herriott, for appellee Washington & Jefferson College. William A. Way, for appellee Presbyterian Hospital. Dalzell, Scott & Gordon, for appellee Homeopathic Hospital.

PER CURIAM. We find nothing in this record that requires a reversal or modification of the decree from which this appeal was taken, nor do we think that any of the questions presented in the specifications of error require further notice than is taken of them in the opinion of the learned judge who entered the decree. On his opinion, the decree is affirmed, and appeal dismissed, at appellants' costs.

(184 Pa. St. 306)

In re OLIVER'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

DESCENT AND DISTRIBUTION—ILLEGITIMATE CHILDREN.

One born out of wedlock, whose parents afterwards married, and died domiciled in England, may inherit a share in lands left by an uncle *ex parte materna* domiciled in the United States, under Act May 14, 1857, providing that, in "any" and "every" case where the parents of an illegitimate child marry, such child shall thereby become legitimate, and enjoy the same rights as if born during wedlock.

Appeal from orphans' court, Allegheny county.

Petition by Harry Jeans for the partition of certain land of which John Oliver died seised. From decrees ordering partition and confirming the sheriff's inquisition, Robert Oliver appeals. Affirmed.

The opinion of the orphans' court is as follows (Hawkins, P. J.):

"The question involved in this matter is whether or not a claimant born out of wedlock, whose parents afterwards married, and died domiciled in England, may inherit a share in lands left by an uncle *ex parte materna*, domiciled in this country, under and by virtue of the act of May 14, 1857. That act, like the act of 1855, relating to the inheritance of illegitimates, is general in its terms, and makes no distinction between resident and nonresident parties. Waesch's

Estate, 166 Pa. St. 204, 30 Atl. 1124. It provides that 'in any and every case where the father and mother of illegitimate child or children shall enter into the bonds of matrimony and cohabit, such child or children shall thereby become legitimate and enjoy all the rights and privileges, as if they had been born during the wedlock of their parents.' The effect of the act was to add such persons to the class entitled to take under the interstate law, and the facts bring the present [case] clearly within its provision. The case of *Smith v. Derr's Adm'rs*, 34 Pa. 126, upon which exceptions rely, having arisen before the passage of the act of 1857, has no application to the present case. And now, to wit, September 20, 1897, this matter came on to be heard upon exceptions filed, and was argued by counsel, and thereupon said exceptions are dismissed, at the cost of exceptant."

W. B. Rodgers, R. C. Rankin, and J. H. Beal, for appellant. Wm. E. Newlin and Wm. A. Challenger, for appellee.

PER CURIAM. The act of May 14, 1857, quoted in the opinion of the court below, in effect created a new class of distributees, in addition to those theretofore entitled to take under our intestate laws. In its terms the act is general, and makes no distinction between resident and nonresident parties. The undisputed facts of this case bring it clearly within the plain provisions of the act, and hence there was no error in holding that the appellee (whose deceased mother, through whom he claims, was born out of wedlock, but her parents afterwards married, and died domiciled in England) may inherit a share in lands of which his uncle *ex parte materna*, domiciled in this country, died seised and intestate, as fully as if his said mother had been born during the wedlock of her parents. There is nothing in the case that requires further discussion. The decree is affirmed on the opinion of the learned president of the orphans' court, and the appeal is dismissed, at appellant's costs.

(184 Pa. St. 232)

HOOK et al. v. McCUNE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

DEBTS OF DECEDENT—LIEN ON REAL ESTATE.

1. A suit in equity for an accounting between partners is an "action," within Act 1834, § 24, providing that the debts of a decedent cease to be a lien on his real estate after five years, unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors, or administrators within five years after his decease.

2. It is sufficient if an action on decedent's debt be brought within five years and duly prosecuted, though the judgment be rendered after the five years have expired.

Appeal from court of common pleas, Allegheny county.

Action by Jacob Hook and George Hook

against Eliza L. McCune. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

The opinion of the court of common pleas is as follows (White, P. J.):

"Edward F. Lightner died in April, 1875, and J. H. Lightner was appointed administrator in September, 1876. G. W. Smith filed a bill in equity against the administrator for an account of the partnership between him and the said E. F. Lightner, which was duly proceeded in until September 1, 1880, when a decree was entered against the estate of E. F. Lightner for \$13,610.10. On November 27, 1880, the administrator applied to the orphans' court for power to sell certain real estate of E. F. Lightner for the payment of the said decree and other debts, which was granted, in pursuance of which a sale was made and duly confirmed by the orphans' court. The lots in controversy in this suit were parts of the real estate of E. F. Lightner thus sold. The question now raised is as to the validity of that orphans' court sale, because it took place more than five years after the death of E. F. Lightner. Under the facts stated there can be no doubt on the subject. Under the act of assembly of 1834 (section 24), the debts of a decedent cease to be a lien upon his real estate after five years, 'unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors or administrators, within the period of five years after his decease.' An 'action' is a demand or legal proceeding in a court of justice to secure one's rights. It embraces a proceeding in equity as well as at common law. This action was begun less than two years after the death, and judgment by decree obtained within four years thereafter. It was only a few months over five years after the death of the decedent. It has never been held that the action must be prosecuted to judgment within the five years after death. It is sufficient if the action is brought within the five years and duly prosecuted, although the judgment may not be obtained within the five years. *Phillips v. Railroad Co.*, 107 Pa. St. 472. And now, September 4, 1897, this cause came on to be heard on the case stated, and after arguments by counsel and due consideration judgment is ordered to be entered on the case stated, in favor of the plaintiffs against the defendant, for \$1,075, with costs."

Geo. H. Quail, for appellant. Chas. W. Dahlinger, for appellee.

PER CURIAM. The question presented by the facts set forth in the case stated is whether the orphans' court sale, made more than five years after the death of the intestate, for the payment of his debts, vested in the purchaser at said sale a good and marketable title to the land in question? The learned president of the common pleas held

that it did, and judgment was accordingly entered in favor of the plaintiffs. For reasons given by him, this was so clearly right that further discussion of the question is unnecessary. The judgment is therefore affirmed on his opinion.

(184 Pa. St. 146)

JOHNSTON et al. v. CALLERY.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

SALE OF LAND — INCUMBRANCE — LOCATION OF RAILROAD.

1. When engineers to survey the route of a railroad have returned to the office of the company the protracted surveys of the line or lines run, and the survey thus made has been formally adopted and declared to be the location of the road, that constitutes and completes the fact of location, so as to create an incumbrance on the property without notice to the owners thereof, or the adjusting and paying or securing of damages.

2. The plan or map of a survey of the route of a railroad returned by the company's engineers to its office is the best evidence on the question of location of what has been done by them.

Appeal from court of common pleas, Allegheny county.

Action by Anna D. Johnston and others against James D. Callery. Judgment for defendant. Plaintiffs appeal. Affirmed.

Knox & Reed and George E. Shaw, for appellants. Geo. C. Wilson and Wm. D. Evans, for appellee.

GREEN, J. When this case was here before (173 Pa. St. 129, 33 Atl. 1036), it was upon the sufficiency of an affidavit of defense to prevent judgment. The statement of cause of action claimed judgment for the amount of the purchase money stipulated in the agreement for the sale of the land, and the affidavit of defense claimed that the stipulation of the agreement which provided for a title clear of all incumbrances had been violated, and that the plaintiffs were unable to convey such a title. The incumbrance alleged in the affidavit was that which was created by the survey and location of a branch railroad of the Pittsburgh & Connellsville Railroad over the land in question, at a time anterior to the execution of the contract of sale. All the particulars of the survey and location were set forth in the affidavit, including the formal adoption of the location by the resolution of the directors of the railroad company of the 4th day of April, A. D. 1892. The affidavit also set forth a notice from the counsel of the railroad company, by letter dated May 19, 1893, to the effect that the company had surveyed and located the said branch railroad some time before, over the property, and that, if the defendant purchased the property, he would have to take it subject to the right of the railroad company to appropriate the right of way for the road over the land. The plaintiffs having entered a rule for judgment notwithstanding the affidavit, the court below

discharged the rule, whereupon the plaintiffs took an appeal to this court. But we sustained the court below, and practically said that if, on the trial, the facts set out in the affidavit were established by testimony, the defendant would have made out a good defense. On the trial the defendant gave evidence to prove all the matters alleged in the affidavit of defense, and, so far as we can discover, there was no lack of testimony as to any of them. The case was submitted to the jury on the question whether there had been an actual location of the railroad over the property prior to the agreement of sale; and the court ruled that if there had been, it constituted an incumbrance on the plaintiffs' title, and the defendant would not be bound to take the land. So far as the evidence is concerned, we do not understand that there is any dispute, and the learned counsel for the appellants concede that such is the case, in their printed argument. Their contention seemingly is that there was no evidence of a survey or any entry on the ground having been made prior to the contract, and that no notice had been served on the owners, and that on May 1, 1893, there was nothing but a paper location, evidenced only by the passage of a resolution on April 4, 1892, unknown to all but the officers of the company. As to this resolution, they contend it was rescinded by a later resolution, adopted on February 20, 1895, and they argue from these premises that no incumbrance was imposed upon the property at the date of the contract. In view of the testimony taken on the trial and of the decisions of this court as to what constitutes a good location, we cannot consider these contentions as at all tenable. We have so recently defined what is a good location of the route of a railroad that a brief citation from our latest decision on the subject will be sufficient.

In the case of *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, our Brother Williams, delivering the opinion, said: "The successive steps contemplated by the act of 1849 and subsequent legislation, as necessary to vest a title to the roadway in the corporation, are these: (1) A preliminary entry on the lands of private owners for the purpose of exploration. This is made by engineers and surveyors, who run and mark out one or more experimental lines, and who report their work with such maps and profiles as may be necessary to present it properly to the company that employs them. (2) A selection and adoption of a line, or one of the lines so run, as and for the proposed railroad. This is done by the corporation, and it requires the action in some form of the board of directors. This makes what was before experimental and open, a fixed and definite location. It fastens a servitude upon the property affected thereby, and so takes from the owner, and appropriates to the use of the corporation. (3) Payment to the owner for what is taken, and the consequences of the taking, or security that it shall be made when

the amount due him is legally ascertained. The title of the owner is not divested until the last of these steps has been taken. [Citing authorities.] As against him, the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation. As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title. * * * The act of location is at the same time the act of appropriation. The space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner. After the act of location by the company, the owner or the company may proceed at once to secure an ascertainment of damages." It will be observed now that the selection and adoption of a line by the directors "fastens a servitude upon the property affected thereby, and so takes from the owner, and appropriates to the use of the corporation." All of this was repeated and reaffirmed in the opinion of Mr. Chief Justice Sterrett in *Johnston v. Callery* (this same case) 173 Pa. St. 129, 33 Atl. 1036.

Let us now see what was the action of the company as to the adoption and location of the route in this case. Mr. J. B. Washington, the secretary and treasurer of the company, was examined on the trial, and was asked: "Have you in your possession any plan of that company showing the location of a branch railroad from a point at or near the crossing at Glenwood, down in the direction of Marion Station? A. I have. Q. Will you produce that plan, please? (Plan produced by the witness.) Q. By whom was this plan prepared? A. By the chief engineer of the company. Q. Now, where does that line of railroad cross this property that is now in question? (Witness indicates on plan.) Q. What action, if any, was taken by the board of directors with respect to that adopted location? A. There is the adoption by the board on the plan, with the seal. Q. By whom was that adoption? A. Adoption by the board of directors. Q. And entered upon the plan by whom? A. That is my handwriting. * * * Q. Will you look at the meeting of the board of directors held on the 4th of April, 1892? A. I have that. Q. Now, will you give us that minute? A. Resolved that this company survey, locate, and construct a branch railroad of one or more tracks from a point on the main line of the Pittsburgh and Connellsville Railroad, at or near the crossing of Second Ave., in Glenwood, Twenty-Third ward, city of Pittsburgh, and thence extending to a point of connection with the said main line at a point near Marion station, west of Laughlin street, in the development of the territory along the Monongahela river, lying between said points, and furnishing an outlet for the productions thereof; and be it further resolved that the survey of said branch heretofore made by the engineers

of this company, the center line of which is shown upon a plan thereof presented to the board with these resolutions, be accepted and adopted as the location between the points aforesaid of said branch railroad, and that the president be authorized and is hereby directed to do all things necessary at once to put said line under construction upon said survey as aforesaid, with a right of way of the width of sixty feet; and be it resolved, further, that the secretary be directed to cause a map or plot showing accurately a survey of the line of said branch to be filed in the office of the secretary of state." It will thus be seen that the resolution of April 4, 1892, recites that a survey of the route had been previously made, and that a map or plan thereof was then before the board; and, further, that "a map or plan showing accurately a survey of the line" should be filed in the office of the secretary of state. The witness was asked on cross-examination: "Q. At the time the resolution of the board of directors was passed that you have just read, there had been no map or plot showing accurately the survey of the line of the branch road made? A. There was a map presented to that meeting, and adopted, a copy of which was filed in the office of the secretary of the commonwealth. Q. Now, was that this map? A. Yes, sir." Subsequently the witness produced the original map that was before the board of directors. He was asked: "Q. Have you the plan with you now that is referred to in that resolution of April 4, 1892? (Witness produces plan, which is marked 'Exhibit No. 3.')

Q. Will you indicate what marks the line of the located railroad upon that plan? A. This is the property and this is the line (indicating). Q. I wish you would state when this particular plan was adopted by the board of directors? A. April 4, 1892. Q. Is that the plan referred to in the resolution that you read? A. Yes, sir. Q. Is this the plan referred to in the resolution of the board of directors dated April 4, 1892? A. It is." While it is true that the surveyors or engineers who actually ran the line on the ground were not produced, the result of their work, to wit, the plan showing the survey, was produced, and was acted upon, and the line thus surveyed was adopted as the line of the road. We do not understand that anything more than this is required. When the engineers have returned to the office of the company the protracted surveys of the line or lines run, and the survey thus made has been formally adopted and declared to be the location of the road, that constitutes and completes the fact of location. It certainly cannot be necessary for the company to keep the original engineers who did the work on the ground, always in sight, so as to produce them in court years after the work was done, in order to testify to their work whenever the fact of the location may be questioned. The plan or map of the survey is the best evidence of what was done, and affords the strongest implication that the work was done. Moreover, the ques-

tion whether the actual location had been made was a question of fact, and was submitted to the jury, and was found in the affirmative; and there was not a particle of testimony in the case to impeach the fact of the survey, or the correctness of the finding of the jury.

The contention that because the damages had not been adjusted and paid or secured at the time of the contract, and therefore no title had yet been acquired by the company, is of no importance. If the inchoate right of the company was complete, it "fastened a servitude" upon the property, and therefore became an incumbrance upon the title. The owners were still entitled to prosecute their claim for damages, and to receive the damages when assessed; and, in point of fact, such proceedings were commenced in October, 1893, at the suit of the company, and were participated in by the defendants in that proceeding, who are the plaintiffs in this. The record does not show whether they have been completed, nor is it necessary that it should do so. The contention that no notice of entry or survey on the property had been served upon the owners is of no consequence, because such notice is not an essential prerequisite to a valid location. As to the contention that the location of April 4, 1892, was rescinded by the resolution of February 20, 1895, and the route thereby changed, it was abundantly proved that no change was made in the location through the plaintiffs' land, but only at another point, called Laughlin. Moreover, it was fully proved that the road was actually built on the plaintiffs' land, upon the precise location made in April, 1892.

As the case was submitted to the jury on the facts set forth in the affidavit of defense of which we have previously approved as being sufficient, if true, to make out a good defense, and the jury has found those facts, there seems to be nothing on the record that demands further consideration. It was shown on the trial that the property was bought for the Second Avenue Traction Company, to erect a power house thereon, and for that purpose it was very desirable to have the building on the bank of the river. The location of the railroad cut off such use of the ground, and rendered the land undesirable. As there was no doubt of the railroad company's right to proceed to the ascertainment of damages under its location, and to erect the road on the route adopted, it is difficult to understand how or in what sense the adoption of the survey and the location of the road on that line was not an incumbrance on the title. With this servitude fastened upon it, and holding it for the benefit of the railroad company, the purchaser could not get the title he contracted for; and therefore his contract rights as a purchaser were seriously affected by the superior rights of the company. On this subject, our brother, the chief justice, said in this very case (173 Pa. St. 129, 33 Atl. 1086), quoting from the Williamsport Case: "The act of location is at the same time the act of appropriation. The

space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner. After the act of location by the company, the owner or the company may proceed at once to secure an ascertainment of damages." In the court below, the case was tried strictly upon these principles, and we discover no error in the rulings of the court. The assignments of error are all dismissed. The judgment is affirmed.

(184 Pa. St. 251)

PITTSBURGH IRON & STEEL ENGINEERING CO. v. NATIONAL TUBE-WORKS CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

BUILDING CONTRACTS — DELAY IN COMPLETING WORK — DAMAGES.

A building contract provided that defendant should have the foundations ready by specified times; that plaintiff should complete the work by a time named, and pay \$300 for each day's delay. The work was not completed by the time fixed. There was evidence that delay was caused by defendant's failure to complete the foundations in time, and by changes in the original plans made at defendant's request. *Held* that, if plaintiff was obstructed by defendant in strict performance, it did not absolve it from further effort to speedily perform; and, when the cause for delay ceased, the obligation to finish was at once imposed on plaintiff, and failure then to perform within a reasonable time warranted damages for unreasonable delay thereafter.

Appeal from court of common pleas, Allegheny county.

Action by the Pittsburgh Iron & Steel Engineering Company against the National Tube-Works Company to recover the balance of the contract price alleged to be due for the erection of a Bessemer steel plant for defendant, and an additional sum claimed for changes and additions. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. B. Rodgers and J. H. Beal, for appellant. Knox & Reed, for appellee.

DEAN, J. On June 11, 1892, the plaintiff entered into a written contract with defendant to erect a Bessemer steel plant of eight buildings, equipped with all the machinery necessary for the operation of a Bessemer steel pipe manufactory. The defendant agreed to have all building foundations ready for the superstructures by December 1, 1892, and all other foundations January 1, 1893. At the date of the contract, defendant was operating on part of the same ground an iron pipe plant, employing about 7,000 men. In view of this, and to avoid as much as possible the interruption to their business while the new work was in progress, this clause was inserted in the contract: "It is understood that this contract

is to be completed on or before June 1, 1893; and as a failure on the part of the party of the first part to complete the work embraced in this contract would, in view of the necessities of the party of the second part and the requirements of its business, involve great loss to the second party, which it would be difficult to estimate, it is hereby agreed that for each day after June 1, 1893, that the work remains unfinished, the first party shall pay to the second party the sum of three hundred dollars as liquidated damages." The work was not completed until about 1st of January, 1894, seven months after the date fixed in the contract, although defendant was partly in possession from October, 1893. The consideration was to be \$340,000, in nearly equal installments, at 60 day intervals, commencing 15th September, 1892. The plaintiff admitted payments to the amount of \$323,300.65 on the contract, but claimed the additional sum of \$53,011.38, for changes and additions to the original specification, which, with a balance unpaid on the principal contract of \$18,699.35, made the entire sum claimed \$69,710.73. The plaintiff averred in its statement: (1) The contract and amount of claim; (2) that the delay of plaintiff in completion of contract of June 1, 1893, was attributable solely to defendant's conduct; that it had not prepared the foundations for the structures by December 18, 1892; that at its request, during the progress of the work, costly and extensive changes were made in the original plans, and large additions thereto, and by reason thereof the time was prolonged, but that, nevertheless, the work was completed as soon as possible. The affidavit of defense averred that defendant was entitled to have set off the \$300 per day for so many days as plaintiff was in default after June 1, 1893, in completion of building; denied the foundations were not ready at the times named in the contract; averred that all changes in the plans and work were voluntary on part of plaintiff, and that the delay was caused by plaintiff's neglect in preparing the working plans. It claimed damages by reason of plaintiff's default, in the amount of \$66,300. The statement of claim and affidavit of defense made up the issue as tried in the court below. The evidence on each side was voluminous, and the contention was wholly one of fact, to be settled by the jury. They found for plaintiff, \$76,154.48, about the amount of plaintiff's claim, with interest; and we have this appeal by defendant, with 15 assignments of error.

The complaints of appellant in the assignments are that plaintiff failed to establish by competent evidence the facts on which it sought relief from strict performance of its contract as to time of completion, and, further, that the court below committed error in its instruction to the jury as to the rules which should control them in computation of defendant's damages. As to the facts re-

lied on by plaintiff to excuse it from strict performance, there was evidence tending to establish each one of them; contradicted, it is true, by evidence on part of defendant, but still leaving the contention in such situation that the court could not say the evidence was insufficient. Therefore there was no error in submitting it to the jury.

Was there error in statement of the rule for computation of defendant's damages, which may have led the jury away from the true rule,—that fixed by the parties themselves in the contract? For it may be plausibly argued that, if the jury once thought they were permitted to disregard the contract in this particular, they would be inclined to make a new contract for the parties, and set up one allowing no damages for delay in completion, without regard to reasonableness. What was the instruction as to the liability for and measure of damages? Plaintiff averred the delay was occasioned by failure of defendant to perform its stipulations in two particulars: First, the foundations were not completed in time; second, it failed to fill in the ground around the foundations in time; and, further, third, radical changes and large additions to the original plans were made at request of defendant while the work was in progress. It is obvious, if there was evidence tending to support these averments, and the jury found they were proven, then the only further question was, did the acts of defendant cause the delay in completion? Not merely cause some delay, but the whole delay from 1st June to the date the plant was finished, handed over to and taken possession of by defendant; for the fact that plaintiff was obstructed by defendant in strict performance did not absolve it from further effort to speedily perform. When the cause for the delay (the conduct of the defendant) ceased, the obligation to speedily finish was at once reimposed with all its force on plaintiff; and failure then to perform within a reasonable time warrants defendant in invoking the \$300 per day damages for every day of unreasonable delay thereafterwards. And this, as we read the charge and answers to plaintiff's written points, was the instruction of the court below. It was in exact accord with *White v. Braddock Borough*, 159 Pa. St. 201, 28 Atl. 136, and *Lilly v. Person*, 168 Pa. St. 219, 32 Atl. 23. In the first case cited, the owner's architect failed to furnish the plans and specifications in the time required by the contract, and changes were made which caused delay. It was held that the court below properly instructed the jury that if the delay in completion complained of by the owner was caused by the failure of the architect, and by the changes, strict performance was excused to the extent of the delay caused by the default of the architect. The second case cited, although in different language, is to the same effect; this court holding that, if the delay complained of was

the result of changes directed by the owner in the character of the building, then stipulated damages could not be recovered for the additional time necessary to complete the changed structure.

In the case before us, by a possible construction of some parts of the charge, it could be held to mean that an act of defendant which relieved plaintiff from strict performance as to time also relieved it from any liability for stipulated contract damages; but this is not the obvious construction, nor the fair one. Every point put by plaintiff requesting such instruction was flatly refused. More than once the jury was told that the \$300 per day for delay was damages which the parties by the contract had liquidated; and if there had been unreasonable delay after the 1st of June, 1893, then for every day of such delay there should be computed for defendant that sum and the amount deducted from plaintiff's claim. The court did not, as argued, lay down different and inconsistent rules, but throughout, in substance, charged as stated. The charge is quite elaborate, but not unnecessarily so, in view of the voluminous testimony. We do not believe it possible that a charge such as this, occupying certainly more than an hour in its delivery, with no time for careful preparation, could be so framed as to be exempt from criticism. With the time on part of counsel for careful examination of the typewritten charge, trifling defects are disclosed, such as the use of inapt words, or words so placed in the sentence as to be capable of other signification than that intended; but the question on review is not, is the language possibly capable of conveying a wrong meaning? but, does the charge as a whole correctly and fully bring to the minds of the jury the true point in controversy, and direct their attention to the evidence bearing upon it? If this be so, it is altogether improbable that they were misled by trifling inaccuracies of language or a single inadvertent misstatement of the evidence. When it requires on part of counsel a microscopic inspection of a charge to detect a flaw, we will not assume it was manifest to the jury, and that they were controlled by it; and, to work a reversal, it must appear much plainer to us than do those complained of here. What we have said applies to all the assignments of error worthy of any notice. All are overruled, and the judgment is affirmed.

(184 Pa. St. 245)

WILLOCK v. CRESCENT OIL CO., Limited.
(Supreme Court of Pennsylvania. Jan. 3, 1898.)

SALE—BREACH OF CONTRACT—DAMAGES.

Plaintiff, a refiner, having contracted to buy from defendant, a dealer in crude petroleum, "all the crude oil that I may need or use at the W. Oil Works * * * during the

year," and having given the notice provided by the contract as a condition of extending it for another year, is entitled to recover, as damages for defendant's refusal to fill an order given after the renewal, the difference between the then price of oil and that which he was thereafter obliged to pay, on such amount as plaintiff required, in addition to what he had on hand at the time the order was refused, to supply the needs of the refinery for the second year.

Appeal from court of common pleas, Allegheny county.

Action by S. M. Willock against the Crescent Oil Company, Limited. Judgment for plaintiff, defendant appeals. Reversed.

S. D. Mitchell and J. McF. Carpenter, for appellant. J. S. & E. G. Ferguson, for appellee.

WILLIAMS, J. The defendant was a dealer in crude petroleum. The plaintiff was a refiner, with a refinery known as the Waverly Oil Works, located in Pittsburg, Pa. On the 13th day of August, 1892, they entered into an agreement in writing with each other, by the terms of which the plaintiff agreed to buy from the defendant "all the crude oil that I may need or use at the Waverly Oil Works, near Fifty-Fourth street, Pittsburg, Pa., during the coming year; that is, from August 13, 1892, until August 13, 1893." The defendant company agreed to sell him the oil that he might need or use at his refinery during the year at the current price in Oil City, and deliver it at the plaintiff's refinery at 12½ cents per barrel pipage. The plaintiff was permitted to order the oil in lots not exceeding 20,000 barrels at one time, but such orders were in no case to be made oftener than once in 30 days. The defendant further agreed to hold the oil, so ordered, in its pipe line, for 30 days after the date of the order, without charge for storage; but, after the expiration of this time, the oil was to be subject, if left in the lines, to the usual storage charges. It was also agreed that the contract might be extended for one more year upon the same terms if Willock gave written notice to the company of his wish to extend it before the first year had fully expired. This was a contract for the supply of the plaintiff's refinery with crude oil in any amount that "he might need or use" for refining during one year from the 13th of August, 1892, not exceeding 20,000 barrels per month. It was not a contract to supply the plaintiff with crude oil for any other purpose than the refining done by him at the Waverly Oil Works; nor for any other time than one year between the 13th day of August, 1892, and the 13th day of August, 1893. But during the year the defendant was bound to supply the plaintiff with the crude oil of the variety known as the "Washington District Crude Oil," which he might "need or use" at his refinery. In the first 11 months of the year, Willock ordered, and the defendant furnished, 127,833 barrels of crude oil. He had used, when the year was closing, but 59,472

barrels, and had on hand 68,410 barrels of crude oil, waiting to be refined. While this was the state of things at the refinery, the plaintiff, two weeks before the year closed, ordered 20,000 barrels more of crude oil. This order was refused, on the ground that it could neither be "needed or used" during the year, as more than one-half of all the oil delivered during the year was still on hand, and the year was just closing. Nine days later, or on the 8th of August, 1893, Willock elected to continue the contract for another year, and gave notice in writing to that effect. A few days later he gave another order for 20,000 barrels of oil, which was also refused, upon the same grounds as the order of the 31st of July previous. This action is brought to recover damages for the refusal to fill the orders of July 31, 1893, and August 30, 1893, for 20,000 barrels each.

The learned judge of the court below was right in holding that the original contract was for one year, and was to be so considered in determining the right of the plaintiff to have his order of July 31, 1893, honored by the defendant. He did not "need or use" any portion of the oil covered by that order at his refinery during the year, and for that reason had no right to insist on its delivery to him. The contract gave him no right to order it, and imposed no obligation on the defendant to furnish it, unless it could be "needed or used" at the Waverly Oil Works before the expiration of the year. This is not pretended, and this item in the plaintiff's claim will require no further consideration. But, as we have seen, the plaintiff had the right to renew or extend the contract over one more year upon the same terms and conditions, by giving a written notice of his desire to do so. This notice he gave five days before the year closed. He still had more oil on hand than he had refined during the first year of the contract; but, a few days after the notice of renewal, he again ordered 20,000 barrels of crude oil from the defendant. Had he the right to do so? He had a right to a year's supply for his refinery, and he had the right to order what he expected to "need or use" at such time in the year as he thought prudent, in view of the condition of the oil market and its apparent tendency. If the market was falling, it might seem wise to order no faster than he actually needed the oil for immediate refining. If it was rising, it would be good business management to put in his entire year's stock as soon as it could be done. Which course should be taken was for the plaintiff to determine. The defendant was to supply the oil in quantities not exceeding 20,000 barrels at one time, and not oftener than once in 30 days until the plaintiff was supplied with all the oil he should need or use during the year. The defendant, by refusing to fill the order of August 30, 1893, assumed that the plaintiff would need or use no more crude oil at his refinery during the year than he had in stock at that time. To

what extent the plaintiff was injured by the refusal of the defendant company, if he was injured at all, must depend, therefore, on whether the event justified the assumption on which the refusal was based,—that he was already supplied with a stock of crude oil that would last for the balance of the year. If he should need no more oil for refining than had already been furnished him, he would have no right to complain, since the obligation of the defendant would have been already discharged, and his contract fulfilled; but, if the stock on hand proved insufficient for the needs of his refinery during the year, to the extent of such insufficiency the order should have been filled, and to that extent, together with the added costs of securing the amount needed, the plaintiff has a good cause of action.

The learned master finds the fact to be that the stock on hand on August 30, 1893, was insufficient to supply the needs of the refinery during the second year's operation, and that it became necessary for the plaintiff to buy 8,624.79 barrels of crude oil in addition, and at a somewhat advanced price. From this fact the learned master drew a correct legal conclusion when he held that the oil company, having undertaken to furnish the year's supply of crude oil, was bound to reimburse the plaintiff for the increased cost of the supply that he was compelled to buy outside of the contract. This increased cost furnishes the true measure of damages in this case. The plaintiff had the right to have the oil at the price which it bore on the 30th day of August, 1893, the date of his order. He was compelled to pay for it what the defendant company charged him when it furnished him the additional oil needed. The difference was his actual loss. When this difference is restored, he has been fully compensated for his loss by the refusal of the company to fully perform its contract. In this class of cases damages are given by way of compensation. *Eckel v. Murphey*, 15 Pa. St. 495; *Forsyth v. Palmer*, 14 Pa. St. 93. *Sedgwick* states the rule applicable to cases arising from the failure of the seller to perform his agreement thus, in his treatise on the Measure of Damages (page 260): "It seems to be well settled both in England and the United States that the measure of damages is the difference between the contract price and the market value of the article when it should have been delivered, upon the ground that this is the plaintiff's real loss, and that with this sum he can go into the market, and supply himself with the same article from another vendor." In this case the plaintiff did not go into the market, and supply himself from another vendor. He had no access on account of the manner in which crude oil is stored and transported to the general market. His refinery was connected with the defendant's system of transportation and storage, and, when the need to use additional oil came, he bought it of the de-

fendant, by whom he was required to pay the then current prices for both the oil and pipage upon it. His loss is determined, therefore, by the difference between what he finally paid the defendant for the additional oil required by him to meet the needs of his refining during the second year, and the price under the contract at the time the order was made and refused. True, the plaintiff might have gone into the market, and bought the needed oil, and charged up his loss as damages, but he did not. On the other hand, he waited to see if he would need more oil than he already had. When he found that he would, he bought of the defendant so much, and at such times, as his business required, and paid such price as was demanded. His loss is thus capable of exact ascertainment. The controversy over the question whether the breach of the contract was at one date or another becomes unimportant in this view of the case so far as fixing the price of the oil with which the plaintiff might have supplied himself at the cost of the defendant. He did not buy at either of the dates set out. He bought when he came to need the oil, and what he paid is involved in no uncertainty. The defendant must return what he received more than the plaintiff should have been required to pay under the contract, with interest thereon. The assignments of error relating to the measure of damages are sustained. The judgment is reversed, and a *venire facias de novo* is awarded.

(124 Pa. St. 237)

RAUWOLF v. GLASS.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

RES JUDICATA.

A defense in replevin being that there were fraudulent representations, whereby title to the goods did not pass to plaintiff, fraud is an issue, so that judgment for plaintiff bars a suit by defendant to enjoin the judgment on the ground of such fraudulent misrepresentations, though new and additional evidence is introduced.

Appeal from court of common pleas, Allegheny county.

Suit by Leonard Rauwolf against James E. Glass. Decree for plaintiff. Defendant appeals. Reversed.

D. T. Watson, W. W. Thomson, and James W. Prescott, for appellant. Wise & Minor, for appellee.

MITCHELL, J. The parties made an exchange, by written agreement, of a stock of goods in plaintiff's store for certain real estate of appellant, and this is a bill to declare the agreement void for fraud in its making, and to enjoin further proceedings on a judgment in replevin obtained by appellant for the goods in the store. The answer sets up the judgment in replevin as an adjudication on the question of fraud, and therefore a bar to the present bill. It is open to very serious ques-

tion whether the filing of a bill to restrain a judgment on grounds existing and known prior to the judgment is not of itself a necessary admission of the identity of subject-matter in the two proceedings. But in the present case the identity in fact is too clear for question. After the signing of the agreement the present plaintiff, becoming dissatisfied, refused performance, and thereupon the appellant, alleging that title to the goods in the store had passed by delivery, brought replevin for them, and obtained a verdict. The defense was that there had been no delivery, and, secondly, that the agreement was void on account of fraudulent misrepresentations. The latter is the exact ground of the present bill, and its identity with what was decided in the replevin appears in the opinion of this court, where it is stated by the chief justice: "One of the two main questions of fact presented by the testimony in this action of replevin was whether, in procurement of the agreement, * * * misrepresentation and fraud were practiced. * * * Both questions were submitted to the jury. * * * The verdict is necessarily predicated of their finding that there was no fraud." And a review, for the purposes of this case, of the evidence and the judge's charge in the replevin (*Glass v. Rauwolf*, 172 Pa. St. 655, 34 Atl. 55), satisfies us that the summary of the issue by this court above quoted was exactly accurate. If the jurors in the replevin had taken the same view of the evidence that the learned court below did in this case, they must of necessity have found a different verdict. When a jury and a judge have arrived at different conclusions on a question of this kind, the natural presumption will be that the latter is right, especially in the case of so experienced and capable a judge as the late president of common pleas No. 2 of Allegheny county; but, unfortunately for the plaintiff, the jury passed on the question first, and their verdict, undisturbed by the court, settled it once for all between these parties. It is of no avail that the plaintiff in the present proceeding produced some new and additional evidence. The issue was the same; and it is the issue, not the evidence, which is concluded by the former adjudication. The learned court below was of opinion that the issue in the replevin was the title to the goods, and that the question of fraud was merely collateral, and therefore was not concluded. But the issue of fraud can in no proper sense be called "collateral." True, the issue in terms was the title of the plaintiff to the goods; but that title, as asserted in the action, depended absolutely and exclusively on the questions of fraud and delivery. The fraud was directly involved, and the verdict of the jury could not have been rendered as it was without an express finding that no fraud existed. This was sufficient. A judgment concludes, not only the technical fact in issue, but also every component fact necessarily involved in its determination. *Weaver v. Lutz*, 102 Pa. St. 505. "There may be one of many

issues in a case, and so far as they are directly passed upon, whether principal or subordinate, they will be regarded as adjudicated." 21 Am. & Eng. Enc. Law (1st Ed.) 185. "Any conclusions which a court or jury must evidently have arrived at, in order to have reached the judgment or verdict rendered, will be fully concluded." *Id.* 193. Decree reversed, and bill directed to be dismissed, with costs.

(124 Pa. St. 227)

PENNSYLVANIA R. CO. et al. v. GLENWOOD & D. ELECTRIC ST. RY. CO. et al.

(Supreme Court of Pennsylvania. Jan. 2, 1898.)

STREET RAILROADS—LOCATION—OVERHEAD CROSSING OF STEAM RAILROAD—INJUNCTION.

1. Street railways may diverge from the street for a short distance to avoid grade crossings.

2. A steam-railroad company stood by while the tracks of a street-railroad company were laid on an avenue nearly parallel to the former's road, and on a street which crossed said road at right angles. Without objecting to a grade crossing, it negotiated with the street-railroad company as to the manner in which it should be made. When its demands were acceded to, it objected to a grade crossing. After its suggestions as to an overhead crossing were accepted and acted on by the street-railroad company, and the latter had purchased a right of way, and was proceeding with a construction which would not interfere with the operation of the steam road, it for the first time objected that its property rights were encroached upon. The injury to its property was infinitesimal. *Held*, that it was not entitled to an injunction to prevent the construction of the overhead crossing.

Appeal from court of common pleas, Allegheny county.

Bill by the Pennsylvania Railroad Company and others against the Glenwood & Dravosburg Electric Street-Railway Company and others for an injunction. From the decree, plaintiffs appeal. *Affirmed*.

Dalzell, Scott & Gordon, for appellants. D. T. Watson and W. A. Stone, for appellees.

FELL, J. The bill in this case was filed to prevent the defendants from constructing a bridge or viaduct over the tracks and property of the plaintiffs at a point where there is no street or highway, and also to prevent the construction of an overhead way across a street on which the plaintiffs own property in fee. The answer denies the right of the plaintiffs to the intervention of a court of equity, for the reason that the overhead crossings which the defendants have undertaken to construct, and on which they have made large expenditures, were suggested by the plaintiffs in order to prevent a crossing of their road at grade, and were undertaken with their knowledge and consent. Work was commenced on the defendants' road in September, 1894, and it was practically finished in March, 1895, except at a point on Mo-

Clure street, in the village of Dravosburg, where it intersected the plaintiffs' road. A number of consultations had been held between the defendants' officers and the local officers of the plaintiffs to determine the best plan to effect a crossing at grade. Negotiations had been pending for some time, and an agreement had been prepared, when the decision of this court in *Pennsylvania R. R. v. Montgomery Co. Pass. Ry.*, 167 Pa. St. 62, 31 Atl. 468, was handed down. On April 5, 1895, the plaintiffs filed a bill to prevent a crossing at grade. Having allowed the road to be built in front of their properties on Maple avenue and McClure street without objection, it was then too late to ask for its removal, but they sought to prevent a grade crossing. The bill alleged a want of power in the railway company to construct a road, but there was no prayer asking for its removal. The application for a preliminary injunction was refused. An appeal was taken by the plaintiffs, which, by order, was made a supersedeas. When the case was called for argument in this court in October, 1895, a decree reversing the order of the common pleas refusing an injunction was entered by consent of the parties, and an injunction was awarded. The decree contains a preliminary recital that the defendants had abandoned the intention to construct a crossing at grade. At the hearing of that case in the common pleas the right of the defendants to cross at grade was contested, on the ground that it was reasonably practicable to make an overhead crossing, and different ways in which this could be done were pointed out by the plaintiffs' officers. Maple avenue is nearly parallel to the plaintiffs' road, and McClure street crosses it at right angles. On one side of McClure street is an elevated incline or private coal road, which crosses Maple avenue and the tracks of the railroad above grade. The tracks of the electric railway had been laid on Maple avenue and McClure street at grade to the tracks of the plaintiffs' road. Of the plans for an overhead crossing, the best, but by far the most expensive, suggested, was to purchase property on Maple avenue, to divert the tracks to it, and to elevate them until a sufficient height was obtained. Then to cross the avenue 30 feet above its surface to the elevated coal road, and thence, at an elevation of about 40 feet, to cross the tracks of the railroad. This plan was suggested by the plaintiffs and adopted by the defendants. To carry it into effect it was necessary to purchase private property fronting on the street, to purchase the right to use the coal road, to bridge the avenue, and to reconstruct the coal road. This the defendants proceeded to do at an expense of about \$40,000. They were then met by this bill denying their right to cross in this manner, because the construction proposed would interfere with the plaintiffs' right to the exclusive occupation of their ground for railroad purposes, and be-

cause the defendants' right to construct their railway is limited to the highways mentioned in their charter, and upon the grade thereof, and that, having located their road, they cannot change the location so as to construct the same upon a bridge and upon private property.

The extent of the interference with the property rights of the plaintiffs is this: On McClure street, on the side opposite to that on which their property is situated, and below the surface, and within the curb line, the foundation of the piers will extend 2 or 3 feet beyond the property line. At an elevation of 40 feet a footwalk will extend from 2 to 3 feet beyond the property line, and this on the side opposite to their property. On Maple avenue, 30 feet above the surface and over the middle of the street, there will be an encroachment of a few feet on the theoretical property lines. At the height of 40 feet the structure of the electric railway crosses the line of the tracks of the railroad. Two of these tracks are on a public street. The third has been laid on a right of way since the controversy relating to the crossing arose. The rights of the railroad company were already subject to the rights of the overhanging coal road, which has been reconstructed and placed at a greater height, and will remain between their tracks and those of the electric railway. The court found that the construction and operation of the overhead crossing will not appreciably increase the risk of accident, but that it will be lessened by the substitution of a steel structure at a greater height for a wooden one.

The right of the defendants to diverge from the highway, and to construct their railway on property which they had secured for that purpose, in order to avoid a grade crossing, need not be discussed, in view of the decisions in *Rahn Tp. v. Tamaqua & L. St. Ry.*, 167 Pa. St. 84, 31 Atl. 472, and *Pennsylvania R. Co. v. Greensburg, J. & P. St. Ry. Co.*, 176 Pa. St. 559, 35 Atl. 122. In the first of these cases it was said that passenger railways, under the act of 1889, "may diverge for a short distance, where the conformation of the surface or the position of streams make it necessary in order to avoid discomfort or danger to the traveling public"; and, in the latter, that to these reasons "it may be added to avoid grade crossings, or for any other reason amounting to necessity, or, what is the same thing in such matters, great public convenience."

The appellants have no just ground of complaint, and they are not entitled to the relief asked. They stood by without objection while the tracks of the defendants' road were laid on Maple avenue and McClure street. Without objecting to a grade crossing, they negotiated with the defendants as to the manner in which it should be made. When their demands were acceded to, they objected to a grade crossing of any kind, for the reason that it was practicable to con-

struct an overhead crossing. When their suggestions as to an overhead crossing were accepted and acted upon without regard to expense, and the defendants had purchased private property and a right of way, and were proceeding with a construction which will minimize the danger and in no way interfere with the operation of the steam road, they for the first time objected that their property rights were being encroached upon. The injury to their property is infinitesimal, if not purely fanciful. Whatever it may be, they have encouraged and invited it. The granting of an injunction would do them no good, except by crippling, if not destroying, a rival road. It would cause irreparable injury to the defendants, and great inconvenience to the public. An injunction was refused in *Hellman v. Railway Co.*, 175 Pa. St. 188, 34 Atl. 647, where there had been a clear invasion of the plaintiff's rights. The objection first made was that the road had been built without first paying damages, and it was held that the plaintiff, having based his objection on that ground, impliedly sanctioned the right to build if his damages were paid, and could not, after the completion of the road, be heard to object to the company's want of authority. In that case it was said by our Brother Williams: "An injunction is not of right. It will not be issued when, upon a broad consideration of the situation of all the parties in interest, good conscience does not require it." The decree is affirmed, at the cost of the appellants.

(184 Pa. St. 262)

In re LINDSAY'S ESTATE.

Appeal of HENRY et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

ABATEMENT AND REVIVAL — ANOTHER ACTION PENDING.

A proceeding to enforce against an estate a claim of a corporation on an ordinary subscription contract for stock was prosecuted to judgment in the orphans' court, pending an action at law by the company against the administrators in the court of common pleas on the same contract. The estate claimed that any cause of action was barred by limitations. *Held*, on appeal from the decree of the orphans' court, that such decree should be opened, and all further proceedings in such court and the supreme court should be suspended until the action in the common pleas was determined.

Appeal from orphans' court, Allegheny county.

Settlement of the second and partial account of W. D. Henry and others, as administrators of the estate of James H. Lindsay, deceased. From a decree directing payment in full of a claim of the North Side Bridge Company, a corporation, for an alleged subscription for stock made by deceased, the administrators appeal. Proceedings suspended.

W. B. Rodgers and J. J. Miller, for appellants. H. & G. C. Burgwin, for appellee.

GREEN, J. This case comes before us on an appeal from the decree of the orphans' court of Allegheny county in the settlement of the second account of the administrators of James H. Lindsay, deceased. Upon the settlement of the first account a distribution had been made of the whole fund among the widow and heirs. When the second account was filed, a creditor, the North Side Bridge Company, appeared, and presented a claim for \$20,000 upon an alleged subscription made by the decedent, for 400 shares of its capital stock, which it was claimed had never been paid. On the hearing it appeared that there never was any subscription actually made by the decedent to the stock of the company, but it was contended by the bridge company that in the original certificate of organization of the company the decedent was named as one of the subscribers to the amount of 400 shares, and it was claimed that this was, in legal effect, a subscription to the capital stock for that number of shares. But it appeared that the organization certificate was made in October, 1881, and that no call upon the subscribers to pay for their capital stock had ever been made until in December, 1895, more than 14 years after the date of the organization certificate. It was argued for the estate that the statute of limitations was a bar to the claim, and thereupon various contentions were advanced upon both sides as to the effect of the plea. It also appeared that an action at law had been brought by the bridge company against the administrators in the court of common pleas No. 3 of Allegheny county,—No. 370, November term, 1896,—before the hearing in the orphans' court, founded upon the same alleged subscription contract, which has not yet been decided. Pending that action the movement was made in the orphans' court to charge the estate with liability for the same cause of action. The claim is purely and distinctively adversary in every possible sense. It is properly remediable in a common-law action founded upon the contract. While, for the benefit of creditors, a bill in equity may be entertained where the object is to collect the unpaid stock for the benefit of all creditors after the exhaustion of the assets of the corporation, this is not that kind of a case, but is simply a demand to enforce the claim of the company upon an ordinary subscription contract for stock. It is certainly very unusual to prosecute that kind of claim in the orphans' court, especially during the pendency of a common-law action. We are not aware of any instance in which such course has been pursued, nor have we been referred to any case in which it has been done. From the character of the contentions which are advanced on either side of the present controversy, including the statute of limitations, it would seem to be appropriate that the issue should be decided by a jury, which can be done in the action at law. We will not decide at this time the merits of the controversy.

nor indicate any opinion relative thereto, but have thought it best to order a suspension of all further proceedings until the determination of the action at law which has already been brought. Now, January 3, 1898, it is ordered and adjudged that the decree of the orphans' court be opened, and all further proceedings in the orphans' court and in this court in this case be suspended until the action No. 370 of November term, 1898, in common pleas No. 3 of Allegheny county, has been tried and determined.

(184 Pa. St. 265)

STRATHERN et al. v. GILMORE et al.
(Supreme Court of Pennsylvania. Jan. 3, 1898.)

SCHOOL DISTRICTS — SALE OF LANDS — CHANGING TERMS—MINUTES OF BOARD.

1. Requirement of Act April 11, 1862 (P. L. 471), that in the sale of real estate of a school district the names of the members of the board of directors voting in the negative and affirmative shall be so entered on the minutes of the board, must be substantially complied with.

2. Material departures, in sale of land of school district, from the terms of the advertisement, as to amount of land sold and terms of payment, invalidate the sale.

3. There being no improper conduct on the part of the purchaser of land from a school district, he should not be charged with any of the costs of an action, against him and the school board, to enjoin the board from delivering to him a deed, because the board failed to enter on its minutes its vote for the sale, and departed from the terms thereof as given in the advertisement.

Appeal from court of common pleas, Allegheny county.

Bill by Allen Strathern and others, taxpayers of the school district of Wilkins township, against James Gilmore and others, school directors of said district, and James M. Johnston, to enjoin the execution and delivery by said directors to said Johnson of a deed of land of the district sold to said Johnson. Decree for plaintiffs. Defendants appeal. Modified.

R. E. Stewart and S. Schoyer, Jr., for appellants. E. J. Small and D. F. Patterson, for appellees.

FELL, J. The vote of the members of the board of directors on the question of the sale of the school property is found by the court not to have been a unanimous vote, and there is no record of the vote as it was cast. The provision of the fourth section of the act of April 11, 1862 (P. L. 471), that in the levying of taxes, the purchase and sale of real estate, the location or change of location of school houses, and the appointment and dismissal of teachers, "the names of the members voting both in the affirmative and negative shall be so entered on the minutes of the board by the secretary," has been held to be more than merely directory. The necessity of recording the vote in the manner prescribed by the act was recognized in *Tobin v. Morgan*, 70 Pa.

St. 229, in the levying of a tax, and in *Dennison School Dist. v. Padden*, 89 Pa. St. 395, and *Dyberry School Dist. v. Mercer*, 115 Pa. St. 559, 9 Atl. 64, in the employment of teachers, and seems to have been directly affirmed in the latter two cases. In *Dyberry School Dist. v. Mercer*, supra, it was said by the present chief justice: "They are wise and wholesome provisions, intended to correct gross abuses which had gradually crept into the administration of our school system, and hence it is not too much to insist upon a substantial compliance with the spirit, if not the very letter, of the act." The departures in the terms of the sale from the terms of the advertisement were in themselves fatal to the whole proceeding. These departures, both as to the amount of the land sold and as to the terms of payment, were material, and the board was without power to make them. The approval of such action would open the door to gross abuse of power. The court found that there was no fraud or collusion, and that all of the school directors acted in good faith. They overlooked the requirements of the statute, and exceeded their power in departing from the terms of the advertisement. There was no improper conduct on the part of the purchaser, James M. Johnston, and there is no reason why he should be charged with any part of the costs. He is, of course, entitled to recover back the \$100 which he paid on account of the purchase money, but we can make no order to that effect. We think that all of the defendants should be released from the payment of the record costs, and that they should be placed on the school district of the township of Wilkins; and it is so ordered. With this modification, the decree is affirmed.

(184 Pa. St. 174)

KISSICK v. HUNTER.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

ATTORNEY—WAIVER OF INQUISITION.

Where an attorney, who has been acting for defendant up to judgment, on which execution is promptly issued, files a waiver of inquisition, it will be presumed he acted under authority; and this presumption is made conclusive by defendant's failure for 16 years to disaffirm, though immediately after the waiver defendant's land was sold under levy and *fi. fa.*, and the purchaser went into possession.

Appeal from court of common pleas, Allegheny county.

Case stated between Marie Kissick as plaintiff and A. N. Hunter as defendant, to determine sufficiency of title to land which plaintiff agreed to sell defendant. Title was held bad, and judgment rendered for defendant. Plaintiff appeals. Reversed.

A. B. Angney and J. P. Hunter, for appellant. E. B. Patterson and A. N. Hunter, for appellee.

MITCHELL, J. The sale could not be held void for want of apparent authority

in the sheriff to sell under the *fi. fa.*, because the record discloses a waiver of inquisition and extent, duly indorsed by the prothonotary on the writ; but, as the waiver is by attorney, the substantial question in the case is whether such a waiver is valid. On this point the case stated is not as exact as it should be. Its language is: "Said defendants, by John G. McConnell, their attorney, by writing filed, * * * waived the right of inquisition and extension," etc. If we should hold the present parties to the literal wording of the case stated, there would be no question at all; for it avers a waiver by the defendants in the execution, and there can be no doubt that they could do that act, as any other, by attorney, if duly authorizing him, which the language literally implies. But the real question intended to be raised is the authority of an attorney, by virtue of his retainer, and without express instructions, to waive inquisition, so as to make valid a sale of land upon levy and *fi. fa.*

The acts which an attorney may do by virtue of his retainer are readily distinguishable into two classes: First, those in which his authority is absolute, and his action binding on the client, without regard to the latter's consent in fact; and, secondly, those in which he is presumed to be acting in accordance with his instructions, and which are therefore *prima facie* valid, but which the client may nevertheless disaffirm. Of the first class are all the steps in the regular progress of litigation, including even the giving up of technical, though substantial, advantages, such as a nonsuit. *Reinholdt v. Alberti*, 1 Bin. 469. The second class is not so capable of definition, but in general it embraces all such acts as are customary for attorneys to do, even though collateral to the technical course of procedure, and which do not involve the sacrifice of the cause of action. It is frequently said that the implied authority of the attorney does not extend beyond judgment, but this is too strong a statement. No doubt the chief part of the authority of the retainer ordinarily ends with judgment, but not always. Thus, it has been often held that the plaintiff's attorney may collect the judgment, and a payment to him without execution, even long after judgment, is a good payment, to discharge the debtor. *Reinholdt v. Alberti*, 1 Bin. 469; *Lynch v. Com.*, 18 Serg. & R. 368; *McDonald v. Todd*, 1 Grant, Cas. 17. The office of a general retainer is to authorize the attorney to take care of the interests of his client in the litigation, pending or imminent, and in so doing to take all the steps necessary, or only usual and proper, to that end. In a suit for a debt, therefore, the plaintiff's attorney may not only recover a judgment, but may go on and collect it, by execution or otherwise; but he may not accept satisfaction in anything but money. The courts have drawn the line here, because money is the practical object of the suit, and the client's interest authorizes the

obtaining of it by any of the ordinary means of litigation, but not the satisfaction or release of the judgment except for money. *Whitesell v. Peck*, 165 Pa. St. 571, 30 Atl. 933. The office of a retainer for the defendant is equally broad. It is to defend the suit for the protection of his interests, and yet it has been uniformly held that the attorney may agree to an amicable action, and may confess judgment. *Coxe v. Nicholls*, 2 Yeates, 546; *Kimball v. Kelsey*, 1 Pa. St. 183; *Flanigen v. City of Philadelphia*, 51 Pa. St. 491; *Swartz v. Morgan*, 163 Pa. St. 195, 29 Atl. 974, 975. But the interests of the defendant no more end with the judgment than those of the plaintiff, if, in fact, they are not even more vitally involved. There is, therefore, no more reason why the attorney's authority should be arbitrarily held to terminate at this point in one case than in the other. As already said, the plaintiff's attorney may issue execution, and control it, give time to the defendant, direct the sheriff to postpone sale, etc. *Lynch v. Com.*, 18 Serg. & R. 368. And why should not the defendant's attorney, at least in a case where execution immediately follows judgment in the suit he was retained to defend, be presumed to be authorized to continue his care over his client's interests? We know that it is everyday practice for lawyers to do so, and presumptions are founded on average experience of what like parties would do under like circumstances. A waiver of inquisition raises a mixed question of expediency and law. Whether the property pays enough profit to require an extent, and whether, under the defendant's circumstances, it will be best for him in the end to have it extended, may be largely a question of business judgment; but the additional costs, expenses, and disadvantages of management by the creditor during the extent, etc., are matters in which legal knowledge and experience are weighty factors, and in which, as we know, the services of lawyers are usually availed of. The matter is one which goes, not to the substance of the action itself, but largely to the mode of proceeding. When, therefore, an attorney who has been acting for the defendant up to judgment, on which execution is promptly issued, files a waiver of inquisition, it is to be presumed that he is acting under authority, and, if the client desires to disavow, he must do so within a reasonable time.

In the present case we are relieved from the consideration of the question of what is a reasonable time, so much discussed in *Wray v. Miller*, 20 Pa. St. 111, *Spragg v. Shriver*, 25 Pa. St. 284, and the somewhat conflicting cases which have criticised, limited, or followed them. The stringency of the rule announced in *Spragg v. Shriver* has been relaxed, but the principle of the case is sound and unchanged,—that the defendant who may disaffirm his attorney's act will be barred of his right by unreasonable delay, or by con-

duct which is persuasive of acquiescence and ratification. On the case stated it appears that in 1881 a judgment was obtained (for more than the present value of this property, it may be noted), followed by immediate levy, the waiver by attorney was filed, and the land sold under the fl. fa. The plaintiff in the judgment became the purchaser, and went into possession, and no move to disavow or object has been made by the defendants in the execution for more than 16 years. Under these circumstances, the presumption that the attorney was duly authorized, and the sale, therefore, regular in this respect, has become conclusive, and the sale is no defect in plaintiff's title. Judgment reversed, and record remitted, with instructions to enter judgment for the plaintiff on the case stated.

(184 Pa. St. 350)

**CARL BARCKHOFF CHURCH-ORGAN CO.
v. ECKER.**

(Supreme Court of Pennsylvania. Jan. 3,
1898.)

SET-OFF AND COUNTERCLAIM—NOTICE TO PLAINTIFF—EVIDENCE.

1. Rule 8 of the common pleas (sections 1-4) requires plaintiff in certain cases to file a specification of the items of his claim, which shall be taken as admitted if not traversed by the answer, and provides that such rule shall apply to a statement of set-off by the defendant, who shall, within 15 days after filing the same, notify plaintiff thereof, and plaintiff shall, within 15 days after notice thereof, file his verified reply; that, if plaintiff fails to comply with the rule, judgment of non pros. shall go against him, and, if defendant so fails, plaintiff shall be entitled to judgment as for default; and that no evidence will be heard as to any facts not substantially alleged or referred to as a ground of action or matter of defense in the statements on file. *Held* that, where defendant files a verified statement of set-off, but does not give plaintiff notice thereof within 15 days after filing it, no evidence for defendant is admissible to support such set-off or counterclaim.

2. In such case the filing of the statement of set-off or counterclaim, without more, is not notice to plaintiff.

Appeal from court of common pleas, Allegheny county.

Action by the Carl Barckhoff Church-Organ Company against H. P. Ecker, doing business as H. P. Ecker & Co., for the price of goods sold and delivered to defendant, in which defendant filed a set-off. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Joseph Brell, for appellant. J. L. Ritchey, B. S. Ambler, and Geo. W. Acklin, for appellee.

STERRETT, C. J. Assuming, for the present, that the assignments of error are according to rule, and founded on exceptions taken in the court below, this appeal involves the construction of rule 8 of said court. See *Carpet Co. v. Latimer*, 165 Pa. St. 619, 30 Atl. 1050. As will appear by reference to the rule *supra*, the first section thereof re-

quires the plaintiff, in certain specified cases, to file with or before his declaration a specification of the items of his claims, together with a statement of the facts necessary to support it, verified by affidavit, to which the defendant shall, within the time specified in the next section, file an answer, verified by affidavit; and such items of claim and material averments of fact as are not directly and specifically traversed and denied by the answer shall be taken as admitted. The second section, among other things, provides: "If the specification and statement be not filed with the precipe, the plaintiff shall, within fifteen days after filing the same, notify the defendant thereof, and defendant shall, within fifteen days thereafter, file an answer thereto." The third section declares: "This rule shall apply to a specification and statement of set off filed by defendant, who shall, within fifteen days after filing the same, notify the plaintiff thereof, and the plaintiff shall, within fifteen days after notice thereof, file his reply thereto, verified by affidavit. If the plaintiff fails to comply with any of the requirements of this rule, judgment of non pros. shall be entered against him by the prothonotary; and if the defendant shall fail to comply with the requirements thereof, the plaintiff shall be entitled to judgment against him as for default of a plea and affidavit of defense." The fourth section declares: "No evidence will be heard upon the trial of the cause as to any facts not substantially alleged or referred to as a ground of action or matter of defense in the statements then on file in the case," and also specifies the terms and conditions on which the affidavit of either party may be supplemented. The plaintiff in this case, having complied with the rule of court, offered in evidence his verified statement, etc., for the purpose of proving the sale, delivery, and price of the several items of claim therein specified, none of which are traversed or denied by the defendant, and, the same having been admitted without objection, he rested on the *prima facie* case thus fully made out. The defendant having filed, within the required time, a verified statement embodying the items of his set-off or counterclaim, called a witness, and offered "to prove the items of indebtedness of the plaintiff to the defendant, as set forth in the affidavit of defense, in addition to the credits allowed in the [plaintiff's] statement." This was "objected to because notice [of the filing] was not given as required by the rule of court in case of set-off." The objection was sustained, and, there being no evidence on behalf of the defendant, the court, referring to rule 8, *supra*, instructed the jury that, in the case of "a specification of set-off, or a defense in the nature of a set-off, the defendant is required to give notice of the filing of the items of his counterclaim, and then they are admitted, unless the plaintiff, within fifteen days, files a denial under oath.

specifying what particular items are denied. In this case the defendant has set up a number of items of this sort,—a number of items that would come under the rule, as it appears to us,—but he has given no notice, and the consequence is that, under that rule, he is not entitled to prove them. He can, as I understand the items, bring another suit for them, but he cannot set them off in this particular case. We have so ruled upon an offer of evidence, and the result is that there is no evidence in for the defense whatever, and the case simply stands upon the admissions to the effect that there is a balance due to plaintiff of \$1,062.43, with interest from May 31, 1894." A verdict having been rendered accordingly, judgment was entered thereon. The subjects of defendant's complaint are exclusion of his offer of evidence, misconstruction of the rule, and refusal to grant a new trial.

It is scarcely necessary to say that there is no merit in any of the specifications of error. The learned trial judge was clearly right in construing the rule as he did, and in excluding defendant's offer of evidence, etc. It is not pretended that notice of the filing of defendant's statement of set-off or counterclaim was given to the plaintiff "within fifteen days after filing the same," as plainly required by the express words of the rule; but it has been suggested that filing the statement of set-off, without more, is notice to the plaintiff. The obvious answer to that is that the rule positively, and in language too plain to be mistaken, requires both filing and notification to the plaintiff. The defendant's statement of set-off or counterclaim must first be filed, and "within fifteen days" thereafter the defendant must notify the plaintiff that it has been filed. The rulings of the court below are in full accord with the opinion of this court in *Carpet Co. v. Latimer*, supra. That case virtually rules the one under consideration. As was there said, the rule was meant to embrace every species of claim that might be legally or equitably interposed as a defense. As a means of promoting justice and expediting the trial of causes, the rule in question has proved to be most valuable, and its usefulness and efficiency should not be impaired by neglecting to enforce its provisions on all proper occasions. In the face of all that was said in that case, the defendant in this not only omitted to give the required notice, but uselessly undertook to consume the time of the court and jury by calling witnesses to prove the numerous items of set-off specified in his counter statement. All this might have been avoided by giving the notice required by the rule. The case, as presented to the court below, was an eminently proper one for the enforcement of the rule as was done.

We have thus treated the alleged errors as properly assigned in order that the case may be finally disposed of on its merits; but it is proper to state that no exception appears to

have been taken to the rulings of the court, and, moreover, the alleged errors are assigned with similar disregard of our rules to that with which rule 8 of the common pleas was treated. There is no merit in appellant's case, and the judgment is affirmed.

(184 Pa. St. 188)

CLARK et al. v. PITTSBURGH NAT. GAS CO. et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

EQUITY—AMENDMENT—CORPORATIONS—CONTRACT WITH OFFICERS—ESTOPPEL.

1. Such amendments in equity "as obtain in common-law cases and practice" being allowed by Act May 4, 1864 (P. L. 775, § 2), a bill alleging that a gas company was incorporated mainly for the purpose of supplying gas to the works of plaintiff and those of defendants; that each party contracted with the company for a supply of gas for three years; that, since the company had become unable to furnish a full supply to both, defendants, by reason of ownership of a majority of the company's stock, had obtained more than their proportionate share of gas; and that they were mismanaging the company, and making fictitious charges against it, and intended by fraud to obtain a judgment against it, sell its property, and become the sole owner; and praying for appointment of receiver to manage it, defend the threatened suit, and secure a proper apportionment of the gas, and for injunction,—is properly amended by allegations that the accounts between the company and defendants were incorrect and fraudulent, and that defendants had been using the entire gas supply without compensation therefor, and that a large sum was due by them to the company, with additional prayers for appointment of a receiver to sell the property and for an account, as the subject-matter of the amendment is germane to, and in enlargement of, the substantial purpose of the bill.

2. Stockholders who are parties to whatever agreement other stockholders and officers have with the corporation, and secure a like agreement for themselves, are estopped to question the validity of the contract of the others because made with a corporation by its officers.

3. Unsigned memoranda,—one reciting agreement to pay a gas company a certain amount per year "for fuel and light in our works, with the understanding we do not add anything requiring gas without paying 40 per cent. of schedule rates adopted by Natural-Gas Association"; the other, the same, with exception of amount of yearly payment,—though drawn for signature of the two stockholders of the company, are no evidence of agreement of the gas company to furnish them sufficient gas for their works, whatever be the condition of the supply.

Appeal from court of common pleas, Allegheny county.

Bill by Edward L. Clark and others against the Pittsburgh Natural Gas Company and others. Decree for plaintiffs. Defendants appeal. Affirmed.

The unsigned memoranda of agreement referred to in the opinion are the same except as to amount of annual payment, the amount provided in one being \$21,000, and the other being as follows: "Pittsburgh Natural Gas Co., Cor. 30th and Smallman Sts. Pittsburgh, Dec. 3rd, 1888. We hereby agree to

pay to the Pittsburgh Natural Gas Co. the sum of ninety-eight thousand dollars (\$98,000.00) per annum for fuel and light in our works, with the understanding we do not add anything requiring gas without paying 40 per cent. of schedule rates adopted by the Natural Gas Association. This contract to remain in force three (3) years from July 1st, 1889."

Watson & McCleave and Dalzell, Scott & Gordon, for appellant. M. A. Woodward and Shiras & Dickey, for appellees.

FELL, J. As the relief granted is under the prayers of the amended bill, the objection to the allowance of the amendment should be considered first. If it was improperly allowed, the decree must be set aside. The averments of the original bill are that the Pittsburgh Natural Gas Company was incorporated mainly for the purpose of supplying gas to the works of the plaintiffs William Clark, Son & Co. and those of Park Bro. & Co., one of the defendants; that each of the said parties contracted with the company for a supply of gas at their works for three years; that, since the gas company had become unable to furnish a full supply to both, Park Bro. & Co. had, by the use of their power as owners of $\frac{70}{85}$ of the stock, obtained more than their proportionate share of gas; that they were mismanaging the company, and making fictitious charges against it, and intended by fraudulent contrivances to obtain a judgment against it, sell its property, and become the sole owners thereof. The prayers were for the appointment of a receiver to manage the affairs of the company, to defend the threatened suit, to secure a proper apportionment of the gas to the parties, for an injunction, etc. After an answer and replication had been filed, and but seven of the twelve hundred pages of testimony had been taken, an amendment was allowed by the court, in which it is alleged that the accounts between the gas company and Park Bro. & Co. were incorrect and fraudulent; that Park Bro. & Co. had been using the entire supply of gas without making compensation therefor, and that a large sum was due by them to the gas company. The additional prayers were for the appointment of a receiver to sell the property, and for an account. The subject-matter of the amendment was germane to, and in enlargement of, the substantial purpose of the bill, and there was no abuse of discretion in its allowance. It was based mainly on knowledge acquired after the filing of the bill, and it was asked for in accordance with the rules of court. The prayer for an accounting might have been added to those of the original bill. The act of May 4, 1864 (P. L. 775, § 2), permits amendments in proceedings in equity, at the discretion of the court, which affect the merits of the matter in contro-

versy, and expedite justice, in the same manner as obtains in common-law cases and practice. Referring to this act, Sharswood, J., in the opinion in Wilhelm's Appeal, 79 Pa. St. 124, said: "We are thus by legislative mandate for rules as to amendments in equity proceedings referred to those which prevail in 'common-law cases and practice,' intending, no doubt, to incorporate all of the provisions of the acts of assembly, and to make one uniform system of both classes of cases;" and that, while the limit of the power of amendment is that no new cause of action can be introduced, "the true criterion is, as all the authorities show, did the plaintiff so state his cause of action originally as to show that he had a legal right to recover what he subsequently claims?" The most important subject of controversy before the master was the charge of \$324,380.48 made by Park Bro. & Co. for fuel purchased by them to supply their works after the supply of gas received from the gas company became insufficient. This extraordinary charge was made at a time when Park Bro. & Co., by reason of their ownership of $\frac{70}{85}$ of the stock, were in absolute control of the management of the gas company. A part of the time they were receiving the entire product of gas, and at no time were they charged with more than one-fourth or one-third of the market value of the gas. In the first year of their absolute control, during five months of which they received all of the gas the company was able to furnish, they credited it with \$111,294.05 for gas used, and charged it with \$262,467.80 as damages for a failure to furnish a full supply. If this charge rested on a lawful agreement, clear and distinct in its terms, it would have to be sustained, ruinous as it would be to the company. The plaintiffs are not in a position to contest the legality of such an agreement, if made. They are not innocent stockholders of a corporation whose officers have made improvident and unlawful contracts with themselves. They were parties to whatever agreement was made with Park Bro. & Co., and secured a like agreement for themselves; and in a proceeding to secure their individual rights only, in which no question of public rights or duties is involved, they are estopped. They claim, however, that no such agreement was made, and this claim is sustained by the testimony. No formal contract was made, no resolution was passed by the board of directors, and the minutes and books show no such agreement. It is extremely doubtful whether there was any understanding except for a division of the gas between the parties in proportion to the interest which they had as stockholders. The company was not organized or conducted with the intention that it should perform any public duty. Its franchises were obtained and used solely to serve the private interests of the stockholders. They agreed upon a division of the gas proportionate to

their holdings of stock, and in all contracts with other parties they carefully provided against claims for damages by reserving the right to cancel the contracts. When the supply had been cut off from others, and became insufficient to supply their works, they for a time held out to each other the promise of a fair division. That this method of adjustment was considered by them is some indication of their understanding of their rights at the time, and that the unsigned memoranda now set up as evidence of an agreement to furnish a full supply were intended only to provide for a division of the supply. In fact, the only force these memoranda have as evidence of any understanding is that the parties apparently acted under them in making a division. After July, 1892, there is no pretense of a contract except such as was made by the officers of the company with themselves as members of a co-partnership.

With what amount Park Bro. & Co. should be charged for gas used by them after July 1, 1892, is a question by no means free from difficulty. The difficulty results in part from their failure to use means to ascertain the amount they consumed when they were dealing with the property of the gas company as if it were their own. We find no reason, however, which would justify us in setting aside the finding of the court upon the subject, and it is unnecessary to enter upon a discussion of it. By a motion to amend the decree attention has been called to an error in calculation made by the learned judge. In reducing the sum of \$285,609.28, charged by the master for the use of gas from July 1, 1892, to June 1, 1896, one-third, the amount of the charge is fixed at \$170,406.19, instead of \$190,406.19. This is clearly an error of calculation, and has been carried into the decree. The decree is now corrected by fixing the sum to be paid by Park Bro. & Co. at \$252,719.03, instead of \$232,719.03. With this correction, the decree is affirmed, at the cost of the appellant.

(184 Pa. St. 386)

IN re HAYES' ESTATE.

Appeal of WYLIE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

DEVISE—LIFE ESTATE—TRUST.

A will devising testator's property to his executors in trust, with a provision that for 10 years it shall be managed by them, and "the net annual income and profits shall be divided into 11 shares, and distributed in absolute property" to persons named; each of his daughters to receive one share, which shall be paid her "for her sole and separate use, and shall be paid into their own hands, respectively, upon their own sole and separate receipt therefor"; with direction that the directors shall hold the shares of the daughters in the estate, after its division at the end of the 10 years, on the same trust, and with the same power of control, as they held the estate before division, and pay over to each the net income from her share dur-

ing her life, for her separate use, and on her sole and separate receipt; such trust to continue for the life of each daughter, and the minority of any children she might leave to survive her; the directors to have the entire business management and direction of the shares of the daughters, except that a daughter could prevent the sale of any piece of real estate included in her share,—creates an active trust, and gives to a daughter a life estate only, though the direction for division of the estate at the end of the 10 years is for "a complete partition" of all his estate into 11 parts; this not meaning a partition which should vest title in fee simple in each of the children, but merely that none of the property should be left undivided.

Appeal from orphans' court, Allegheny county.

In the matter of the estate of James H. Hayes, deceased. The petition of Agnes Wylie that a former decree of partition be declared void, and that it be decreed that she take her share in fee simple, was denied, and she appeals. **Affirmed.**

James Fitzsimmons and J. Guy Bassett, for appellant. Lazear & Orr, for appellee.

WILLIAMS, J. The questions presented by this record are ruled by Barnett's Appeal, 46 Pa. St. 392. The will of James H. Hayes was carefully prepared. He gave to Mrs. Wylie, the appellant, as to his other daughters, an equitable life estate, limited to her sole and separate use, in one eleventh part of his real estate. The legal title was distinctly given to his executors, who were also trustees for his daughters, upon a well-defined trust, which was to continue beyond the lives of the cestui que trust. The estate was large, embracing more than a quarter of a million of dollars in personalty, and between two and three millions in real estate. Much of the real estate consisted of coal lands. His two sons, whom he named as executors, had been associated with him in his coal operations, and knew the general plan upon which his purchases had been conducted, and the relations of the several tracts to each other. To afford his executors time to make themselves familiar with the situation of all his investments, and arrange for the division of his estate to the best advantage for all his children, he directed that the estate should be kept together for 10 years after his death, during which time his executors were to collect the income from both real and personal estate, divide it into 11 parts, and pay to the distributees named in his will. This they were directed to pay in these words: "The net annual income and profits shall be divided into eleven shares, and distributed in absolute property." Each of the daughters was to receive one share, which was to be paid her "for her sole and separate use, and shall be paid into their own hands, respectively, upon their own sole and separate receipt therefor." These words are apt and appropriate for the creation of a sole and separate use trust for each of the daughters in the income from the undivided estate, and are substantially repeated as to the

shares of each in the estate after its division at the end of 10 years. The executors were directed to hold the shares of the daughters after the division upon the same trust, and with the same power of control, as they held the estate before division, and to pay over to each the net income derived from the share allotted to her during her life, for her separate use, and upon her sole and separate receipt, just as the income from the undivided estate was to be paid. The duration of the trust so created was for the life of each of the cestuis que trustent, and the minority of the children she might leave to survive her. The duties of the trustees were not dry and technical, but active and continuous; involving the entire business management and direction of the shares of each of the six daughters. The will gave them a negative upon the action of the trustees in the one case of a proposed sale of any part of the real estate included in the share of either of the daughters. She could say, when such a sale was proposed to her, "No; I do not wish this piece of real estate sold;" and the power of the trustees to sell was thereby at an end. The appellant lays great stress upon the words used by the testator in directing the division of his estate after the end of 10 years. He says that at the end of that time he wishes "a complete partition" to be made of all of his estate into 11 parts. This means a division from which nothing shall be omitted. He wished the division complete, in the sense of including all that he left behind him. It was not a direction that the partition should be conducted with a view to vest a title in fee simple in each of his children, discharged from the trust. He gave his daughters a title which he defined with great care. It was a life estate, the legal title to which was placed in trustees upon an active trust created for the sole and separate use of each of them during life, with a limitation of the fee after their death. This was evidently the view entertained by the orphans' court, and amply justified the dismissal of appellant's petition. The assignments of error are overruled, and the decree is affirmed.

(184 Pa. St. 395)

REEVES et al. v. McCLOSKEY et al.

(Supreme Court of Pennsylvania. Jan. 17, 1898.)

INSTRUCTIONS.

The court need not, in addition to affirming defendants' request for instructions, refer to the testimony relating to the requests.

Appeal from court of common pleas, Philadelphia county.

Action by George W. Reeves and another against L. J. McCloskey and another for balance of purchase price of goods sold and delivered. Judgment for plaintiffs. Defendants appeal. Affirmed.

Julius O. Levi, for appellants. Henry R. Edmunds, for appellees.

PER CURIAM. We find no error in the rulings of the learned trial judge, or in his instructions to the jury, including portions of his charge referred to in each of the five specifications of error. A careful consideration of the latter, in connection with the accompanying references to and citations from the testimony, etc., covering 45 pages of appellants' paper book, has satisfied us that there is nothing in either of them that requires special notice. Defendants' nine requests for instructions were all affirmed. There is no merit in the complaint that the learned trial judge did not go further, and specially refer to the testimony relating to these requests. The right of the plaintiffs to recover depended upon questions of fact which were fairly submitted to the jury, with full and adequate instructions, and by them determined in favor of the plaintiffs. There appears to be no valid reason for disturbing the judgment entered on the verdict thus rendered. Judgment affirmed.

(184 Pa. St. 401)

HARSHAW et al. v. HARSHAW.

(Supreme Court of Pennsylvania. Jan. 17, 1898.)

DEVISE—ADEMPTION.

A devise of two particular ground rents, in trust, with provision, "Should said ground rents, or either of them, be paid off at any time, I order and direct my executors to invest the proceeds, * * * and hold the same on the same trusts," does not carry a ground rent purchased by the testator with part of the principal of one of said ground rents paid testator after execution of the will.

Appeal from court of common pleas, Philadelphia county.

Case stated between David Harshaw and another, trustees under the will of Eliza Harshaw, deceased, as plaintiffs, and David Harshaw, as defendant. Judgment for defendant. Plaintiffs appeal. Affirmed.

Peter Boyd and George W. Wilgus, for appellants. T. M. Daly, for appellee.

STERRETT, C. J. All the facts relating to this contention, as agreed upon by the parties, are set forth in the "case stated for the opinion of the court" below, and need not be recited here. It is conceded that the single question for the decision of that court was "whether the ground rent of one thousand dollars purchased by the said Eliza Harshaw on or about the eleventh day of May, 1887, and issuing out of premises No. 1322 South Seventeenth street, * * * is the property of said David Harshaw and Peter Boyd, trustees under the last will and testament of Eliza Harshaw, deceased, or is the property and estate of David Harshaw (the defendant), as residuary devisee under said will." The court below, having reached the conclusion

that said ground rent was the property of the defendant, without filing any written opinion, entered judgment in his favor on the case stated. Hence this appeal by the plaintiffs.

By her will, executed March 1, 1887, the testatrix devised to the plaintiffs, her executors, two specifically described ground rents, one of \$64 annually, "issuing out of premises southwest corner of 17th and Wharton streets, Philadelphia," and the other issuing "out of the premises on 17th street, adjoining said corner premises," to be held by them "in trust to pay the said rents, as they accrue, to my brother Obediah Boyd, for his life," etc. This trust clause contains the following provision: "Should said ground rents, or either of them, be paid off at any time, I order and direct my executors to invest the proceeds in legal securities, and hold the same on the same trusts as I have above set forth." Evidently, this contemplates only payment of one or both of said rents after the decease of the testatrix, and cannot relate to a payment in her lifetime and investment by herself of the proceeds, which actually occurred as to the first-mentioned ground rent. About two months after execution of the will, the principal (\$1,066.66) of that ground rent was paid to testatrix, and the rent was extinguished. Shortly thereafter she invested \$1,000 of the proceeds in the annual ground rent of \$60, in controversy, issuing out of premises about 170 feet south of the corner lot out of which the extinguished ground rent issued. The devise of the two particularly described ground rents was undoubtedly a specific devise as to each. One of the two subjects of that specific devise having been disposed of in the lifetime of the testatrix,—absolutely extinguished by payment to her of the principal of the ground rent (\$1,066.66),—there was nothing upon which the specific devise could operate, at the time of her decease, except the remaining subject of the devise. It is hornbook law, for which neither argument nor citation of authority is needed, that where a particularly described lot or piece of land is specifically devised, and afterwards the subject of said devise is sold by the testator, or taken from him by operation of law in his lifetime, the devisee takes nothing. It was accordingly held "that a devise of a particular ground rent is a specific devise, which will be adeemed by the payment and extinguishment of the ground rent during the testator's lifetime." *Donaldson's Estate*, 11 Pa. Co. Ct. R. 311. It was, of course, competent for the testatrix in this case to have so changed her will that the ground rent in controversy would have been substituted for the extinguished ground rent, but no change or alteration whatever was made in her will. As has already been observed, the provision for investment by the executors of the proceeds of extinguished ground rent, etc., relates only to extinguishment of one or both of the rents

referred to after the trust became operative by her death, and not to extinguishment in her lifetime. She lived nearly two years after she had purchased the ground rent in controversy; and, if she had so desired, she might have provided that it should be substituted for the one extinguished, but she did not do so; and no authority can be found in the will for any such substitution. The court was therefore right in entering judgment for the defendant. Judgment affirmed.

(87 Md. 68)

METROPOLITAN SAV. BANK OF BALTIMORE CITY v. MANION.

(Court of Appeals of Maryland. Jan. 5, 1898.)

NUISANCE—WHAT CONSTITUTES—WHO LIABLE—EVIDENCE—EXPERT TESTIMONY—APPEAL—WAIVER.

1. Where an exception is not pressed on the attention of the appellate court, an intention to abandon it will be inferred.

2. In an action for damages for the erection and maintenance of a livery stable on land adjoining plaintiff's dwelling house, the question whether plaintiff had notified defendant not to put the windows in the side of the stable opposite the dwelling is immaterial, as such notice would not affect defendant's liability.

3. In an action for damages for a nuisance, letters of plaintiff to defendant, intended as notice to the latter to abate the nuisance, are immaterial evidence.

4. A witness was asked if, from an examination, he could say whether a number of windows in the wall of a stable in which a large number of horses were kept would, in the ordinary use to which windows are put, create a nuisance. Held inadmissible as expert testimony.

5. The owner of a livery stable so constructed that, when used with proper care and caution, it would not reasonably cause such physical discomfort of persons of ordinary sensibility, tastes, and habits, living in an adjoining house, as to constitute a nuisance, is not liable to the owner of such house.

6. The lessor of a livery stable so constructed that, by a proper use, it would not be a nuisance, is not liable to the owner of an adjoining dwelling house for any consequences growing out of the careless or improper use of the stable by the tenant, or his employés, in possession thereof.

Appeal from superior court of Baltimore city.

Action by the Metropolitan Savings Bank of Baltimore City against Bernard Manion. From a judgment entered on a verdict for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

A. J. Shriver and Julian S. Jones, for appellant. Ber. Carter & Sons, for appellee.

ROBERTS, J. This is an action brought to recover damages for a nuisance. The case was tried before a jury in the superior court of Baltimore city, and, the verdict and judgment being against the plaintiff, it has taken this appeal. The appellant (plaintiff below) is the owner of a lot of ground in the city of Baltimore which it purchased prior to March, 1895. The only improvement up-

on the lot at the time of its purchase was a double house fronting on North Eutaw street. Subsequently to the purchase the appellant built on the lot a small two-story dwelling house fronting on Jordan alley, which extends along the rear of said lot. The appellee, at the time this suit was brought in the court below, was the owner of a lot of ground adjoining that of the appellant, and extending from Eutaw street to Jordan alley. Upon this lot he erected a brick stable, which was first occupied in August, 1895. In July, 1895, the appellee leased the property, the lease to begin on August 1, 1895. It has since then been almost continuously used by the lessee as a livery stable wherein a large number of horses were kept; that there are a great number of openings in the northwest wall of said stable on a line with the windows of the first floor of the house of the appellant, through which openings, the declaration charges, offensive gases and odors flow into the house of the appellant, rendering it unfit for the use of a dwelling, etc. At the very threshold of this case it must be noted that the declaration contains no allegation that the stable, as constructed, constituted a nuisance, or that, in its proper use and occupancy, it would necessarily become a nuisance. The testimony shows very clearly that the appellee has never, at any time since its erection, used or had in his possession the stable in question.

With this preliminary statement, we will examine the exceptions contained in the record, six of which relate to the admissibility of the proof offered, the other to the granting of the appellee's two prayers.

We infer from its treatment in this court that the first exception was abandoned. It was not pressed upon our attention at the argument, and, in any event, it could avail the appellant nothing, as the question was clearly irrelevant and improper.

The second exception was to the refusal of the court to permit the question to be asked the appellant's president, "Did you notify Mr. Manion that he must not put those windows in the wall next to that property?" Upon objection, the court refused to allow the question to be put and answered. For what purpose should it have been allowed? It in no respect affected the liability of the appellee. It could make no possible difference whether the appellee was notified or not. By giving the notice, the appellee's liability was neither fixed nor enlarged. The question was therefore immaterial, and properly disallowed.

The third and fourth exceptions can properly be considered together. We do not perceive that the two letters which are the subject of the third and fourth exceptions are in any sense material to the issues in this case. The letter of the president of the appellant, addressed to the appellee, contains no information which the jury should have

been permitted to pass upon, and is wholly without character, as legal evidence in this cause. The letter addressed by the appellant's attorney to the appellee is merely a notification of the intention of the appellant, in the event of the failure of the appellee to agree upon an adjustment of their differences. But, if either or both of the letters were intended to be notice to the appellee to abate the nuisance, no previous demand was necessary, and therefore these letters were immaterial, and the court committed no error in excluding them from the jury. *Walter v. Commissioners*, 35 Md. 386; 1 Tayl. Landl. & Ten. § 211. What we have said concerning the third exception applies equally to the fifth exception, and no further comment need be indulged in here.

The sixth exception is taken to the action of the court in refusing to allow Mr. Snell to answer the following question: "Now, from that examination, can you say whether or not a number of windows in the wall of the stable, in which a large number of horses are kept, within the space you described,—whether or not those windows, in their ordinary use, such as windows are usually put to, would create a nuisance?" By the question propounded to Mr. Snell it was sought to make of him an expert, instead of stating the facts within his knowledge, and allowing the jury, as was their duty, to pass upon those facts and draw their own inferences. This court has in a recent case said: "It was an unsafe practice in the admission of testimony to allow witnesses to speak as experts, unless the court is well satisfied that they possess the requisite qualifications. Not alone on this account, but the effect of such testimony is more difficult to estimate from the fact that undue importance not infrequently attaches to it, and gives to it an influence upon the minds of a jury to which it is not fairly or reasonably entitled." *Dashell v. Griffith*, 84 Md. 377, 35 Atl. 1094. Judge Miller, delivering the opinion of this court in *Stumore v. Shaw*, 68 Md. 19, 11 Atl. 360, said: "There is a general concurrence of authority and decisions in support of the proposition that expert testimony is not admissible upon a question which the court or jury can themselves decide upon the facts; or, stated in other words, if the relation of facts, and their probable results, can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury." To the same effect is the case of *Turnpike Road v. Leonhardt*, 66 Md. 78, 5 Atl. 346, and also *Railroad Co. v. Schultz*, 43 Ohio St. 270, 1 N. E. 324.

We come now to the consideration of the prayers. The appellant offered five prayers, all of which were granted by the court. The only instructions to which exceptions have been reserved are the two prayers offered by the appellee and granted by the court. The first of these prayers contains the proposition that if the jury find that the stable in contro-

very here was so constructed that when used for livery purposes, with proper care and caution, it would be so used as not to occasion any of the objections set out in the prayer,—that is to say, would not fairly and reasonably cause such actual physical discomfort to persons living in the property of the appellant, of ordinary sensibility and ordinary tastes and habits, which, under the decisions of this court, constitutes a nuisance,—and shall further find that said stable has not, at any time since its erection, been used by the appellee as a livery stable, but has always been in the possession of the tenant under the lease from the appellee, then the appellant is not entitled to recover; and, further, that the appellee is not responsible for any consequences growing out of the careless, improper, or incautious use of said stable by said tenant or his employés. The authorities which hold that a livery stable in a city is not per se a nuisance are so numerous that it would serve no useful purpose to repeat them. It may, however, be taken as a concession that such is the well-established rule of law, about which no controversy can be reasonably expected to arise. And, while this is unquestionably true, it is equally clear that a stable, whether used for livery purposes or for private convenience, may sometimes become a very great nuisance and source of discomfort that the courts would not fail to grant relief. But the fact, just noted, that a livery stable is not necessarily *prima facie* a nuisance, suggests caution in dealing with the rights of the owners or occupants of livery stable property. The court in *Dargan v. Waddill*, 31 N. C. 244, said: "It is true that a stable in a town is not, like a slaughter house or a sty, necessarily and *prima facie* a nuisance. There must be places in towns for keeping the horses of people living in them or resorting thither, and, if they do not annoy others, they are both harmless and useful erections. But, on the contrary, if they are so built or kept or so used as to destroy the comfort of persons owning and occupying adjoining premises, and impair their value as places of habitation, stables do thereby become nuisances." It cannot be denied that a livery stable in a town adjacent to buildings occupied as private residences is, under any circumstances, a matter of some inconveniences and annoyance, and must more or less affect the comfort of the occupants as well as diminish the value of the property for the purpose of habitation. But this is equally true of various other erections that might be mentioned which are indispensable, and which do and must exist in all towns. *Kirkman v. Handy*, 11 Humph. 406; *Shiras v. Olinger*, 50 Iowa, 571; *Flint v. Russell*, 5 Dill. 151, Fed. Cas. No. 4,876. In conflict with the law settled and determined by this court in numerous cases, the appellant contends that the last proposition embodied in the defendant's first prayer, which we have been considering, is not supported by the authorities quoted in support of it. The case of *Rich v. Basterfield*, 56

E. C. L. 783, has been subjected to a most critical examination, and an effort has been made to show that its authority has been doubted and impaired. The case has been recognized, and practically and substantially supports the opinion of this court, in the following cases: In *Owings v. Jones*, 9 Md. 117, Mr. Chief Justice Le Grand, delivering the opinion of the court, said: "A careful examination of the authorities satisfies us there is no foundation for either of the prayers. We have consulted them in the original reports, but, inasmuch as they are very clearly brought together and discussed, both by court and counsel, in the case of *Rich v. Basterfield*, 56 E. C. L. 784, we will content ourselves with a reference to that case. After a full review of all the cases, and that, too, after a second argument, we understand the court to deduce, at least, the two following principles from the numerous adjudications to which reference is had: First, that where property is demised, and at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happens during such possession, the owner is not liable; but, second, that where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of possession, he is liable." In *Maenner v. Carroll*, 46 Md. 216, Mr. Justice Alvey, delivering the opinion of the court, held that, "if a landlord demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premises by the tenant. He is not responsible for enabling the tenant to commit a nuisance, if the latter should think proper to do so. *Owings v. Jones*, 9 Md. 108; *Rich v. Basterfield*, 4 C. B. 783. In such case, it may be said, in one sense, that the landlord permitted the tenant to create the nuisance, but not in such sense as to render him liable." In accordance with the views just stated are *Albert v. State*, 66 Md. 325, 7 Atl. 697. Therefore, whatever may be the standing of *Rich v. Basterfield*, elsewhere, it must in this state be regarded as a recognized and well-established authority. We think the court was clearly right in the granting of the appellee's first prayer. As to the appellee's second prayer, we find it differs, substantially, but little from the principles announced in the first prayer. What we said in regard to the first prayer is in great measure applicable to the second prayer. We have failed to discover such inconsistency in the prayers of the appellant, when contrasted with those of the appellee, as in any manner tends to mislead the jury, as contended by the appellant. The second prayer pointedly calls the attention of the jury to the effect of the windows in affording light to the stable, and also the ventilation thereof, if the same should be required. If, in the construction of the stable, the landlord

made these windows, with the possible effect asserted in the language of 46 Md. 216, "he is not responsible for enabling the tenant to commit a nuisance, if the latter should think proper to do so. In such case, it may be said, in one sense, that the landlord permitted the tenant to create a nuisance, but not in the sense to make him liable." Finding no error in the ruling of the court, it follows, from what we have said, that the judgment must be affirmed. Judgment affirmed, with costs.

(87 Md. 97)

INTERNATIONAL FRATERNAL ALLIANCE OF BALTIMORE CITY v. MALLALIEU.

WORLD NEWSPAPER CO. OF BALTIMORE CITY v. SAME.

(Court of Appeals of Maryland. Jan. 5, 1898.)

LIBEL—EVIDENCE—IDENTITY OF PLAINTIFF.

1. In an action for libel, plaintiff's identity as the party intended is sufficiently established, in the absence of proof to the contrary, when he testifies that his name is the same, and that he was employed by the same company at the time, as alleged in the libelous statement, and that he had been accosted on the street by a gentleman, who referred to him as the person mentioned in the statement.

2. In an action for libel, proof that the libelous statements emanated from, and their publication was paid for by, the defendant, who never repudiated the publication or any part thereof, is sufficient to sustain a verdict for plaintiff.

Appeal from superior court of Baltimore city.

Action by William Franklin Mallalieu against the International Fraternal Alliance of Baltimore City and the World Newspaper Company of Baltimore City for libel. From a judgment for plaintiff, defendants bring separate appeals. Affirmed.

Argued before McSHERRY, C. J., and BOYD, FOWLER, BRYAN, BRISCOE, and ROBERTS, JJ.

C. L. Wilson, A. S. J. Owens, and Rob. Lud. Preston, for appellants. William Reynolds, for appellee.

ROBERTS, J. There are nominally two appeals in this record, both of which are taken from a judgment of the superior court of Baltimore city, entered upon a verdict rendered in an action of libel, wherein the two appellants here were held jointly liable,—the World Publishing Company for the publication of the alleged libel, and the Fraternal Alliance for having procured the same to be written and published. While two appeals have been taken, they are, in point of fact and in substance, but one, and they will be so considered. The appellee brought his action against the two appellants, both of which are bodies corporate, under the Public General Laws of the state, and also against George Hardesty and Charles H. Unverzagt. The libel complained of in this case was published by the appellant the World News-

per Company, and, as stated in the declaration, is as follows: That the defendants, knowing the fact that the plaintiff was a canvasser for insurance and a collector for the Metropolitan Life Insurance Company of New York, wickedly and maliciously did compose and publish, and caused to be composed and published, of and concerning the plaintiff, in relation to his said business, in a newspaper called "The World," a certain false, scandalous, malicious, and defamatory libel, containing, among other things, the following: "The public is also warned against a man named Mallalieu [thereby meaning the plaintiff], connected with the Metropolitan [thereby meaning the Metropolitan Life Insurance Company of New York], who is saying that the International [thereby meaning the defendant corporation the International Fraternal Alliance of Baltimore City] has an unpaid claim, etc., another lie [thereby meaning that the statement so as aforesaid attributed to the plaintiff was a lie]. This man says that he is employed expressly to break up International business. His lying methods will be shown up, if reported to the company." Issue was joined on the plea of non cul., and the case was tried before a jury. The verdict being against the defendants, who are the appellants here, they have appealed from the judgment of the court below.

The only exceptions contained in the record relate to the granting of the instructions asked for by the appellee, and the refusal of the court to grant the prayers of the appellants, except as hereinafter indicated. It is not contended that the publication complained of is, not libelous per se. This being so, we shall not further concern ourselves as to the real character of the publication. At the close of the case of the plaintiff below (appellee here), three of the defendants below, the Alliance, Hardesty, and Unverzagt, offered four prayers, which substantially asked the court to instruct the jury that plaintiff had not offered any testimony legally sufficient to entitle him to a verdict against them. The first, third, and fourth prayers were rejected by the court, and the second was granted on the ground that the plaintiff had offered no legally sufficient evidence to show that said Hardesty and Unverzagt composed and published the statement set out in the declaration.

We come, now, to the consideration of the question as to who is liable for the publication of the alleged libel, or as against whom does the responsibility attach in the procurement of such publication. Mr. Odgers, in his work on Libel and Slander (page 294), says: "In cases of libel, every one concerned either in writing or publishing the libel, or in causing or procuring the libel to be written or published, is equally liable for all the damage consequent on that publication. They are all deemed publishers. Thus, if the libel appear in a newspaper, the proprietor, the editor, the printer, and the author are all liable to

be sued, either separately or together." Newell, Def. 382. It is very clear from the testimony in the record that the appellant the World Newspaper has offered no evidence which in any manner tends to relieve it from responsibility as the publisher of the libel in question, nor is it contended that the statement in the declaration is not libelous per se.

The chief controversy now remaining to be considered relates solely to the liability of the Fraternal Alliance, as the instigator of the publication of the libel in question. The Alliance seeks to escape liability in this case by confusing the name of the plaintiff with that of some other person by the name of Mallalleu, but the testimony in the record is sufficiently clear and conclusive as to have enabled the jury to reach a fair and intelligent verdict. There is certainly nothing in the testimony of the plaintiff calculated to mislead the jury. He proved that his name was Mallalleu, and that he was connected with the Metropolitan Insurance Company, a rival company with the Alliance, and employed by the Metropolitan as its agent, at the time of the publication of the libel. He further testified that, after the publication, he was stopped on the street by a gentleman, who was a policy holder in the Metropolitan Company, and who accosted him with the remark, "I see you are a liar, and the public is warned not to trust you." If the Alliance wished to place at rest this alleged unfair inference as to the identity of the plaintiff, it was its privilege to have called the author of the libel as a witness, when he could have solved the mystery, if any there be, of the identity of the plaintiff. It would then have been a question for the jury to find, as instructed by the prayer, whether or not the words set forth in the declaration were published of and concerning the plaintiff. *Bernstein v. Hobelman*, 70 Md. 40, 16 Atl. 374; *Smith v. Henderson*, 9 Mees. & W. 801; *Odgers, Sland. & L.* 129. It is contended by the Fraternal Alliance that it was necessary for the plaintiff to prove, in order to maintain this action, that the libel was authorized by the officers of the Alliance, or that it was subsequently ratified by them. It may be true that neither Hardesty nor Unverzagt composed or caused the libel to be published. That question is not before us, and we forbear commenting upon it. But it is clearly shown by the testimony in the record that the libelous statements emanated from the Alliance, its publication was paid for by the Alliance, and the Alliance never repudiated the publication of the libel or any part thereof. We have examined with care the testimony contained in the record, and we entertain not the slightest doubt as to its proper construction and meaning. The question of the ratification of an unauthorized act of an agent of a corporation is not of sufficient consequence or importance in this case as to require consideration and determination. At all events, it has been given, in our view of

this case, as much consideration in the prayers of the appellants and of the appellee as it was entitled to. We have not given to the several prayers separate consideration, as we did not deem it necessary. We have, however, examined them with care, and find no error in the disposition which the court below has made of them. It was entirely unnecessary and improper to have incumbered the record of this appeal with the motion for a new trial and certain affidavits filed in the court below, which could not be made to serve any useful purpose in the hearing in this court. It follows from what we have said that the judgment below must be affirmed. Judgment affirmed, with costs.

(37 Md. 128)

CROOK v. GIRARD IRON & METAL CO.
(Court of Appeals of Maryland. Jan. 5, 1898.)

FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Under Code, art. 23, § 295, providing that any foreign corporation which shall transact business in the state shall be deemed to hold and exercise franchises therein, and shall be liable to suit in any court of the state on any dealings therein, a foreign corporation, having no place of business in the state, and having had no dealings therein, except the purchase by it of personalty at a sheriff's sale, could not be served with a writ of replevin for such property by serving its agent temporarily within the state.

Appeal from superior court of Baltimore city.

Replevin by Edward D. Crook against the Girard Iron & Metal Company. From a ruling in favor of defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, and BOYD, JJ.

Dan. L. Brinton and Robt. H. Smith, for appellant. Isidor Rayner and R. H. Worthington, for appellee.

ROBERTS, J. This is an action of replevin brought by the appellant against the appellee to recover the possession of a lot of electrical machinery. The appellant is a citizen of the state of Maryland. The appellee is a body corporate of the state of New Jersey. The appellee in June, 1896, purchased at sheriff's sale in Baltimore city the above-mentioned machinery, and paid cash for the same. After the sale and delivery of said machinery, the appellant, claiming that he had purchased the same from the appellee, and was entitled to the possession thereof, sued out the writ of replevin, and took possession of the goods in dispute. The writ having been served upon Mr. Ginsberg, the agent of the appellee, it appeared in the court below for the sole purpose of filing a motion to quash the writ of summons and to set aside the return of the sheriff; assigning as a reason therefor that it was a corporation not chartered by the laws of this state, and did not hold and exercise fran-

chises in this state at the time of the service of the writ issued in this case. There is but one question arising on this appeal which it will be necessary for us to consider and determine, and that relates solely to the right of the appellant to maintain this action under the state of case which the record presents. In the view which we entertain of the disposition which should be made of the motion to quash, it will not be requisite to pass upon any other question in the record, for the reason that, if no legal service of the writ of replevin has been made upon the appellee, it will be useless to consider any other question in the case. The character of the question before us has been sufficiently indicated in what we have already said. The decisions upon this question are by no means uniform. To the contrary, they are somewhat confused. But we think the decided weight of authority is in favor of the proposition that, so long as a corporation confines its operation to the state in which it was created, it cannot be sued in a state where it has no office, or transacts no business, by serving process on its president or other officer when temporarily present within such state. *Thomp. Corp.* § 7994; *Moulin v. Insurance Co.*, 24 N. J. Law, 222; *Camden Rolling-Mill Co. v. Swede Iron Co.*, 32 N. J. Law, 15; *U. S. v. American Bell Tel. Co.*, 29 Fed. 17. The provisions of the Code which relate to this subject are sections 295-297 of article 23. For the purpose of this opinion it will only be necessary to quote the language of section 295, which reads as follows: "Any corporation not chartered by the laws of this state, which shall transact business therein, shall be deemed to hold and exercise franchises within this state, and shall be liable to suit in any of the courts of this state, on any dealings or transactions therein." It is conceded that the appellee is a foreign corporation, having no place of business within this state, and that it has, so far as the record discloses, had no dealings or transactions in this state other than the purchase by it of the electrical machinery hereinbefore mentioned. Upon this state of facts, has the appellant a legal right to maintain this action by making service of the writ upon the agent of the appellee, who was at the time of such service temporarily within the state of Maryland? In determining the liability of a corporation to process and action within a state foreign to its creation, it is oftentimes important to ascertain the extent and character of the dealings or transactions had or done within such state. This question was considered in the case of *Clews v. Iron Co.*, 44 Fed. 31, in which there was, as in this case, a motion to set aside service of the summons, and to quash the writ, for the reasons assigned in this case. The facts in that case are briefly these: A foreign corporation, which had done no business in New York, beyond negotiating a mortgage on its property, and having the bonds secured there-

by put on the list of the New York Stock Exchange, was served with summons by service of the writ upon its president, who was temporarily in the state of New York, attending to other business matters, including the negotiation of said mortgage. The court held that the corporation was not engaged in business in that state, and that no jurisdiction over it was acquired by service of summons on its president while temporarily in that state for the purposes named. Also, *Good Hope Co. v. Railway Barb-Fencing Co.*, 22 Fed. 635; *Moulin v. Insurance Co.*, 24 N. J. Law, 224; *Phillips v. Library Co.*, 141 Pa. St. 462, 21 Atl. 640; *United States Graphite Co. v. Pacific Graphite Co.*, 68 Fed. 442; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354. From a careful examination of the case presented by the record, we find nothing therein which we deem necessary to further consider or pass upon. Concurring in the ruling of the court below, we affirm the same. Ruling affirmed, with costs.

(87 Md. 127)

STOCKBRIDGE et al. v. FAHNESTOCK.

ALLEN v. SAME.

(Court of Appeals of Maryland. Jan. 5, 1898.)

ATTACHMENT—AFFIDAVIT.

1. An affidavit of attachment made by the agent of an attaching creditor, which describes him as agent, but does not show that he swore that he made it, as agent, on behalf of the creditor, is sufficient, under Code, art. 9, § 4, providing that an attachment may be issued when there is an affidavit, and section 7, providing that the affidavit required by the preceding sections may be made by the agent of the creditor or creditors.

2. A bill in equity to set aside a mortgage to a trustee is not admissible in an attachment proceeding against the cestui que trust by a creditor for the purpose of holding the fund by garnishment, as against the mortgage, where plaintiff in attachment was not a party to the bill, and it was filed after the attachment suit was begun.

3. Where a trustee of a fund was garnished in an action by a creditor against the cestui que trust, evidence that the garnishee notified a mortgagee of the fund of the garnishment within 60 hours, by mail, was properly admitted, where the mortgagee did not deny the receiving of the letter.

4. In an attachment to hold the fund of a debtor by garnishment, as against a mortgage of \$4,000, claimed to be fraudulent, the debtor and mortgagor was asked whether he owed anything to the trustee of his mortgage, either individually or as trustee, when the mortgage was executed, to which he was allowed to answer that he did not. The trustee testified without objection that he had no pecuniary interest in the mortgage. *Held*, that the evidence was properly admitted.

5. In an action by a creditor, where it is sought to show that a certain mortgage, which covers a fund of the debtor sought to be held by attachment and garnishment proceedings, is void and fraudulent, for want of consideration, it is proper to admit the account kept by the mortgagee between himself and the mortgagor as a statement emanating from the mortgagee, tending to establish the indebtedness when the mortgage was given, and the amount of the debt secured.

6. Where a mortgage on a fund sought to be

held by a creditor by garnishment is attacked as fraudulent, a check payable to the mortgagor, and indorsed by him to the mortgagee, is admissible to establish the character of the consideration of the mortgage.

7. Where the record on appeal contains no information as to the rules of court relied on by a party urging them on appeal, the rules cannot be considered.

8. The court of common pleas has jurisdiction to set aside a mortgage for fraud or want of consideration, in an attachment proceeding, in which it is sought to hold a trust fund in the hands of a garnishee as against a mortgage alleged to be fraudulent.

9. It is not error, in an action wherein it is sought to hold a fund in the hands of a garnishee as against a mortgage alleged to be fraudulent, to refuse instructions asked by the garnishee which ignore all the proofs offered to show the fraudulent character of the mortgage.

10. In an action where a creditor sought to hold a fund by garnishment, as against a mortgage made to a trustee, which is claimed to be fraudulent, the garnishee asked an instruction that the creditor could not recover, because the trustee had no knowledge of the fraud in the execution of the mortgage. *Held*, that the question of the knowledge of the trustee, or the fact that he was trustee, was immaterial, and the instruction was properly refused.

11. In attachment by a creditor against a non-resident debtor to hold a fund of the debtor by garnishment, as against a mortgage claimed to be fraudulent for want of consideration, the creditor, after the evidence was in, asked the court to instruct that, if defendant was indebted to plaintiff as alleged, and was a nonresident at the time the suit was brought, and the garnishees had the money of the defendant in their hands, and the defendant was entitled to certain credits upon the mortgage, which was claimed to be sufficient to absorb the fund in the hands of the garnishees, and that said credits, being allowed, would leave a balance in the hands of the garnishees, then the creditor should recover from the garnishees the sum sued for. *Held*, that the instruction was properly given.

12. A refusal of a part of the instructions asked by a party to a suit is not error, where all the law the party is entitled to has been given in the instructions asked by him which were granted, in the instructions given by the court, and those given on behalf of the other party.

Appeal from court of common pleas.

Action by James W. Fahnestock against George L. Hopper, defendant, and Henry Stockbridge, Jr., and Amos F. Musselman, executors and garnishees, consolidated with an action by James W. Fahnestock against Edward M. Allen, trustee, and others. From a judgment in favor of the plaintiff, defendant and garnishees appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Frederick C. Cook and John P. Poe, for appellants. Charles W. Field, for appellee.

ROBERTS, J. This controversy arises on a foreign attachment issued out of the court of common pleas of Baltimore city at the instance of James W. Fahnestock, to whom George L. Hopper, by his promissory note dated October 1, 1894, was indebted in the sum of \$1,584.70. The writ was laid in the hands of Henry Stockbridge, Jr., and

Amos Musselman, executors of Isaac Albertson, deceased, as garnishees, to bind a legacy of \$8,000 due the defendant in the estate of said Albertson, who was his uncle. This legacy was subject to a mortgage from the defendant to J. H. Preston of \$4,000, which left in the hands of the garnishees the sum of \$4,000. On this balance there was a second mortgage from the defendant to E. M. Allen, trustee, claimed to cover the whole balance due on said legacy. One phase of this controversy depends upon the validity, *vel non*, of the last-mentioned mortgage, and to test its validity this attachment proceeding was instituted. We take it to be conceded that there is no controversy as to the defendant's non-residence, nor as to his indebtedness to the plaintiff. On the 15th of December, 1896, the jury were sworn to try the issues joined; and, on the following day, Allen, trustee, filed his petition, claiming the fund in the hands of the garnishees, and made a motion to quash the writ of attachment, assigning reasons therefor. The verdict and judgment being against the defendant and the said garnishees, both defendant and garnishees have appealed. In this court the cases were argued together. They will therefore be considered and decided as but one appeal.

There are two questions presented by the record of this appeal, which practically constitute the only questions which need be considered. They are briefly as follows: First. Because the attachment proceedings are defective. Second. Because the plaintiff has no standing in court to impeach the mortgage from the defendant to Allen, trustee; and, if he has, the remedy of attachment is not the proper method, because a common-law court has no right, under the circumstances of this case, to attach the fund in the garnishee's hands. These questions will be disposed of in the order named, and first as to the defect in the attachment:

It is claimed that it does not sufficiently appear from the affidavit that John J. B'ves had any authority to make it, or that he was in fact the agent of the plaintiff, and that he has failed to depose that he is such agent. Code, art. 9, § 4, provides that no attachment shall issue unless there be an affidavit, etc. Section 7 of the same article provides "that the affidavit required by the preceding sections may be made by the creditor or one of them, where there are more than one, or by the agent of the creditor or creditors," etc. The affidavit in this case is not materially variant from the terms of the statute, to follow which it has generally been regarded a safe rule. "Under the act of 1715, c. 40, there appears to have been no restriction as to the status of plaintiffs in attachment cases; but by the act of 1795, c. 56, the right to proceed by attachment against the property of nonresident or absconding debtors was restricted to citizens of this state or of any other of the United States. This restriction continued until 1854, when by the act of that year (chapter 153) it was

put an end to." 2 Poe, Pl. & Prac. § 505. Notwithstanding no one but a "citizen of this state or of any other of the United States" could proceed by attachment against a non-resident or absconding debtor, it was only necessary to aver that he was a citizen of this state or of the United States, and not necessary to depose or establish by proof aliunde that he was a citizen of this state or of the United States. *McCoy v. Boyle*, 10 Md. 391; *Boorman v. Patterson*, 1 Gill, 372. The authorities upon this subject are directly in point, and remove all doubts as to the construction proper to be placed upon this affidavit. The court in *White v. Stanley*, 29 Ohio St. 423, held that if the party who made the affidavit was described as agent of the plaintiff, he need not swear that he was the agent or attorney of the plaintiff. Nor is it necessary that he should swear that he makes the affidavit on behalf of the plaintiff. *Smith v. Victorin*, 54 Minn. 338, 56 N. W. 47; *Murray v. Cone*, 8 Port. 250; *Simpson v. McCarty*, 78 Cal. 175, 20 Pac. 406; *Baker v. Huddleston*, 3 Baxt. 1; *Heating Co. v. Sloteman*, 87 Wis. 118, 30 N. W. 241. The alleged defect in the affidavit did not justify the court below in quashing the writ, and in its refusal to do so we think there was no error.

We come now to the consideration of the second question raised by this appeal. The question here relates entirely to the character of the mortgage from the defendant to Allen, trustee, which, if valid, will absorb the entire fund. But it is claimed on the part of the plaintiff that the mortgage is purely voluntary, without consideration from the defendant or any other person, and therefore constructively fraudulent and void as to the plaintiff. The plaintiff contends that, after paying Allen \$1,300 on account of his mortgage, there remained in the hands of the garnishees assets to the amount of \$2,625. The question resolves itself into the inquiry whether the \$2,625 should be applied to pay off the mortgage, or whether the mortgage was voluntary, fraudulent, and void as to the plaintiff, and therefore properly to be condemned to pay the plaintiff's claim. The evidence on this subject was very conflicting and unsatisfactory; depending almost exclusively upon the testimony of the defendant and of his brother, Harrison Hopper, for whose benefit said Allen was trustee. The controversy which this conflicting testimony created was matter for the jury to decide under the instructions of the court below. There are three exceptions to the admissibility of the proof offered, the first of which was to the refusal of the court to admit in evidence a bill in equity filed by the defendant against Harrison Hopper and Allen, attacking the validity of the mortgage to Allen on account of its voluntary and fraudulent character. The court very properly rejected this evidence. The plaintiff was not a party to the proceeding, and in no way affected by it; and, further, the bill was filed after the at-

tachment in this case had been issued. The third exception relates solely to the question of the manner in which Allen was notified by Mr. Stockbridge, one of the garnishees, of the service upon him of the attachment. Mr. Stockbridge testified that he notified Mr. Allen, the claimant, of the fact of the service of the writ, within 60 hours thereafter, by mail. Allen was subsequently called to testify, but did not deny having received the letter. This testimony was properly admitted. *Roberts v. Mattress Co.*, 46 Md. 384. The defendant was asked whether, when the \$4,000 mortgage was executed, he owed anything to Allen,—either individually or as trustee. Witness was allowed to answer that he did not. Allen, in the further progress of the case, testified without objection that he had no pecuniary interest in the mortgage. This constitutes the third exception, and there can be no doubt as to the correctness of the court's ruling. The fourth exception is taken to the admissibility in evidence of the account kept by Harrison Hopper against his brother George, the defendant, showing George's indebtedness to him at the time of the execution of the two mortgages hereinbefore mentioned. It was a question important to be ascertained, as to what was the amount which George owed to his brother Harrison, and any statement emanating from the creditor to whom the debt was due was clearly evidence tending to establish the amount of such indebtedness. The fifth exception is taken to the introduction in evidence of the check of James H. Preston for \$1,000, drawn payable to the defendant, and by him indorsed to Harrison Hopper. The object of the proof was to show the payments which the defendant had from time to time made to Harrison Hopper; thus establishing the credits to which the defendant was entitled, and demonstrating the character of the consideration of the \$4,000 mortgage. It was clearly admissible. The seventh and ninth exceptions are taken to the refusal of the court, in the midst of the trial of the case, and after the jury were impaneled, to act upon claimant's motion to quash. It is contended by the plaintiff that, under the rules of the Baltimore city courts, all motions to quash must be heard before the judge at large. But, as the record contains no information upon the subject of the rules, we are not at liberty to consider them. But, independently of such rules, we do not perceive wherein Allen was injured by the failure of the court to act upon the motion to quash, as the record discloses no sufficient reasons which would have justified the court in sustaining the motion. In support of the motion to quash, the claimant, Allen, trustee, has assigned various grounds, which, for the purposes of this case, can be reduced to one proposition, namely, that, even though the mortgage was without consideration and fraudulent, the court below had no jurisdiction to set it aside in an

attachment proceeding. We think this contention is without authority to sustain it. It was very earnestly argued at the hearing in this court, and vigorously asserted, that a common-law court had no jurisdiction to attach the fund in question here. This court, in the case of *Williams v. Jones*, 38 Md. 555, has held differently, and we think rightly. The case just referred to and the case under consideration here are in many respects similar. The plaintiff had the right to resort to either one of two remedies,—that of attachment, or by bill in equity. *Green v. Early*, 39 Md. 227; *Luckemeyer v. Seltz*, 61 Md. 324, 325.

Having disposed of the exceptions to the evidence, we can now examine the law of the prayers. At the close of the plaintiff's case the garnishees offered four prayers, all of which the court refused to grant, which constitutes their sixth bill of exceptions. By the first of these prayers, the court was requested to instruct the jury that "because there is no evidence that J. J. Rives, the affiant in the attachment proceeding, had authority to make the affidavit, or was in fact the agent of the plaintiff at the time of making the affidavit," etc. We have already discussed this proposition, and no further reference to it is necessary. The second and fourth prayers are equally erroneous, in that they ignore all of the proof offered by the plaintiff tending to show the voluntary and fraudulent character of the mortgage. The third prayer asks the court to instruct the jury upon absolutely untenable grounds, because even if it be true that Allen, trustee, had no knowledge of the state of accounts between the defendant and Harrison Hopper at the time of the execution of the \$4,000 mortgage, and did not participate in any fraud connected with the mortgage, yet if Harrison Hopper, for whose benefit Allen was trustee, did participate in or perpetrate the fraud, they were not entitled to the instructions asked for. Allen had, as heretofore mentioned, no interest in the mortgage, and has entered a disclaimer to that effect; and, if Harrison Hopper was a party to the fraud, it made no difference whether Allen, who was merely his agent, was or was not. At the close of the case the plaintiff offered two prayers, which the court granted; the claimant offered one prayer, which was rejected; and the garnishees offered six prayers, all of which were rejected, with the exception of the fifth and sixth, which were granted by the court. The plaintiff's first prayer presents a proposition which correctly states the plaintiff's case, and is entirely free from just criticism, and was properly granted. The authorities which sustain it are numerous and uniform. *Goodman v. Wineland*, 61 Md. 449; *Ellinger v. Crowl*, 17 Md. 375; *Williams v. Banks*, 11 Md. 226, 227; *Baxter v. Sewell*, 3 Md. 334; *Christopher v. Christopher*, 64 Md. 588, 3 Atl. 296; *Worthington v. Bullitt*, 6 Md. 193. The plain-

tiff's second prayer requires no comment, and was not pressed at the argument. The claimant's prayer is a mere repetition of his motion to quash, and has already been considered and disposed of. We have carefully examined the garnishees' prayers, and think that by the granting of their fifth and sixth prayers the court below has given them all the law to which they were justly entitled. Taking the plaintiff's first prayer in conjunction with the garnishees' fifth and sixth prayers, the jury were fully and fairly instructed on the law of the case, and no injury resulted to the garnishees in consequence of the court's refusal to grant their other instructions. Finding no error in the ruling of the lower court, and for the reasons assigned herein, we affirm the judgment. Judgment affirmed, with costs.

(36 Md. 584.)

MAYOR, ETC., OF BALTIMORE v. MERRYMAN.

(Court of Appeals of Maryland. Jan. 4, 1898.)
RIPARIAN RIGHTS—OBSTRUCTING STREAM—DAMAGES—MUNICIPAL CORPORATIONS—LEGISLATIVE AUTHORITY.

1. Plaintiff was the owner of a farm bounding on a running stream. The defendant city erected a dam across this stream four miles below plaintiff's farm, which obstructed the flow of water along the farm, and forced it back upon it to such an extent as to cause the water to overflow the farm and destroy certain fencing and crops, and causing large deposits of sand, dirt, and filth to remain upon the land. The dam was made by defendant under powers granted it by the legislature, and in connection with its water supply. *Held*, that defendant was liable for the damages resulting to plaintiff's land by reason of the erection of the dam.

2. The fact that a city, in erecting a dam for its water supply across a stream, is acting under legislative authority, is no defense to an action for damages brought against the city, by the owner of land along which the stream runs, for injuries to his land caused by the erection of the dam.

3. In an action against a city to recover damages to plaintiff's land, by reason of the erection of a dam across a stream which flowed along the land, plaintiff is not limited in her recovery to such damages as she suffered prior to the bringing of the suit, but is entitled to recover for any damages suffered after the suit was brought and up to the trial, if they were the natural and necessary results of the acts done prior to the bringing of the suit.

Appeal from circuit court, Harford county.

Action by Ellen Merryman against the mayor and city council of Baltimore for damages for building a dam across a stream. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

Thos. I. Elliott and Thos. G. Hayes, for appellant. John I. Yellott and O. I. Yellott, for appellee.

BOYD, J. The appellee is the owner of a farm in Baltimore county bounding on a running stream of water called the "Great Gun-

powder Falls." The appellant completed, in 1881, the erection of a dam across this stream, about four miles below the appellee's farm. The dam is a stone structure, 20 feet high above the natural bed of the stream, and the water is backed up by it about 800 or 1,000 feet north of Meredith's Ford bridge, which crosses the stream at the lower end of this farm. The plaintiff claims that the erection of the dam obstructed the flow of water along her farm, forced it back upon it, and thereby caused large deposits of sand, mud, dirt, and debris to collect and gather in the bed of the stream, which the defendant negligently permitted to remain there, whereby the stream became obstructed, filled, and choked up to such an extent as to cause the water to overflow her farm, and destroy the fencing, the crops, and vegetables growing on it, and large deposits of sand, mud, dirt, and filth to remain on it. It is also alleged that the defendant became the owner and possessor of the bed of the stream, the bank thereof, and the land contiguous thereto on either side for several miles below this farm. The dam and improvements were made in connection with the water supply of the defendant, the water being drawn from the lake into a conduit and eventually taken into the city. The plaintiff offered evidence tending to prove the above facts, and also that the water in the stream along her land is now a foot or more higher than it was before the dam was built. At the conclusion of the plaintiff's testimony the defendant offered two prayers. The first asked the court to instruct the jury that, under the pleadings, there was no legally sufficient evidence to entitle the plaintiff to recover; and the second, that, under the pleadings, there was no legally sufficient evidence to entitle the plaintiff to recover more than nominal damages. Both were rejected, and will be considered together.

That these prayers were properly rejected we think can admit of no reasonable doubt. It is true that the defendant was acting under powers granted it by the legislature when the dam and lake were made, but if in building them it caused the water to flow back, and remain on the plaintiff's property, or any part thereof, we can understand no reason why it could not be made to respond in damages for the injury sustained thereby. It is proven that the erection of the dam raised the water a foot or more higher than it formerly was on the bank of the stream along plaintiff's property. If that be true, and if this bank belonged to the plaintiff, as we understand to be conceded, although the record furnishes but little evidence on that subject, then there was undoubtedly a "taking" of some of her property, for which she was entitled to compensation. The defendant had no more authority to take a part of the bank of the stream, if it was the plaintiff's property, by covering it with water, and keeping it so covered for its own purposes,

than it would have to go beyond the bank, excavate the plaintiff's land, flood it with water, and use it as the testimony shows other lands were used, lower down the stream, in making the lake. If it had been deemed necessary or proper to erect a dam or other structure on this property, in connection with this improvement, no one would suppose that it could be done without compensating the owner, and it seems to us to be equally clear that the plaintiff's land, or a part of it, cannot be taken for storage of water; for, after all, that was what was done, so far as the bank is concerned, without just compensation.

The allegations in the declaration are that the dam, etc., of the defendant, caused large deposits of sand, mud, dirt, etc., to collect and gather in the bed of the stream, and that the defendant negligently and carelessly suffered and permitted such deposits to remain in the bed of the stream, where it flowed through and over the lands of the defendant for and during three years, and until the institution of this suit, so that the stream became and continued all that time obstructed, filled, and choked up to such extent as to cause the waters thereof, which would otherwise have freely flowed off and down said stream, to be backed up, and to overflow the farm; and the testimony tends to establish these allegations. Is it to be said that a municipal corporation can thus interfere with the rights of others, and injure their property, without being liable in damages, merely because it, in constructing its works, is acting under legislative authority? The legislature has no power to grant such rights to any corporation, public or private. In the familiar case of *Pumpelly v. Green Bay Co.* 13 Wall. 166, the supreme court of the United States, after referring to the doctrine that for a consequential injury to the property of the individual, arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress, said: "It remains true that when real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle." So much of the plaintiff's property, therefore, as is covered by the water, would seem to be clearly taken, within the meaning of the constitutional prohibition.

But, as we have seen, the declaration alleges that the defendant negligently permitted these large deposits of sand, etc., to remain in the stream, and thereby cause the overflows which damaged the plaintiff's property. The testimony shows that, since the erection of the dam, the bed of the stream has changed materially. Formerly it had

"a hard, rocky bottom, with good current, strong in some places, and without deposits of sand and mud. Now, it is filled in many places some three or four feet above the surface of the water of the lake. Some of the deposits are acres in extent, and in places you can walk across. This filling up extends all along the stream from near the breast of the dam up to Meredith's bridge, and in places above the bridge, along the Merryman property." The plaintiff's witnesses also testified that "overflows of the land up there are more frequent, so that now every little rain or high water raises the stream, so that it overflows its banks in many places. * * * A great deal of the bottom land is valueless now. There are forty or fifty acres of the plaintiff's land injured in this way." The testimony also shows that as the current comes down the stream, and strikes the still water and the obstructions in the stream, it is forced on the plaintiff's land, and leaves a sand deposit. There is also evidence tending to show that the materials settling in the lake could be gotten out by dredging or flushing it. So, if it be conceded, which we by no means do, that the defendant would not be liable for consequential damages resulting from its mere act of building the dam and lake, and thus obstructing the current, there is evidence of negligence in the maintenance of the improvements. Municipalities are liable either for negligence in the construction of sewers, drains, culverts, etc., or for the negligent failure to keep them in repair, although they are only intended to carry off surface water within the corporate limits; and why should they not be responsible for negligence in not keeping what was formerly a running stream of water, thus used by them, free from obstructions that force the water on the abutting property? It will not do to argue that the deposits of sand, etc., have not injured the plaintiff, for there is evidence to the contrary, and it was stated by some of the witnesses that it had only been since the lake has been so filled up by the deposits that the plaintiff has suffered from the overflow beyond what she did prior to the erection of the dam. That evidence was, of course, for the jury.

We do not deem it necessary to discuss the question whether the mere building of the dam and lake, and thus interfering with the natural flow of the water, would be sufficient to entitle the plaintiff to recover, without some negligence being proven, as the declaration does not rely upon that, but charges negligence in both counts, and relies on the fact that the stream is choked up, as the foundation for recovery. As there was testimony to support the allegations in the declaration, and there was evidence of substantial, and not merely nominal, damages before the jury, the prayers offered at the conclusions of the plaintiff's testimony were both properly rejected.

We can see no valid objection to the plain-

tiff's prayer. The criticism that it assumes the right of the plaintiff to recover we think is not justified, as it expressly leaves that to the jury. The fifth and sixth prayers of the defendant were sufficiently covered by those granted, not to do any injury to the defendant by rejecting them. The seventh is erroneous, because the plaintiff was not limited in her recovery to such damages as she suffered within three years prior to February 10, 1896, the date of the bringing of this suit. It is true the declaration alleges that the defendant negligently permitted the condition of things therein stated to continue "for and during three years, and up to the time of the institution of this suit"; but the plaintiff was entitled to recover for any damages she suffered even after the suit, if they were the natural and necessary results of the acts done prior thereto. *Mayor, etc., v. Dufty*, 70 Md. 55, 16 Atl. 642. The eighth undertook to confine the plaintiff's recovery to actual loss of rents or profits directly caused by the overflow. There was testimony tending to show permanent injury to the land itself, loss of fences, etc., and therefore that prayer was not proper. What we have already said is sufficient to indicate that we do not think the ninth was correct.

There were some exceptions to the rulings of the court in reference to the testimony, but we do not understand that any of them are pressed on this appeal. The most of the bills of exception do not show what the answers to the questions were, if they were answered, and hence we cannot tell whether the defendant has been injured by them. Finding no error in the rulings of the court below, the judgment will be affirmed. Judgment affirmed, the appellant to pay costs.

(36 Md. 663)

RICHARDSON et al. v. OWINGS et al.

(Court of Appeals of Maryland. Jan. 4, 1896.)

MORTGAGES—SUMMARY SALE—PARTIES.

1. A mortgagor may file exceptions to an order ratifying a sale made by a trustee appointed on petition, under Pub. Loc. Laws, art. 4, §§ 694-704, the grounds of which exceptions are that the decree of sale was invalid because all the persons holding mortgaged notes were not made parties, and, furthermore, that petitioners were not entitled to a decree.

2. Pub. Loc. Laws, art. 4, § 703, provides that when a mortgage, after a default, is submitted to the court, the latter shall decree that the premises be sold, but that before each sale the mortgagee or mortgagees, or some of the mortgagees, or the assignee or assignees of the mortgagee, or one of such assignees, shall file a statement of the amount of the mortgage claim remaining due. *Held*, that a petition for the sale of mortgaged premises, together with the mortgage, may be filed by the holders of two of four notes secured thereby, which notes have been assigned by the mortgagee, without making the holders of the other two notes parties.

Appeal from circuit court of Baltimore city.

Petition by Annie M. Owings and another, for the sale of mortgaged premises. Cath-

arine R. Richardson and another, mortgagors, filed exceptions to the ratification of the sale, which were overruled, and from the order of ratification they appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Joseph P. Merryman, for appellants.
Oscar L. Quinlan, for appellees.

BOYD, J. The appeal in this case was taken from an order of the circuit court of Baltimore city ratifying a sale made by a trustee appointed to sell the property mortgaged by the appellants to Charles Herbert Richardson, executor of Matilda M. Richardson. The mortgage was given to secure four promissory notes, each being for the sum of \$1,100. One of them was assigned to Annie M. Owings, another to John A. Richardson, and the other two to C. Herbert Richardson and William K. Richardson, trustees. The appellees filed a petition, and with it the original mortgage, alleging that one of the notes secured by the mortgage had been assigned to each of them, that default had been made in the payment of the mortgage debt and interest, and praying the court to pass a decree for the sale of the mortgaged premises in accordance with the provisions of article 4, §§ 694-704, inclusive, of the Public Local Laws. A decree was passed in the usual form, appointing Oscar L. Quinlan trustee who made and reported a sale of the premises, and exceptions were filed by the appellants to the ratification thereof. The exceptions were overruled, and the only questions urged before us are: (1) Whether the appellants are entitled to except to the ratification of the sale; and (2) whether the decree was invalid because it was passed, at the instance of the appellees, without making the holders of the other two notes parties to the proceedings.

As to the first question, we are of opinion that the appellants were entitled to file exceptions to the ratification of the sale. If, as contended by them, the decree was invalid because all the parties holding the notes secured by the mortgage were not made parties, the property might be sacrificed by reason of such defect in the proceedings, which would necessarily affect them. If the petitioners were not entitled to a decree, as alleged in one of the exceptions, the mortgagors could certainly urge that objection to the ratification of the sale. So, without further discussion of that branch of the case, we will proceed to the consideration of the second, which is the important one.

There have been a number of decisions in this court construing one or more of the sections of the local code above referred to, but this precise question has not been decided, although it is one of importance, and one

that we might suppose would have arisen before. It may be conceded that, if the appellees had filed an ordinary bill to foreclose the mortgage, all persons interested, including the holders of the other two notes, should have been made parties, and it cannot be denied that there must be a substantial compliance with the requirements of the statute which authorizes such a summary proceeding against the mortgaged premises in case of default. We must, however, determine the question by ascertaining the true meaning of these provisions, so far as applicable to this point. Section 692 of article 4 of the local code, as amended by chapter 197 of the Laws of 1890, provides that "in all cases of conveyances of land * * * wherein the mortgagor shall declare his assent to the passing of a decree for the sale of the same, it shall be lawful for the mortgagee or his assigns at any time after filing the same to be recorded, to submit to either of the circuit courts of Baltimore city the said conveyances or copies thereof under seal of the superior court, and the circuit court to which the same is so submitted may thereupon forthwith decree that the mortgaged premises shall be sold," etc. In this mortgage there was the assent of the mortgagors, the appellants, to the passing of a decree, and to a sale under it in case of default, and also to a sale by the mortgagee, his executor, administrator, or assigns, under the provisions of the public general laws, if default be made. It would seem clear, then, that, if all the notes had been assigned to one person, he would have been entitled to a decree; and it is not denied that the holders of all the notes could have obtained a valid decree on their joint application. Section 703 of this article provides that, if a default has taken place before the conveyance is submitted to the court, "it shall, nevertheless, be the duty of said court, upon the submission of the said conveyance to such court, after the said default, to forthwith decree that the mortgaged premises shall be sold, * * * but before each sale, the mortgagee or mortgagees, or some of the mortgagees, or the executor or the administrator of a deceased mortgagee, or the assignee or assignees of the mortgagee, or one of such assignees, on the execution or administration of a deceased assignee, shall file in the court in which the said proceedings are pending a statement of the amount of the said mortgage claim remaining due," etc. This mortgage was not submitted to the court for decree until after default, and the last-mentioned section therefore applies. Taking the whole section together, as we must, it is evident that the legislature, although not distinctly stating who could submit the mortgage, intended that any of the parties authorized in the subsequent part of the section to file the statement of the amount due could do so. It has been held by this court that, although the statement

can be filed after the decree is passed, yet, if not filed before the sale, and the court's attention is directed to that fact, the sale ought not to be ratified. That being so, it would seem clear that when the legislature authorized the court to pass a decree for sale upon the submission of the mortgage to it, without stating who could submit it, but provided that the sale could not be made unless the statement was filed by one or more of the parties named, all of whom are interested parties, it intended that the decree could be passed at the instance of any of them. The appellants cannot be injured by this interpretation of the statute, because, if the holders of the other notes should attempt another proceeding, it should be promptly stayed, as the decree already passed is for the sale of the premises to satisfy the whole mortgage debt, and the holders of the other notes are entitled to their shares of the proceeds of sale. As we said in *Hughes v. Riggs*, 84 Md. 502, 36 Atl. 269: "The decree 's required to be passed on an ex parte petition by the mortgagee or his assigns, and so, of course, there can be no party defendant in the proceedings." If, then, the holders of the other notes declined to unite in the petition, and the appellants were correct in their contention that they must be parties, the appellees would have been deprived of the right to obtain a decree under this local law, although they were assignees of the mortgage; and the statute expressly provides that a decree shall be passed on application of the mortgagee or his assigns. It is true, they could have sold under the power of sale, which was also included in the mortgage; but, if they had proceeded under that power, the holders of the other notes would not have been parties, and neither they nor the appellants would have been in any better position than they are now. Section 6 of article 66 of the Code of Public General Laws, which authorizes sales to be made by mortgagees, or other persons named in the mortgages, under powers contained in them, provides that, where the interests in any mortgage are held under one or more assignments or otherwise, the power of sale therein contained shall be held divisible, and he or they holding any such interest who shall first institute proceedings to execute such power shall thereby acquire exclusive right to sell the mortgaged premises, thus giving the holder of a part of the mortgage debt the right to exercise the power himself, while under our construction of this local law he only obtains from the court a decree appointing a trustee, who represents all parties interested. It is apparent, then, that when we hold that the law applicable to Baltimore city authorizes the holder of a part of the mortgage debt to procure a decree without making the owners of the other interests parties, our interpretation is in accord with the policy of the legislation of the state as manifested in the general law. No

other reasons than those we have mentioned having been given for setting aside this sale, we will affirm the order of the court below ratifying it. Order affirmed, costs to be paid by the appellants.

(87 Md. 43)

MARTIN v. JONES.

(Court of Appeals of Maryland. Jan. 5, 1898.)

ADMINISTRATRIX—OPENING ACCOUNT—ERROR OF COURT—BURDEN OF PROOF.

1. Accounts of an administratrix will not be reopened, where the error alleged is one of the court's, and not the administratrix's, after the time limited for appeals has expired.

2. A petition to reopen an administratrix's accounts, filed over 17 months after their allowance without protest, will be dismissed, where the ground relied on is an alleged error of the court in not allowing a share of the commissions to the estate of a co-administratrix, who, after giving bonds, died at the threshold of her duty, and performed little or no services.

3. The burden of proving error in the accounts of an administratrix on a petition to reopen is upon the petitioner.

Appeal from orphans' court of Baltimore city.

Petition in orphans' court by William R. Martin, administrator of the estate of Mary K. Jones, deceased, against Georgia G. Jones, surviving administratrix of the estate of Isaac D. Jones, deceased. From an order dismissing the petition, petitioner appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Geo. M. Upshur, for appellant. S. D. Schmucker, Geo. Whitelock, and Charles Marshall, for appellee.

ROBERTS, J. This appeal is taken from an order of the orphans' court of Baltimore city dismissing the petition of the appellant. The facts are that Isaac D. Jones died, intestate, in the early part of July, 1893, leaving, surviving him, a widow, Mary K. Jones, and an only child, Georgia G. Jones, who is the appellee in this case. Letters of administration were on the 19th of July, 1893, granted by said court to the widow and daughter of said intestate. The widow survived the intestate a short while, dying in the month of December, 1893, up to which time no inventory had been filed, and but little progress made in the administration of the estate. After the death of the widow, the appellee filed an inventory of the personal estate, and passed two accounts of her administration in the orphans' court,—the first on the 19th of July, 1894; the second on the 19th of July, 1895,—on each of which she was allowed full commissions. On the passage of these two accounts, almost the entire estate was accounted for and settled, except a small sum, which was retained to meet the expenses of certain litigation (not exceeding \$200). It was not until the ex-

piration of nearly a year and a half after the passage of the second account by the appellee in the court below that the appellant, as administrator of the said Mary K. Jones, deceased, filed his petition in the court below, praying that said two accounts might be reopened, and the appellant be permitted to receive the one-half of the commissions allowed to the appellee in the first and second accounts settled by her as surviving administratrix of the said Isaac D. Jones, deceased. The appellee answered this petition, denying all the material allegations therein which go to make up this controversy. Both parties offered testimony in support of their respective contentions, but the proof taken affords but little assistance in the solution of the questions contained in the record.

The first question on this appeal which we shall consider is whether, after the lapse of 17 months from the date of the passage of the second administration account, the court below would be justified in reopening and restating the first and second accounts, which the appellee has settled therein. This court has undoubtedly held that, "so long as an estate is open (which means not finally closed and settled), the accounts of the executor and administrator in the orphans' court are subject to revision and correction as to any matter discovered to be in error." *Edelen v. Edelen*, 11 Md. 415; *Stratton's Case*, 46 Md. 551; *Bantz v. Bantz*, 52 Md. 689, 690. And it has just unquestionably been held that the burden is upon the appellant to establish the fact that such error does exist, and that the account is unjust, false, or fraudulent, or that some item thereof was improperly allowed. *Shafer v. Shafer*, 85 Md. 554, 37 Atl. 167. The only contention on this appeal is that in the first and second accounts, as stated by the appellee, there has been no allowance of commissions to the said Mary K. Jones, now deceased, who was in her lifetime the co-administratrix with the appellee of the said intestate. It is not contended that the appellee, by any act of hers, has stated and passed an unjust account of her administration. She did not fix the amount of the commissions, which is the sole contention here. That duty devolved upon the court alone. The petition seeks to have the court, long after the time when an appeal would lie, reconsider its action in fixing the commissions and reopen the accounts. Resting, as this contention does, upon an alleged error of the court itself, and not of the appellee, this court does not feel itself justified in reopening these accounts after the time limited for appeals in such cases has long since expired. Mrs. Jones, the widow of the intestate, died before she, as co-administratrix with the appellee, had participated in the discharge, to any substantial extent, of the duties devolving upon her. This case cannot fairly or reasonably be likened to a case where two executors or administrators are clothed with administra-

tive powers in the settlement of an estate, and one of them performs all the duties equally incumbent upon both. This question was passed upon by this court in *Richardson's Adm'x v. Stansbury*, 4 Har. & J. 275, where it was held that letters testamentary having been granted to co-executors, and one did all the work in settling the estate, the other is entitled to his proportion of commissions without abatement. But that is not the case which we are now considering. In the one case the failure to discharge his duties may have been his inability or indisposition, attributable to perhaps numerous causes. An entirely different state of case is presented by the record of this case. At almost the very threshold of her duties, Mrs. Jones was stricken down by death, and the appellee was required to assume the burden of the settlement of the entire estate, which she has satisfactorily done.

It was very earnestly contended by the appellant in the argument before us that when Mrs. Jones, as co-administratrix, qualified as such by giving bond and entering upon the discharge of her duties, she had a vested right in a portion of the commissions allowed by law, and that nothing could deprive her of that right except some dereliction of duty. This statement is not an accurate presentation of the law of this case, as it fails to take into consideration the effect produced by the death of Mrs. Jones. To the time of her death she had done little or nothing of a substantial character in the settlement of the estate; and if there had been any well-grounded apprehension of loss resulting to Mrs. Jones' estate because of her being one of the obligors in the bond, while the estate of her late husband was in course of settlement after her death, by the appellee, the court below had ample power, under section 2 of article 90 of the Code, to grant complete indemnity and protection to her estate. The two accounts settled in the court below by the appellee were passed by her with the full cognizance of the appellant, and this was done without protest from any quarter. The petition alleges no error in the various items of the two accounts, nor does it charge any misconduct on the part of the appellee. It merely claims that the court below erred in allowing the entire commission to the appellee. The question, then, resolves itself into the inquiry, did the court below commit any error in the allowance of the entire commission to the appellee? She became, by the act of God, the sole surviving administratrix of her father, having the burden and the responsibility cast upon her of discharging all the duties which pertained to the settlement of the estate. Upon what theory, then, should the heirs at law of Mrs. Jones be allowed to participate in the compensation which the appellee alone had earned? No burden or responsibility rested upon any one save the appellee, and she was entitled to the commissions fixed by the court below, as shown

by her two administration accounts. We do not think the testimony in this case shows that Mrs. Jones performed any duty of sufficient importance to justify the reopening of these accounts. The motion to dismiss the appeal must be overruled, for the reason that we do not consider this a case in which the court below was called upon to exercise its discretion, but simply to correct the two accounts on the alleged ground of error, the burden of proving which was upon the appellant, and which he has failed to sustain. For the reasons stated, we affirm the order of the court below dismissing the petition, with costs. Order affirmed, with costs.

(70 Conn. 125)

GUSTAFSON et ux. v. RUSTEMEYER.

(Supreme Court of Errors of Connecticut. Jan. 5, 1898.)

VENDOR AND PURCHASER—MISREPRESENTATION—EVIDENCE—DAMAGES—APPEAL—FAILURE TO OBJECT—EVIDENCE OFFERED FOR ONE PURPOSE—HARMLESS ERROR.

1. Misrepresentation as to value of land, knowingly made by the vendor to the vendee, is not actionable unless the vendee was fraudulently induced to forbear inquiry.

2. An objection that a vendee could have no cause of action against his vendor for misrepresentation as to the dimensions of the land cannot be first raised by the brief in the supreme court, under Gen. St. § 1135, forbidding the consideration of questions on appeal that were not raised at the trial and stated in the reasons of appeal.

3. Where a vendor, who was sued for misrepresentation, offered certain evidence solely as bearing on the question of damages, and it was rejected, the supreme court cannot consider whether it was admissible to show the improbability of the misrepresentation.

4. The measure of damages for misrepresenting the dimensions of land is the difference between its actual value when the sale was made and its value if it had been as represented.

5. Misrepresentations as to the dimensions of land made by the vendor before the execution of the deed are not inadmissible, in an action for fraud in the sale, as tending to contradict the deed correctly describing the land.

6. In an action for deceit, the court's refusal to determine whether the rule of damages applicable was the difference between the real value of the land and the price the vendee paid for it, or the difference between its actual value and its value if it had been as represented, was harmless, where the court found that the application of either rule would lead substantially to the same result.

Hamersley, J., dissenting.

Appeal from superior court, Hartford county; William T. Elmer, Judge.

Action by Frederick J. Gustafson and wife against Charles P. Rustemeyer to recover damages for fraud in the sale and exchange of property. The defendant filed an answer denying the fraud, and a counterclaim to recover damages for fraud on the part of the plaintiffs. The plaintiffs demurred on the counterclaim, and the court sustained the demurrer. The case was then tried to the court, facts found, judgment rendered for the plaintiffs, and appeal by the defendant for

alleged errors in the rulings of the court. No error.

The complaint alleged, in substance, that the defendant, who owned a farm in Suffield, which he knew in fact to contain only 78 acres of land, in order to induce one of the plaintiffs, the wife of the other plaintiff, to purchase said farm and a certain quantity of lumber, falsely and fraudulently represented to the plaintiffs that the farm contained 186 acres of land, and falsely and fraudulently represented to them that he owned 10,000 feet of lumber, when he in fact knew that he only owned 1,000 feet of lumber; that the wife, relying upon said representations, was thereby deceived, and was thereby induced to purchase said farm and lumber, and to give the defendant in exchange therefor the sum of \$500, and certain real estate on Julius street, in Hartford, of the value of \$1,750 above all incumbrances. The answer was in effect a general denial, and with it was filed the following counterclaim: "(1) In the transaction referred to in the complaint, plaintiffs represented to the defendant that the property on Julius street was worth \$3,000 over and above incumbrances, and thereby induced the defendant to make, execute, and deliver to the plaintiffs a deed of the land in question. (2) The property on Julius street was of little, if any, value, over and above the incumbrances, as the plaintiffs well knew at the time of the transaction; but defendant says that they made the representations fraudulently and falsely, and for the purpose of inducing the defendant to convey the said Suffield property, to his great loss and damage. (3) Relying upon the plaintiffs' representations, the defendant made, executed, and delivered his Suffield property, referred to in the complaint, to his great loss and damage. Defendant claims by way of counterclaim \$3,000 damages, and asks to recover the whole of said sum, or any part of the same over and above the amount, if any, that shall be allowed to the plaintiffs in this action." The following demurrer was filed to the counterclaim: "Plaintiffs demur to so much of the defendant's answer as is contained in the counterclaim, and for reasons of demurrer they assign the following, to wit: (1) The alleged false representations, as appears from the answer, are matters of information, judgment, and estimation, only, and therefore not actionable. (2) It is not stated in the counterclaim that plaintiffs made any false representations of fact upon which the defendant had a right to rely. (3) It is not averred in said counterclaim that the plaintiffs made any false representations as to any facts, but only that they falsely stated the value of said real estate. (4) It does not appear from the counterclaim that, at the time said defendant received and accepted the deed of said real estate on Julius street, he was not fully informed as to the true value of said real estate; nor does it appear but that he was equally qualified with the plaintiffs to judge as to

its true value." The court sustained the demurrer.

The substance of the findings is as follows: On the 28th of September, 1884, the defendant, being the owner of a certain farm in Suffield, Conn., conveyed it to the plaintiff Johanna Gustafson by warranty deed. As comprising said farm, said deed described three separate parcels of land,—one containing 6 acres, more or less; one containing 120 acres, more or less; and one containing 60 acres, more or less; a total of 186 acres, more or less. The boundaries given in said deed were correct, but the first piece of land, described in said deed as 6 acres, more or less, contained only $5\frac{1}{4}$ acres; the second piece, described as containing 120 acres, more or less, contained only $51\frac{1}{4}$ acres; and the third piece, described as containing 60 acres, more or less, contained only $39\frac{1}{4}$ acres; a total of $96\frac{1}{4}$ acres. Prior to this conveyance the plaintiffs, in company with the defendant, visited said farm, and, under the direction of the latter, passed across the three pieces. They did not go around them; the second and third pieces being irregular in shape, and somewhat obstructed with undergrowth, bushes, and trees. At this time, while upon this land, the defendant indicated to the plaintiffs different objects as being upon the boundary line of said tract, which proved to be beyond the boundary line; and at this time the defendant represented to the plaintiffs that said second piece of land contained 120 acres and said third piece contained 60 acres. At the time of these representations, and at the time of said conveyance, the defendant knew that there were not 186 acres of land in said tract. He had, some time prior to the representations aforesaid, caused said land to be measured by a surveyor, and had seen the report of the surveyor, showing that there were less than 100 acres of land in said tract, and at this time was aware of the correct or approximate number of acres contained in the same. Shortly before the conveyance of said land the defendant represented to the plaintiffs that he had purchased 10,000 feet of lumber, with which to erect a tobacco shed on said land. At this time there was 1,000 feet of lumber on the land, and the defendant represented that the remaining 9,000 feet would be soon delivered, and that the possession and ownership of all of said lumber would be transferred to the plaintiff Johanna when the conveyance of the land was made to her. In exchange for said tract of land conveyed by the defendant to the plaintiff Johanna, the latter paid the defendant \$500 in money, and, also, the plaintiffs executed and delivered to the defendant a deed of certain real estate, consisting of a house and lot situated on Julius street, in the city of Hartford, belonging to the plaintiff Johanna Gustafson, the value of which was estimated to be \$1,750 above a mortgage incumbrance. At the time the representations were made as to the pur-

chase of lumber, the defendant had not purchased and paid for the same, as he represented; nor has the same ever been purchased and delivered to the plaintiffs. And when the defendant made the aforesaid representations to the plaintiffs with reference to the quantity of land in said tract, and as to his purchase of lumber which was to be delivered to the plaintiff Johanna, he knew that such representations were false; and he knowingly and willfully made said false representations with intent thereby to deceive the plaintiffs; and to induce them to convey the property on Julius street to the defendant, and to pay to him the said sum of \$500, which they did pay him, and the land on Julius street, in Hartford, which they did convey to him; and, relying upon the truth of said representations, they were deceived and defrauded by the defendant. The land conveyed by the defendant to the plaintiff Johanna was of the value of \$10 per acre. In form, the deed was adequate, and did convey title to the premises in question.

Upon the trial below, the defendant, for the purpose of showing the value of his farm when it was conveyed, as compared with the value of the Julius street property, which he received in exchange, asked a witness the following question: "How did the farm compare in value with the house? * * * Which was worth the most?" This was objected to by the plaintiffs. The court held it to be immaterial, and said, "That is excluded for the present." To this the defendant excepted, and asked the court to allow the stenographer to note an exception. The court replied, "I will, eventually." Nothing more appears to have been done about the matter. One of the plaintiffs (the wife) was called as a witness to testify to a conversation she had with the defendant, about a month before the deed of the farm was delivered to her, concerning the size of each of the three pieces of land. As she was about to testify, the following occurred: "Q. What, if anything, did Mr. Rustemeyer say—Did you hear him say anything about the number of acres of land there was in that farm? Judge Henney: I object. Mr. Barbour: On what ground? Judge Henney: On the ground that this conversation had taken place in August. Late in August is too remote. They made no bargain at that time. The deed is dated the 28th of September. They made no bargain at that time. No deeds were drawn. The deed was drawn here in Hartford, or drawn in Suffield and executed here in Hartford, and so it was over a month between the conversation and the final transaction. Inasmuch as they made no bargain, then they cannot base any false representations upon a statement made at that time. The Court: Was this part of the inducement, as you claim? Mr. Barbour: Yes, sir; on which the final bargain was made. The Court: You may ask it. Judge Henney: Will your honor note an exception?

The Court: I take it, this led to the bargain. Mr. Barbour: Yes, sir. The Court: Go on with the examination." She then testified, in substance, that the defendant at that time said that the home lot contained 6 acres; the second piece, 120 acres; and the third piece, 60 acres. Upon the trial the plaintiffs claimed that the rule of damages, in case of judgment for the plaintiffs, should be the difference between the value of the property which the defendant represented that he owned and conveyed and its value if it had been as represented. The defendant claimed that the measure of damages was the difference between the value of the tract of land in Suffield and the value of the property given by the plaintiff in exchange for it. With reference to these claims the court said: "Adopting either rule, I find from the evidence as to the value of the several properties that the result would be approximately the same, and that the sum of \$925 is the amount of damages which the plaintiff Johanna Gustafson is entitled to recover under the allegations of the complaint and the facts proven at the trial." In the reasons of appeal, the defendant claims that the court below erred (1) in sustaining the demurrer to the counterclaims; (2) in sustaining the objections to the interrogatories of defendant's counsel as set forth in the findings; (3) in holding that all the representations and agreements of the defendant as to the dimensions of the tract of land set forth in the warranty deed were not embraced in the deed itself, and in the descriptions contained therein; (4) in not assessing damages given to the plaintiff upon some established rule, and in refusing to adopt some rule as to the measure of damages, and in approximating damages to the injury complained of, instead of awarding them in accordance with the rules of exact justice.

William F. Henney, for appellant. Joseph L. Barbour, for appellees.

TORRANCE, J. The first question to be considered is whether the court erred in sustaining the demurrer to the counterclaim. The false representation therein set out and relied upon relates simply to the worth of the Julius street property over and above the incumbrances. It is a mere naked representation of the value of an equity of redemption, and nothing more. The general rule is that a mere naked assertion of the value without more, made between vendor and vendee during negotiations for a sale, though untrue, and known to be so by the one who makes it, and relied upon by the other, to his hurt, does not constitute an actionable deceit; and this for the reason that such an assertion, in most cases, is, and is understood to be, the statement of an opinion, and not of a fact, and the party to whom it is made has no right to rely upon it, and, if he does so, his loss, if any occurs, held to be the result of his own folly. 1

Big. Fraud, p. 490; *Parker v. Moulton*, 114 Mass. 99; *Morse v. Shaw*, 124 Mass. 59; *Hommer v. Perkins*, Id. 431; *Ellis v. Andrews*, 56 N. Y. 83; *Chrysler v. Canaday*, 90 N. Y. 272; *Shanks v. Whitney*, 66 Vt. 405, 29 Atl. 367. See, also, cases cited in note to *Cottrill v. Krum*, in 18 Am. St. Rep. 556 (s. c. 100 Mo. 397, 13 S. W. 906). There are, undoubtedly, exceptions to this general rule, arising out of the special circumstances under which the representation as to mere value is made,—as, for instance, where the one who makes the representation holds a position of trust or confidence towards the other, which gives the latter a right to rely on the representation, or where the seller has, or assumes to have, special knowledge of the value of the property, and the buyer has no knowledge thereof, and the latter, to the seller's knowledge, trusts entirely to the seller's representation. In such cases the seller may justly be held liable for his false representations, because by them the buyer is fraudulently induced to forbear inquiry as to their truth. A mere false representation as to the value of real estate, knowingly made by the seller to the buyer, is not actionable, unless the buyer has been fraudulently induced to forbear inquiry as to its truth; and in that case the means by which he was thus induced to forbear inquiry must be specifically set forth in the pleading. "To such representations the maxim caveat emptor applies. The buyer is not excused from an examination unless he be fraudulently induced to forbear inquiries which he would otherwise have made. If fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration, and cannot be charged in general terms only." *Parker v. Moulton*, 114 Mass. 99, 100; *Ellis v. Andrews*, supra; *Chrysler v. Canaday*, supra. Upon the counterclaim, as it stands, the defendant's case falls within the general rule, and not within any of the recognized exceptions. If he desired to bring it within any of these exceptions, he should have alleged the specific facts which would bring it within one of them; but this he did not do, and for this reason the demurrer was properly sustained.

In his brief the defendant claims, in substance, that the general principles here applied to the statement of facts in the counterclaim, if applied to the facts found, show that the plaintiffs have no cause of action. He says, "Misrepresentations of the dimensions of the farm in question by the defendant to the plaintiff, even though intentional, cannot lay a foundation for an action, upon the facts found by the court." If the defendant were at liberty to make this claim here, it might be shown in reply that the facts set up in the counterclaim, and the facts found, differ very materially, and that this difference may be just the difference between a false representation that is actionable and one that is not; but the defendant, under the statute (Gen. St. § 1135), is not at liberty to make this claim here, be-

cause he did not make any claim of this kind in the court below, nor has he made it in his assignments of error. Under the circumstances of this case, we decline to consider this claim.

The defendant claims that the court excluded the evidence of the value of the Julius street property as compared with the value of the farm, and that it erred in so doing. Although there is some doubt as to whether the court did absolutely and finally rule this evidence out, we will consider the case as if it had so ruled. The defendant claimed that the measure of damages was the difference between the value of the farm and the value of the property given in exchange for it, while the plaintiffs claimed that it was the difference between the value of the property which the defendant owned and conveyed and its value if it had been as represented. From the record, it is clear that this evidence was offered solely as bearing upon the question of damages, and on the assumption that the rule as to the measure of damages was as claimed by the defendant. In his brief the defendant now claims that the evidence was admissible for another purpose, namely, as "tending to show the improbability of his having made the representations complained of." The evidence was undoubtedly admissible for this purpose, and for other purposes, as, for instance, as evidence—but not conclusive—to show, from the price paid, the value of the farm conveyed to the plaintiffs. *Big. Frauds*, pp. 627, 628; 3 *Suth. Dam. p.* 592. But the trouble with this claim is that it was not made in the court below, and cannot be considered now. The question, then, whether the court erred in excluding this evidence, depends on the further question, what is the proper measure of damages in cases of this kind? A vendee, induced to purchase land by false and fraudulent representations, may, acting, seasonably, rescind the contract, and, after giving or offering to give back what he received, may recover back the consideration, or he may retain the land, and recover damages for the deceit in a proper action. *Ives v. Carter*, 24 *Conn.* 392, 403; *Krumm v. Beach*, 96 *N. Y.* 398; *Vail v. Reynolds*, 118 *N. Y.* 297, 23 *N. E.* 301; *Pryor v. Foster*, 130 *N. Y.* 171, 29 *N. E.* 123. The present case is one where the plaintiffs have elected to keep the land, and seek to recover for the deceit in an action of tort; and the question is, what is the measure of damages in this action? Upon this question the decisions of the courts of last resort are not in harmony. In one class of cases the measure of damages is held to be the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be, while in the other class of cases it is held to be the difference between the real value of the property retained by the plaintiff, as it was at the time of the purchase, and the value of that which he gave

for it. In the former class of cases the plaintiff is allowed the benefit of his bargain; in the latter, he is not. *Morse v. Hutchins*, 102 *Mass.* 439, is an example of the first class of cases, while *Smith v. Bolles*, 132 *U. S.* 126, 10 *Sup. Ct.* 39, is an example of the other class. In *Morse v. Hutchins* the court say: "It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be."

* * * This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the plaintiff * * * only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer, and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract." In *Smith v. Bolles*, on the other hand, it was said: "The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations."

* * * The defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation." Both of these cases relate to sales of personal property, but no distinction is made, in the application of these rules, between sales of personal and sales of real property. *Big. Frauds*, p. 627; *Sedg. Dam.* (2d Ed.) p. 559; 3 *Suth. Dam.* § 1171. And no good reason has yet been given why there should be any such distinction. Both courts, in the cases above mentioned, recognize the existence of the general rule that the defendant is only liable for such damages as are the natural and proximate result of his fraud, but they differ in applying it. In *Morse v. Hutchins* the loss of the benefits of his bargain is regarded as one of the elements of plaintiff's

damages, resulting naturally and proximately from the fraud, while in *Smith v. Bolles* such loss is not so regarded. The general rule in regard to the measure of damages in actions of deception has been stated, and we think correctly, as follows: "The defendant is liable, not for everything that follows upon his fraud, but for what may be presumed to have been within his contemplation at the time, as a man of average intelligence." *Big. Frauds*, p. 625. Applying the general rule as thus stated to a case like the present, we think the loss of the benefits of the bargain is one of the elements of damages which the defendant must be held to have contemplated as the natural and proximate result of his conduct, and for which he is therefore answerable. In *Big. Frauds*, p. 627, the rule is stated as follows: "It is now well settled that, in actions for deceit or breach of warranty in sales of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be," citing numerous cases. This is the rule, also, as stated and favored in 3 *Suth. Dam.* pp. 589, 592. It is the rule adopted and followed in numerous cases relating to the sale of personal property, and it is the rule adopted and followed in the following cases relating to the sale of real estate: *Krumm v. Beach*, *supra*; *Vall v. Reynolds*, *supra*, in New York; *Drew v. Beall*, 62 *Ill.* 164, 168; *Nysewander v. Lowman*, 124 *Ind.* 584, 24 *N. E.* 855; *Page v. Parker*, 43 *N. H.* 363; *Shanks v. Whitney*, 66 *Vt.* 405, 29 *Atl.* 367; *Williams v. McFadden*, 23 *Fla.* 143, 1 *South.* 618. Moreover, it is the rule adopted and followed by this court in *Murray v. Jennings*, 42 *Conn.* 9. In that case it does not appear to have been much discussed, but its application was directly in question,—was, indeed, the only question in the case,—and it was specifically and deliberately adopted and followed. We see no good reason why it should not be considered as the settled rule in this state. The evidence of the value of the Julius street property, then, having been offered solely for the purpose of showing the amount of the plaintiffs' damages, under the rule laid down in *Smith v. Bolles*, was inadmissible, and the court committed no error in excluding it for that purpose.

The defendant further claims that the court erred in holding that all his representations as to the number of acres in the farm "were not embraced in the deed itself, and the descriptions contained therein." From the objectionable way in which this matter is stated in the record, by transcript from the stenographer's notes, instead of a brief statement of the point by the court in the ordinary manner, it is a little doubtful just what the precise claim of the defendant was before the lower court upon this point. He seems to claim that, as the false representations were made about a month before the deed was

made, they were too remote in time to be admissible; but in his brief he says, "The court erred in refusing to hold that all the representations as to the dimensions of the property were embraced, and must be found, in the descriptive part of the deed itself." He says, in effect, that the representations were made a month before the deed was given; that plaintiffs had ample opportunity during that month to find out whether they were true or false, and that they then accepted a deed repugnant on its face to the representations; and that these facts show that it is "hardly credible that after all these representations the defendant executed and the plaintiffs accepted a deed radically different from their tenor." These facts were entitled to great weight as evidence bearing upon the question whether the plaintiffs relied on such representations, and whether they were made at all; and we must, upon this record, assume that the court gave to them all the weight to which they were entitled; but, in spite of them, the court found against the defendant on this point, as upon a matter of fact, and we cannot review that finding here. We understand the real claim of the defendant upon the point now in question to be that evidence of the oral representations was inadmissible because it tended to contradict or vary or add to the deed in some way; that all such representations prior to the deed were merged and embraced in it, and so could not be proved. This claim is not tenable. The evidence was not offered to contradict, add to, or vary the deed, but to show the fraud as alleged, which could be shown in no other way. It was offered to show the false representations which induced the plaintiffs to enter into this transaction and to accept the deed. Certain monuments were pointed out by the defendant to the plaintiff as marking the bounds of the land as to which they were in treaty, which in fact were situated outside of it. This was done with an intent to deceive, and led her to accept the deed subsequently tendered, without having the property surveyed, or making any further examination as to the number of acres embraced within the boundaries mentioned in the conveyance. Her omission to take such steps was a natural consequence of the fraudulent representations. They had precisely the effect designed by the defendant, and he was properly held responsible for the resulting damage. As was said in *Russell v. Tuttle*, 2 *Root*, 22: This action is not laid upon the writing, but for the fraud, * * * which can be no otherwise proved than by the testimony of witnesses." In *Cabot v. Christie*, 42 *Vt.* 121, a vendor, orally, falsely represented that a farm contained 130 acres, when it contained but 117; and it was held that, although a parol warranty could not be shown as against the deed, fraud in representing the quantity could be shown. In *Whitney v. Allaire*, 1 *N. Y.* 305, 308, it is said: "For more than thirty years it has been the settled

doctrine of the courts of this state that fraudulent representations in reference to the title of real estate, accompanied with damage, is a good cause of action, and that it is immaterial whether any, or what, covenants are contained in the deed of conveyance." In *Carvill v. Jacks*, 43 Ark. 430, a vendee, induced to accept a deed by false and fraudulent representations, sued for damages for the fraud; and it was held that, notwithstanding the deed and its covenants, he could prove the oral representations. A similar ruling was followed in *Dano v. Sessions*, 65 Vt. 79, 26 Atl. 585; *Keefe v. Sholl*, 181 Pa. St. 90, 37 Atl. 116; *Griswold v. Gebble*, 126 Pa. St. 353, 17 Atl. 673,—cases where vendees, after deeds to them, sued for fraud in the sale of real estate. See, also, the following cases, where fraud was allowed to be shown notwithstanding the fact that the evidence, in one sense, tended to contradict a writing: *Cummings v. Cass*, 52 N. J. Law, 77, 18 Atl. 972; *Mallory v. Leach*, 35 Vt. 156; *Cole v. High*, 178 Pa. St. 590, 34 Atl. 292; *Feltz v. Walker*, 49 Conn. 98-98; *Fox v. Tabel*, 66 Conn. 397-400, 34 Atl. 101. The court below did not err in admitting the evidence in question.

In his last assignment of error, the defendant claims, in effect, that the court failed to adopt and apply any fixed rule as to the measure of damages, and did not assess them "in accordance with the rules of exact justice." The record shows that the parties upon the trial made specific, conflicting claims with respect to the rule of damages; and they were entitled to have the true rule applied, and to know which of the conflicting rules was applied by the court. It was the duty of the court to adopt and apply the rule which the plaintiffs contended for, and it was also its duty to make this known to the parties in some way. The record upon this point is not as clear as it should be. It says: "Adopting either rule, I find from the evidence as to the value of the several properties that the result would be approximately the same." The fact implied in this statement, that the court had heard and considered evidence as to the value of both properties, would seem to indicate the adoption of the rule which the defendant contended for, while there are other things elsewhere in the record which seem to indicate that the court adopted the other rule. The record does not show, either expressly or by clear implication, which of the conflicting rules the court adopted and applied. Perhaps the fair import of the record is that in the process of assessing the damages the court applied both rules, and, finding the results approximately the same, did not decide which of them was the true rule, and exclusively applicable. It was the duty of the court to decide this question, however, and to make its decision manifest in some way to the parties, and this was not done. We think the court erred in this, but if, as is found, the application of either rule leads in this case to substantially the same result, it is dif-

icult to see how the defendant has been harmed by the error, and for this reason we do not advise a new trial on account of it. There is no error. The other judges concurred, except *HAMERSLEY, J.*, who dissented.

HAMERSLEY, J. (dissenting). In an action of fraud the plaintiff can recover the amount of his actual damage. The elements of actual damage depend on the circumstances of each case, are widely variant, and can hardly be defined accurately in a general rule. Where a vendor warrants an article sold to be of a certain kind, he makes a special contract to indemnify the vendee for any loss by reason of the article not being of that kind; and so, in case of a breach of the warranty, he is bound, by force of the contract, to put the vendee in the same position he would have occupied if the article had been as warranted. In other words, the damage to the vendee is the loss of the benefit of his contract. In a large class of sales of personal property, a contract of warranty may be established by proof of false representations. In such cases it has been held that, so far as the damage was concerned, it was immaterial whether the form of action was the one provided in case of fraud, or in case of breach of warranty; that in either case a contract was established by the same proof, and in either case the plaintiff was entitled to the benefit of his contract, but entitled to that benefit solely because the contract had in fact been validly proved. And so for this class of cases a special rule was recognized,—that in actions of fraud, where a sale had been induced by false representations, the plaintiff could recover the benefit of his contract. But it is evident that such rule implies an existing contract of indemnity, and cannot apply where such a contract is not proved. It might have been better if in such cases the courts had held the plaintiff to his action of contract when he merely sought to recover for its loss, but it is certain the rule cannot be extended beyond its reason without leading to unfortunate confusion in respect to the features which distinguish contract from tort. I do not understand the majority of the court to question this, but to hold that the present case is within the reason of this special rule. It seems to me, however, that it is not. False representations as to certain classes of personal property may establish a contract of warranty. This is not true as to representations of the dimensions of land sold. A contract of warranty in such case can only be proved by the writing. The present plaintiff could not have recovered the alleged benefit of his contract in an action for a breach of contract. There was no legal contract of indemnity, and he could therefore prove no breach and no damage. There was a fraud which induced an exchange of land, and he can recover for the damage resulting from

that exchange, but not, as it seems to me, for the loss of the benefit of a contract which he has not made. I think, also, that the error in refusing to assess damages in accordance with a rule adopted by the court is fatal. If we assume that the judge made a separate assessment under each rule, and reached substantially the same result, yet he did not reach the same result, whatever latitude we may give to the word "substantially." The assessment adopted must have followed one or the other rule (for the judgment is clearly illegal, if he followed neither); and if his judgment, following the wrong rule, is a single dollar larger than it would have been, following the right rule, it involves the violation of a legal right. To sustain the judgment on the ground that no practical injury was done, the assessment under each rule must have been validly made; but the assessment under the rule claimed by the defendant was made, if not without evidence, yet in the absence of material evidence which the defendant was not permitted to introduce. I think there is error, and that a new trial should be granted.

(70 Conn. 148)

SWAN et al. v. CITY OF BRIDGEPORT.

(Supreme Court of Errors of Connecticut. Jan. 5, 1898.)

SHERIFF—CIVIL PROCESS—ESCAPE OF PRISONER—MEASURE OF DAMAGES—PLEADING AND PROOF.

1. Under a city charter which provides that the sheriff of the city shall be liable to the same suits or penalties for neglect of duty as sheriffs by law now are, and that the city shall be liable for the defaults of its sheriff in his office, where such sheriff negligently permits the escape of one arrested under a civil process placed in his hands the measure of damages for which the city is liable is the actual loss which the aggrieved party has suffered by reason of the default.

2. In an action against a city for damages resulting from a default of its sheriff in permitting the escape before judgment of one arrested under a civil process, and for a failure to return the process, the plaintiff is required to prove the judgment which he could have obtained in the action against the escaped prisoner had the process been returned.

3. Under an allegation in a complaint that defendant obtained a loan of the plaintiffs, and gave therefor a note which was forged, plaintiffs are entitled to judgment for the amount due by the terms of the note, although it was given as a renewal of other notes.

4. In an action for damages resulting from the negligence of a sheriff in permitting the escape of one arrested under a civil process, where there is no showing that the escaped prisoner was insolvent, or that a judgment against him could not have been collected, the damages will be the amount for which judgment would have been found against him.

Appeal from court of common pleas, Fairfield county; George P. Carroll, Judge.

Action by Swan & Bushnell against the city of Bridgeport to recover damages for the default of the sheriff of the defendant city. Facts found and judgment rendered for the plaintiffs, and appeal by the defendant for al-

leged errors in the rulings of the court. No error.

Section 21 of the charter of the city of Bridgeport (10 Priv. Acts, p. 519) provides that: "The sheriffs of said city shall severally have, within the limits of the jurisdiction of the city court, the same power and authority, and be liable to the same suits or penalties for neglect of their official duty, to all intents and purposes, as sheriffs by law now have and are; and the said city shall be liable for the defaults of its sheriffs in their offices." The complaint describes the default of the city sheriff as follows: On said 17th day of September, 1894, the said Swan & Bushnell had a valid claim against one Edward Klaus, of Bridgeport, Conn., to the amount of \$240, which said claim was of such a nature that the body of said Klaus was liable to be attached therefor, and have execution levied thereon to satisfy the same. On said day, Swan & Bushnell, through their attorney caused to be placed in the hands of said Dwight Thompson, a sheriff of said city of Bridgeport, a writ, legally issued and signed, commanding him, the said sheriff, to attach, to the amount of \$400, the goods or estate of said Klaus, and, in want thereof, his body; and the sheriff, being unable to find any property of the said Klaus, did attach his body, to respond to the demand of said writ, and took said body into his possession. Immediately thereafter, while the body of said Klaus was still in his possession, he, the said sheriff, negligently and carelessly permitted him, the said Klaus, to escape from his custody; and the said Klaus, by means of said carelessness and negligence of the sheriff, was enabled to so escape, and did flee from said sheriff, out of his jurisdiction, and out of the state of Connecticut, where he has ever since remained. After said escape said sheriff made no further efforts to serve said process, and did not otherwise serve the same than as stated, and did not return said writ to the court to which it was returnable. The said Klaus owned no property of any kind that can be taken to satisfy this claim of said Swan & Bushnell, and by his said escape from said sheriff, and by said misconduct and negligence of said sheriff as aforesaid described, the said Swan & Bushnell have lost their said claim, and all chance to secure the same or to enforce payment thereof.

The following are the material averments of the complaint of the plaintiffs against Klaus, and under which Klaus' body was attached as above described: (1) On the 20th day of May, 1894, the defendant obtained a loan of the plaintiffs to the amount of \$240, and gave them therefor a certain note of that date for said amount, signed by R. Klaus, Mary Klaus, Fred Hardy, and Marshall E. Gray, payable to the defendant's order, and indorsed by him. (2) Said names of the makers of said note were forged and counterfeited. (3) The defendant, at the time he obtained said loan upon said note, knew that the said names were forged and counterfeited, but represented that

they were genuine, with intent to defraud the plaintiffs. (4) The plaintiffs believed that said names were genuine, and, relying upon said representation, they loaned the said defendant said money. (5) Said note is still unpaid, and in the possession of the plaintiffs, and the defendant is wholly irresponsible.

The following facts found by the trial court are more or less material to the questions involved in this appeal: During the time of the dealings that the plaintiffs had with Edward N. Klaus, referred to in the complaint, the latter was conducting a saloon business in Bridgeport. Apparently, he owned the saloon (that is, the stock in trade and fixtures), and he so told the plaintiffs when they first advanced him money. The plaintiffs believed that he owned the business which he was conducting, both in consequence of what he told them, and also in consequence of the way in which the business appeared to be carried on. As a matter of fact, during the latter part, at least, of the time Klaus conducted the saloon, a brewing company owned the saloon and its business, and paid Klaus a salary for his services. Either Klaus had bought the saloon, and had sold it to the brewing company, while still continuing in charge of the business, some time before he absconded, or else he never owned it. The interest of the brewing company in the saloon was not known to the plaintiffs until about the time Klaus absconded. On February 20, 1894, one Ernest Hockheimer, Jr., indorsed over to the plaintiffs a promissory note executed in his favor by Klaus. The plaintiffs paid Hockheimer \$60 for the note. Its face value was considerably more than what the plaintiffs paid for it. Whether the note was then not due, or was overdue, did not appear; nor did the nature of the indorsement appear,—whether in blank, or with a waiver of demand and notice, or otherwise. On February 21, 1894, the plaintiffs paid Klaus \$98.45 for a note in favor of Klaus, apparently given by one Marshall E. Gray, and indorsed by Klaus. The amount of this note, and the time when it became due, did not appear in evidence; nor did it appear whether demand and notice were waived in the indorsement of the note. Gray was known to the plaintiffs as an owner of real estate and other property. At this time Klaus told the plaintiffs—and they believed him—that the note to Hockheimer represented a part of the purchase price of the saloon business which he said he had bought of Hockheimer, and that the Gray note represented goods that Gray had bought of Klaus. So far as Gray's signature to the note bearing his name was concerned, it was a forgery, and Gray did not owe Klaus anything. Klaus knew this note was forged. The plaintiffs bought and paid for the note in consequence of what Klaus said about his affairs, and because he said the note was given by Gray. On March 6, 1894, the plaintiffs, also because of their belief in Klaus' ability and business condition, as represented by him, loaned him \$30. On May 20, 1894,

the plaintiffs, who had been pressing Klaus for some time to pay the notes and the loan, told him that he must pay the moneys, all of which were then due them, or else he must do something to secure them. Klaus accordingly suggested that he get a note from his sister, Mary Klaus, who was known to the plaintiffs as owning property, and from Gray. The plaintiffs agreed to this proposition, and wrote out a joint and several note for \$240, which was the correct total amount due them upon the two other notes and from the loan, as then ascertained and agreed by the plaintiffs and Klaus, payable on demand after May 20, 1894, to the order of Edward N. Klaus, at the office of the plaintiffs, for value received. The same day Klaus returned with the note apparently bearing the signatures of his sister, Mary, and of Gray, as makers, and of R. Klaus and of Fred Hardy, also apparently as makers, who, however, as he said, were witnesses. Klaus indorsed this note in blank, and waiving demand and notice. The plaintiffs accepted the note in satisfaction of their other claims, under an understanding that he was to pay \$10 a month on it until paid. At the same time they gave up to Klaus the other two notes, in consequence of their belief in the genuineness of the new note then received by them, and given them by Klaus as a genuine note. Whether or not at that time Klaus had enough property to make it possible to collect the notes from him, did not appear. As a matter of fact, the signatures of Mary Klaus, Marshall E. Gray, and Fred Hardy on this note were forgeries, and Edward N. Klaus knew them to be forgeries. What the plaintiffs did in the way of advancing moneys to Klaus, giving up notes, extending his time for payment, and altering their position generally in their dealings with him up to this time, had been done in consequence of his false and fraudulent representations as to his business affairs, and as to the names appearing on the notes. Two payments of \$10 each were made on this last note. Early in September, 1894, the plaintiffs discovered that the names of the makers of this last note were forgeries. On September 17, 1894, the plaintiffs caused to be issued a writ, with its accompanying complaint, dated on that day, directed to the sheriff of the county of Fairfield, his deputy, or either sheriff of the city of Bridgeport, and returnable on the first Tuesday of October, 1894, to the court of common pleas for Fairfield county. The writ was given to Sheriff Thompson for service on the day of its issuance. He served the writ on Klaus, and attached his body, in default of finding attachable property. After keeping Klaus in his custody overnight, the officer negligently and inexcusably permitted him to escape some time the next morning. The officer further, negligently and without excuse, omitted to return the writ to court, and made no return of his doings on the writ. Neither the plaintiffs nor their attorneys knew of the failure to return the writ to court until long after its return day, and until too late to

get judgment upon it. At the time the writ was served on Klaus, he had no property liable to attachment, so far as known to the plaintiffs, their attorney, or the officer. Before then he had some money, but how much it was, or what became of it, did not appear in evidence. He was 26 years old. His mother owns some property. Upon his escape from arrest he left the state, and went to parts unknown. His present whereabouts are unknown. The loss and damage sustained by the plaintiffs by reason of the officer's negligence amount to \$256.30. For which sum (that being the amount due upon said \$240 note, with interest) the court rendered judgment for the plaintiffs.

The following are among the reasons of appeal: That the court erred and mistook the law in holding and deciding that it did not devolve upon the plaintiffs to prove affirmatively that they were in fact actually damaged by the said officer's said neglect, and to further prove precisely the extent of such damage in order to recover at all. The court erred and mistook the law in holding and deciding that the plaintiffs were entitled to recover any damages by reason of said neglect of said officer, when it appeared upon the trial of this action, as shown by the finding, that the cause of action alleged and set up by the plaintiffs in their said writ and complaint against said Klaus did not in fact exist, and that upon said writ and complaint, as the facts existed and are found in the finding in this action, the plaintiffs could not have recovered against said Klaus in said action at all, but, on the contrary, judgment in said action would have been rendered against them on said writ and complaint for the costs of said action. The court erred and mistook the law in holding and deciding that the plaintiffs were entitled in this action to recover damages for the said officer's neglect to serve and return said writ, upon the theory that some other cause of action might by amendment have been substituted for the cause of action alleged and set up in said complaint in said writ against Klaus. That the court erred and mistook the law in holding and deciding that the plaintiffs were entitled to recover as damages the full amount of said forged note, deducting the payments thereon made, when it appeared from the evidence, as shown by the findings in this case, that the said forged note was for a prior indebtedness already contracted and in existence when said note was given, and that said note, being on demand, was not the means of procuring from the plaintiffs any valuable thing, or placing the plaintiffs in any worse condition than they were in before, as regards their said claims against Klaus, and his indebtedness to them.

Robert E. De Forest, for appellant. J. C. Chamberlain and Elbert O. Hull, for appellees.

HALL, J. Section 21 of its charter renders the city of Bridgeport directly liable for the defaults of its sheriffs in their offices, and imposes upon them, within certain territorial limits, similar duties to those which are by law imposed upon sheriffs generally. Among the duties which sheriffs owe by law to plaintiffs in civil actions is that of executing "with reasonable diligence, according to its terms, all lawful civil process duly delivered to them for service within their jurisdiction." Mechem, Pub. Off. § 744. Section 1992 of our General Statutes provides that "each sheriff shall receive all process directed to him when tendered, and execute it and make return thereof. * * *" The facts of record show a default in office of City Sheriff Thompson, in negligently permitting Klaus, whom he had arrested under the civil process placed in his hands by the plaintiffs, to escape, and in neglecting to return the process to the court to which it was returnable. Upon this appeal we are called upon to consider (1) what the rule of damages is for such breach of duty of the city sheriff; and (2) whether, under such rule, upon the facts found by the trial court, the plaintiffs could be entitled to a judgment for the amount due on the \$240 forged note.

The language of the section of our statute above cited is, "If any sheriff shall not duly execute and return the process or shall make a false or illegal return thereof he shall be liable to pay all damages" to the party aggrieved. The law is well established that for such default in failing to execute the mandates of mesne process the officer becomes liable to the injured party to the amount of the damage actually sustained. Mechem, Pub. Off. §§ 759, 764; 2 Sedgw. Meas. Dam. (8th Ed.) § 544; 1 Swift, Dig. v. 542. The amount of the debt is not necessarily the measure of such damages. It is the actual loss which the aggrieved party has suffered by reason of the officer's default. Clark v. Smith, 9 Conn. 379, 10 Conn. 1; Palmer v. Gallup, 16 Conn. 555; Bank v. Waterman, 26 Conn. 324. The acts, themselves, of such defaulting officer, do not constitute the injury for which the law gives the plaintiffs reparation, but the damaging consequences of such acts. The injurious consequence is the interference with the plaintiffs' right to collect their debt by legal process. To prove his damage,—at least, beyond a nominal sum for a negligent escape, or a failure to attach on a mesne process,—the plaintiff is ordinarily required to proceed and establish his debt by judgment, since judgment may be satisfied notwithstanding the failure to attach, or the defendant who has been permitted to escape may be produced in court to respond to final judgment, in either of which cases the plaintiff would have suffered no actual loss from the acts of the delinquent officer. 1 Swift, Dig. p. 543; Bank v. Waterman, *supra*. But the plaintiff, having thus established his debt,

and his inability to collect it by legal process, has proved, *prima facie*, a liability of the defaulting officer to the extent of the debt thus established, and the burden thereupon rests upon the defendant to prove that the actual loss of the plaintiff was less than the amount of such debt. 2 Sedgw. Meas. Dam. (8th Ed.) § 545 et seq.; Mechem, Pub. Off. § 759; State v. Mullen, 50 Ind. 598; Hootman v. Shriner, 15 Ohio St. 43; Brooks v. Hoyt, 6 Pick. 468.

In the present case it was impossible for the plaintiffs to prove their debt in their action against Klaus. They were prevented from doing so by the escape of Klaus beyond the jurisdiction of the court, and the failure of the officer to return the complaint to court. They are, however, required in this action to prove the judgment which they could have obtained in the action against Klaus had the process been returned. This accords with the claim of defendant's counsel in his brief, that "the plaintiffs, in order to recover in this action, were bound to show, not only that said City Sheriff Thompson neglected to attach the body of Klaus, and to return said writ to court, but also that, if said writ had been returned, the plaintiffs would have recovered damages upon it. * * * But the defendant insists that the plaintiffs could not have recovered in their action against Klaus had the complaint in that suit been returned. The cause of action described in that complaint, says defendant's counsel, was the obtaining of a loan from the plaintiff of \$240 by false representations, and the facts show that no such cause of action existed. Nor, says the defendant, can the plaintiffs avail themselves in this action of any right which they might have had to amend that complaint had it been returned to court, since the defendant can only be held liable for the failure of the officer to serve the writ placed in his hands, and not a writ describing a different cause of action, and since the complaint in the present action counts solely "upon the neglect of the officer to serve and return the writ as it was placed in his hands." This argument of the defendant is, in our judgment, invalid. The suit against Klaus was not to recover the \$30 which the plaintiffs had loaned him, together with the sums they had advanced on the Gray and Hockheimer notes. The gist of that action was the fraud of Klaus in indorsing and delivering to the plaintiffs a forged note in satisfaction, by agreement of the parties, of a valid claim of \$240 which the plaintiffs held against Klaus, and which was evidenced by the note for that amount set forth in the complaint, and indorsed by Klaus. It was immaterial whether that valid claim was for money loaned, or was a sum due upon notes which Klaus had made or indorsed. The averment that Klaus had obtained a loan of the plaintiffs was a matter of inducement, which need not be stated with particularity, nor strictly proved. 1 Chit. Pl. (16th Am.

Ed.) 296; 1 Swift, Dig. p. 604; Bliss, Code Pl. § 311. Under the allegations of that complaint, proof of the indorsement and delivery to plaintiffs, for a valuable consideration, by Klaus, of the note which he knew to be forged, entitled plaintiffs to a judgment for the amount due by the terms of the note. But we think that, if the allegation that Klaus obtained a loan of the plaintiffs be regarded as a material one, the facts show no fatal variance. The transaction was in effect the same as if the plaintiffs had loaned Klaus \$240 upon the forged note, and he had thereupon paid the \$30 which he owed them, and taken up the two notes upon which he was liable. If, without taking that course, the parties themselves preferred to treat the notes as money, and the new arrangement as a loan, they were permitted to do so. We think the transaction may be treated as such an agreement. The finding discloses no facts which would have rendered a judgment against Klaus valueless, or which would necessarily have reduced the plaintiffs' loss below the amount due upon the forged note. From the record it does not appear that defendant offered any evidence for that purpose. Apparently the defendant relied upon its claim that it devolved upon the plaintiffs to prove that the judgment would not have been collectible. The trial court found the plaintiffs' damage to have been the amount due upon the forged note; that, at the time the writ was served, Klaus had no attachable property, so far as was known to the plaintiffs, their attorney, or the officer; that "before then he had some money, but how much it was, or what became of it, did not appear in evidence." There is no finding that Klaus was insolvent. As, in our opinion, the plaintiffs could have recovered judgment in their action against Klaus without amending their complaint, it is unnecessary for us to determine whether they could have recovered in the present action had such amendment been required. No error. The other judges concurred.

(70 Conn. 153)

SOUTHEY et al. v. DOWLING et al.

(Supreme Court of Errors of Connecticut. Jan. 5, 1898.)

ACTION PREMATURELY BROUGHT — PLEA IN ABATEMENT.

Under Gen. St. § 874, and Prac. Act, rule 4, § 6, which require the defendant in his answer to state special matters of defense, and prohibit evidence of matters in avoidance or defense consistent with the truth of the material allegations of the complaint unless specially pleaded, evidence that the suit was prematurely brought is inadmissible, unless raised by plea in abatement.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Action by John W. Southey and others against Joseph M. Dowling and others to recover a balance claimed to be due for stone furnished. Facts found and judg-

ment rendered for the plaintiffs, and appeal by the defendants for alleged errors in the rulings of the court. No error.

The complaint contains two counts. The first count, in four paragraphs, alleges, in substance, (1) that in May, 1895, the plaintiffs contracted with the defendants to furnish them with stone for use at Portchester, N. Y., as set forth in the bill of particulars filed under this count; (2) that the defendants agreed to pay for said stone \$7,067; (3) that the plaintiffs furnished said stone as agreed; (4) and that the defendants had paid the plaintiffs \$6,300 on account, but had refused to pay the balance. The second count alleged, in substance, that during the time that the plaintiffs were furnishing stone, as set forth in the first count, the defendants requested them to supply certain extra stone over and above the quantity described in the first count; and that the plaintiffs had furnished said extra stone to the amount of \$915. An itemized bill of particulars was filed under this count.

The defendants filed the following answer: "First defense to first count: (1) Paragraphs 1, 2, 3, and 4 of the first count are denied, except as hereinafter admitted. (2) On or about May 11, 1895, the plaintiffs contracted with the defendants to furnish the defendants with cut stone for use at Portchester, N. Y., for certain jobs taken by defendants known as the 'Park Jobs.' (3) The defendants agreed to pay for said stone the sum of \$7,067, delivered f. o. b. at Portchester, N. Y. (4) The plaintiffs delivered said stone upon the cars at Portchester, but did not pay the freight thereon, amounting to \$430.18, which the defendants were obliged to pay; and a portion of said stone was not cut as agreed, and the defendants were obliged to have the same recut at a cost of \$81.34. First defense to second count: (1) All the allegations of the second count are denied, except as hereinafter admitted. (2) From time to time, during the period in which the defendants were engaged upon the said jobs, they requested the plaintiffs to supply certain extra stone necessary for the completion of the various buildings, over and above the amount called for by the contract, set out in the first defense to the first count. (3) The plaintiffs furnished stone, as requested, to the amount of \$223, the same being the item set forth in plaintiffs' bill of particulars in the second count, except items Nos. 1, 8, 9, 13, and 14 of said bill of particulars, which the plaintiffs did not furnish to the defendants. The defendants' second defense to first and second count, by way of set-off and counterclaim: (1) All the allegations of the first defense to the first count and of the first defense to the second count are made part of this defense. (2) The defendants claim an offset of the said sums of \$81.34 and \$430.18, paid by them as alleged in said first defense to the first count."

The reply was as follows: "To the first defense to the first count: (1) Paragraphs 2 and 3 of the defendants' first defense to the first count are admitted. (2) Paragraph 4 is denied, except as hereinafter admitted. The defendants paid freight charges for the plaintiffs as alleged, but to what amount the plaintiffs have not sufficient knowledge to form a belief. To the second defense to the first and second counts, by way of counterclaim and set-off: (1) Paragraph 2 of the defendants' second defense to the first and second counts is denied, except in this: that concerning the item of \$430.18, by way of counterclaim, the plaintiffs have not sufficient knowledge thereof to form a belief."

That part of the finding which relates to the rulings complained of is as follows: "Upon the trial the defendants offered to prove, and did lay in evidence the testimony of the defendant Charles Bottomley, that the agreement between the parties was that 20 per cent. of the price agreed upon for the stone furnished was to be retained until such time as the building was accepted by the architect, and, in connection with this testimony, offered to prove that the building was not accepted by the architect until after this action was begun, and that the plaintiffs were notified of this fact, that the building was not accepted at the time this suit was begun. In this connection, the paper marked 'Exhibit 1,' for identification, was offered in evidence. The purpose of the offer was to prove that the suit was begun prematurely, and that nothing was due, under the first count, at the time the suit was begun. To these offers the plaintiffs objected, because the evidence for such a purpose was not admissible, under the pleadings; that they had had no notice that this defense would be made, and no opportunity to meet such a defense. The court ruled that all that transpired between the parties was admissible in evidence, but that the offer to prove the suit was prematurely brought was not admissible as a defense under the pleadings, and excluded the offers, and Exhibit 1, for identification, for such a purpose; and the defendants duly excepted to the ruling. The above offer related exclusively to the first count."

Exhibit 1, referred to in the finding, is as follows: "Dowling & Bottomley, Masons, Builders, and Contractors. Office: 7 Wall Street, Bridgeport, Conn., Oct. 31, 1895. Received of Dowling & Bottomley note for seven hundred dollars, to apply on contract for stone purchased for park job purchase, said note to be renewed until such time as work is accepted by architect; interest on note to be paid by J. Southey & Son. J. W. Southey & Son."

The errors assigned relate solely to the rulings as above stated.

Daniel Davenport, for appellants. John W. Banks and William T. Hincks, for appellees.

TORRANCE, J. The question upon this appeal is whether, under the pleadings in this case, the defendants could avail themselves of the fact that the action was prematurely brought. At common law, matter of this kind, not appearing upon the face of the pleadings, was clearly matter in abatement. "Matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should, in general, be pleaded in abatement." 1 Chit. Pl. 446; 1 Swift, Dig. p. 606. The proceeding will abate "if it appear that the suit was commenced before the cause of action had accrued." 1 Swift, Dig. p. 610; 1 Chit. Pl. 453; Gould, Pl. c. 5, § 138. It was, however, unusual to plead such matter in abatement, because if it appeared upon the face of the pleadings it could be taken advantage of by demurrer, and, if it appeared by the plaintiffs' evidence, it was ground for a nonsuit. 1 Chit. Pl. 453; Gould, Pl. c. 5, §§ 137, 138. Whether under the later practice at common law, under the general issue in an action of assumpsit, the defendant could offer evidence to show that the suit had been prematurely brought, is not, perhaps, quite clear. Under the issues of nonassumpsit and nil debet, proof of almost every defense that would defeat the action was admissible. Judge Swift says: "In assumpsit, everything that proved there was no right or debt when the action was commenced might be given in evidence under the general issue, for they were consistent with that plea." 1 Swift, Dig. p. 614. In another place (page 705) he says: "Every special matter of defense may be given in evidence under the general issue, excepting alienage after suit brought, tender, and the statute of limitations." It is upon statements of this kind, in text-books and reports, that counsel for the defendants seem to rely in support of their claim upon this appeal; but the question here is not whether at common law the offered evidence would have been admissible under the general issue, but it is whether, under our present system, such evidence was admissible under the pleadings in this case, and we are of opinion that it was not. Under that system of pleading, the defendant, in his answer, is required to state special matters of defense, and is not permitted to "give in evidence matter in avoidance, or of defense, consistent with the truth of the material allegations of the complaint, unless in his answer he states such matter specially." Gen. St. § 874. The rules under the practice act (rule 4, § 6) also provide as follows: "No facts can be proved under either a general or special denial, except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements, but show, notwithstanding, that he has no cause of action, must be specially alleged."

Under the pleadings in this case, leaving out of view the answer of set-off and counterclaim, the issues were, in effect: (1) How

much have the defendants paid for freight? (2) What sum, if any, have the defendants paid for recutting stone? (3) What is the correct amount due for extra stone furnished? The defense that the suit had been prematurely brought was clearly not within the issues. Whether, if the defendants had desired to make that defense, they should have set it up in a plea in abatement or in an answer, is a question which we need not discuss nor decide now, for it was not stated nor set up either by plea or answer. Clearly, it was "matter in avoidance, or of defense, consistent with the truth of the material allegations of the complaint," within the meaning of the statute and the rule, and it was not stated at all. To allow the defendants, under these pleadings, to avail themselves of a defense of this kind, would be contrary both to the letter and the spirit of our present system of pleading. Under systems of pleading in other states substantially similar to our own, it has been, so far as we know, uniformly held that a defense of this kind which the defendant attempts to prove by evidence, is not available to him, unless he has in some way set it up in his pleading. Goodrich v. Association, 96 Ga. 803, 22 S. E. 585; Collette v. Weed, 68 Wis. 428, 32 N. W. 753; Iselin v. Simon, 62 Minn. 128, 64 N. W. 143; Elder v. Rourke, 27 Or. 363, 41 Pac. 6; Pom. Rem. & Rem. Rights, pars. 678, 691, 698; 1 Enc. Pl. & Prac. pp. 839, 849, and cases there cited. There is no error. In this opinion the other judges concurred.

(70 Conn. 159)

NOLAN v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Errors of Connecticut. Jan. 5, 1898.)

RAILROADS—OPERATION—NEGLIGENCE—APPEAL—REVIEW—CONCLUSIONS OF LAW—QUESTIONS OF FACT—MASTER AND SERVANT—FELLOW SERVANT.

1. The court of appeals has no jurisdiction of an alleged failure of the court below to determine the facts in issue correctly.

2. Whenever the record presents all the facts found by the trial court, and the conclusion is plainly erroneous, and error has been lawfully assigned, it is a question of law so far as the jurisdiction of the court on appeal is concerned, and is reviewable.

3. The judgment on the special facts in issue as ascertained by the evidence settled by the trier is a conclusion of law, and reviewable.

4. Where, in an action for injuries caused by a collision, every special fact from which the court inferred the liability of the defendant is found, including the rules and regulations adopted by defendant railroad company for safely operating the train, and the finding shows neglect of a fellow servant to obey the rules, and the collision might not have happened if they had been obeyed, and therefore holds that defendant is not liable for the neglect, and draws from the special facts found certain inferences, the inferences are reviewable as conclusions of law.

5. Defendant's rules were substantially the same as those in use by 90 per cent. of the steam railways in the United States, and were the best and safest devised by the best rail-

road talent. They covered the movement of trains, provided for special orders for extra trains, required the train dispatcher to give telegraphic information of the meeting places of such trains, and of trains moving in the opposite direction, as well as of regular trains off the regular time, but did not require him to inform by telegraph trains moving in the same direction of their relative positions, and to determine whether there was likelihood that a rear train might overtake, and, if the rules were not obeyed, run into, the forward train. *Held*, that defendant's rules fulfilled its legal duty to persons on trains moving in the same direction, and the giving of telegraphic information to two particular trains, moving in the same direction, of their relative position, was not a duty imposed on defendant by law.

6. The court found as facts that train 474 consisted of an engine pushing a snow plow; that 1411 was over an hour behind its schedule time, and stopped to attach freight cars at K., which is merely a siding, where freight trains stop occasionally; that 474 moved at a faster rate of speed than 1411; that the day was very cold, and the snow plow threw snow, rendering it difficult for the lookout stationed on the plow to see ahead; and that just before the accident the plow was not throwing much snow, and the lookout could see. *Held*, that such conditions were those in general attending trains moving in the same direction, did not constitute an exceptional case unprovided for by the general rules, and did not throw on defendant or its train dispatcher the special duty of keeping the conductors of said trains informed by telegraph of their relative position.

7. It was not error to refuse to sustain the claim of law in the terms in which it was phrased: "That upon the facts in evidence the defendant, having operated its trains under suitable rules and regulations, and having properly equipped said trains, had performed its entire duty toward plaintiff's intestate, and the law imposed no higher degree of care than that exercised by it."

8. In Connecticut, an employer is not liable for the injury or death of an employé, caused by the negligence of another employé.

9. Where the material question in a case is whether the ascertained conduct of a person is in law negligent, and such ascertained conduct consists of a single impression produced in the mind of the trier by the whole mass of relevant testimony, the conclusion of the trier that such conduct is or is not negligent in law is quoad the trier a conclusion of law; but such conclusion is, quoad the power of the supreme court of errors to review the trier's inference, a conclusion of fact.

10. Where, in an action for negligence, the events on which the cause of action arises are of such a nature that they can be fully found by a trial court as adjudicated facts, and have been so found, and properly appear before the supreme court of errors in the record, the inference of legal liability drawn by the trial judge is a question of law, and reviewable by the supreme court of errors.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Action by Mary J. Nolan, administratrix, against the New York, New Haven & Hartford Railroad Company for the death of plaintiff's intestate, caused by defendant's negligence, in which defendant made default. From a judgment in favor of plaintiff, rendered on a motion for hearing in damages, defendant appeals. Reversed.

The facts on which liability is claimed are alleged in the third and fourth paragraphs of the complaint, and are as follows: "Third.

On the 12th day of March, A. D. 1896, the defendant, by itself, its servants and agents, was operating and running in a southerly direction on said railroad a train of freight cars, and was operating and running on said railroad, in the rear of and following said freight train, a train which consisted of a snow plow and a locomotive, the locomotive being behind the snow plow, and pushing it forward, and then, and while so operating said trains, negligently conducted itself in the management and equipment of said trains by failing to give proper telegraphic information to the conductor and engineer of each of such trains relative to the position of the other of said trains; by failing to give proper orders to the conductor and engineer of each of said trains; by running the said rear or snow plow train at a high and dangerous rate of speed; by failing, when the said freight train, as hereinafter stated, was left standing upon the main track, to give sufficient and timely signal and warning to the approaching aforesaid snow-plow train; by failing to have upon the said freight train a sufficient number of men to both do the freighting work required of the train crew and to also guard against collision; by failing to have sufficient and serviceable brakes upon the snow plow and locomotive composing the snow-plow train; by using and putting into said snow-plow train a plow so high and improperly constructed that it obstructed the engineer's view of the tracks in dangerous places on said railroad, and while approaching the place where the collision hereinafter stated occurred; by having in the said snow plow only such windows as were too small and inconveniently placed to serve properly for lookout purposes; by failing to have a proper, certain, and speedy means of signaling from the snow plow to the engineer of the locomotive; by failing to exercise proper supervision of the running of said trains, so that the said snow-plow train collided with the said freight train at a place on said railroad in the town of Kent, near the Kent Furnace switch, and as a result of such collision the plaintiff's intestate, Jerry Nolan, received severe injuries, which injuries were aggravated by exposure and rough treatment, made necessary by the negligence of the defendant in failing to have upon the said snow-plow train a hospital stretcher, as the law required. In consequence of the aforesaid injuries, the said Jerry Nolan died. Fourth. At the time of the said collision, the said freight train, with the exception of the locomotive, was standing upon the main track, near the Kent Furnace switch, in the town of Kent,—the same track upon which the snow-plow train was approaching. The locomotive of the freight train had been detached, and was working on a side track. The said snow-plow train, coming at a terrific rate of speed, crashed into the rear end of the freight train. The said Jerry Nolan was rightfully within said snow plow, which,

by force of the collision, was crushed in upon him, inflicting severe injuries."

The finding states the facts on which the judgment is founded as follows: "(1) On March 12, 1896, the defendant was a duly-organized corporation under the laws of the state of Connecticut, and was operating its single-track road with sidings and switches extending from the city of Bridgeport, in the state of Connecticut, to the city of Pittsfield, in the state of Massachusetts, and forming a part of what is known as the 'Berkshire Division' of the defendant. (2) At all of the regular stopping places for trains, with three exceptions, the defendant maintains a telegraph office, and the departure of all trains from stations having a telegraph office is at once telegraphed to New Haven, to the train dispatcher. (3) At all of the regular stopping places for trains, with three exceptions, the defendant maintains a time board, upon which the station agent places in large figures the time of departure of each train from these stations. The time board apprises the conductor and engineer of each train of the time of departure of the train last at the station, and going in the same direction, and these officials rely upon such information in regard to the position of trains in advance, in the absence of special order. (4) The movement of all trains upon this division was in the exclusive control of the train dispatcher at New Haven. Conductors and engineers and all officials were bound to obey his orders. He acted in the name, by the authority, and in the place, of the defendant. (5) The division superintendent ordered trains to run, and the train dispatcher gave the running orders by telegraph. (6) The train dispatcher had at all times the location of every train, regular and extra, running upon this division, as they passed the telegraphic stations, and knew at what stations or places each train was to stop, and about the length of time it would be required to stop. (7) Whenever special orders to control the movements of trains are necessary, the train dispatcher at New Haven sends such orders by telegraph to the operator located at a station which such train is approaching, and the operator hands a copy of said order to the conductor and a copy to the engineer of said train. (8) On said day the regular way freight, known as '1411,' and so designated hereafter in this finding, started from Great Barrington at 5:30 a. m. It gradually fell behind its schedule time, and at Falls Village was considerably late. Freight trains are often late, and every one connected with the operation and movement of defendant's trains knew this. (9) At Great Barrington the conductor received an order from the division superintendent to stop at Kent Furnace, and attach to 1411 three freight cars on siding there. (10) Kent Furnace is between North Kent and Kent, and is nothing but a railroad siding, where freight trains occasion-

ally stop, but only upon orders from the division superintendent. There is no station, no station agent, no telegraph, or time board there. There are only two other places on this division where freight trains stop similar to this place, viz. Trumbull Ice Pond and South Glendale. Kent Furnace is an unusual stopping place, not named upon the official time table in use by defendant's employes. (11) Freight 1411 ran at the rate of from twenty to twenty-five miles an hour,—the usual speed of freight trains,—and when it left Cornwall Bridge at 10:28 a. m., its last stopping place, and the last station at which telegraphic orders could have been issued to it, it was one hour and eighteen minutes behind its regular schedule time. (12) The only station between Cornwall Bridge and Kent is North Kent, where they have no telegraph, and where 1411 was not required to stop, and did not stop, on this day. (13) Kent Furnace is about seven miles and Kent about eight and one-half miles from Cornwall Bridge. (14) Freight 1411 reached Kent Furnace about 10:50 a. m., and while the train remained on the main track the engine began the work of getting the three freight cars from the siding to the main track. (15) The usual running time for the freight train between Cornwall Bridge and Kent Furnace, where no stop is made at North Kent, is twenty-one minutes, and the usual stopping time to do the work at Kent Furnace is fifteen minutes. (16) The work at Kent Furnace on this morning would have taken the usual stopping time, fifteen minutes. (17) Between 5:30 and 6 a. m. an extra train, known as '474,' and hereafter in this finding so designated, consisting of a snow plow, locomotive, and tender, the snow plow being ahead of the locomotive and tender, and pushed by the locomotive, left Pittsfield, for the purpose of clearing the track of the defendant of snow. (18) Train 474 ran at about forty miles an hour, and steadily gained on 1411. In order that 474 should do effective work, it was necessary that it run between thirty-five and forty miles an hour. (19) Train 474 received telegraphic orders at Falls Village to run extra to New Milford. New Milford is the fourth station below Kent. This gave 474 the right of the track to New Milford, keeping ten minutes off the time of all regular trains. Thereafter train 474 ran under this order, which was in accordance with the rules. When 474 reached a station, and the time board showed that the last train at the station departed ten minutes or more before, 474 might continue its run, in the absence of special order. (20) Train 474 passed Cornwall Bridge at 10:52 a. m., twenty-four minutes behind freight 1411, under the order recited in paragraph 19, supra. (21) Train 474 knew freight 1411 had passed Cornwall Bridge at 10:28. (22) Train 474, under the rules of defendant, had the right to proceed, and under the order recited in paragraph

19 was bound to proceed, and did so, running at the rate of forty-two miles an hour. (23) No one on board of train 474 knew that 1411 had received orders to stop at Kent Furnace. The conductor in charge and the engineer knew, from the order, that 474 had the right of track to New Milford. (24) No one in charge of or on 1411 knew officially that 474 was in the rear. The conductor and rear brakeman had heard the night before that 474 would be out in the morning, but had no information that 474 was in fact out. No one on 1411 knew the location of 474 at any time on said day. The conductor of 1411 had cautioned Rear Brakeman Hall, at West Cornwall, the station just north of Cornwall Bridge, to look out for 474, but gave him no further caution or order. (25) No order was received by those in charge of 474 or 1411 of the location of either of said trains, or of any fact relating to either train. (26) The train dispatcher knew that 474 must overtake 1411 either at Kent Furnace or on the track before reaching Kent; and all of the foregoing facts except those in paragraphs 1, 14, 16, and 24, and the last two lines of paragraph 18, were known, or ought to have been known, to him, as well as those contained in paragraphs 49 to 53, inclusive. (27) The snow plow on 474 was in charge of plaintiff's intestate, the assistant roadmaster of defendant, who was engaged in working the flanges,—the appliances used in cleaning the tracks,—lifting them when they came to bridges, switches, etc., and lowering them thereafter. (28) Within the front part of said snow plow was a small elevation above its main floor, known as the observatory or cupola, and from which, through two circular windows about fifteen inches in diameter, the track could be seen. The snow plow was so constructed that it prevented a view ahead of the engine by the engineer. (29) Rule 104 of said defendant for the movement and operation of trains provides that 'when a train is being pushed by an engine, a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger, and immediately signal the engineman.' (30) The cupola was designed to carry two men, one to work the flanges, and one to act as a lookout. (31) Between West Cornwall and Kent Furnace no one was in the cupola as a lookout or flagman. The assistant superintendent of the division was in said cupola watching the work of the plow, for which purpose he boarded the plow at Falls Village. (32) In the small compartment on the main floor of the plow was a stove, and nine men, who were laborers, to shovel snow in case of a drift, and other employes of defendant. (33) Said day was very cold, and the snow plow threw the snow considerably, rendering it difficult to see ahead. Just before the accident the plow was not throwing much snow, and a lookout could see through said two win-

dows. (34) During the trip from Pittsfield, an employe, by direction of the conductor, had cleaned the two windows in the cupola every time 474 stopped. It was impossible to clean them while the train was in motion, and these windows had not been cleaned since 474 stopped at West Cornwall, eighteen minutes before. (35) After 1411 stopped at Kent Furnace, the rear brakeman, Hall, went up the track to flag 474. Rule 97 covered all the duty devolving on Hall, and provides: 'When a scheduled freight train is detained at any of its usual stops beyond its leaving time, when the rear of the train can be plainly seen from a train moving in the same direction at a distance of at least twenty telegraph poles, the flagman must go back with danger signals not less than fifteen telegraph poles, and as much further as may be necessary to protect his train; but, if the rear of his train cannot be plainly seen at a distance of at least twenty telegraph poles, or if it stops at any point that is not its usual stopping place, or if an extra train is stopped at any point, the flagman must go back not less than twenty telegraph poles, and, if his train should be detained until within ten minutes of the time of a passenger train moving in the same direction, he must be governed by rule No. 99.' The employes of defendant occasionally violated this rule, and the conductor of 1411 knew this. Trains sometimes stopped so short a time that a strict compliance with the rule was impossible unless the brakeman was left behind, which sometimes occurred. 474 was an extra train, and Hall's duty under the rules was to go back twenty telegraph poles, and flag the same. This was a distance of three thousand feet, the telegraph poles being one hundred and fifty feet apart. Hall went up the track about six hundred feet, when train 474 rounded a sharp curve. (36) The assistant superintendent saw Hall running up the track, and flagging, as soon as he could have seen from 474; and when 474 was about six hundred feet from Hall he jumped from the cupola to the compartment, and motioned the conductor to stop the train. The conductor at once jumped upon the cupola, and pulled the bell rope twice, but it did not ring the bell in the engine cab. This bell rope connected with the engine, and the engineer relied upon it to warn him of danger ahead. (37) The engineer saw around the sharp curve, from the right-hand side of his cab, Flagman Hall, when about three hundred feet ahead, and he at once did all that he could do to stop 474 by reversing and applying brakes to engine and tender. (38) There was no air brake on said plow, the only brake being a hand brake. (39) Train 474 slowed down in running the nine hundred feet to train 1411, after Flagman Hall was seen. It was running about twenty miles an hour when it struck the rear of the freight train as it stood on the main track.

It plunged through three freight cars before it stopped. The collision occurred at 11:02 a. m., ten minutes after 474 passed Cornwall Bridge. (40) As a result of the collision, the conductor of 474 was killed, some of the men in the compartment were injured, and the plaintiff's intestate was fatally injured. He lived about two or three hours after the collision, suffering greatly, and then died. He was fifty-one years of age, in good health, and at the time of his death, and for some time before, he had been the assistant roadmaster of the Berkshire Division of the defendant, having been employed on this division some thirty years. (41) Had the engineer been notified, through the bell, of the flagman ahead, and had he then done all he could to have stopped the train, the collision could not have been avoided, but probably its force and extent somewhat modified. (42) There was no negligence on the part of any of the employees of train 474, or of train 1411, except Rear Brakeman Hall. (43) Said train 474 was properly equipped, and its appliances in good order, except that it had no hospital stretcher on board, as required by statute, and no air brakes on the snow plow. Its appliances were in good order, except the said bell cord and bell. Train 1411 and its appliances were proper, and in good order. (44) The absence of the hospital stretcher in some degree increased the sufferings of the plaintiff's intestate, who had to be removed on boards for some distance, but did not cause his death. (45) Train 474 could have been stopped in about fifteen hundred feet, or the distance of ten telegraph poles. (46) Had the rear brakeman gone back twenty telegraph poles, and signaled, and had those in the cupola or on the engine of 474 seen him, and done their duty, the collision would not have occurred. (46½) The rear brakeman had about time to have gone back three thousand feet after 1411 stopped at Kent Furnace, but not time enough to have returned to 1411, nor to have returned within the ordinary time of stopping at Kent Furnace. (47) The rules or regulations for the movement and operation of trains adopted and used by the defendant were substantially the same as those adopted by the American Railway Association after protracted conferences, and revised from time to time at the semiannual meetings of this association. About ninety per cent. of the steam railways of this country are using these rules with such modifications as adapt them to the particular railway. (48) For the general movement and operation of trains these rules are the best and safest general rules yet devised by the best railroad talent of the country. (49) The only protection afforded by these rules to trains 474 and 1411 to prevent their colliding was the rule quoted in paragraph 33, supra. These rules were not and are not intended to cover all emergencies. These call often

for special orders. (50) No order had been sent 474 or 1411 when they should meet, and it was certain they would meet unless 474 was stopped before 1411 reached Kent. It was part of the train dispatcher's duty to notify trains, not regulated by the time tables and rules, in advance, where they would meet, so that they might know this fact, and collisions be avoided. Ordinary care required such orders, and in his failure to notify trains 474 and 1411 of this he was negligent. (51) Train 474 was a special and irregular train, run for an unusual purpose, for the first time the morning in question. The circumstances of this case were unusual, and present an emergency which probably no general code of rules could provide for, and the rules in question did not provide for. It required special orders and special instructions to trains 474 and 1411, so that train 474 should not collide with 1411 between Cornwall Bridge and Kent. (52) Extra trains are run daily over said division, averaging from eight to fifteen, and some days as high as twenty. (53) It would be impracticable to operate extra and regular trains entirely by special orders. In case of emergency, this must be done, and general rules cannot cover them. The meeting places of trains not upon the time table and of regular trains off the regular time are provided for by special orders, and not governed by the printed rules. (54) Those in charge of 474 and 1411 and Rear Brakeman Hall were familiar with the rules, and knew that in ordinary cases the rules, and not special orders, would govern the movement of all trains on the division. The defendant had exercised ordinary care in the selection of all of its employees on trains 474 and 1411. (55) On March 20, 1896, the plaintiff was duly appointed administratrix of the estate of said Jerry Nolan, and duly qualified. (56) Written notice of a claim for damages was made in conformity to the statutory provision. (57) Time table No. 23 and rules (Exhibit B) is made a part of the record, and need not be printed. Copies of the same may be handed to the judges of the supreme court of errors. (58) I find as a fact that these rules did not sufficiently provide for this emergency, and for the reasonably safe operation of trains 474 and 1411. This emergency required the exercise of great care by the defendant, since the danger of collision was great. (59) I find as a fact that the defendant was negligent in not providing for this emergency, and for the safe operation of trains 474 and 1411 by special orders and instructions, in addition to the general rules, and that this collision resulted from the defendant's failure to so provide. (60) I find as a fact that the operation of these trains under these general rules alone, under the circumstances of this case, was not a suitable and safe method to operate these trains. (61) I find as a fact that the train dispatcher did not exercise ordinary care in not issuing

special orders for the reasonably safe movement of these trains. (62) I find as a fact that the injury to plaintiff's intestate resulted from the combined negligence of Rear Brakeman Hall and of the defendant. (63) I find as a fact that the defendant did not exercise ordinary care in the movement and operation of trains 474 and 1411. (64) I find as a fact that the plaintiff's intestate was not guilty of any negligence contributing to his injury or death."

The finding also states the defendant's claims of law, as follows: "(1) That, if the collision occurred through the negligence of Rear Brakeman Hall, the plaintiff was entitled to nominal damages only, because Nolan, the plaintiff's intestate, and said rear brakeman, were fellow servants. (2) That, upon the facts in evidence, the defendant, having operated its trains undersuitable rules and regulations, and having properly equipped said trains, had performed its entire duty towards plaintiff's intestate, and the law imposed no higher degree of care than that exercised by it. The court sustained the defendant's first claim, and did not pass upon its second claim, except to find as a matter of fact from the evidence submitted that the defendant did not exercise ordinary care in the operation of these trains, and that ordinary care required additional precautions by way of special orders to those provided in the rules for the reasonably safe operation of these trains."

The defendant assigns as reasons of appeal error in the ruling on its second claim of law, and error in inferring, from the facts found, the conclusions stated in paragraphs 58 and 63 of the finding, and error in certain of the conclusions of fact from the testimony given on the trial, a copy of which testimony is certified, and made a part of the appeal record.

Goodwin Stoddard and William D. Bishop, Jr., for appellant. John Cullinan, Jr., and Thomas M. Cullinan, for appellee.

HAMERSLEY, J. The finding of facts upon which judgment is founded contains a statement in detail of inferences produced in whole or in part by weighing evidence, and the credit to be given witnesses, and also of the conclusions drawn from these inferences. The former are called "facts," as denoting adjudicated facts, which can only be retried by an appellate court having jurisdiction in the trials of such facts. This court does not have appellate jurisdiction of that nature. The superior court is the court of last resort for that purpose; and its adjudication of such facts, in the exercise of original or appellate jurisdiction, is the end of litigation, unless, in the process of adjudication, it has violated some rule or principle of law. *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165; *Thresher v. Dyer*, 69 Conn. 404, 408, 37 Atl. 979. The alleged failure to de-

termine such facts correctly is improperly assigned in the appeal as error, and cannot be considered. The request of counsel for the certification of testimony in support of such claimed errors is an abuse of the provisions in respect to certifying evidence. *Thresher v. Dyer*, supra. The latter—that is, conclusions drawn from such facts—are also called facts, but with a much broader signification, including all issues that the line separating the province of the jury from that of the judge in a jury trial practically leaves to the jury. The word "fact," used in this broad sense, does not accurately denote matters not reviewable by this court. In defining facts as denoting those questions practically within the province of a jury, we are controlled, not only by established practice, but by the constitutional provision forbidding any violation of the political "right of trial by jury." In defining facts as denoting questions not reviewable by this court, we are controlled by "the primary distinction drawn by the constitution between the jurisdiction, original and appellate, of courts for the full trial and adjudication of causes, and the jurisdiction of a court of last resort for correcting errors in law which may have intervened in the course of a trial." *Atwater v. News Co.*, 67 Conn. 504, 528, 84 Atl. 871. "The true distinction, as drawn under our system of jurisprudence, in connection with this provision of the constitution, between facts that the trial court must find from the testimony, and the application of principles of law based upon such facts," includes "questions of law," as distinguished from "questions of fact," in a jury trial, but is not fully expressed by that distinction. While the jurisdiction of this court may be affected in its practical operation by existing procedure or practice, the jurisdiction itself "is co-extensive with the judicial power of the state in all matters wherein legal principles—that is, rules of law or principles of equity—appear to have been erroneously or mistakenly determined by a trial court." *Styles v. Tyler*, 64 Conn. 454, 30 Atl. 172.

The limitations of procedure formerly existing, in connection with the practice followed in view of that procedure, prevented in some instances the full exercise of our jurisdiction, and the conclusions of trial courts, because not presented in such manner as to be reviewable under existing procedure and practice, have been spoken of in language appropriate enough for the purpose, as questions of fact. But whenever the record before us has legally presented all the facts found by the trial court as the basis of its judgment, and the conclusion drawn from those facts has been plainly erroneous, and such error has been lawfully assigned, we have uniformly held such conclusion, although for some purposes it might be called a question of fact, to be, quoad the jurisdiction of this court, a question of law; i. e. it is reviewable. When the

finding of facts states evidence so that the conclusion must be reached by weighing evidence, the finding is essentially a report of evidence, and not a statement of facts adjudicated; and the question of legal inference from facts that may be involved is irregularly presented. *Corbin v. American Mills*, 27 Conn. 274, 278. In *Bloodgood v. Beecher*, 35 Conn. 469, the judges were equally divided upon the question whether, upon the finding of facts in that case, the intention of a mortgagor to prefer the mortgagee to his other creditors could be drawn by this court as a conclusion of law; *Hinmon, C. J.*, and *Park, J.*, holding that it could not, and *Butler and Carpenter, JJ.*, holding that it could. The case was decided by the second vote of the Chief Justice. In *Mead v. Noyes*, 44 Conn. 487, the trial court, in an action of replevin, spread upon the record the facts from which it drew its conclusion that the plaintiff was the owner of, and entitled to immediate possession of, the property replevied. Upon motion in error, this court reversed the judgment, because the conclusion from the facts found was an error in law. In *Hayden v. Allyn*, 55 Conn. 280, 289, 11 Atl. 34, Judge Loomis, speaking for the court, laid down the broad principle that whenever, in trials to the court, the judge has fully weighed the testimony, and passed upon the credit of witnesses, and specifically found, as the basis of his judgment, the inferences produced by the testimony, so that the evidence "had exhausted itself in producing the facts thus found, nothing remained but for the court, in the exercise of its legal judgment, to draw its inferences from the facts"; and "in such a case the conclusion of the court can always be reviewed by the appellate court. An erroneous conclusion is an error of law, and not an error in an inference of fact." This principle was deliberately affirmed in *Tyler v. Wadingham*, 58 Conn. 375, 386, 20 Atl. 335, and applied to a special finding of facts, from which was drawn the conclusion that the plaintiff, at the time of making a contract with a partnership, elected to give exclusive credit to a single partner. In *Ward v. Ward*, 59 Conn. 188, 197, 22 Atl. 149, the principle is recognized as established, although its application in that case is treated with some subtlety. The principle may at times be misapplied, but a mistake of this kind cannot shake its authority. It is not only supported by the true ratio decidendi of a long line of decisions, but is imbedded in the very structure of our system of jurisprudence. Settling the credit of witnesses, weighing evidence, ascertaining the truth from conflicting testimony or incongruous evidential facts, this is the peculiar province of, and under our system within the exclusive jurisdiction of, trial courts; and a mistake in the inference produced by such means is an error in fact. When such facts are adjudicated, a mistake in drawing the legal inference—i. e. in applying the law to the facts found—is an error in law. The application of this principle has been

hampered, and its meaning somewhat obscured, through inadequate and uncertain methods for bringing into action the jurisdiction of this court. Sometimes the conclusion of a trial court from conceded facts is so clearly right that practically no question is presented; and in such cases we have said that the conclusion is one of fact, properly decided; yet if in such cases the conclusion, instead of being clearly right, had been a palpable non sequitur, we would have reviewed it as a question of law, unless the question were irregularly presented. But more frequently the alleged error in a conclusion from conceded facts has been irregularly presented, either through mistake in making up the record, or through defect in methods for obtaining a record which should properly present the question; and in such cases we have said that the conclusion is one of fact, not reviewable. Such indeterminate use of the phrase "question of fact" or "conclusion of fact" must be taken in connection with the circumstances of each case, and cannot be treated as precisely distinguishing those conclusions which are to be treated as facts in respect to the jurisdiction of this court, nor as modifying the settled principle that the unwarranted conclusion of a trial court in drawing its inference from the special facts which, in compliance with existing law of procedure, it has found for the purpose of drawing that inference, is essentially an error in law.

For many years, and especially since 1879, the legislature has endeavored, by means of various statutes, to modify the law of procedure so as to require a trial court to place upon record the special facts on which its judgment is founded, and to enable this court to exercise its full jurisdiction in reviewing the legal judgment of a trial court in drawing its inference from conceded facts. Such legislation has considerably enlarged the facilities for exercising the jurisdiction of this court. The effect of this legislation has been the subject of frequent consideration, and the main general conclusions reached are summarized in *Thresher v. Dyer*, supra, and *Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565, 575, 38 Atl. 311. In the latter case we say: "The judgment or ultimate conclusion of a court upon the special facts in issue, as ascertained from the evidence and settled by the trier, is a conclusion of law, and, as such, reviewable by this court; and this is true whether such facts are settled by a special verdict of a jury or by a special finding of a judge;" and referring to the changes in procedure: "We think that the result of this legislation is that in cases tried to the court the judge is now authorized, and upon request required, to find and state in a special finding the facts adjudicated by him in reaching his ultimate conclusion, including all specific facts which, when so adjudicated, must determine the ultimate conclusion and subordinate conclusions involved therein, by force of settled rules and principles of law. The judgment

rendered on such an adjudication of facts is simply the voice of the law declaring the legal effect of the facts adjudicated."

These considerations must control the disposition of the claim made in the case before us, that the conclusions we are asked to review are conclusions of fact, and not of law.

It appears that the defendant operated a single-track railroad; that train 474 (an extra train), following train 1411 (a regular way freight), ran into the latter train, which had stopped to attach some freight cars standing on a siding; and in the collision one Jerry Nolan, the plaintiff's intestate, was killed. Every special fact from which the trial court inferred the liability of the defendant for the injury is found, including the rules and regulations adopted by the defendant for safely operating these trains. The finding shows the neglect of one Hall, the rear brakeman of train 1411, to obey the rules provided for the protection of his train under such circumstances, and that the collision might not have happened if the rules had been obeyed, but also shows that Nolan and Hall were fellow workmen; and the trial court therefore holds that the defendant is not liable for this neglect. The question of liability is not otherwise affected by the relation of master and servant. The complaint does not allege that this relation existed between Nolan and the defendant, and claims nothing by reason of that relation, but charges the defendant with negligently conducting itself in the management of said trains; and the only allegations, so far as is material under the finding, of acts constituting such negligent conduct, are: "By failing to give proper telegraphic information to the conductor and engineer of each of such trains relative to the position of the other of said trains," and "by failing to exercise proper supervision of the running of said trains," so that train 474 ran into train 1411, and, as a result of the collision, said Nolan, who was rightfully on the former train, was killed. The trial court draws from the special facts found the following inferences: That the rules and regulations of the defendant "did not sufficiently provide for this emergency (i. e. the operation of the trains in the manner as found), and for the reasonably safe operation of trains 474 and 1411; * * * that the defendant was negligent in not providing for the emergency (i. e. the operation of the trains as found), and for the safe operation of trains 474 and 1411, by special orders and instructions, in addition to the general rules; * * * that the operation of these trains under these general rules alone, under the circumstances of this case (i. e. the special facts as found), was not a suitable and safe method to operate these trains; * * * that the train dispatcher did not exercise ordinary care in not issuing special orders for the reasonably safe movement of these trains; * * * that the injury to plaintiff's intestate resulted from the combined negligence of Rear Brakeman Hall and of the defendant; * * * that the de-

fendant did not exercise ordinary care in the movement and operation of trains 474 and 1411." These inferences are reviewable as conclusions of law. It is true that, in stating the inferences, the trial judge says, "I find as a fact," etc., but this is immaterial. It is the duty of the trial judge to find, as facts within the peculiar province of a trial court, those inferences which are controlled by the weighing of evidence and the credit given to witnesses. It is also his duty to find his conclusions drawn from these inferences of fact; and, in a certain sense, these latter are findings of fact, but they are conclusions reviewable by this court, and the name given them does not alter their intrinsic character of conclusions reviewable for error in law.

We think the court below erred in reaching these conclusions. They are all drawn in support of the claim set up in the complaint that the defendant violated the legal rights of the plaintiff's intestate, because it failed to exercise proper supervision of the running of said trains, and because it failed to give telegraphic information to the conductor of each train relative to the position of the other. The supervision of the trains (unless as involved in the failure to give telegraphic information) is to be found in the rules for the movement of the trains. These rules are before us. They are substantially the same as those in use by about 90 per cent. of the steam railways of this country; and the trial court finds that, "for the general movement and operation of trains, these rules are the best and safest general rules yet devised by the best railroad talent of the country." There is nothing in the record that calls for a review of this finding. For the purposes of this case, we assume the conclusion to be correct. These rules cover the movement of regular and extra trains. They provide for special orders for starting extra trains. They require the train dispatcher to give telegraphic information of the meeting place of such trains, and of trains moving in the opposite direction, as well as of regular trains off the regular time. But they do not require him to inform, by telegraph, trains moving in the same direction of their relative position, and for that purpose to keep in mind the position of all such trains, so as to decide, as they approach each station, whether there is a likelihood that a rear train may overtake, and, if the rules are not obeyed, run into, the forward train. On the contrary, they are drawn upon the theory that such telegraphic supervision of trains moving in the same direction, in view of all the conditions involved in operating a single-track road, tends rather to lessen than increase the safety secured by the rules adopted relative to the movement of such trains. The soundness of this theory has received judicial sanction. *Enright v. Railway Co.*, 93 Mich. 409, 413, 53 N. W. 536; *Railroad Co. v. Neer*, 31 Ill. App. 126, 134. In the latter

case some self-evident reasons are given. We think in this respect the rules of the defendant do not violate its legal duty, and that their compliance or noncompliance with that duty, under a given state of facts (notwithstanding many cases hold that such question must be submitted, with instructions more or less precise, to a jury, by force of the law defining the province of a jury), is essentially an inference of law, and, when drawn by a trial court, is reviewable by this court. So far, therefore, as the proper supervision of trains 474 and 1411 depended on the adoption of adequate rules for the safe operation of those trains, the only legal inference from the facts found is that the defendant did not fail to exercise proper supervision of the running of these trains.

The failure to give trains 474 and 1411 telegraphic information of their relative positions is found as a fact, and the conclusions of the trial court are simply an inference from this fact, in connection with other facts found, that the defendant, by this means, had violated the legal rights of the plaintiff's intestate. In other words, the inference is one of legal liability, and affirms that the law which defines the duties of railroad corporations, and the rights of persons lawfully on their trains, imposed upon the defendant the duty of giving such telegraphic information, and gave to the plaintiff's intestate the correlative right to have such information given. The validity of this inference is really determined in the disposal of the claim that the rules of the defendant did not fulfill its legal obligation in the supervision of those trains under the circumstances of the case; i. e. the facts as found. The rules do not require such information to be given, because giving such information in all instances involving like conditions would tend to danger, rather than to safety. A railroad corporation, in operating its road as a quasi public highway, is engaged in a business dangerous to human life, and is exercising for its private benefit a franchise granted by the state, on condition that it transport such members of the public as have lawful occasion to use the highway with every precaution for their safety that public policy, as fixed by legislation or recognized by adjudication, requires. For these reasons, the law imposes upon the corporation a duty to use such precautions. That duty it owes to each person lawfully on its trains; and this, independently of any special duty arising from a contract of carriage or employment. *McAdam v. Electric Co.*, 67 Conn. 445, 447, 35 Atl. 341. Each person lawfully on a train has a right to the protection of such precaution, and is entitled to damages for any injury done him in violation of this right. In holding that the rules for the supervision of trains under conditions like those attending the trains in question fulfilled the legal duty of the defendant in this respect, and that public pol-

icy does not require these rules to prescribe giving telegraphic information in the manner claimed, we necessarily hold that giving such information to these particular trains on the day specified is not a precaution required by public policy, and is not a duty imposed upon the defendant by law, and therefore a failure to give such information did not violate any legal right of the plaintiff's intestate.

But the claim is made that the conditions attending trains 474 and 1411 differed essentially from the conditions in general attending trains moving in the same direction, and differed so essentially as to constitute an exceptional case or emergency, unprovided for by the general rules, and of a character so peculiar to itself as to throw upon the defendant or its vice principal, the train dispatcher, the duty of acting, in view of all these exceptional circumstances, as a man of ordinary prudence should act; that the trial court has found that the train dispatcher did not so act; and that such a finding can never be reviewed by this court. This, in truth, is the real ground of the judgment, and the very gist of the question before us. We think the conditions attending trains 474 and 1411 did not differ essentially from those in general attending trains moving in the same direction, and did not create an exceptional case or emergency unprovided for by the rules; and that the finding of such emergency by the trial court is an inference from the special facts found reviewable by this court. The conditions in general attending trains moving in the same direction under the rules, without telegraphic information of their relative position, includes: All trains, regular and extra, made up in all ways, even to a single engine; trains off their regular time, way freights being commonly behind time; stopping places for trains which are used only occasionally and not at regular intervals; trains moving at all times of day and night, and in all conditions of weather and atmosphere; trains moving at various rates of relative speed. The special facts found from which, apparently, the inference of an exceptional case or emergency is drawn, are the following: Train 474 consisted of an engine pushing a snow plow. Train 1411 was upward of an hour behind its schedule time. Train 1411 stopped to attach three freight cars at Kent Furnace, which is merely a siding where freight trains stop occasionally and at irregular intervals. The rear train, when in motion, moved at a faster rate of speed than the forward train. The day was very cold, and the snow plow threw snow considerably, rendering it difficult for the lookout stationed on the snow plow to see ahead. Just before the accident, the plow was not throwing much snow, and the lookout could see. We think the conditions shown by these special facts, considered by themselves or in connection with all the special facts found, are within the conditions in general attending trains mov-

ing in the same direction; do not constitute an exceptional case or emergency unprovided for by the general rules; and did not throw upon the defendant or its train dispatcher the special duty of keeping the conductors of those trains informed by telegraph of their relative position. No other inference can be legally drawn from the facts. A conclusion from conceded facts drawn by a court in the exercise of its legal judgment, and controlled by the assumption that two and two make five, is just as truly an error in law as if it were controlled by the assumption that an ordinary breach of contract calls for exemplary damages. In the present case the error is not of this palpable kind. As a matter of first impression, there is room for hesitation and doubt; but, upon full consideration, it seems to us that the legal inference is clear, and that, in reaching its conclusion, the court below, unless influenced by the error involved in its inference that the rules adopted were inadequate, has failed to apply to the facts those settled principles of sound reasoning whose recognition and application are termed the soul of the law.

The plaintiff relies mainly upon the recent case of *Sprague v. Railroad Co.*, 68 Conn. 345, 36 Atl. 791. In that case the plaintiff's intestate was a servant of the defendant, and was killed in a collision between his train and the train moving in the opposite direction, caused by the misconduct of the conductor of the opposite train. The complaint charged the defendant with liability on account of its violation of its duty as master in employing the conductor at fault to run this train, knowing him to be incompetent. Any other violation of duty on the part of the defendant was inseparably entangled with this, the real ground of the action. The main question considered was one of law as to the use of the admissions of a demurrer overruled upon a hearing in damages. Aside from this, our decision turned wholly upon the question whether, upon the facts as stated, we could find error in the conclusions of the trial court that the conductor was incompetent; that the defendant knew or ought to have known that he was incompetent, and with this knowledge placed him in charge of the train where his incompetency caused the injury. Here the inference of legal liability from the conclusions of fact as stated was unquestioned. The finding shows that these conclusions were not inferred from subordinate specific facts found, but depended in part upon the weighing of evidence and credit given to witnesses. This sufficiently appears in the opinion, but more clearly in the record, which is not printed in the report. We held that such conclusions were plainly conclusions of fact, within the province of the trial court. No question was presented as to a conclusion from specific facts found where such conclusion is clearly a non sequitur. The defendant claimed that the question of its violation of a legal duty, by reason of the insufficiency of its railroad man-

agement, was a pure question of law. In referring to this claim, the opinion holds the question to be irrelevant to the case in hand, and that, if the principle claimed is sound, it cannot control emergencies which no system of rules can anticipate and provide for. It is in this connection that the language specially relied on, relative to emergencies, is used. The language must be read in this connection, and in view of the circumstances of the case then before us. So read, the language does not establish any principle inconsistent with the views expressed in the present case.

After stating the specific facts found and the conclusions from those facts (which statement is strictly a part of the judgment, specially setting forth the facts on which it is founded), the finding states that the defendant claimed, as a matter of law, "that, upon the facts in evidence, the defendant, having operated its trains under suitable rules and regulations, and having properly equipped said trains, had performed its entire duty towards plaintiff's intestate, and the law imposed no higher degree of care than that exercised by it"; and that the court did not pass upon this claim "except to find as a matter of fact, from the evidence submitted, that the defendant did not exercise ordinary care in the operation of these trains, and that ordinary care required additional precautions, by way of special orders, to those provided in the rules for the reasonably safe operation of these trains." The trial court did not err in refusing to sustain this claim of law in the terms in which it is phrased, but it did err in inferring from the specific facts found that it was the legal duty of the defendant to give the telegraphic information mentioned; and, for the purposes of review, this inference is not a conclusion from the evidence, which the finding shows had exhausted itself in producing the conclusions of fact from which the inference was drawn. This error is not raised by the assignment specifying error in the refusal to sustain the claim of law, but is raised by the assignments specifying the reasons why the facts specially set forth do not support the judgment founded upon them. The only function in this respect of that part of the finding reciting the claim of law made is to show that the questions as to the legal inferences from the facts found were distinctly raised at the trial, and decided adversely to the appellant's claims. The real position of the plaintiff is that the trial court has found that the defendant failed to exercise ordinary care under the circumstances of this case; that the legal liability of the defendant consists in negligence; that the failure to exercise such care is negligence; that negligence is a question of fact entirely within the province of a trial court; and therefore the law determining the legal liability of the defendant was properly found as a fact within the exclusive province of a trial court to determine. We have already indicated the mistake involved in this position; but it is a mistake so often made, and so

readily fallen into through the use of words expressing different ideas without due attention to the particular idea the word, as used, is intended to express, that we deem it advisable to restate the ground of our decision with special reference to the confusion of ideas that leads to such mistakes.

We are dealing with a practical question of procedure; i. e. upon the process or record before us, what are the alleged errors that this court can review? The answer is briefly and broadly expressed in the saying, "Errors in law can be reviewed; errors in fact cannot." As we have seen, "fact" is a word of many meanings, and the saying is deceptive unless we keep in mind the particular meaning attached to the word as here used. We have explained that "fact," as here used, denotes those conclusions reached by the trier directly, from sifting testimony, weighing evidence, and passing on the credit of witnesses (conclusions which are not within the jurisdiction of this court, and cannot be reviewed or retried on appeal, whatever the process may be), and that it does not denote those inferences drawn by the trial court from the facts ascertained and settled by it as described (inferences which always involve, to some degree, the application of rules and principles of law to adjudicated facts, and may be reviewed whenever the legal process properly presents an alleged error, and we can see that the inference as to which error is alleged is in truth one of this nature). The word, as here used, may possibly have a little broader meaning in some exceptional cases, but this is immaterial to the purpose in hand. We have also explained that the word "fact," as here used, must be distinguished from the same word when used to denote those matters within the province of a jury. In the latter sense it often denotes the whole question of legal liability, which, by the law of jury trials, must in certain cases be settled by a general verdict; and so far as it may be used, in connection with jury trials, to denote inferences from evidence as distinguished from inferences from adjudicated facts, it is, of necessity, used with an imperfect or uncertain meaning. The trial judge, in instructing a jury upon inferences of law, cannot ordinarily know what the inferences from evidence may be, and in all such cases must give his instructions hypothetically, and is limited in this by the consideration that the law of jury trial forbids his giving instructions upon the law in such manner as in truth to invade the province of the jury in drawing inferences from evidence. Whereas, in a trial to the court, the judge first adjudicates all the facts (i. e. inferences drawn from the evidence), and puts upon record those facts. The inference from those facts of legal liability, or of the conclusions essential to legal liability, present to us, in a lawful process for that purpose, the questions of law, free from the limitations which hamper a trial judge in instructing a jury upon the same question. And it must be remembered that

while there is in theory a distinction of a fundamental nature between the judicial function exercised in ascertaining facts from evidence, and that exercised in applying to conceded facts the rules of law for the purpose of inferring logical conclusions and legal liability, yet the two functions are essential to the one judicial act of passing judgment, and the precise line of distinction has little, if any, practical importance, except when the exercise of judicial power is divided between two branches of one court, as in a trial by jury, or is divided for the purpose of establishing an appellate court with a jurisdiction pertaining to the judicial function exercised in applying to conceded facts the rules of law, as in the correction of errors in law by this court. In such cases the necessary line of division, although based on a natural distinction in the character of judicial power exercised for the different purposes, may become, as in this case, a practical question of procedure.

Again, it must be remembered that the rule defining the erroneous conclusions of a trial court which this court can review is, and must be, of universal application. There is not a different rule for each class of actions. Actions in tort as well as actions in contract, actions to recover damages resulting from intentional wrongs as well as to recover damages resulting from wrongs not intentional, are all subject to the same rule; and actions of tort or contract, wherein questions of negligence arise, are subject to the same rule. The mistake in question is largely due to overlooking this, in the confusion caused by a failure to distinguish, when the word "negligence" is used, the precise one of its many meanings intended to be expressed through the particular use. "Negligence" is frequently used to express the cause of action where a party seeks redress for injury from an unintentional wrongful act. In the nomenclature of the common law, this is called a "cause of action enforceable by the action of trespass on the case,"—"trespass," as signifying a passing over or beyond our right, i. e. a transgression or wrongful act (Bac. Abr. ad verb.); "trespass on the case," as signifying a form of action devised to cover all cases where an actionable wrong is claimed under the particular circumstances of the case stated. "Negligence," so used, is a comparatively modern term of art, denoting a class of actions grouped under one head for the purpose of study and treatment. It covers the injury received; the act done, positive or negative; the proximate relation of the act to the injury; the legal rule of liability applicable to the case stated, and the application of that rule. The numerous definitions of "actionable negligence" attempt to state briefly and comprehensively the conditions essential to all of this group of actions. So used, "negligence" has no more relation to the question before us than if the meaning denoted were expressed in the older language of the common law,—those causes of

action where the appropriate remedy is an action of trespass on the case to recover damages for an unintentional injury. Related to this meaning, and sometimes confused with it, "negligence" is used to denote the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act. This conception of the moral blame which should make one liable for the consequences of his acts is the foundation of our law of tort, and, in a wider sense, of our whole system of jurisprudence. In the very early stages of English law this element of moral blame, in cases where the conception seemed too subtle for the times, was overlooked, and the innocent cause of a condition resulting in injury was held liable for damages to the innocent victim. But the true theory, that moral blame is an essential element of legal wrong, was soon fully recognized, largely through the potent and unacknowledged influence of the Roman law. "*Dolus* (i. e. *injuria quam quis sciens volensque commisit*) aut *culpa* (i. e. *omnis protervitas, temeritas, inconsiderantia; desidia, negligentia, imperitia, quibus citra dolum, cui nocitum est*)," as used in the *Lex Aquilia*, and as approximately expressed in our common law by the terms "intention or negligence," describe the two phases of the moral blame or fault essential to make the one causing damage legally liable. 2 Aust. Jur. 109. The body of our law has been developed through the application of this conception to an infinite variety of facts or events. It has its origin in the accepted law of ethics, and the unfolding of its meaning as a legal maxim is confided to the court. Indeed, the highest function of a judge is exercised in holding to a steady and definite course in the application of such a maxim to ascertained facts, whether their conjunction be novel or not. In the exercise of such a function, our system of jurisprudence develops under the control of fixed maxims and prior authorities. It is this control of the element of discretion inherent in the application of a general principle to each new state of facts that distinguishes the justice administered by a common-law judge from that of an oriental *cadi*. Whether this primary conception of moral blame is vague or not in itself, the principle of legal liability which in theory it justifies is certain. The legal liability is not wholly coincident with the moral blame. It depends upon the law, however derived; and that law consists mainly in rules of public policy defining and limiting the rights and duties pertaining to person and property. These rules are ordinarily intended to square with the highest theory of ethics,—an intention not always realized. But it is the law, and not the theory, which determines legal liability. No principle of legal liability which is, in the legal sense, uncertain,—which is derived, not from settled maxims and authority that must govern every case, but from the unrestrained will of a single

man, or a dozen men, which can govern no other case,—is a legal principle. "*Ubi jus incertum, ibi jus nullum*." "Negligence," with the meaning under discussion, is a convenient term for denoting the conception of legal blame in a certain class of causes of action for the purpose of investigating the theory underlying the law which determines liability in such cases. It is a term more useful to the jurist, in seeking the theoretical sources of the law, than to the judge in applying positive law to conceded facts. Used in this sense, "negligence" is largely synonymous with the "law of liability," in this class of actions (although it hardly covers the whole law of liability in such cases), and denotes a principle which is essentially compound, i. e. one which includes a variety of maxims and rules, any or all of which may be involved in its application to particular cases. This use of the word might not have produced the confusion it has led to, were it not that one of the rules covered by the term "negligence," and one most frequently invoked in actions of this character, involves the use of "negligence" with the primary meaning of the word; and so the considerations peculiar to this single rule have been easily commingled with those applicable when the same word is used, not with its primary meaning, but as a term of art signifying the whole principle of legal liability. "Negligence," thus used, is scarcely distinguishable from "heedlessness," and may be shown in omitting to do an act, or in doing an act. When the law says a person whose conduct is negligent (in this sense), the other conditions of liability existing, is liable for damages caused by his conduct, the meaning of "negligent," like the meaning of any material word used in stating a rule of law, is a question of law, to be settled by the courts, whose province it is to declare the law; and, where the rule is intended to apply to an indefinite variety of events, the meaning of the rule in its application to each group of events is a question of law for the court. So it has been held in cases of "reasonable" notice to take a deposition (*Sharp v. Lockwood*, 12 Conn. 155, 159; *Sing Cheong Co. v. Yung Wing*, 59 Conn. 535, 543, 22 Atl. 289); "reasonable" time for presenting a note for payment (*Lockwood v. Crawford*, 18 Conn. 361, 372); "reasonable" or "diligent" search for a lost document (*Kelsey v. Hanmer*, 18 Conn. 311, 317); and the principle may be illustrated in other ways. This is elementary law. Were it not so, the growth of any stable system of jurisprudence would be far less practicable. No difficulty can arise where the group of events calling for the application is clear and certain. But where, as sometimes happens, the group of events in respect to which the meaning of a word must be declared are of a nature insusceptible of clear statement, then, while the function of ascertaining facts from testimony, and that of applying the law to

the facts, should be separately exercised by the trial judge, yet any adequate separate statement by him, in the record, of the results (i. e. the facts ascertained, and the application of the law to those facts) may be impracticable. Dilemmas of a similar nature account for most of the troublesome questions relating to the instruction of a jury by the court. In a trial to the court, where the two functions are united, there is no difficulty, so far as the disposition of that case is concerned; but, inasmuch as a statement of the facts is impracticable, the application of the law is not apparent, and the case cannot serve as a precedent, and cannot be reviewed for error in law by an appellate court. In a large number of cases the material question is whether the ascertained conduct of a person is in law negligent, in the sense last indicated. Often the ascertained conduct cannot be formulated into a series of adjudicated facts. It consists of a single impression produced in the mind of the trier by the whole mass of relevant testimony. That impression cannot be stated in words. It is a mental view which language is not luminous enough to photograph. Is that conduct negligent in law? Clearly, the conclusion of the trier that it is or is not must be, *quoad* the trier, a conclusion of law. Whether it be considered as an inference from many facts, or as the declaration of the meaning of a rule of law in relation to a single fact, it is the inference of a legal wrong from ascertained fact, and that is essentially a conclusion of law. Equally clearly the conclusion of the trier must be, *quoad* the power of this court to review his inference, a conclusion of fact. Not because the inference is not one of law, but because the fact or facts from which the inference is drawn cannot, by any process known to the law, be transferred from the mind of the trier to the mind of the appellate court. When such a question comes before us, we say we will not attempt to review the conclusion; it is one of fact; and this notwithstanding the trial judge has conscientiously tried to give in his finding a word picture of a mental impression that cannot be painted in words. He has not succeeded. He cannot succeed. The precise legal inference he has drawn must remain unknown. It cannot, therefore, be reviewed, and is practically a conclusion of fact. Now, this condition may arise in any kind of action, and is not peculiar to actions of negligence; using the word as a term of art describing a certain class of actions.

The mistake of the plaintiff arises mainly from confusing an ascertained fact,—where the fact is conduct claimed in law to be negligent,—incapable of transference from the mind of a trial court to that of an appellate court, with the legal inference drawn by the trial court from that fact, and which cannot be reviewed because the appellate court cannot have the fact from which the inference is drawn before it, and then applying the prac-

tical result of such a condition to the inference of liability in all actions classed under the term "actions of negligence." And this confusion arises mainly from the fact that the word "negligence," as used in respect to the same general subject, has entirely distinct, although closely-related, meanings, dependent on the particular purpose for which it is used. A similar confusion arises from the use of "ordinary care," which is used sometimes in reference to actual conduct under circumstances, as found by the trier, incapable of being so formulated in a finding as to state the facts really adjudicated, and show the inference actually drawn, and sometimes as indicating the rule of legal liability under any given state of facts. As used in the latter sense, it may denote the ultimate ground of every cause of action.

In the present case we hold that the inference of legal liability drawn by the trial judge is reviewable, because the events upon which the cause of action arises are of such a nature that they can all be fully and clearly found by a trial court as adjudicated facts, and have been so found, and properly appear before us in the record; that the conclusion of the trial court of an "emergency" which required of the defendant a line of conduct appropriate only to the single transaction in question is reviewable, because this subordinate conclusion is drawn from adjudicated facts fully and clearly found in compliance with existing law of procedure, and the trial court, in reaching the conclusion,—unless the law defining such an emergency was misapplied,—has plainly mistaken those rules of sound reasoning whose observance is essential to the validity of an inference from admitted facts.

In stating our conclusion, we have not sought to lay down a binding rule, but have merely endeavored to explain, as far as the infirmities of language will permit, the test of our decision in this case. We believe that such a test, if applied (with discrimination as to the circumstances of each case) to the whole line of our decisions where the question of reviewability of errors alleged in inference of trial courts has arisen, will reconcile those cases, as resting on a ground substantially the same in all. This question was very carefully considered in *Farrell v. Railroad Co.*, 60 Conn. 239, 21 Atl. 675, and 22 Atl. 544. The opinion of Judge Torrance in that case touches *cum acu* the root of the difficulty; and has been our main guide in subsequent decisions. The underlying principle was there considered with special reference to contributory negligence, where the ascertained fact could not be stated in the finding, and so the inference of the trial court could not be reviewed, and remained, for all practical purposes, a conclusion of fact. In this case we consider the same principle with special reference to the question of legal liability where the adjudicated facts can be, and are, fully set forth. And the task of testing the principle is now of a somewhat different

nature, and easier than it was then, by reason of further changes in procedure, and our decisions upon the effect of such changes in enlarging the facilities for the full exercise of our jurisdiction in correcting the erroneous inferences of a trial court.

We allude to some matters suggested by the record merely to avoid any implication from a failure to mention them. It is claimed that one or two of the facts stated as found from the evidence are in reality nothing but deductions from the rules, or from other facts found, and as such erroneous. The facts referred to have too slight a relation to the controlling question to call for particular comment. As a whole, the finding is exceptionally full and clear, and furnishes proper facility for its correction in the matters complained of, were such correction necessary. It is claimed that the court erred in its conclusion that the injury resulted from the combined negligence of the brakeman, Hall, and the defendant. The Massachusetts case of *Hayes v. Railroad Corp.*, 3 Cush. 270, apparently supports this claim. As we hold that the court erred in finding the defendant negligent otherwise than by reason of the fault of its brakeman, the question is not material, and we do not pass upon it. The court finds that "the employés of the defendant occasionally violated this rule [the one whose violation by the brakeman caused the collision], and the conductor in charge of 1411 knew this." If there were other facts in connection with this clearly showing that the rule was not enforced through the neglect of the defendant, a different question would arise in respect to its liability. The duty imposed by law upon the defendant is not fulfilled by merely adopting adequate rules. The law imposes upon it a duty in respect to the enforcement of rules necessary for the protection of the public. This question was considered in *Gerrish v. Ice Co.*, 63 Conn. 9, 16, 27 Atl. 235, and is discussed in *Railway Co. v. Hammond*, 58 Ark. 324, 332, 24 S. W. 723. It is not raised in this case. The judgment under review is controlled by the conclusion that the collision in which Nolan was killed was caused by the legal negligence of the brakeman, Hall, in conducting the business of the defendant, and that the defendant escapes liability solely on the ground that Nolan, the victim of the wrong, as well as Hall, through whom the injury was done, was its employé. The rule which produces such a result is too firmly established as law by a multitude of decisions to be now reversed or seriously modified by any exercise of the power vested in courts. There is error. The judgment of the superior court is set aside, and the case is remanded for assessment of nominal damages. The other judgments concurred.

NOTE. The rule is one deduced by a process of analogy from decisions rendered under a state of society very different from that of to-day, and the crystallization of such analogies into a binding rule is of comparatively modern origin. It first appeared in England in *Priest-*

ley v. Fowler, 8 Mees. & W. 1, and in 1850 was applied to the employés of railroad companies in *Hutchinson v. Railway Co.*, 5 Exch. 343. In 1841 it was formulated in South Carolina (*Murray v. Railroad Co.*, 1 McMullan, 385), and in 1842 in Massachusetts, in the leading case of *Farwell v. Railroad Corp.*, 4 Metc. 49. The very able opinion of Chief Justice Shaw in the last case has largely dominated the law on this subject during the past 50 years, and contains the most plausible statement that can be given of the grounds supporting the public policy which compels a workman entering the service of a master to assume the whole risk of any injury that may be done him by the master through the misconduct of a fellow servant. The vigorous language of this statement, however appropriate it may have been at that time, has a touch of grim irony when read in the light of existing conditions in the employment of labor. In England in 1880 the rule was changed by the employers' liability act, and is now practically abolished, as to large classes of workmen, by the workmen's compensation act, passed during the present year. The rule has been dealt with by legislation in several of our sister states. It was first formally recognized in this state in *Burke v. Railroad Co.*, 34 Conn. 474, 479, with a strong protest against the sufficiency of the grounds for a principle deemed too firmly settled in other jurisdictions to be differently treated here. In *Darrigan v. Railroad Co.*, 52 Conn. 285, the application of the rule was somewhat modified, and possibly cases may arise where the legitimate exercise of the duty of the court in applying established principles to novel conditions may involve some limitations of its apparent reach. But the evil is too deep-seated to be remedied by judicial action. It needs radical treatment through wise legislation.

W. H.

FURTH v. FURTH.

(Court of Chancery of New Jersey. Jan. 3, 1898.)

DUTIES OF HUSBAND—SUPPORT OF WIFE.

The fact that the husband is at present without means, does not discharge him from the duty to support his wife, though it may be some excuse for a present failure. His duty to support his wife is continuous, and is not dependent upon his prosperity.

Action by Altheria Furth against Harry C. Furth, her husband, for nonsupport. Decree ordered for plaintiff.

Clarence Atkinson, for complainant. Samuel W. Belden, for defendant.

GREY, V. C. (orally). I think I ought to dispose of this case now. There is practically no dispute that the complainant has made such a case as entitles her to a decree that the husband support her. He testifies he is not willing to live with her, but that he is willing to support her if he had the means; and upon his testimony only the court is asked to accept his statement that he is wholly without means, that he is largely indebted, and that he is unable to obtain any employment whereby he may earn enough money to support his wife, as a full answer to the relief sought by the complainant's bill. It is apparent that the defendant is a man in good health and strong of body. He has a trade, which has enabled him, not in a very remote past, to earn a large weekly stipend, and he has had employment

since which he says he has accepted at a much less rate, which has brought him in some money. His statement—and it is a matter which is peculiarly within his own knowledge, and scarcely capable of being contradicted—has not been disproven. He says he has earned only at the rate of \$1.50 per day at occasional employment, and that he is indebted to his brother. I do not think I am called upon to give unlimited credit to the statement of the defendant as to his ability to earn a living. His feeling to his wife is evidently hostile, and I am not led to believe, from his manner on the stand, that he would be eager to increase his income, if with the increase came the ability to support his wife. Nor do I consider his statement that he is presently unable to earn a sufficient sum to support his wife as a reason for dismissing the bill without relief to the wife. I think he should fully understand that the obligations of his marriage contract, and the consequent duty that he owes to the woman whom he contracted to support, and to the public, to carry the burden of his wife's maintenance, still rest upon him, and may justly be expected to be fully performed by him. The mere fact that the husband presently has no money does not discharge him of the duty to support his wife, though it may be some excuse for a present failure. His duty to support his wife is continuous, and is not dependent upon his prosperity. There should be a decree for the complainant accordingly.

As there is no affirmative proof of present capacity fully to maintain the wife, I think it is right that the sum allowed for alimony should be made so low that any healthy man, irrespective of a favorable engagement, should be able to earn it, and there should go into the decree a provision that the money be payable each week, subject to the further order of the court. This will keep the matter under control, and make the defendant understand that the duty which is required of him is the support of his wife according to his circumstances in life. I can see that some embarrassment may attend upon the enforcement of the decree, but there is no other way to do justice to the parties, and to put the burden of performing the marriage contract where it should rest. I will advise an order that the defendant pay to the complainant two dollars each week until the further order of the court. I think any man, engaged in any employment, the very lowest, if he is a mere carter or digger on the streets, ought to be able to earn enough to support himself and pay two dollars per week.

I am more embarrassed to know what should be done with relation to the costs.

Mr. Atkinson: I do not want any costs taxed, as far as we are concerned.

The Vice Chancellor: Counsel for complainant, upon hearing delivered the opinion of the court indicating its embarrassment as to an order for the payment of costs, declares that he has no desire to have such an order put upon the complainant.

Mr. Atkinson: We waive that.

30 A.—9

The Vice Chancellor: I think the complainant will, by the proposed decree, be treated with all the consideration to which, under the circumstances, she is entitled. You may draw a decree in accordance with the views I have expressed.

(56 N. J. E. 1)

VANDERHOVEN v. ROMAINE et al.

(Court of Chancery of New Jersey. Jan. 5, 1898.)

DEEDS—RESULTING TRUST—PAROL EVIDENCE—ACCOUNTING—COSTS.

1. The fact that a deed, absolute on its face, was made only as security for a loan, may be shown by parol, and the deed will be regarded as a mortgage, from which the real owner of the property may redeem.

2. When the grantee in a deed absolute on its face, but which is held by him as security for a loan advanced to another for the purchase of the land described in the deed, sells the land, without notice to the equitable owner, he will be made to account to the equitable owner for the net cash value of the property at the time of the sale, with interest from date of sale, against which he should be allowed credit for the amount due to him for the principal and interest of his advances at the time of the sale, with interest thereon from that time.

3. In an action brought by the equitable owner of land against the legal owner, who had sold the land, and applied the proceeds to his own use, where it appeared that the legal owner of the land had a lien thereon for moneys advanced to the equitable owner, which the latter had failed to pay, no costs will be awarded to either party.

Action by Orrin Vanderhoven against John W. Romaine and others to enforce a resulting trust. Decree for plaintiff against defendant Romaine, and dismissed as to other defendants.

Isaac N. Miller, for complainant. De Witt C. Bolton, for defendant Healey. Frank Van Cleave, for defendants Romaine and Evans.

McGILL, Ch. In December, 1885, the complainant applied to the defendant John W. Romaine to assist him in securing the title to 13 lots of land in the city of Paterson. He had theretofore paid \$90 on account of \$500, the purchase price of the lots, and Emma C. T. Mortimer, who held the legal title to the lots, admitted his right to have a conveyance of them upon his paying to her \$410, the unpaid balance of the \$500, with the interest from March 2, 1885. The complainant's difficulty was that he did not have the money to pay Mrs. Mortimer, who was unwilling to wait longer for the payment. Mr. Romaine agreed to assist him, and, taking from Mrs. Mortimer a deed for the land, gave her a mortgage upon the property, payable in one year, with interest, for \$250, and paid her in cash \$197.84, the balance due to her. Mr. Romaine says that he acted thus under a parol agreement with the complainant that he should take the title to the property absolutely, and that the complainant would buy the property from him, within a year, for the amount of his advances, with interest. Or

the other hand, the complainant insists that it was first proposed that the complainant's son should take the title to the property, and give Mrs. Mortimer a mortgage for \$250, and that Mr. Romaine should lend \$160, to enable the complainant to make the cash payment which Mrs. Mortimer required; but that, as that plan would leave Mr. Romaine without security for the cash he should advance, it was subsequently arranged that Romaine should take title, as he did, as security for his advances or loan, until the complainant should repay him. These contentions present the question of fact whether the deed to Romaine consummated an absolute purchase of the property by him, or was merely taken by him in resulting trust for the complainant, and as security for a loan made by him to the complainant.

The transaction at which the money was paid and the deed and mortgage were delivered took place in the office of William H. Williams, the lawyer of Mrs. Mortimer. It does not appear that the complainant gave Romaine any acknowledgment of indebtedness, but it does appear that in February, 1886,—less than three months after the settlement with Mrs. Mortimer,—he gave Mr. Romaine an order upon the comptroller of the state of New Jersey for \$197.84, the amount of cash advanced by Romaine, to be paid out of moneys which should thereafter become due to the complainant for publishing the laws in a newspaper of which he was the proprietor. Later \$817.25 did become due to the complainant from the state for the publication mentioned, and was paid to him or to others to whom he had given orders upon it. Mr. Romaine says that in August, 1886, he presented his order to the comptroller, but was refused payment, the comptroller stating that the money due to the complainant was already fully covered by orders. Mr. Williams testifies that after the delivery of the deed from Mrs. Mortimer to Romaine, Mr. Romaine made statements to him which led him to believe that Romaine had loaned the money advanced to the complainant. He remembers that Mr. Romaine said that he wanted to help the complainant, and that he showed him some orders on either the treasurer or comptroller of the state, which the complainant had given him as security. He remembers, also, that in 1887, more than a year after the deed was taken by Romaine, he was instructed by Mrs. Mortimer to collect the amount due upon the mortgage Romaine had given her, and that he urged both Romaine and the complainant to pay the mortgage, and that Romaine then stated to him that he was trying to get the orders he had had from the complainant cashed, that he did not wish to advance any more of his money, that he was simply acting in the matter as the friend of the complainant. On the 3d of July, 1887, after foreclosure of the Mortimer mortgage had been commenced, Romaine paid the mortgage off; his payment

being \$293.75 for the principal and interest of the mortgage and the costs of the foreclosure proceedings to the time of payment. After he had paid the mortgage off, he several times asked the complainant to pay him the money he had advanced, and take the property off his hands. Twice he talked with the complainant about temporary uses to which the land could be put, and two years after he received the deed from Mrs. Mortimer he reported to the complainant that he had had the taxes reduced. In these matters he conducted himself as though the complainant had at least some right and interest in the land not inconsistent with that now claimed. By the testimony of the complainant and of Mr. Williams and the corroborative circumstances adverted to, I am of opinion that it clearly appears that Mr. Romaine took the conveyance from Mrs. Mortimer in resulting trust for the complainant, and as security for the repayment of his advances for the complainant; and that, though the deed was absolute upon its face, it in reality must be regarded, between him and the complainant, as having been a mortgage. It is well settled that the fact that a deed absolute on its face was made only as security for a loan may be shown by parol, and that the deed will be regarded as a mortgage, from which the real owner of the property may redeem. *Clark v. Condit*, 18 N. J. Eq. 358; *De Camp v. Crane*, 19 N. J. Eq. 166; same case on appeal, 21 N. J. Eq. 414; *Van Keuren v. McLaughlin*, 19 N. J. Eq. 187; *Phillips v. Hulsizer*, 20 N. J. Eq. 308; *Cake v. Shull*, 45 N. J. Eq. 208, 16 Atl. 434; *Pace v. Bartles*, 47 N. J. Eq. 170, 20 Atl. 352; *Winters v. Earl*, 52 N. J. Eq. 52, 28 Atl. 15. The complainant, by means of the loans by Romaine to him, and his previous payment of \$90, furnished the full consideration paid Mrs. Mortimer for the property, and became the real or equitable owner, and Romaine therefore not only held the legal title by way of mortgage to himself to secure the repayment of his loan, but also as trustee for the complainant upon the repayment of his advances. In November, 1889, without notice to the complainant, Romaine sold the land to the defendant Healey for \$900, \$300 of which was paid to Romaine in cash, and \$600 of which was secured to be paid to Romaine by a purchase-money mortgage upon the land sold. The proofs abundantly satisfy me that Mr. Healey was a bona fide purchaser, without knowledge or notice of the interest of the complainant in the property. He paid a price for the property which, although perhaps below the full value of the land, was not so much below it as to arouse suspicion, and put him upon inquiry. Subsequently, in February, 1890, Mr. Romaine sold and assigned the purchase-money mortgage he had received from Healey to the defendant Evans for \$575. I think that Mr. Evans purchased in good faith, without notice or knowledge of the complainant's right or interest. It appears

that the sale to Mr. Healey was negotiated by one Crooks, who acted as the agent of Mr. Romaine, and was paid by Romaine \$25 for his services. Crooks knew of the complainant's interest in the property, but did not say anything to Healey about it; yet he did tell the complainant of the proposed sale, and warned him that, if there was anything coming to him, he should take care of his interest. It does not appear that the complainant took any steps to stop the completion of the transaction. The proofs indicate that, so far as the opinions of witnesses go, the land sold to Healey at the time of the sale was worth about \$1,200, but there is no proof which fully satisfies me that such a price could have been obtained for it in cash. Possibly more than \$900 might have been had.

As the case stands, we have this state of facts: That Mr. Romaine sold the property at private sale, upon his own discretion, without consulting the complainant, or regarding him in the matter; and that the price realized was below the estimated value of the property; and that shortly after the conveyance of the land he sold and assigned the purchase-money mortgage at a considerable discount. The bill, in substance, prays that Evans may reassign the \$600 to Romaine upon just terms, and that Romaine may cancel it, and that Healey may be decreed to hold the property in trust for the complainant, and, upon the complainant's payment to him of \$410, with interest from March 2, 1885, that he shall convey the same to the complainant, or convey it to Romaine, who shall convey it to the complainant; "and that the complainant may have such other and further relief in the premises as shall be agreeable to equity, and as the nature and the circumstances of the case may justify and require." It is very clear that the relief specially prayed cannot be granted. The defendants Healey and Evans, having been bona fide purchasers, without notice of any right in the complainant or claim upon his part, are entitled to have the bill as against them dismissed, with costs. I think, however, that under the prayer for general relief the complainant is entitled to have redress against the defendant Romaine. Romaine had the right to be repaid his loan, with interest, but he should not have sold the land without notice to the complainant. Having done so, he should account for the fair net cash value of the property at the time of the sale, with interest from the date of sale, against which he should be allowed credit for the amount due to him for the principal and interest of his advances at the time of sale, with interest thereon from that time. *Clark v. Condit*, supra. This suit is, in effect, like a suit for redemption by a mortgagor. In such suits the mortgagor will be required to pay costs unless the conduct of the mortgagees has been unfair and oppressive. *Phillips v. Hulsizer* and *Winters v. Earl*, supra. In this case I think that the

conduct of the defendant Romaine in making a secret sale was unfair, and that his resistance in this suit has been in a degree oppressive, and hence that he should not have the costs as against the complainant. At the same time I am of opinion that the complainant's delay in repayment to Romaine so far induced Romaine's arbitrary action that it will be improper to permit him to recover costs against Romaine. Therefore no costs will be allowed between the complainant and the defendant Romaine.

The realization by Romaine from the sale of the property after deducting the \$25 paid to Crooks for effecting the sale was \$875. The amount due to the defendant Romaine at the time of the sale was \$574.67. I will decree that the \$875, with interest thereon from the date of the sale, November 18, 1889, less \$574.67, with interest thereon from the same date, be paid by the defendant Romaine to the complainant, unless the complainant shall elect to have the cash value of the property at the time of the sale ascertained, in which case there will be a reference to a master to ascertain what the cash value of the land then was, and that value, with interest, will be allowed to the complainant, after deducting therefrom the \$574.67 due to the defendant Romaine, with interest thereon from the date of the sale.

(56 N. J. E. 191)

MACFARLANE v. RICHARDSON et al.

(Court of Chancery of New Jersey. Dec. 27, 1897.)

CHattel Mortgages—RECORDATION—FRAUDULENT CONVEYANCES—BILL TO FORECLOSE—PLEADING.

1. Where, in a suit to foreclose a chattel mortgage, the answer does not set up the defense that the mortgage was not recorded immediately, as required by 2 Gen. St. p. 2113, a decree cannot be made holding the mortgage invalid on such ground.

2. A mortgage can be declared fraudulent against creditors, on a bill to foreclose, only when the creditors raise that issue in their answer.

Bill in equity by Arthur MacFarlane against Britton Richardson, assignee, etc., and others, to foreclose a chattel mortgage. Decree for complainant.

James Benny, for complainant. James B. Vredenburg, for defendant Richardson. John Garrick and Mr. Hughes, for defendants Gerll and others.

EMERY, V. C. The disputes in this cause relate to the priority of a chattel mortgage given to complainant over a subsequent assignment for the benefit of creditors, and over creditors whose debt existed at the time of the mortgage, and who subsequently obtained judgment on their debt, and title to the mortgaged chattels by sale under execution issued upon the judgment. At the argument of the cause two grounds of priority over the chattel mortgage were relied on by

the judgment creditors: First, that the mortgage is void as against them under the fourth section of the chattel mortgage act of 1885 (2 Gen. St. p. 2113), because it was not recorded immediately, as required by the act; and, second, that the mortgage is fraudulent as against creditors. Neither of these defenses to the mortgage, however, is specially set up in the answer to the bill so as to make an issue thereon in the cause, and the general rule requires that such issues must be made upon the pleadings, in order to justify a decree holding the mortgage invalid upon either of these grounds. In *Bank v. Sprague* (Err. & App.; 1870) 21 N. J. Eq. 530, a mortgage was held to be fraudulent against creditors under the statute against fraudulent conveyances, but only in favor of those creditors who had raised this issue on the record. As against those creditors who had not by their answers attacked the validity of the mortgage upon this ground, and as against those who had failed to file answers setting up that the mortgage operated to hinder or delay them, the mortgage was sustained. The reasons given by Mr. Justice Van Syckel in the opinion of the court (pages 542 and 543) are that, the mortgage, which on its face is a prior lien, being made void by statute only in favor of a particular class, the affirmative is on the creditor, and it is incumbent upon him to place himself upon the record as belonging to this class, so that his opponent can be heard. And the rule as to raising the issue specially on the record seems also in this case to have been applied, or at least expressly declared to be applicable, to the case of a chattel mortgage claiming precedence over a mortgage prior in time by reason of the failure to record the latter as directed by the statute. See pages 532, 533. In reference to the execution, delivery, and recording of the present mortgage and its consideration, the issues on the record are as follows: The allegations of the bill are that on or about April 22, 1896, William MacFarlane & Co. were indebted to complainant in the sum of \$3,510, and, being so indebted, made the promissory note bearing date April 22, 1896, for \$3,510, payable on demand; that, in order to secure the payment of the note, with interest, the firm executed and delivered to complainant the mortgage in question, bearing date April 22, 1896; that after the execution of the mortgage the same was, on the 22d day of April, 1896, acknowledged by the mortgagors, and on the 25th day of April an affidavit was indorsed thereon by complainant, setting forth its true consideration, and on the 27th of April, 1896, at 10:30 a. m., it was recorded. The bill further alleges that after the execution and delivery of the mortgage to complainant, to wit, on April 27, 1896, the partners made an assignment to the defendant Richardson for the benefit of creditors, according to the statute, which assignment included the mortgaged chattels; and that the assignee took possession of these goods and

chattels, together with the other property assigned. The bill then charges that the assignment was made "after the execution and delivery and record of complainant's mortgage," and that the assignee's title is subject to complainant's lien. It is also alleged that the assignee had full and actual notice of complainant's mortgage. As to the judgment creditors, the defendants Gerli & Co., the bill alleges the recovery of their judgment on or about June 4, 1896, the issue of execution, a levy thereunder, and a sale of the mortgaged chattels to the defendant on July 6, 1897, and charges that their title is subject to complainant's mortgage. The answer of defendant Richardson, assignee, denies any knowledge, information, or belief as to the existence of the debt, sets up the assignment to himself on April 27, 1896, alleges that his first knowledge of complainant's mortgage was received in May, 1896, after taking possession, and that he then first learned of the existence of any indebtedness from the mortgagors to complainant. He denies any knowledge or information sufficient to form a belief whether there was any money due from William MacFarlane & Co. to the complainant. The defendants Gerli and others, by their answer, deny knowledge or information of the indebtedness to complainant, or of the making of the chattel mortgage, or of its consideration, and therefore leave complainant to make proof thereof. They deny also knowledge or information as to the date of acknowledgment of the chattel mortgage or of making the affidavit, as set out in the bill, and leave the complainant to make proof thereof, but they admit on information and belief the allegations of the bill as to the time and place of record of the chattel mortgage; and, after setting out their title to the goods under the execution sale on their judgment, and claiming that the assignment to Richardson is fraudulent and void as against them, they claim that they are the owners of the goods purchased at the execution sale under their judgment, "free from any title or claim of said Richardson under the said fraudulent and void assignment so made to him for the benefit of creditors, and subject only to the indebtedness, if any, which the complainant may establish to the satisfaction of this court to be due him from the said Jane MacFarlane and William MacFarlane, and secured to be paid by the complainant's said mortgage."

Clearly, no issue is made by either of these answers as to the invalidity of the mortgage by reason of the failure to record it immediately, and the first reference on the record to this objection was when the mortgage was offered in evidence by the complainant, and objected to by the defendants "on the ground that it does not comply with the statute in not having been recorded immediately after being executed." This objection to evidence is not sufficient to create an issue not made by the pleadings. This claim, therefore, not hav-

ing been set up on the record, would seem to be unavailing, if the general rule laid down in *National Bank v. Sprague*, *supra*, is applied. And the reasons for requiring the claim depending upon failure to record the mortgage immediately to be specially set up are more imperative than in other cases; for, as has been settled in *Roe v. Meding* (Err. & App.; 1895) 53 N. J. Eq. 350, 33 Atl. 394, the "immediate" recording required by the act means as soon as may be by reasonable dispatch under the circumstances of the case. Opinion, page 368, 53 N. J. Eq., and page 395, 33 Atl. Reasonable dispatch in recording is, therefore, a question of fact to be determined upon a consideration of all the circumstances of each case, and before a decision upon the question the contesting parties should each be notified, and be bound by the record to produce all the evidence relied on to support their respective claims on this issue. The ultimate decision upon such questions of fact often depends, either wholly or to some extent, upon the failure of a party to produce or explain the absence of witnesses who apparently have the knowledge of facts necessary to their case, as made on the record, and whom, by reason of this notice on the record of the issue involved, they are bound to call under the penalty of unfavorable inferences or presumptions. The evidence in this case, as presented on this question, is an illustration of this situation. The person to whom the mortgage was delivered by complainant for recording, and who subsequently had it recorded, is not produced as a witness by either side, nor is his absence explained, and his testimony was essential for the party who was bound to produce him, or satisfactorily explain his absence. This will appear, I think, from the following statement: The mortgage was dated April 22, 1896, and was executed and acknowledged on that day by the complainant's mother and brother (composing the firm of W. MacFarlane & Co.), and to secure a note for \$3,510 given by them to complainant and payable on demand. The note was given, or claimed to be given, for wages due complainant from the firm, as the superintendent or manager of their factory for nearly five years. The firm were then in embarrassed circumstances by reason of the failure of a customer who owed them a large amount (\$10,000, as complainant says), and he, knowing of this, desired his claim, for which there was no written evidence, adjusted and secured. The note was given to him for this purpose, and the mortgage, which bears the same date with the note, was executed on that date by the mortgagors, at the office of Mr. Carman, their lawyer, in New York. It was apparently then left in the possession of Mr. Carman, from whom complainant, as he now swears, first received it on Saturday morning, April 25, 1896, perhaps as early as 10 o'clock. Complainant then signed the affidavit to the mortgage, and, as he says, gave the mortgage to Carman in New York, with directions to record on Monday

morning. The recording offices are not open after 12 o'clock on Saturday, and the mortgage was recorded at 10:30 on Monday morning, April 27th. Complainant's credibility upon this point, as to delivery as late as April 25th, is, however, shaken by his affidavit annexed to the bill in this case, in which he states "that, although the said assignment [for the benefit of creditors] was made on the same day as the date of the record of deponent's mortgage, said mortgage was actually made and delivered on the said 22d day of April, 1896, and was recorded prior to the execution and delivery of the assignment," etc. Carman seems to have had the actual custody during the interval from April 22d to April 25th, and whether he held for the mortgagee is a point upon which his evidence appears to be essential. And his evidence is essential upon another point, relating to the reasonable dispatch in recording the mortgage. Complainant swears that on Saturday morning, perhaps as early as 10 o'clock, and when he had taken the affidavit, he directed Carman to record the mortgage on Monday morning. Mrs. MacFarlane, complainant's mother, and one of the mortgagors and members of the firm of William MacFarlane & Co., was called as a witness for the complainant. From her examination it appeared that on the same date with the execution of this mortgage other mortgages to other creditors were executed, which were also recorded on the following Monday; and upon her entire evidence I think it is an open question whether, so far as she was concerned, the recording of all these mortgages, including complainant's, was not to be delayed until Monday morning, in order to await the result of an application she was about to make to a creditor for the renewal of notes of the firm coming due on Monday. In answer to the question whether the witness did not instruct Carman (who was then her lawyer) not to record the mortgages in case the note was renewed, she says that she does not remember; possibly she did, but "I don't know whether I did or not." Under all the circumstances of this case developed by the evidence, the failure of the complainant to call Carman, if he was bound to do so, to support the issue on his side, was a material circumstance in the case, to be carefully weighed. But, in the absence of an issue on the record against complainant's mortgage, which notified him of this objection, and put on him the burden of sustaining such issue on his part, it would not be just to put this penalty upon him. If either party had called Carman, and his evidence had been taken upon the point now raised, and both parties had thus proceeded without objection to the taking of evidence, as if it had been an issue on the record, an amendment of the answer so as to include the issues would have been within the power of the court, so as to embrace the proofs taken. But the case has been submitted on this point on proofs which are apparently not complete, and which are insufficient

to base a conclusion on the fact in dispute, unless an inference from failure to produce evidence is to some extent relied on; and the duty to produce this evidence could only arise by reason of an issue upon the record of which the party had notice. The case on this point seems to me to be one where the general rule as to the necessity of setting up the statutory objection to the chattel mortgage applies with special force, and that I must, therefore, overrule this objection on the ground that it was not set up by the answers.

As to the second objection to complainant's mortgage,—that it was made in fraud of creditors,—the case stands in a different situation, although this objection is not formally made in the answer, as required by the general rule. On the bill and answer an issue is made as to the consideration of complainant's mortgage, and the indebtedness of the firm to him, and he is put upon his proof of the indebtedness, which is thereby made an issue. The main reason urged by defendants against the validity of the mortgage upon the evidence is that nothing was due to the complainant, and that the alleged indebtedness was a claim created for the purpose of defeating creditors. This question, therefore, as to the indebtedness of the complainant, is fairly an issue, and should be decided. Upon this question I reach the conclusion that the claim of the complainant is sustained by the evidence, which shows, in my judgment, that the note secured by the mortgage was based upon a bona fide settlement, made at the time of giving the note between the complainant and the firm, for an indebtedness then existing in complainant's favor for wages as the manager or superintendent of their factory. These services had been performed since the complainant came of age, on June 16, 1891, and under an express agreement for compensation, the money payment being \$60 per month; and, in view of the nature of the services rendered, and of the proof as to the usual rate for such services, there would seem to be no basis for concluding that the claim was a fraudulent claim. The most serious objection to the claim, in my judgment, is the delay of its adjustment by complainant until the firm became embarrassed, when its adjustment and security preferred complainant over the other creditors. But this delay is satisfactorily accounted for by the fact that under the agreement as originally made between complainant and his mother the money for his salary was not to be drawn out by complainant, but was to remain with the firm, in which, at the time of the agreement, it was further contemplated that at some future time he should become a partner. No agreement of partnership was made, however, either then or subsequently. The circumstance that no payments on the claim were made in the meantime to complainant, which would ordinarily tend to cast doubt upon its bona fide existence, is also satisfac-

torily explained. While under age the complainant had lived with his mother, and had worked in the factory without compensation other than his board and clothing; and after coming of age and making the agreement for compensation he still continued to live with her, receiving his board without charge, and money for clothing, and also receiving for himself only small amounts for incidental expenses, which were charged to his mother's personal account, or advanced by her. The complainant, becoming uneasy about his claim, in February or March, 1896, by reason of the failure of a large customer of the firm, which might threaten its solvency, pressed for a settlement and security, and the note and mortgage were thereupon given. In view of the whole circumstances of the case as disclosed by the evidence, this settlement and adjustment of complainant's claim for wages then arrived at was made fairly and in good faith, and the amount of the note secured by the mortgage must be held to be due. I will therefore advise a decree that complainant's mortgage is a lien prior to the defendants' claim, and must be first paid out of the proceeds of sale.

The defendant Richardson, as assignee, has filed a cross bill against the defendants Gerli & Co., but at the argument the questions arising on the cross bill were not presented by counsel, and the decree therefore will go no further than establishing the complainant's rights as against the defendants.

(56 N. J. E. 251)

BROMBACHER et al. v. BERKING et al.

(Court of Chancery of New Jersey. Dec. 23, 1897.)

WILLS—CONSTRUCTION—RIGHTS OF DEVISEES—NATURE OF ESTATE.

1. A will directed that all the testator's property be sold, and the proceeds invested by the executors and trustees, and that one-third of the income therefrom be paid to the widow of the testator during her life, as often as semi-annually, the remainder of the income to be paid to testator's children during life, in fixed but unequal proportions. Then followed the following paragraph: "In the event of death of my wife, the income herein given to her is thereafter to be payable to my children, respectively, pro rata; and, in case of the death of any child leaving issue, such proportion of the capital or corpus of my estate as was represented by the income to which such child shall have been entitled hereunder at the time of his or her death shall go and be paid to such issue in equal shares, if more than one; but, in case any child shall die without issue, then his or her share of such income shall be paid ratably to my surviving children." *Held*, first, that by the use of the words "pro rata" the testator meant that the income which the widow was to receive during life was upon her death to be paid to the children in the same proportions as the income given to them immediately upon testator's death; second, that the gift of the use of the income is to be regarded as equivalent to a gift of the use of the corpus; third, that the children of the testator took a life estate only in the income, both in that which was to be paid to them after the widow's death as well as in that which was to be paid to them after the death of the testator.

2. The income to be paid to the widow during

life is to be regarded as interest, and not as an annuity, and such part of said income as accrued after the last payment until her death belongs to her estate.

3. The trustees are directed, in case of the marriage of a child, to pay to such child a marriage portion; and in case any son should engage in any business or profession, with the approbation of the executors, to pay to such son one-half of the corpus of the share of such child, in either of which events the income of such child is to be correspondingly reduced. *Held*, that a child takes an absolute, and not a life, estate in a portion paid under these provisions.

(Syllabus by the Court.)

Bill by Augustus F. Brombacher and others against Max B. Berking and others for the construction of a will.

Joseph P. Osborne, for complainants.

REED, V. C. The complainants are trustees of the estate of Charles H. Berking, deceased. They have filed this bill for the purpose of obtaining the instruction of this court as to the meaning of certain parts of the will of Mr. Berking, deceased, under the directions of which they are to execute their trust. The will provided—First. For the payment of debts and funeral expenses. Second. It appoints three trustees and executors. Third. It devises and bequeaths to executors and survivors of them all the testator's estate, real and personal, remaining after payment of debts, funeral and testamentary expenses, in trust, to invest proceeds of sale of said estate, real and personal (which he empowered executors and trustees to convert into money by sale or otherwise), in first-class securities or real-estate mortgages; to collect and pay over the income therefrom as often as semiannually, as follows: To the widow, 33 $\frac{1}{3}$ per cent. of said income during her life; to a daughter, Pauline, 9 per cent. of the income during life; to a son, Charles, 12 $\frac{1}{2}$ per cent. of the income during life; to a daughter, Jessie, 13 $\frac{1}{4}$ per cent. of the income during life; to a daughter, Dora, 16 per cent. of the income during life; to a son, Max, 16 per cent. of the income during life. The fourth paragraph is as follows: "In the event of death of testator's wife, the income given to her is thereafter to be payable to testator's children, respectively, pro rata; and, in case of the death of any child leaving issue, such proportion of the capital or corpus of my estate as was represented by the income to which such child shall have been entitled hereunder at the time of his or her death shall go and be paid to such issue in equal shares, if more than one; but, in case any child shall die without issue, then his or her share of such income shall be paid ratably to my surviving children." The widow died December 22, 1896. She had, upon the death of the testator, qualified as the sole executrix and trustee under his will. Upon the death of the widow the complainants were appointed trustees in her stead.

The first question propounded by the trustees is in respect to the distribution of the income formerly payable to the widow. The fourth paragraph provides, as already displayed, "that, in the event of the death of my wife, the income herein given to her is hereafter to be payable to my children, respectively, pro rata." The query is, what did the testator mean by the use of the phrase "pro rata"? Did he mean that the income was to be equally divided among his children, or did he have in mind the proportions fixed by him in the third paragraph for the payment of the rest of the income? "Pro rata" means according to a measure which fixes proportions. It has no meaning unless referable to some rule or standard. If the use of these words did not follow, as they did, the third paragraph, and if there was no other gauge to fix the proportions, they would probably, in the absence of such standard, be regarded as equivalent in meaning to the words "per capita." But, in my judgment, the testator had in mind, when he employed these words, the measure or standard fixed by him in the preceding paragraph for the division of the two-thirds part of the income among his children. That the testator meant to distinguish between a distribution pro rata and a division in equal shares appears from his language in the latter part of the fourth paragraph; for it is observed that in that part he provides "that, in case of the death of any child leaving issue, such portion of the corpus as was represented by the income to which such child shall have been entitled at the time of his or her death shall go and be paid to such issue in equal shares, if more than one; but, in case any child shall die without issue, then his or her share shall be paid ratably to my surviving children." The word "ratably" is, of course, equivalent to the words "pro rata." My conclusion is that the income which during the life of the wife was paid to her should now be paid to the children of the testator in the same proportions as the other part of the income is payable.

The next question propounded is whether the unpaid portion of the one-third of the income which accrued up to the time of the death of the widow is payable to her personal representatives. She was paid up to August 31, 1896. She died December 22, 1896. The point is whether the income accruing between the date of the last payment and the date of the widow's death belongs to her estate. When a sum is given as an annuity, and the annuitant dies between the pay days, there can be no claim by his personal representative for anything accruing after the last pay day. But this rule is subject to exceptions, one of which is where the annuity is given in lieu of dower, or for the support of a widow, or of minor children. In such instances the amount of the annuity will be apportioned. *Lackawanna Iron & Coal Co.'s Case*, 37 N. J. Eq. 26, and notes. The bequest in this case,

is of income or interest. The whole of the testator's property was to be sold and invested, by the terms of his will. The income is to be paid, not at any particular time, but not less frequently than semiannually. The income accrues from day to day, and belongs to the life legatee from the time of its accrual. *Edwards v. Countess of Warwick*, 2 P. Wms. 176; *Craig v. Craig*, 3 Barb. Ch. 76; *Eyre v. Golding*, 5 Bin. 472. I conclude that the income unpaid up to the time of the widow's death belongs to her estate.

Other questions are propounded regarding the construction of a clause in the fourth and of the fifth and sixth paragraphs of the will. The clause in the fourth paragraph is in these words: "And, in case of the death of any child leaving issue, such proportion of the capital or corpus of my estate as was represented by the income to which such child shall have been entitled at the time of his or her death shall go and be paid to such issue in equal shares, if more than one; and, in case any child shall die without issue, then his or her share of said income shall be paid ratably to my surviving children." The fifth paragraph is as follows: "In case of the marriage of any of my children, my executors are to pay to such child, as a marriage portion, twenty-five hundred dollars out of the corpus of the share of such child, and the income of such child will thereafter be correspondingly reduced." The sixth paragraph is in these words: "If any of my sons shall, with the approbation of my executors, engage in any business or profession, then one-half of the corpus of the share of such son may thereupon be paid to him by my executors, in which event his income shall be thereafter correspondingly diminished." The queries which concern the clause in the fourth paragraph are—First, in respect to the present interest of children of the testator; and, second, in regard to the interest of the issue of those children leaving issue, or in regard to the interest of the survivors of those children dying without issue. The question as to the present interest of the children is involved in the inquiry whether the death of a child leaving issue, or without issue, is referable to death before the death of the testator, or before the death of the widow, or to death at any time. All the children have survived the testator and the widow. If the period to which the death of a child is referable is death before the death of either testator or widow, then, inasmuch as the event upon which either one, the alternative limitation over, was to occur has failed, the children take an absolute interest. I am of the opinion that each child takes an interest for life only, not only in that portion of the estate the income of which was to be paid to such child during the life of the widow, but also in that portion of the income which became payable to each child after the widow's death. The death of a child refers to death at the time the life estate shall determine. 3 Jarm. Wills, 614; Hawk. Wills,

255. It is entirely clear that in that part of the estate the income of which was to be paid to the children from the time of the testator's death each child took only a life interest. The direction of the will is that the trustees pay over to each child during life his or her proportion of the income. The rule is that a gift of income is equivalent to a gift of the land or corpus out of which the income springs. *Traphagen v. Levy*, 45 N. J. Eq. 448-452, 18 Atl. 222; *Gulick v. Gulick's Ex'rs*, 27 N. J. Eq. 498. The gift of the income or direction to pay the income during life to the children gave a life interest. *Monarque v. Monarque*, 80 N. Y. 320; *Sampson v. Randall*, 72 Me. 109; *Howell v. Green*, 31 N. J. Law, 328. As to this part of the estate, it is entirely clear that each child took, upon the death of the testator, a life estate, with remainders over either to his issue or to his or her surviving brothers or sisters. I am not including within this statement either the marriage or the business or professional portions of which I will presently speak. In addition to the proportion of income which each child was to be paid immediately, there is the income of the widow, which upon her death is to be paid to the children. There is no express limitation of the period during which the payment of this part of the income is to continue. There are also alternative gifts over. These conditions will sometimes restrict the gift over to the period of distribution, which is, in this instance, at the death of the widow. *Barrell v. Barrell*, 38 N. J. Eq. 60. In my judgment, it was not the intention of the testator to give the children who survived the widow an absolute interest in this portion of his estate. The manifest scheme was that, upon the death of the widow, her portion of the income should coalesce with the rest of the income, and all should be paid by the trustees alike, and enjoyed by the beneficiaries for the same period and by like title. The will provides that, in the event of the death of the widow, the income given to her is thereafter to be payable to my children pro rata, and, in case of the death of any child leaving issue, such proportion of the capital or corpus of the estate as shall be represented by the income to which each child shall have been entitled at the time of his death shall go and be paid to such issue. Here is a gift of the income to the children, with a gift over of the corpus to the issue. This circumstance was by Sir J. Leach thought significant to indicate that the gift over, in case of the death of the prior legatee, meant death whenever it occurred, and that, therefore, the prior legatee took only a life estate. 2 Jarm. Wills, § 750. It is transparent that all the estate which came to each child, whether originally or at the death of the widow, goes to the issue of that child, or to his surviving brother or sister, at the same time. It is that part of the corpus "represented by the income to which such child shall have been entitled at the time of his death" that by the language of the fourth paragraph is

given over. This includes all income, from whatsoever portion of the corpus derived. All the income is treated as a unit. The contingency upon which the gift over is to occur is obviously single, not double. It is death in the lifetime of the testator, death in the lifetime of the widow, or death whenever it shall occur. Now, in regard to two-thirds of all the income or of the corresponding estate, the will, by an express limitation of the estate of the children to a life interest, has fixed the end of each child's natural life as the time when the gift over is to take effect. The gift over of all the income or estate necessarily occurs at the same time. My conclusion is that each child has now a life estate. This interest, however, may in part become absolute under the fifth and sixth paragraphs, providing for the payment of marriage portions, and for the payment of a moiety of the corpus to those who engage in business or in a profession. The bill propounds a question relative to the fifth paragraph, in these words, "What is to be the disposition of the income of the \$2,500?" The purport of this question, I assume, is whether the marriage portion is to be taken into account as part of the estate to be distributed upon the death of any child so advanced. This query is already answered. The payment is made absolutely, and becomes the property of the child. The only part of her income which is thereafter limited over is the reduced income accruing from the advanced child's diminished capital. The sixth clause provides that "if any of my sons shall, with the approbation of my executors, engage in any business or profession, then one-half of the corpus of the share of such sum may thereafter, be paid to him." The query is, what is meant by "engage in any business or profession"? It is impossible to give a general definition which is more specific than the words themselves. If a particular instance arises as to whether a party engages or is engaged in a business or profession, an intelligent construction can be given when the instance arises. In regard to those questions which relate to the interest of the issue or to the interest of the surviving children after the death of a child, I think the consideration of these matters should be postponed until the event occurs. The interest of the infants should not be passed upon now, when such judicial action is not required for the purpose of guiding the trustees in the performance of their present duties; nor, if it were necessary, should it be settled without assigning counsel to specially present the case of the infants.

(56 N. J. E. 232)

TURNER v. HILL et al.

(Court of Chancery of New Jersey. Jan. 2, 1898.)

APPLICATION OF PAYMENTS—APPORTIONMENT BY COURT—BURDEN OF PROOF.

1. Where no definite direction is given by a debtor to apply a balance of account in the

hands of a creditor to any one or more of several debts due the creditor, the latter may make the application.

2. In making it, he may not, without the debtor's direction, appropriate it to the payment of a debt of his debtor which he does not hold.

3. If the creditor applies it generally, the court will recognize his appropriation so far as he had power to make it, and will apportion it ratably towards the payment of all the debts of the debtor which the creditor held, to which he applied it generally, where such apportionment accords with equitable principles.

4. When a subsequent lien creditor or holder of lands claims that a credit has been applied in satisfaction of a precedent lien, the burden is upon the party who alleges the application to prove it.

(Syllabus by the Court.)

Bill by Catherine E. Turner against William Hill and others to foreclose certain mortgages. Decree for complainant.

The bill is filed by the complainant to foreclose six mortgages upon a number of tracts of land in Warren county. The defendants are William Hill, the owner of the equity of redemption, and his wife, several judgment creditors of Hill, and Thomas P. Frome, who is both a judgment creditor of Hill and a grantee from him of one of the tracts described in several of the mortgages. Frome is the only litigating defendant, and the questions presented arise in the ascertainment of his equities as judgment creditor of Hill, and as grantee of the one tract. The six mortgages held by the complainant were all originally made by the defendant William Hill, and were given for the principal amounts and recorded at the dates following: One to William Trimmer for \$1,000, recorded April 9, 1877; one to Isaac Dill for \$1,000, recorded September 11, 1879; one to First National Bank of Washington for \$2,385, recorded April 16, 1890; one to Hackettstown National Bank for \$2,500, recorded April 29, 1890; another to Hackettstown National Bank for the same debt, recorded August 18, 1890; and the last, called an additional and collateral mortgage, to the complainant, Catherine E. Turner, dated and recorded May 18, 1894, for \$5,000. The mortgage recorded April 29, 1890, to Hackettstown National Bank, and the last mortgage, to the complainant, recorded May 18, 1894, are the only mortgages which assume to be liens upon tract No. 14 in the bill of complaint, which is an undivided one-half part of 37½ acres of land. This undivided interest the complainant conveyed in fee to the defendant Thomas P. Frome, by deed dated January 6, 1894, recorded May 16, 1894. The effect of this conveyance was to pass the title to this tract, No. 14, out of the mortgagor, Hill, before he gave the mortgage of May 18, 1894, to the complainant, so that Hill's mortgage of that date, to the complainant, is no lien on that tract. All of the above-named mortgages except the first (Trimmer's) and the last, which was given to the complainant, had in May, 1894, come to be owned by one John Karr,

who had purchased them from various holders. While he held these mortgages, he had received possession of the mortgaged premises, and had permitted the mortgagor to stay on the place under lease from him, had stocked and equipped the farm, and had received the profits which he had in great part expended for the benefit of the mortgagor, in rent and other expenses, resulting, however, in leaving a balance in his hands of \$1,287.83. In May, 1894, Karr, being still the holder of the mortgages, except the Trimmer mortgage, desired to raise money upon them, and applied to Judge Morrow for \$5,000; seeking to effect a sale of the Trimmer first mortgage, and all the other subsequent mortgages which Karr then held. An arrangement was made by which the complainant, through Judge Morrow, advanced the \$5,000. The Trimmer mortgage and the four others held by Karr were assigned absolutely to her, with the bonds and notes the payment of which they secured. It was noticed that the wife of the mortgagor, Hill, had not signed some of the later mortgages; and, to bind her dower and as an additional security, a new mortgage upon all the several tracts described in all the previous mortgages was executed and delivered by Hill and his wife to the complainant. The mortgages all being due, the complainant filed her bill to foreclose them, making the mortgagor, Hill, and his wife, and several judgment creditors, and Frome, in respect to his deed for tract No. 14 and his judgment against Hill, defendants. No answers have been filed by any defendant except Frome.

Joseph M. Roseberry, for complainant. L. De Witt Taylor, for defendant Frome. William H. Morrow, for defendant Amella Clayton.

GREY, V. C. (after stating the facts). A computation of the amounts due on the several mortgages is necessary to an understanding of the action of the parties in the premises:

The testimony shows that at the time of the assignments to the complainant, May 11, 1894, there was due on the mortgage of Hill to Trimmer, for principal and interest.....

\$1,061 39

On the Hill to Dill mortgage (which was pledged to Trimmer by Karr), the consideration of the assignment to the complainant on May 11, 1894, is stated to be.....

1,296 26

On the Washington Bank mortgage there was due on the notes it secured on July 2, 1891

(the date when this mortgage and notes were assigned to Karr), after crediting all payments made by Hill..\$2,123 65

There is no proof of any payments to Karr on these notes or mortgages. I therefore add interest on the principal of the notes from July 2, 1891, to May 18, 1894, the time of the transfer to complainant. The aggregate principal sum of the note is \$2,077.34, and the interest from July 2, 1891, to May 18, 1894, is

358 46

Making amount of principal and interest due on Washington Bank mortgage, etc., on May 18, 1894 (date of assignment to complainant), to be.....

2,482 11

The Hackettstown Bank had two mortgages, both securing the same set of notes. On these there was due, for principal on the notes, at the time Karr purchased the securities, July 9, 1891

1,224 15

Interest then due..\$26 52
Interest from July 9, 1891, to date of assignment to complainant, May 18, 1894....\$209.88

236 40

Amount due on Hackettstown Bank mortgage on May 18, 1894 (date of assignment to complainant), if no allowance be made by applying the credit in Mr. Karr's hands due the mortgage

1,460 53

Total amount due on all mortgages not applying the credits due Hill, in Karr's hands

\$6,300 29

For the assignments of these mortgages, which were made on May 11 and May 18, 1894, to the complainant, the sum of \$5,000 was paid by her. Mr. Karr made an absolute transfer of them to the complainant. He gave no obligation of his own which these mortgages, etc., were pledged to secure. He owes nothing to the complainant, and she has become, by her purchase, the absolute owner of all that is due on the securities. When Karr sought to raise the \$5,000 on the

mortgages which he held, it appeared that the mortgagor's wife had not signed the later mortgages, and he was obliged to secure an additional mortgage, to be made to the complainant on all the tracts, in which the wife joined, in order to secure the money. This mortgage is the complainant's last mortgage, and, Judge Morrow testifies, was given as a collateral mortgage.

Judge Morrow disbursed the fund, and testifies that he paid:

To Trimmer, for the Hill- Trimmer mortgage....	\$1,061 39
To Trimmer, for Karr, for the Hill mortgage..	1,296 26
To Karr, for the Wash- ington Bank and Hack- ettstown Bank mort- gages, the following checks were given by Judge Morrow:	
May 18, 1894.....	\$1,200 00
June 2, 1894.....	750 00
August 30, 1894.....	578 63
	\$2,528 63

Making the total expendi-
ture by Morrow for the
purchase of all the
mortgages to be.....

\$4,885 28

In addition to the above payments, Judge Morrow states that, out of the complainant's advance of \$5,000, he was paid for his services in conducting the business, and that he also paid some arrears of interest on an outside mortgage, with Mr. Karr's assent.

The testimony is somewhat confused as to these detailed items of the subsequent disbursement, but it is quite clear that the complainant's money was all paid either to Mr. Karr himself, or by his direction to others, and that she became, by the assignments, the owner of all the mortgages which she now seeks to foreclose.

The defendant insists that the Hackettstown Bank mortgage, dated April 28, 1890, which is the only one held by complainant which is a lien upon the undivided one-half of the 37½-acre tract (No. 14 in the bill), has been actually paid by the application of the credit in the hands of Mr. Karr (while the holder of that mortgage) in favor of William Hill, the mortgagor; and that, if such a credit was not actually made, then that, in equity, it ought to be made, because the defendant claims it was directed to be made by the mortgagor, or, if not so directed, then that, the credit in the hands of the holder of the mortgage having arisen from the issues and profits of the mortgaged premises, it should be made by the court. The proof shows that this credit arose as follows: The mortgagor, Hill, had accepted a lease of the mortgaged premises from Mr. Karr. Hill continued to have the actual possession, not only of the mortgaged premises, but also of horses, cattle, and the stock equipment of the farm, which had been bought by Karr

at a chattel mortgage sale, upon an understanding between Hill and Karr that these chattels were to belong to Hill as soon as he had paid for them, Mr. Karr paid the running expenses and supplies of the farm, interest on some of the mortgages, the expenses of a foreclosure, and the purchase of stock, horses, and cattle. He received, in actual gross receipts, \$3,946.27. He did not apply any of it to the payment of the Hackettstown Bank mortgage, which he held. He had a balance of \$1,287.83 in his hands, a credit in Hill's favor that had not been applied when all the mortgages were about to be assigned to the complainant. He swears that while it was a matter of discussion between him and Hill, the mortgagor, as to what mortgage it should be applied on, the Hackettstown Bank mortgage and the Washington Bank mortgage both being mentioned, Hill spoke as if he wanted it applied on the Hackettstown Bank mortgage; but Karr swears that Hill did not give him (Karr) any direction or order to apply it to any particular mortgage. The testimony of Mr. Karr on this point was fairly shown by these questions and answers: "Q. Have you any of that money in your hands now? A. No, sir. Q. Had you when you assigned the Hackettstown Bank mortgage to Miss Turner? A. I had. I had an account with Mr. Hill, debit and credit account of the whole transaction; and, when this account was closed up, there was \$1,287.83 that should have been indorsed on those mortgages. Q. Which mortgages? A. That I can't say,—on the whole of them. Q. Which mortgage was it to be indorsed upon by Mr. Hill's agreement or direction? A. There was no definite agreement in regard to that." He further states: "I was to use that money in any way that I chose for his [Hill's] benefit. Q. Did you so use it? A. I did. Q. How did you use it for his benefit? What did you do with the funds? A. With the \$1,287 or with the whole fund? Q. No; the \$1,287, the rest you say you applied. What did you do with it at any time? Those mortgages that I held, amounting to some \$5,000, and Trimmer's together, amounted to some \$6,300; and I said to Judge Morrow, at the time that these assignments were made, that there was \$1,287.83 that should be applied on some of these mortgages. I did not know on which to apply them. Q. What was done with them? A. Judge Morrow said, 'After that credit is made, does it still leave \$5,000 due on those mortgages?' I told him, 'Yes; that is true.'" Karr further testifies that this \$1,287.83 credit in favor of Hill was to have been credited on these mortgages, as he stated to Morrow, and that the credit was definitely ascertained to be that amount "at the time they arranged the settlement in George Morrow's office." This was the time the transfers were made to the complainant.

I think it is quite evident that there was no definite instruction by the mortgagor as to the application of this credit. The witness Karr testifies that its application was discussed between himself and the mortgagor, and the Hackettstown mortgage seems to have been favorably considered; but its application to pay the Washington Bank mortgage was also talked over, and, at the time when the final transfers were made to the complainant, no direction for appropriation to any particular mortgage had been given by the mortgagor, nor until that time was the actual amount of the credit apparently known to the parties. Mr. Karr then applied it generally as a credit on the whole sum due on all the mortgages. The ascertainment of the credit and its application appear to have been substantially coincident. Karr treated the mortgages as calling for \$6,300 before the credit was applied, and for over \$5,000 afterwards; and this very nearly accords with the amounts due on all the mortgages, as above shown. Hill was present in Morrow's office at the time of the settlement and assignments of the mortgages. He knew he had this credit balance of \$1,287.83 in Mr. Karr's hands. He joined with his wife in making the additional collateral mortgage to the complainant for \$5,000, the amount due on all the mortgages after applying the credit; and it is difficult to believe Hill took so important a part in that settlement, and would have permitted Mr. Karr to apply this credit generally on all the mortgages, if he (Hill) had already directed it to be applied on the Hackettstown Bank debt. Hill was himself the best witness to the fact that he had directed an appropriation of this credit to be made towards the payment of the Hackettstown Bank mortgage, if he had made any such direction. He was not called for the defendant. The burden of supporting the allegation in the answer that the Hackettstown Bank mortgage had been paid is upon the defendant who makes the claim. The evidence does not support it.

Hill, the mortgagor, who was entitled to the credit, was the debtor who created and owed all the bonds and notes secured by all the mortgages. As he had made no application of it to any specific mortgage before the settlement, Mr. Karr, the creditor, who held Hill's bonds and mortgages, had the right to appropriate it to such of them as he chose. He did apply it by giving a general credit of the amount remaining in his hands upon the whole amount due on all the mortgages; so that, after the application of the credit, they should, as a whole, stand as securing the payment of \$5,000. On the faith of this assurance, the complainant's \$5,000 was delivered and disbursed; and I think she is entitled to the benefit of the statements then made by Mr. Karr, that that sum remained due on those mortgages after the application of the credit. As there was no direction by

Hill that the credit should be applied to the Hackettstown Bank mortgage, and it was applied generally by Mr. Karr without specific appropriation of any definite sum to any particular mortgage, the application of the credit still remains incomplete. So far as Mr. Karr had power to apply it, and so far as he actually did apply it, I think his action should be recognized as a forceful appropriation; but to the extent that he lacked the power to apply, or failed to do so in an effectual manner, the court should apply the credit in accordance with equitable principles. Mr. Karr assumed to apply the credit in reduction of the amount due on all the mortgages, including that made by Hill to Trimmer. Mr. Karr, as Hill's creditor, having moneys in his hands due Hill, had the right, when Hill did not direct its application to any one of his debts, to apply it to such of the debts he held against Hill as he (Karr) should choose. Karr testified that he thought the lease authorized him to apply the credit as he chose, but the lease dated March 25, 1891, under which Hill held the premises till the spring of 1894, under which the credit accumulated in Karr's hands, gave him no special right to appropriate the credit. His authority was simply that of a creditor who might apply a credit when his debts did not. But he had no right to apply it to any debt of Hill's held by some one else, unless by Hill's direction. As to such debts, he was not Hill's creditor. In May, 1894, when the application was made at the time of the settlement in Morrow's office, Mr. Karr was not the holder of the Trimmer mortgage. There is no proof that Hill directed the application of any part of the credit to the payment of this mortgage, and Mr. Karr had no authority, without Hill's direction, to appropriate the credit in whole or in part to pay Hill's debt to Trimmer. No special application was made of it to Trimmer's mortgage, but that debt was included in the computation of the aggregate \$6,300 of Hill's debts, to which Karr applied the credit generally. This application, so far as the Trimmer mortgage is concerned, must be disregarded, and the credit must be appropriated only towards the satisfaction of those mortgages which Karr, who made the appropriation, then held. Mr. Karr, however, while having the right to apply the credit, and actually applying it generally, did not indicate any proportion or order in which the credit should be applied to the mortgages which he held. The rule is that, when neither the debtor nor the creditor directs the application to the payment of any particular debt, the court may appropriate it; and, in so doing, the court will usually apply it to the payment of that debt which has the least security, upon the assumption that the debtor would desire to pay all his debts; and this disposition of the credit most nearly accomplishes that result. *Terhune v. Colton*, 12 N. J. Eq. 238, 312; *Leeds v. Gifford*, 41 N. J. Eq. 469, 5 Atl. 795.

No other evidence has been offered in this case which can be used to show that any one of the mortgages held by Mr. Karr in May, 1894, was a less certain security for the payment of the mortgage debt than the others, save that which arises from the inference that the subsequent mortgages have less likelihood of payment than the prior ones, where they all cover the same property. But the mortgage securing the last-created debt, to the Hackettstown Bank, is additionally secured by including tract No. 14; and as no proof has been made which shows that this mortgage, with this additional tract, is in any way less secure than any of the others held by Karr, there seems to be no reason for selecting any particular mortgage to receive the whole benefit of the credit. Mr. Karr's act of appropriation was general on account of all of them. An application of the credit in proportionate reduction of all of the mortgages which he held accords with the spirit of his appropriation. I think the rights of all the parties are fairly recognized by the perfecting of the application, left incomplete by Mr. Karr, and apportioning the credit of \$1,287.83 in pro rata satisfaction of all the mortgages held by him when the settlement was made.

It is insisted that the defendant Frome has a right to have the credit so applied as to discharge the Hackettstown Bank mortgage, and thus allow him to hold tract No. 14, clear of any lien. The burden was upon Mr. Frome to prove some fact or contract which would support such an equity. He made no such proof. He did offer by his own testimony to prove what Hill had said to him about such an appropriation, on two occasions, one before this suit was begun, and the other afterwards. This testimony was objected to and rejected, because there was neither proof nor offer to prove that Hill, who was entitled to the credit, had made the statement as to appropriation, in the presence or with the knowledge of Karr, who was the creditor. Nor were any circumstances shown which indicated that Karr could have known that Hill had claimed to have made an appropriation. The intention to appropriate to the payment of the particular debt must be signified to the creditor. *Terhune v. Colson*, 12 N. J. Eq. 237. The offer to prove what Hill said as to appropriation after this suit was brought was subject to the same objection, and to the further one that Hill's declaration was made after Karr had applied the credit on Hill's failure to direct its application, and after the complainant had taken the assignments and parted with her money, on the assurance that \$5,000 was due on all the mortgages, including that to Hackettstown Bank. The statements of Hill, under the circumstances, were hearsay, and in no way evidential against the complainant. As to Frome's equitable right to have this court make an appropriation which shall prefer him by selecting the Hackettstown Bank

mortgage, and satisfy it for his benefit, he has shown nothing to justify such a preference; and as it would negative the assurance under which the complainant parted with her money, by lessening her security for its payment, and would defeat the appropriation generally made by Mr. Karr, the creditor, I think it would be inequitable for this court to make such special application of the credit.

I will advise a decree applying the credit of \$1,287.83 in proportionate satisfaction of the amounts secured to be paid by the mortgages held by Karr, and which he transferred to the complainant, namely, the mortgages of Hill to Dill, Hill to Washington Bank, and Hill to Hackettstown Bank. The order of sale of the mortgaged premises should be such that tract No. 14, to which the defendant Frome has acquired title, should be the last sold, to satisfy any residue remaining unpaid on the Hackettstown Bank mortgage from the other proceeds of sale.

(184 Pa. St. 19)

JULIUS v. PITTSBURGH, A. & M. TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

TRIAL—INSTRUCTIONS.

1. In an action to recover for personal injuries, where the defense was that the injured party released the defendant by a written agreement, and there was evidence that plaintiff's condition was due to the injury inflicted by defendant, it was proper to refuse an instruction that there was no evidence connecting plaintiff's condition with any negligence on the part of defendant, and that defendant's negligence, if any, must be limited to damages done to plaintiff's wagon.

2. It is not error for the court to refuse to instruct that a release of damages for personal injury, claimed to have been voluntarily executed by the injured party with full knowledge, was binding upon the said party, and a bar to a recovery in an action for damages for the injury, where the evidence as to whether or not the injured party signed the said release voluntarily is conflicting.

Green, Williams, and Dean, JJ., dissenting.

Appeal from court of common pleas; Allegheny county.

Action by Martin Julius against the Pittsburgh, Allegheny & Manchester Traction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

A. M. Neeper, for appellant. Wm. Blakeley and L. K. & S. G. Porter, for appellee.

MCCOLLUM, J. The plaintiff claims compensation for an injury which he alleges he received through the negligence of the defendant. That the defendant's car collided with the plaintiff's wagon, and that one of the consequences of the collision was that the plaintiff was thrown from the wagon to the ground, is undisputed. Whether the occurrence was attributable to a want of reasonable care on his part, or to negligence on

the part of the defendant, were questions for the jury, upon the evidence applicable to them. It is not contended that the evidence affecting these questions was insufficient to warrant their submission to the jury. It is true that the excerpt from the charge which is the subject of the fifth assignment is criticised by the defendant as unauthorized and partial. The criticism does not involve a denial of the sufficiency of the evidence, but it alleges a misstatement of it in the instruction. A careful examination of the evidence affecting the questions of negligence, and of the instructions applicable to them, has satisfied us that there is no merit in the criticisms of the excerpt referred to, when it is considered, as it should be, in connection with the other parts of the charge relating to the same subject.

The third assignment is based on the refusal of the defendant's fourth point, which is as follows: "There is no evidence connecting the plaintiff's present condition with any negligence, on the part of the defendant, causing the same; and, under the evidence in the case, if the jury find the defendant negligent they must be limited in the verdict to the damages shown to be done to the plaintiff's wagon, to wit, the destruction of the singletree." This point, in view of the defense based on the alleged settlement and release, is interesting. It shows a change in the defendant's conception of its liability to the plaintiff for the injury he received in the collision. The fourth point, and the alleged settlement, as testified to by the agents of the defendant, present seemingly inconsistent defenses. The former denies any liability on the part of the defendant for the injury the plaintiff received by his fall from the wagon, and the latter related principally, if not entirely, to compensation for it. It was not "the destruction of the singletree" that moved the defendant, through its agents, to prepare, and, if possible, to obtain from the plaintiff, a release of all damages accruing to him or his property by reason of injuries received in the collision. The release which the defendant sought to obtain from the plaintiff, and the testimony in relation to it, unite in showing a recognition by the former of liability to the latter for injuries to person and property. Besides the inconsistency referred to, there was ample evidence compelling the refusal of the defendant's fourth point. The plaintiff's description of his fall from the wagon, and the testimony supporting it, together with the testimony of Dr. Miller and of Dr. McCord, tended strongly to show that his condition on the 29th of November and afterwards was the result of his fall the day before.

The remaining assignments may be considered together. They refer to the defense founded upon the release, and to the instructions in regard to it. It seems that one evening in December, about three weeks after the collision, Wheeler, the defendant's paymas-

ter, and Irwin, the defendant's superintendent, with the aid of a colored man they had never seen before, found their way to the house of the plaintiff, for the purpose of obtaining a settlement of his claims, arising from the occurrence of November 28th, against their employer. They found him in bed, and, according to their version of his condition, competent to make the settlement they sought. They testified that they paid him \$40, and that he was satisfied with that sum; that Wheeler then signed the plaintiff's name to the release they had prepared; that the plaintiff made his mark to it; and that Wheeler and their colored guide signed their names to it as witnesses of the execution of it. Wheeler and Irwin testified positively that they saw the plaintiff make his mark on the release at the proper place with the pen in his right hand, and without assistance from anybody. They were the only witnesses who testified that he was mentally competent to make the settlement, or physically able to make his mark to the release without assistance. Against this testimony there is the testimony of at least six witnesses to the effect that he was mentally and physically incompetent to transact any business at, and for weeks before and after, the time it is alleged the settlement was made and the release executed. Dr. Miller visited the plaintiff frequently from the 30th of November to the 22d of January, and he was asked, "What was the condition of Julius' right arm, with respect to capacity to write or to make a mark at any time during that time?" and his answer was, "During that time he was paralyzed,—palsied; and it is beyond reason and it was impossible for that man to lift a pen, or to use it, unaided." To the question, "What as to his mental capacity about December 26th?" Dr. Miller replied: "I would say that, during that time, that he could neither apprehend nor comprehend the signing or making of a contract. In the first place, he could not with the hand; and, in the next, he could not with his mind." His testimony on these points was positively corroborated by the testimony of Dr. McCord and other witnesses. It is very clear from the evidence in the case that the court could not instruct the jury that the release in question was binding upon the plaintiff, and a bar to a recovery. The instructions on this branch of the defense were clear and fair, and the defendant has no cause to complain of them, or of the answers to its points. As we discover no error in the instructions or rulings complained of, we overrule all the assignments. Judgment affirmed.

GREEN, J. (dissenting). I am not able to agree with the majority of the court in the disposition of this case. I do not consider that there was any evidence of negligence of the defendant company, and therefore the case should have been withdrawn from the jury. The release was executed by the plain-

tiff with a full knowledge of its contents, and this was abundantly established by the testimony of the persons who were present at its execution. The plaintiff was injured while he was attempting to cross the track in front of an approaching car, and, under all the authorities, he cannot recover in such circumstances. In its most favorable aspect to the plaintiff, the occurrence was a mere accident, for which the defendant is clearly not responsible. I would reverse the judgment.

WILLIAMS and DEAN, JJ., concur in foregoing dissent.

(184 Pa. St. 208)

MURPHY et al. v. LIBERTY NAT. BANK.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

**BUILDING CONTRACTS—LIABILITY OF CONTRACTORS
—FAILURE TO COMPLETE BUILDING—DELAY
—REPLACING MATERIAL BY OWNER.**

1. Building contractors are not responsible for the cost of replacing fireproofing put in by them, which fell wholly by reason of the insufficient design of steel and iron work by the architect.

2. Where a building contract requires the building to be constructed according to plans and specifications of an architect, and the iron-work put in according to his specifications is insufficient to support the part of the building intended to be supported by it, the contractors are relieved of the absolute obligation to complete the work.

3. Building contractors are not liable for delay in completing the building, where the delay results from the falling of a portion of the work caused by the insufficient design of iron-work by the architect, whose plans and specifications the contractors are required to follow.

4. A building contract provided that either tile or improved make of concrete might be used for fireproofing, and that bids should state what material is contemplated. The contractors named tile as their material, and they used tile in which there was no defect. Arches in which it was placed fell, through no fault of the contractors, and the owner had other persons put in other material. *Held*, that the contractors could recover.

Appeal from court of common pleas, Allegheny county.

Action by James A. Murphy and another, partners doing business as Murphy & Hamilton, against the Liberty National Bank. From a judgment for plaintiffs, defendant appeals. Affirmed.

For prior report, see 38 Atl. 233.

In the mechanic's lien on which this sci. fa. was issued the appellees claimed a balance of \$16,565.89, with interest thereon from May 27, 1895. Of this sum, \$15,000 was the balance of the contract price of \$50,000, the sum of \$35,000 having been paid thereon. The remainder was for extra work done and materials furnished. The contract was referred to and attached to the lien. The statement recited the provisions of the contract that possession of the banking room should be given on or before January 1, 1895, and averred that claimants were delayed in the construction and

completion of said banking room, as well as in the completion of the whole of the first floor, by delay of other contractors, and that a written order was given by the architect extending the time for the completion of said first floor and banking room, and that claimants completed and gave possession of said banking room and first floor within the time so extended, to wit, March 30, 1895. This averment of the statement was not denied in the affidavit of defense, and, as appears from the affidavit of defense, it is alleged therein that the building was not completed until July 1, 1895, a period of 181 days. In attempting to charge \$20 per diem for delay, the appellant claims only for 122 days, which is the number of days from March 1, until July 1, 1895; and the fact that the banking room was not completed until March 30th was not denied. The contract required the whole building to be completed by March 1, 1895, and it was not pretended that the entire building was completed at that date. The statement admitted that this was not done, and averred that the reason why the building was not so completed was the delay above mentioned, and the fact that while the claimants furnished materials of the kind required, and did their work properly, yet, owing to an error in the judgment of the architect in preparing the plans and specifications, the iron beams and supports called for by the plans and specifications used to support the fireproofing were too light, and not sufficient to bear the weight of the floors, and by reason thereof portions of said floors fell in, and claimants were required by the architect to remove the remainder above the first floor; that the architect, in order to remedy the trouble caused by his error, and against the will of the claimants, made a separate contract for placing fireproofing in the building, not of the kind and character provided for in the plans and specifications, and that claimants were prevented from proceeding to complete the building during the time the fireproofing was done the second time; and they averred that they completed the building on May 27, 1895, and that, by reason of the facts recited, they were not bound by the provisions of the contract as to time of completion. Of the extra work, \$652.06 was for hauling away rubbish, cleaning out cellars, and removing arches and tile, and this extra work, it was averred, was caused by the error of the architect above mentioned. The balance, \$1,013.79, was for work done and materials furnished by the order and direction of the architect.

The affidavit of defense, in substance, alleged that the building had not been completed according to the express terms and provisions of the contract, and especially had not been finished under the direction and supervision of the architect and building committee. It further alleged that the building had not been completed, and that it was subject to divers claims for work done and materials furnished in its construction, and that liens amounting to at least \$9,000 had been filed, and that appel-

lant had reason to believe that other liens amounting to thousands of dollars would be filed. It claimed damages for 122 days' delay, at \$20 per day. It admitted that the architect had allowed extras to the amount of \$522.33, and alleged that the architect had allowed the bank additional credits over and above the \$35,000, amounting to \$587. It did not undertake to specify what extras had been allowed to the contractors, nor what credits had been allowed to the bank. No other defense whatever was set up.

The jury deducted from the plaintiffs' claim \$1,002.41, and thereby manifestly allowed the appellant \$587 of the credit allowed by the architect, and deducted from the extras claimed by appellees \$415. On the trial it was apparent that there were no liens against the building which could in any way prejudice the appellant. Every claim had been discharged by the contractors except the alleged lien of the Columbia Fireproofing Company, and the lien in favor of T. H. Brooks & Co. for \$1,923.47.

The specifications of error are as follows:

"(1) The learned court below erred in affirming the fifth point submitted by the plaintiffs, which point and the answer thereto were in the following words: 'Fifth. That if the jury find that the fireproofing as put in by the Pittsburgh Terra-Cotta Lumber Company fell, not by reason of any defect in the character of the work as done by that company, but by reason of insufficient and insecure design of steel and iron work by the architect, then plaintiffs are not responsible for the cost of replacing the same in any way. Answer. Affirmed, unless you find that it was replaced by an express agreement with the plaintiffs. Bill sealed for defendant.'

"(2) The court erred in affirming plaintiffs' sixth point, which point and the answer thereto were in the following words: 'Sixth. That if the jury find that the delay in the completion of the work beyond the time fixed in the contract was caused by the lack of skill in the architect in designing the work, then the defendant is not entitled to set off against the plaintiffs' claim any per diem compensation for delay in the work. Answer. Affirmed, and bill sealed for defendant.'

"(3) The court erred in charging the jury as follows: 'The plaintiffs have endeavored to establish to you that the falling down of these arches mainly occasioned the delay, and that was owing, not to their material nor the way they did their work, but to the fault of the architect or his want of judgment in preparing the plans and specifications; that the beams were placed fourteen feet and four inches apart; that the iron structure was not fit for the purpose; and that the plans and specifications showing how it was to be done were such that it would necessarily fall if the work was done as shown and directed by those plans and specifications. Examine that point first. Is that so? And in determining that as well as all other questions in the case, you

will remember that the burden of proof is upon the plaintiffs. They allege that it was not the fault of the Pittsburgh Terra-Cotta Lumber Company, which put these arches in, at all, either in material or workmanship, but that it was due to faulty plans and specifications, which they tried to carry out. If the plaintiffs have satisfied you that the weight and strength of the evidence is on their side, then they, Murphy & Hamilton, would not be responsible for that; and then, if that caused the delay, they should not be deprived of any of the amount of their claim on that account.'

"(4) The court erred in charging the jury as follows: 'But, on the other hand, if, after taking everything into consideration, you are satisfied, by the weight of the evidence, that it was not the fault of the work done there by the plaintiffs, but that it was the fault of the plans and specifications made by the architect, then the plaintiffs would not be held liable at all on that account. If you come to the conclusion that that caused it, then the plaintiffs would not be required to allow anything for the delay in completing the building, over the time specified in the contract.'

"(5) The court erred in charging the jury as follows: 'The next question is the extras. Part of them, amounting to six hundred and some dollars, the proof tends to show, was caused by the falling of these arches, in the work they had to do in clearing up and what was described to you in the evidence. If the fault was the architect's, or his mistake in judgment, then those items should be allowed to the plaintiffs, because it would not then be their fault.'

"(6) The court erred in charging the jury as follows: 'So, if you find that these extras were occasioned by the mistake of the architect in furnishing faulty plans, then they should be allowed.'

"(7) The court erred in charging the jury as follows: 'If the arches fell by reason of mistake of judgment in the plans and specifications of the architect, then, if the plaintiffs, Murphy & Hamilton, objected to his going on and getting somebody else to do it, the architect, under the owner, could not go on and do it at the expense of the contractors. You understand the court: If the fault of the falling of the arches was because of a mistake of judgment of the architect in not giving proper plans and specifications, then the owners, without the consent of, and particularly against the protest of, the plaintiffs, could not go on and put somebody else in to do the work, and charge the contractors with it, for the simple reason that they should have a right to say what should be done.'

"(8) The court erred in charging the jury as follows: 'On the other hand, if you find that the falling of the arches was occasioned by a mistake in the plans and specifications of the architect, then the plaintiffs, not being responsible for it, because it would not then be their fault, would not, if the delay was caused by that, have to pay anything because the

building was not delivered by the specified time.'

"(9) The court erred in charging the jury as follows: 'When you get that established to your satisfaction by the weight of the evidence, remembering that the burden of proof is upon the plaintiffs, then, if the falling of these arches was occasioned by the blunder of the architect, this six hundred dollars extra claim that was caused by reason of that, the plaintiffs would be entitled to.'

"(10) The court erred in charging the jury as follows: 'On the other hand, if it was the fault of the architect's plans and specifications, then he could not put somebody else in to do the work without an express agreement with the contractors, Murphy & Hamilton.'

"(11) The court erred in declining to affirm the second point submitted by defendant, which point and its answer are as follows: 'Second. This suit being based upon a mechanic's lien, and it being admitted that the fireproofing in defendant's building was not furnished or put in by plaintiffs, or by any one under contract with plaintiffs, plaintiffs cannot recover the balance here claimed to the extent of the cost of the materials furnished and work done by the Columbia Fireproofing Company, in this action. Answer. Refused. You can find the facts and apply them to the law as I have given them to you in my charge, and bill sealed for defendant.'

"(12) The court erred in refusing defendant's sixth point, which point and the answer thereto are in the following words: 'Sixth. There can be no recovery for the balance of the extras claimed, so far as in excess of \$522.38, allowed by the architect, since there is no evidence that there was any written order from the architect for the same, as provided by the seventh article of the contract, and since there is no evidence that the provisions of said article were waived in this regard by defendant. Answer. Refused, as it is put, in the whole, and the bill sealed for defendant.'

"(13) The court erred in overruling defendant's objection to the following question asked by plaintiffs' counsel of James A. Murphy, one of the plaintiffs: 'Q. Now, Mr. Murphy, what was the cost of removing the arches? (Objected to for the reason that it is not proposed to show that any application was made to the architect, nor that any claim for this item of extra or additional work was allowed by the architect, in accordance with the provision of the contract. Article 7 of the contract, which provides—) By the Court: I suppose it is the usual provision? By Mr. Wilson: Yes, sir. By Mr. Ferguson: This claim differs from the usual claim. We propose to show that the actual cost of removing these arches, as they had been put in by the Pittsburgh Terra-Cotta Lumber Company, was four hundred and some dollars, and that there were some other expenses in connection with it. And we contend that we are not bound, under the facts in this case, to consult

the architect in relation to it at all; that he has unskillfully designed the building; that we had done our work properly,—so properly that our estimates up to that time were all approved, and the work all passed; and that by reason of his lack of skill the work that we did under the contract, and practically completed under the contract, became worthless, and we were required to remove it. We contend that under that state of facts we were not bound to go to him and get him to give us an allowance for the work. And here is an architect saying, at that stage of the case, that he wouldn't admit anything, because it would hurt his reputation. That is the difference between the usual case and this case. Objected to as incompetent—First, because, generally, they could not recover a claim of this sort in an action by proceeding *scire facias* upon a mechanic's lien; and, second, because the offer made is not proposed to be followed by any proof tending to show that they made any application to the architect for an allowance of the claim made for extra work, or that the architect made an allowance in accordance with the seventh article of the contract made between the parties. By the Court: The objection is overruled, and bill sealed for defendant. By Mr. Ferguson: Now, Mr. Murphy, just go on and tell us what it cost to remove that terra cotta and concrete. A. It was about \$400.'

"(14) The court erred in overruling defendant's objection to the following question asked by plaintiffs' counsel of James A. Murphy, one of the plaintiffs: 'Q. What did it cost you to remove the stuff out of the building? (Objected to for the same two reasons that have just been stated.) By the Court: The objection is overruled, and bill sealed for defendant. By the Witness: \$250.'

"(15) The court erred in overruling defendant's objection to the following question asked by plaintiffs' counsel of James A. Murphy, one of the plaintiffs: 'Q. Now, was there any additional or extra plastering required by reason of the changes in the fireproofing? A. Yes, sir. Q. What was that? (Objected to because it was not proposed to show that they applied to the architect for an allowance, or that the architect made any allowance, for the item claimed, in accordance with the seventh article of the agreement.) By the Court: The objection is overruled, and bill sealed for defendant. By Mr. Ferguson: Give us the items, Mr. Murphy. A. Two hundred and ninety-five yards, extra height of walls, \$81.12; that is, increased height of the stories after the fireproofing was put in, \$81.12.'

"(16) The court erred in overruling defendant's objection to the following question asked by plaintiffs' counsel of James A. Murphy, one of the plaintiffs: 'Q. What else? A. Five hundred and nine yards expanded metal ceiling; that was when the other fireproofing was put in, in place of using the tile that our specifications called for, they

used wire lath, which makes it more expensive to the plasterer, and he charges \$83.98 for that. (Objected to for the same reason.) By the Court: The objection is overruled, and bill sealed for defendant. By the Witness: There was 378 feet of cove, \$83.16.'

"(17) The court erred in overruling defendant's objection to the following question asked by plaintiffs' counsel of James A. Murphy, one of the plaintiffs: 'Q. There is an item of twenty-one and a half hours, cutting holes for heaters. As to that, the architect in the report says it is included in the original contract, and is not correct. (Objected to because there is no certificate from the architect.) By the Court: The objection is overruled, and bill sealed for defendant. By Mr. Ferguson: What was that item? A. That came from the man that had the contract for the stonework, in cutting the holes through stonework for the heater pipes.'

"(18) The court erred in overruling defendant's objection to the following question, asked by plaintiffs' counsel of James A. Murphy, one of the plaintiffs: 'Q. Now, there is an item of brickwork on division wall between the directors' room and banking room, not shown on the plans,—3,000 brick and cement, \$52.50,—which the architect says is included in the original contract and is not correct. (Objected to because there is no certificate from the architect, and because, according to the question, the architect, upon the same being submitted to him, refused to allow it.) By the Court: The objection is overruled, and bill sealed for defendant. By the Witness: There was an order from the architect for the iron that goes in there. There is an order there some place for the beams that form the lintel over the openings, and then the brick wall went on up to the ceiling. Between the banking room and the directors' room that wasn't intended to run to the ceiling, and there is a little order there that Mr. Osterling handed to me in the street.'

"(19) The court erred in overruling defendant's objection to the following question, asked by plaintiffs' counsel of James A. Murphy, one of the plaintiffs: 'Q. There is an item here for painting or sanding cornice, \$55. That was done by Stoughton & Stulen, was it? A. Yes, sir. (Objected to because there was no certificate from the architect.) By the Court: The objection is overruled, and bill sealed for defendant.'

"(20) The court erred in charging the jury as follows: 'As to the balance of the extras, over the amount admitted here (five hundred and some dollars), any items that the architect ordered the subcontractors to do without consulting the plaintiffs, and that were done, should be allowed to the plaintiffs, but no others.'

"(21) The court erred in affirming the first point submitted by plaintiffs, which point and the answer thereto are in the following words: 'First. That, under the contract between plaintiffs and the defendant, the pro-

vision in regard to the alterations of the work, either by additional or omitted work, requiring, in the event of the valuation of the architect not being agreed to, the contractor shall proceed upon the written order of the architect, and the value of the work added or omitted shall be referred to arbitrators, may be waived by the course of dealing between the parties, and the fact, if the jury find it to be a fact, that the architect, without consulting with plaintiffs, saw fit to order of the subcontractors additional work, or the omission of work, is evidence of such waiver. Answer. Affirmed, and bill sealed for defendant.'

Geo. C. Wilson, Wm. D. Evans, and M. W. Acheson, Jr., for appellant. J. S. & E. G. Ferguson, for appellees.

GREEN, J. There was a large amount of very intelligent and important testimony on the trial to the effect that the cause of the falling of the arches was the weakness and insufficiency of the ironwork to sustain the weight of the arches. As this was one of the questions submitted to the jury, and the verdict was in favor of the plaintiffs, it must be presumed that they found the ironwork to be insufficient, and that this was the cause of the falling of the arches. A careful reading of the testimony on both sides convinces us that the finding of the verdict on that subject was correct. The case is practically argued on the part of the defendant upon the basis that the verdict is conclusive in relation to this matter, and therefore the rule is invoked that the contract made by the plaintiffs is absolute, and binds them to complete the building in accordance with the specifications, in any event, and notwithstanding any occurrences or inconveniences or obstructions which may have arisen, unexpectedly or otherwise, to interfere with the work. Thus, the total collapse of the building from defects in the foundation, or from violent tempest, or its destruction by fire while in the course of construction, will not relieve the contractor from his obligation to finish the building, and deliver it in completed condition to the owner, unless such contingencies have been specially excepted by the terms of the contract. There is no doubt that the rule is well established, and is the settled law both in England and in this country, including our own state. It is well expressed in the case of *Trustees v. Bennett*, 27 N. J. Law, 513, thus: "No rule of law is more firmly established by a long train of decisions than this: that, where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. * * * If, before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder; he must rebuild. The thing may be done, and he has

contracted to do it. No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundation in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible." The rule is not strictly and in terms applicable to this case, because the building was completed and was accepted by the owner; and it was completed by the present plaintiffs, the contractors. But a portion of the work was done by another contractor; that is, the filling in of the arches between the beams where the arches had fallen out, or been removed for fear of their falling, was done by another subcontractor than the ones who had put in the first fireproofing. This was done at the instance of the architect, and the question is, so far as this matter is concerned, who is responsible for that work, and are the plaintiffs chargeable with a deduction on that account? There is perhaps another reason why the rule invoked for the defendant is inapplicable. It has an exception if the work to be done is absolutely impossible. Upon the theory that the arches fell out because of the weakness and insufficiency of the ironwork to support them, it is manifest that if the arches were replaced with the same material, and with the same ironwork, they would simply fall out again, and would continue doing this as often as the work was repeated. Hence, if the plans and specifications were strictly followed, as it is contended they should be, it would simply result that the building never could be finished in accordance with them, and the case would be within the exception of impossibility. There is, however, still another reason why the rule invoked by the defendant does not apply. As soon as the plaintiffs discovered that the beams were being distorted out of position by the pressure of the arches, they proceeded to comply with another provision of the contract, which is in these words: "Whenever the contractor or his men know or think that the drawings or specifications, or both, for any part of the work, will not produce secure construction, it is his duty to then stop the work, and to instantly notify the architect of this in writing; and the part of the work so found fault with is not thereafter to be executed until the contractor has received the order in writing from the architect, over his own signature, as to what is to be done and when to proceed." On January 4, 1895, the plaintiffs sent letters to both the building committee of the bank and the architect, notifying them of the entire insufficiency of the ironwork to support the arches, and inclosing in the letter to the building committee the report of engineer Diescher to that effect, and letters from the Pittsburgh Terra-Cotta Lumber Company, who were putting in the fireproofing, of the same purport. To this letter on the next day the architect, Osterling, made reply, saying that they (meaning, ap-

parently, the bank and himself) would have the fireproofing done by others. Mr. Murphy's oral testimony confirms this, and he said the bank then put in a light flooring of concrete, and no terra cotta whatever, and employed other persons to do it. Under the section of the contract above quoted, the contractors stopped the work, which was exactly what the contract required. They never received any notice or order in writing from the architect to proceed with the work, but did receive a notice that the work would be done by others, and that is what was done. This disposition of the matter, of course, takes the case out of the operation of the rule contended for by the defendant, and the plaintiffs were clearly not guilty of any infraction of the contract in respect of their action.

The case is thus narrowed down to the inquiry whether the falling of the arches was the fault of the contractors. They claimed it was not because the ironwork from which it resulted was done in precise accordance with the plans and specifications, and as these were made by the architect, and the plaintiffs were, by the terms of the contract, to follow them explicitly, they were not responsible for the consequences of his mistake. Substantially this was the issue that was submitted to the jury, and was contested before them. The architect, of course, testified that the ironwork was sufficient, according to his plans and specifications; but the evidence to the contrary, by disinterested and very competent engineers and experts, was very strong, and the great weight of the testimony was decidedly against him. It was much strengthened by the testimony of the engineer of the firm of T. H. Brooks & Co., who made the ironwork, who said that he told Osterling, the architect, while the work was going on, that the iron was not near strong enough, and that he ordered his men to leave the building in consequence of the weakness of the iron supports. It is not necessary to review the testimony on this subject. There was a great abundance of it, and the verdict of the jury was fully warranted by it. In view of these considerations, the rule of absolute obligation on the part of the contractors is inapplicable to the case, and, of course, cannot control its determination. These views dispose of the first 10 assignments of error, and they are dismissed. It also follows that the delay in the completion of the building was not the fault of the contractors, and they did not incur the penalty of delay beyond the stipulated time of completion.

The eleventh assignment is not sustained. The contract provided that either tile or improved make of concrete construction might be used, and that bids should state what material was contemplated. The contractors having named tile as their material, and their bid having been accepted, and there being no defect in the tile used, this was a compliance with the contract; and when they actually

furnished perfectly good tiling, and placed it in the arches, they complied with their contract in that regard. If it fell through no fault of theirs, and the architect and the bank selected a new and different material, and put it in themselves, in place of what had been already furnished by the contractors, the contractors were not deprived of their right of lien because their material was not in the building at its completion. Its absence was no fault of theirs, and the defendant certainly did not have an arbitrary right to remove any proper material actually put in place, and then claim an exemption from any lien which embraced the displaced material. The authorities cited for the defendant in this connection are the undoubted law, but they have no application to such facts as these.

The remaining assignments relate to the claim for extras. There was an amount of \$522.38 of extras, which was admitted to be due. A portion of the claim was for work done in removing the material that had fallen from the arches and the remainder of the material that had not fallen. This, it is claimed, was done by specific orders of the architect to the subcontractors without consulting with the plaintiffs. There were a few other items, but as to the whole the evidence raised a question of waiver of the provision of the contract which required that no claims for extras should be made, "unless the same shall be done in pursuance of a written order from the architect." There was evidence enough on that subject to justify the court in leaving the question to the jury, and we cannot say there was error in so doing. There was a large diminution by the verdict of the amount of the plaintiffs' claim for extras, and it is not at all clear that any injustice was done to the appellant by the verdict of the jury in regard to these matters. We do not think that error has been shown in any of the assignments after the eleventh, and they are therefore all dismissed. Judgment affirmed.

(70 Conn. 265)

STATE v. HANLEY.

(Supreme Court of Errors of Connecticut. Jan. 21, 1898.)

CRIMINAL LAW—TRIAL—INSTRUCTIONS—HARMLESS ERROR—EVIDENCE—ADMISSIBILITY—EMBEZZLEMENT—DESCRIPTION OF PROPERTY—VARIANCE—JOINT OWNERSHIP.

1. An agent, who assigned an order due his principal, before maturity, in payment of his own debt, is not guilty of embezzling "money," though the assignee collected the amount of the order when it matured.

2. A charge that, if defendant agent assigned an order due his principal, before maturity, in payment of his own debt, he is guilty of embezzling money, was erroneous, though there was evidence that the assignment was not bona fide, and that defendant collected the order.

3. Where the principal testified that defendant agreed to collect the order, and pay him a part of it and his creditor another part, it was not error to permit the creditor to testify that,

after collecting the order, defendant agreed to pay him the principal's debt.

Andrews, O. J., and Hall, J., dissenting.

Appeal from superior court, Litchfield county; Ralph Wheeler, Judge.

Information for embezzlement against Matthew C. Hanley. After verdict of guilty, defendant appealed, claiming errors in admission of evidence and in the charge of the court. Error.

The information upon which the defendant was convicted was as follows:

"And said attorney further informs and gives this honorable court to understand that on the 16th day of December, 1895, at Thomaston aforesaid, the said Matthew C. Hanley was the agent of said Henry A. Episcopo to collect and receive from the Abbott Brothers Company, of Waterbury, Connecticut, the sum of two hundred and thirty dollars, which sum was then due and belonging to said Henry A. Episcopo, and to pay from and out of said sum, so collected and received as agent aforesaid, the sum of one hundred and sixty-seven dollars, then and there agreed to be due said Hanley from said Episcopo, and to turn over and deliver to the said Henry A. Episcopo, and for and in his behalf, the balance of said sum, viz. sixty-three dollars; and as such agent the said Matthew C. Hanley did then and there receive and take into his possession said sum of sixty-three dollars, and then and there, with force and arms, did fraudulently, feloniously, with intent to defraud the said Henry A. Episcopo, take, purloin, secrete, and appropriate to his own use said sum of sixty-three dollars,—against the peace and contrary to the form of the statute in such case provided."

The finding of facts was as follows:

"On the trial of the above action the state claimed to have proved: (1) That for two or three years prior to December 6, 1895, the accused, Matthew C. Hanley, carried on the liquor business in Thomaston. (2) That during this time one Henry A. Episcopo was the interpreter and purchasing agent for certain Italian laborers then at work in said Thomaston, and as such purchased from the said Matthew C. Hanley intoxicating liquors and cigars. (3) That on December 6, 1895, said Episcopo was indebted for goods purchased from said Hanley in the sum of \$167, as settled and agreed upon by said Episcopo and Hanley. (4) That on December 6, 1895, the Abbott Bros. Company, of Waterbury, Conn., were indebted to said Episcopo in the sum of \$230. (5) That on December 6, 1895, the said Episcopo delivered to the said Hanley a written order on said Abbott Bros. Company for the sum of \$230, which order had been duly accepted by said Abbott Bros. Company, to be paid on the 20th of December, 1895. The said Episcopo delivered said order to said Hanley upon agreement that the said Hanley

should collect said sum of \$230, when due and payable, and pay therefrom his own claim of \$167 against said Episcopo, and should pay the remaining \$63, belonging to said Episcopo, as follows, viz. the sum of \$11 or \$12 to one Smith, of Thomaston, and the sum of \$15 to one Welton, of said Thomaston, to whom said Episcopo was severally indebted in said amounts, and to remit the balance of said sum of \$63 to said Episcopo. (6) That said Hanley assigned, transferred, and delivered said order on the Abbott Bros. Company to one Robert Lowe, of Waterbury, to whom it was paid by said company. It appeared from the testimony of said Hanley (and no other evidence was offered on this subject) that said order was assigned and transferred to said Lowe by said Hanley to pay and satisfy a bill that Hanley owed said Lowe. (See pages 86 and 87 of evidence.) (7) In corroboration of the statement of said Episcopo, the state offered the testimony of one Smith, who was the same Smith alluded to in paragraph 5 as the creditor of Episcopo, that in the latter part of December, 1895, Hanley told said Smith that he would pay his bill against said Episcopo. To this evidence the said Hanley objected, on the ground that it was immaterial, improper, irrelevant, and that the statement was made after the offense was claimed to have been committed. The court overruled the objection, admitted the testimony, and the said Hanley excepted. (8) The said Hanley admitted that he received said order on Abbott Bros. Company, but testified that on the 6th or 7th day of December, 1895, he paid to said Episcopo the sum of \$65, as and for the difference between the amount of said order and Episcopo's indebtedness to him. (9) The said Hanley made the following requests to the court to charge the jury, to wit: First. That, even if it was proved that the defendant delivered the order on the Abbott Company to the attorney, Lowe, and Lowe collected the same, and appropriated the proceeds thereof to the payment of the defendant's debts with the consent of the defendant, this would not constitute embezzlement under our statute. Second. That, as part of this money for which this order was given belonged to the defendant, and as this part had not been separated at any time from the part which belonged to Episcopo, under such circumstances no part of the money in question was the property of another, within the meaning of our statute against embezzlement. The court did not charge the jury as requested, but did charge them as follows: 'And the attorney says that, from the evidence, the accused undoubtedly was the agent—special agent—of Episcopo for the collection of that money, and for the disposal of it in the manner agreed upon between them. And the state goes further, and says that, being thus the agent of his principal, he indorsed over this

order on Abbott Bros. to a Mr. Lowe,—if that was the name,—to pay Hanley's indebtedness to Lowe, and that the full amount of money for which the order was drawn upon Abbott Bros. was paid by Abbott Bros. to Mr. Lowe. Now, I have to say to you that, if the accused did receive this order for the amount named, and if by their agreement he was to dispose of it as Mr. Episcopo says, and if, in the transaction of this business, instead of collecting the money and disposing of it as agreed, he indorsed that order over to his own creditor, and thus paid his own debts with the money, that would be such an appropriation as would be contemplated by this statute. If he thus appropriated, while agent, the money of his principal, with the intent to defraud that principal, then the full offense was committed. Of course, to be guilty in this transaction, you must find beyond a reasonable doubt that there was, not only an agency and the appropriation of the money, but that the accused intended at the time of the appropriation to defraud his principal; and these are the questions presented to you upon the evidence.' To the refusal to charge as requested, and to the charge as actually delivered by the court, the defendant duly excepted. The jury returned a verdict of guilty, which was accepted by the court."

The defendant appealed to this court.

John O'Neill, for appellant. Donald T. Warner, State's Atty., and James Huntington, for the State

HAMERSLEY, J. (after stating the facts). Theft, as distinguished from embezzlement, is taking property of another from the possession of the owner with intent to defraud. Embezzlement, as distinguished from theft, is taking property of another in the possession of the accused with intent to defraud. The crimes are essentially the same, but most unfortunately are, for the purposes of prosecution, entirely distinct. The one demands, as an essential element, a trespass,—a breach of technical possession; the other cannot be committed unless the element of trespass or breach of technical possession is absent. The former is a crime at common law; the latter is a statutory offense. In this state embezzlement was not made a crime until 1829. It was not mentioned in the Digest of Judge Swift, because it was not a crime at the time he wrote. In the editions published since his death, it is not mentioned, except in a single brief form. We have never had occasion to discuss the statutes which, since 1829, have created the different offenses classed as embezzlement. There are only three reported cases under the statutes, and these involve a very slight consideration of the nature of the crime. The offenses, however, are governed by the rules common to all statutory offenses, and these rules are well settled.

The case before us is a prosecution under section 1580 of the General Statutes, which provides that "any agent of any private individual, who shall take, purloin, secrete, or in any way appropriate to his own use, or to the use of others, any of the goods, moneys, or choses in action belonging to such individual, with intent to defraud another," shall be imprisoned. The conditions of the offense under this provision, as charged in the complaint, are: An agency, within the meaning of the statute; specific property the subject of the crime,—i. e., things that are, within the meaning of the statute, either goods, moneys, or choses in action; receipt of the property specified, by an agent, on behalf of the person who is the principal; ownership by the principal of the property so received by the agent,—an ownership, however, unaccompanied by the technical possession of the principal essential to the crime of theft; and an appropriation of the property by the agent with intent to defraud. No claim is made that these elements of the crime are not properly alleged. The property which is the subject of the crime is described as "the sum of sixty-three dollars." This is equivalent to "sixty-three dollars in money," or, "certain money of the amount of sixty-three dollars," or, as stated in the form in Swift, "ten eagles." The complaint does not charge the embezzlement of any goods, nor of any chose in action. Unless it charges the embezzlement of "moneys," no crime is charged. The complaint, therefore, alleges that the accused, Hanley, being the agent for that purpose of one Episcopo, did receive and take into his possession, for said Episcopo, certain moneys, of the amount of sixty-three dollars, and, with intent to defraud said Episcopo, did appropriate to his own use said moneys, belonging to said Episcopo. It appears, from the record, that the trial disclosed, as conceded, the following facts: On December 6th, the firm of Abbott Bros. owed Episcopo \$230, and Episcopo owed Hanley \$167. Episcopo drew an order on Abbott Bros. for \$230, in favor of Hanley, which order was accepted by Abbott Bros., "payable December 18th," and, so accepted, was received by Episcopo in payment of the debt due him. On December 6th or 7th Episcopo delivered the order to Hanley. On December 18th, one Lowe presented the order to Abbott Bros., who paid the amount (\$230) to said Lowe. The state claimed, also, to have proved that at the time of the delivery of the order to Hanley he agreed, as agent of Episcopo, to collect the order when it became due, to pay from the amount collected his own claim of \$167, to pay \$11 or \$12 to one Smith, and \$15 to one Welton (to whom said Episcopo was severally indebted in said amounts), and to remit the balance to said Episcopo; and that Hanley assigned and delivered said order to Lowe, to whom it was paid. The defendant claimed to have proved that no agreement of agency was made by

him, that shortly after the delivery of the order he paid Episcopo in cash the difference between the amount of the order and the amount of Episcopo's debt to him, and that he transferred and delivered the order to Lowe in payment of a bill he owed Lowe.

The controlling fact to be found from conflicting evidence was the fact of agency. As to this the testimony was in direct conflict, and undoubtedly the attention of the jury was centered on this contested fact. But there was in the case the further fact, equally essential to guilt, that Hanley, in pursuance of the agency, did, as charged in the information, "receive and take into his possession," and fraudulently appropriate to his own use, money belonging to Episcopo. This fact was not directly the subject of conflicting testimony. It had to be inferred from other facts, and an accurate statement by the court of the law applicable to the facts was essential to its determination by the jury. It is in the statement of this law that the court below has erred. The accused requested the court to charge "that, even if it was proved that the defendant delivered the order on the Abbott Company to the attorney, Lowe, and Lowe collected the same, and appropriated the proceeds thereof to the payment of the defendant's debts, with the consent of the defendant, this would not constitute embezzlement under our statute." The request does not accurately express the essential point of law the accused was entitled to have stated. For this reason, perhaps, the appeal does not specify as error the refusal of the court to charge as requested. It does, however, assign as error, in the fifth reason of appeal, the charge as given. The court tells the jury, in stating to them the law applicable to the facts as claimed by the parties, that, if the accused received the order upon an agreement of agency, as claimed by the state, and if, "instead of collecting the money, and disposing of it as agreed, he indorsed that order over to his own creditor, and thus paid his own debts with the money, that would be such an appropriation as would be contemplated by this statute,"—meaning, of course, that it would be an appropriation of moneys received by Hanley and belonging to Episcopo. The error here is plain. Whether the sale of that order to a bona fide purchaser, under the circumstances detailed, would or would not be the embezzlement of a chose in action within the meaning of the statute, is not the question. The only question is, would it be the embezzlement of money, the property of Episcopo? Until that order became due, Episcopo owned no money in the hands of Abbott Bros. or of Hanley. There was no money which could be the subject of the crime. Abbott Bros. might pay the order with money, and, if that money came into the possession of Hanley, he might embezzle it. But he could not embezzle it before payment and possession, because the existence of money as the subject of the

crime, and its possession by the agent, are essential elements of the crime as alleged.

If the charge of the court is correct, then the crime of embezzling the money of Episcopo was complete when Hanley transferred the order to Lowe in satisfaction of an existing debt. This cannot be true unless the charge of embezzling "moneys" may be sustained by proving the embezzlement of goods or of choses in action. We deem it clear that this section of the statute defines the subjects of embezzlement substantially as the subjects of theft are defined. Whatever difference there may be between theft and embezzlement in following the identity of articles specified in the indictment, the kind of property which is the subject of the crime charged must in both cases be proved as alleged. If the indorsement to Lowe was a mere cover, so that Lowe became, not the bona fide owner of the chose in action, but only the agent of Hanley to receive the money for him, and Hanley directed the misappropriation of the money so received, then the crime as alleged was complete. It may be possible that the testimony might have justified the jury in finding that Hanley's claim of an assignment or sale to Lowe, in satisfaction of a debt was not true, and that Hanley collected the order, and received the money, and appropriated it to his own use, after it came into his possession. But the court was bound (whether requested to do so or not) to properly submit this question to the jury, and could not take it from them by an instruction that Hanley's sale of the order before it was due, in satisfaction of a debt, was conclusive proof of the allegation that he received into his possession money belonging to Episcopo, and appropriated that money to his own use. The apparent cause of the error lies in the assumption that, before the accepted order was due, Episcopo owned "moneys," within the meaning of the statute, in the hands of Abbott Bros.; that these moneys, while in the hands of Abbott Bros., were in the possession of the agent, Hanley, and were the subject of embezzlement by him as "moneys" under the statute. Possibly the error arose from confounding the relation of agency, under section 1580, with the relation of a trustee of an express trust to his trust fund, under section 1579. However that may be, the error was a material one. It might have been, and probably was, decisive of the question of guilt or innocence of the crime charged.

The other errors assigned furnish no ground for a new trial. Those specified in the first three reasons of appeal relate to the refusal of the court to charge in respect to matters which do not appear to have been pertinent to the complaint and proof. The ruling on evidence specified in the fourth reason was unobjectionable. The sixth reason is too general to be considered. The motion for a new trial for a verdict against evidence is denied. There is error. The judgment

of the superior court is set aside, and the cause remanded for further proceedings according to law.

TORRANCE and BALDWIN, JJ., concur.

ANDREWS, C. J., and HALL, J., dissent.

(70 Conn. 233)

POST v. JACKSON et al.

(Supreme Court of Errors of Connecticut. Jan. 21, 1898.)

WILLS—DESIGNATION OF BENEFICIARIES.

A codicil by which a testator changed the objects of his bounty with respect to the residue of his estate, after the revocation, read as follows: "And I give, devise, and bequeath to my nephews and nieces (they being my lawful heirs) all the rest and residue and remainder of my property, real and personal." *Held*, that there is no ambiguity in the language, so as to admit of parol evidence, and the nephews and nieces took under a per capita distribution.

Case reserved from superior court, Middlesex county; John M. Thayer, Judge.

Application by Ezra E. Post, executor, against Alfred Jackson and others, for the construction of a will. Reservation of questions, by consent of parties, to the supreme court of errors.

Horace Nettleton, late of the town of Clinton, made his will on the 14th day of January, 1892, by which he made certain bequests and legacies. On the 2d day of December, 1893, he made a codicil, by which he changed those legacies. On the 1st day of April, 1896, he made another codicil, as follows: "Whereas, I, Horace Nettleton, of Clinton, Connecticut, have by my last will and testament in writing, duly executed, bearing date January 14th, 1892, and by a codicil dated December 2d, 1893, given and bequeathed to William J. Kelsey \$500, Eugene H. Kelsey \$500, Chauncey N. Kelsey \$500, the Methodist Episcopal Church \$1,000, and the Missionary Society of the Methodist Church the residue: Now, I, the said Horace Nettleton, being desirous of altering my said will in respect to the said legacies, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as part thereof; and I do hereby revoke all the said legacies, sections fourth, fifth, and sixth of my said will, and the whole of said codicil dated December 2d, 1893. And I give, devise, and bequeath to my nephews and nieces (they being my lawful heirs) all the rest and residue and remainder of my property, real and personal; and I do ratify and confirm my said will in everything except where the same is hereby revoked and altered as aforesaid. In witness whereof," etc. It is alleged in the complaint that the nephews and nieces of the testator consist of the following persons, viz: Josiah A. Nettleton, only child of Augustus Nettleton, brother of the testator; Annie Nettleton and Ashford Nettleton, only children of Linus Nettleton,

a brother of the testator; Alfred Jackson, Evelyn Jackson, and Adeline Hart, only children of Mary Jackson, a sister of the testator; John S. Nettleton, Warren O. Nettleton, Wilson F. Nettleton, and Anna A. Reynolds, only children of Danforth Nettleton; and Susan McNamar, only daughter of Alfred Nettleton, a brother of the testator; that some of said nephews and nieces claim that the said rest and residue so devised and bequeathed by said codicil should be distributed to them per stirpes; the others, that it should be distributed to them per capita. All these nephews and nieces were made parties defendant. The complaint prayed for an adjudication of these questions. Alfred Jackson and those of the defendants who claim that there should be a per capita distribution made answer in this way: (1) The defendants admit the allegations of the complaint. (2) The sister and the several brothers of the deceased, Horace Nettleton, mentioned in the complaint, died at the dates and ages as follows: Mary Jackson died December, 1854, aged 62 years; Danforth Nettleton died April, 1882, aged 80 years; Linus Nettleton died February, 1869, aged 79 years; Augustus Nettleton died July, 1882, aged 87 years; Alfred Nettleton died May, 1883, aged 79 years. Horace Nettleton, the testator, was the youngest of his sister and brothers. He died September 6, 1896, aged 86 years. He, as well as his brothers and sister, was born at the family home, in Killingworth, Conn. All his life he had lived either in Killingworth, Mystic, Clinton, or Guilford, Conn. Clinton was his legal residence at the time of his death, and had been so for about 20 years. He was residing there when the original will was made. Katherine M. Kelsey, named in the original will, was the daughter of his second wife by a former husband. The home of the family was in the house adjoining that of Horace Nettleton in Clinton. His second wife died December 31, 1891. At the time of making the second codicil (April 1, 1896), Horace Nettleton was residing, and had been for two or three years, continuously, with his niece Anna A. Reynolds, at her home in Guilford, and he continued to reside with his said niece until the time of his said death. During the whole of said residence of said Horace Nettleton with his niece Anna A. Reynolds at her home in Guilford, Wilson F. Nettleton, of New Haven, a nephew of said Horace Nettleton, a brother of the said Anna A. Reynolds, and a widower without children, was frequently at his sister's house, in Guilford; and it was understood, before the making of the second codicil, between himself and the said Horace Nettleton, that the said Wilson F. Nettleton might be called upon at any time to help take care of his uncle Horace; and from time to time, during the residence of the said Horace at the home of Anna A. Reynolds, in Guilford, Wilson F. Nettleton did assist

on several occasions in taking care of him, and helped to take care of him at the time of his death. The children of Horace Nettleton had both died some years before the making of the original will, leaving no issue. The various nephews and nieces of Horace Nettleton named in the complaint were living, at the date of the original will, and ever since, at the places named in the complaint, and had been living at such places for many years prior to the date of the original will. These defendants claim an order and decree settling the construction of said will, to the effect that said fund remaining for distribution be divided among the nephews and nieces of the said Horace Nettleton per capita. Josiah A. Nettleton, and those of the defendants who claimed that there should be a per stirpes distribution, answered in this way: "(1) The defendants herein named admit the allegations of the complaint. (2) They also admit so much of paragraph second of the answer of Alfred Jackson and others as alleges that the brothers and sister of the testator died prior to his death, and so much thereof as alleges that his nephews and nieces are his only heirs. (3) The estate left by the testator to be distributed to his nephews and nieces under said will consists of \$18,700 in money." These defendants claim an adjudication and decree settling the construction of said will, and an order directing that the fund remaining for distribution be divided among the nephews and nieces of said Horace Nettleton per stirpes. These defendants also demurred to all of the second paragraph in the answer of Alfred Jackson et al., excepting what they had admitted, for the following reasons: First. For the reason that parol and extrinsic evidence is not pertinent, competent, or admissible in the construction or interpretation of wills; that the language used by the testator is clear, and free from equivocation, ambiguity, and uncertainty. Second. Because the allegations in said paragraph furnish no guide, information, or aid in the construction of said will.

Washington F. Willcox, for Josiah A. Nettleton and others. John W. Alling, for defendants.

ANDREWS, C. J. The demurrer should have been sustained. There is no ambiguity in the language of the codicil. *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106; *Woodruff v. Migeon*, 46 Conn. 236; *Patch v. White*, 117 U. S. 210, 224, 6 Sup. Ct. 617, 710. The language we are asked to construe is: "I give, devise, and bequeath to my nephews and nieces (they being my lawful heirs) all the rest and residue and remainder of my property, real and personal." If the language had been, "I give, devise, and bequeath to my nephews and nieces the rest and residue and remainder of my estate," etc., there would have been a complete disposition of his estate,

and there would have been no thought other than that the testator gave his estate to his nephews and nieces as a class, and that they each took in equal share; that is, that there should be a per capita distribution of the estate among them. If the language had been, "I give, devise, and bequeath to my lawful heirs all the rest, residue, and remainder of my estate," although (as we know from the facts admitted in the answer) the estate would go to the same persons as in the former supposition, it would go to them in their character as heirs, and not in their character as nephews and nieces, and then there would be a per stirpes distribution among them. The attribute of being the nephews and nieces of the testator, and the attribute of being his lawful heirs, applies to the same persons. But a devise to them in the former character would produce a different result from a devise to them in the latter one. Indeed, a devise to them in the latter character would be inoperative. The statute of distribution would control. If property is left to the testator's heirs in the same manner and proportion in which they would take were there no will, the rule of law is that they take as heirs, and not as devisees. The former is deemed the worthier title. *Howard v. Howard*, 19 Conn. 313, 318; *Watte, J., Whitney v. Whitney*, 14 Mass. 88, 90; *Ellis v. Page*, 7 Oush. 161; *Sedgwick v. Minot*, 6 Allen, 171; 1 Jarm. Wills, 74. The testator having, by the words first used as above in the codicil, made a good devise to his nephews and nieces, as such, and to them as a class, it cannot be supposed that he intended by the words following that devise to make his will wholly void. It seems reasonably clear that the testator intended to have his nephews and nieces share equally in his estate. The words, "they being my lawful heirs," were used as explanatory of his reason for revoking the provisions of his original will and the first codicil. Other circumstances lead to the same conclusion: The testator was quite advanced in years. He was a widower, and childless. He had a comfortable estate. He was the last of a family of six children, all his brothers and his only sister having died before him,—the last one of them, in 1883. His nephews and nieces had been for more than 10 years his only kindred by blood. They were all related to him in the same degree. They would naturally present themselves to his mind, when he was preparing this last codicil, as directly related to him, and each equally dear, and an object of his bounty, rather than as representing to him his deceased brothers and sister. It was nephews and nieces, as such, to whom the testator gave his estate, and not to nephews and nieces as representing deceased brothers and sisters. We think the per capita distribution should be made. The superior court is advised that a per capita distribution should be ordered of the fund in the hands of the plaintiff as executor. The other judges concurred.

(70 Conn. 238)

SECURITY CO. v. SNOW et al.

(Supreme Court of Errors of Connecticut. Jan. 21, 1898.)

WILLS—CODICIL—CONSTRUCTION—TRUST ESTATE—PERSONAL TRUST—SUCCESSION—PERPETUITY—VALIDITY.

1. A devise limiting the remainder of a trust estate to the lawful heirs of the cestui que trust is void, because contrary to the statute of perpetuities.

2. By the original will of a testator, one of his daughters was to take one-third of the residue of the estate. Subsequently, by a codicil, he revoked this bequest, and bequeathed to his wife all the estate given to the daughter by the will, in trust, to be invested by the wife, and to be paid to the daughter "from time to time during her natural life, as my said wife may deem for the interest and welfare of my said daughter," and any portion of said property or the income thereof which shall not be paid to the daughter during her natural life shall at her decease be paid to her heirs. *Held*, that the discretionary powers given to the wife were purely personal, and, after her death, could not be exercised by one appointed as her successor to the trust.

3. Since the whole will must be taken together, and the object of the codicil was merely to put the devise to the daughter in a different form, the provision made in the body of the will for the daughter stands unrevoked, except so far as her interest during the life of the wife was placed under the latter's control; and hence, upon the death of the wife, the daughter became entitled to the whole of the trust estate.

4. The trust was separable, and therefore to that extent was valid.

Case reserved from superior court, Hartford county; Samuel O. Prentice, Judge.

Bill by the Security Company against Alpheus H. Snow and others for the construction of a will.

Suit by a testamentary trustee for the construction of the will, brought to the superior court for Hartford county, and reserved for the advice of this court on the complaint and answers. From these the following facts appeared: The testator, Alpheus F. Snow, of Hartford, died in 1886, leaving a widow, a son, and two daughters. His will, dated in 1884, made provision for his widow, and then disposed of his residuary estate as follows: "All the rest and residue of my property and estate, wheresoever being, I give, bequeath, and devise in equal proportions to my son, Alpheus H. Snow, to my daughter Ellen Snow, and to my daughter Alice D. Snow, to them and their heirs, forever; the railroad stocks to be divided without sale, but the share of my daughter Alice in such stocks not to be transferred to her until she shall be twenty-seven years old; the dividends thereon in the meantime to be paid to her by my executor, and the legacies to my daughters, in case of marriage, to be to their sole and separate use, free from the control or interference of their husbands." In 1885 he made a codicil to this will, in two articles, as follows: "(1) I revoke and annul any and all gifts, bequests, legacies, and devises to my daughter Alice D. Snow in or by virtue of said last will and testament. (2) I give, be-

queath, and devise to my wife, Sarah M. Snow, any and all property and estate which was given, bequeathed, and devised to my said daughter in and by virtue of said last will and testament, in trust, however, to be invested and managed by my said wife, and to be paid and delivered and conveyed by my said wife to my said daughter from time to time during her natural life, as my said wife may deem for the interest and welfare of my said daughter; and any portion of said property and estate or the net income thereof which shall not be paid, delivered, and conveyed as aforesaid to my said daughter during her natural life shall at her decease be paid, delivered, and conveyed to her lawful heirs." His estate was duly settled, and certain personal estate was distributed and transferred to the widow in trust for Alice, and certain real estate in Hartford surrendered to her as such trustee. There was also residuary real estate of the testator in other states. The widow never paid over any of the principal of the estate distributed to her in trust, but she received from time to time, as trustee, proceeds of land in another state, sold by the executor under a power in the will, and of timber sold therefrom, and paid them over to Alice from time to time, including them with the annual income of the trust in her accounts as trustee rendered to the court of probate. The widow died in 1895, and in January, 1896, the plaintiff was appointed trustee in her stead by the court of probate. It claims, as such, title to certain lands both in and without this state. Alice intermarried with Charles D. Burrill two months before her father's decease, and they have two minor children, and have had one who is not now living. She claims to have demanded from the plaintiff in June, 1896, a delivery of the trust estate to the owner in fee thereof, which the plaintiff refused. Shortly afterwards Alice D. Burrill et al. brought an action in the superior court for Hartford county to enforce said demand, which is still pending. The trustee asked the direction of the court as to the following questions: "(a) Is the gift over to the lawful heirs of Alice D. Burrill at her decease a gift of the estate to her lawful issue, or is the gift void? (b) Even if said gift over is void, does not the trust continue as applicable to the whole of the trust estate during the life of said Alice D. Burrill? (c) Was the discretionary power given by the testator to his wife 'to pay, deliver, and convey said trust estate from time to time to his said daughter Alice D. Burrill, during her natural life, as she might deem for the interest and welfare of said daughter,' a personal discretion, to be exercised only by his said wife, or can said discretionary power be exercised by the plaintiff as trustee under said will by succession? (d) Is the said Alice D. Burrill entitled to demand and receive from the plaintiff at this time any portion of the principal of said trust estate?" Alpheus H. Snow, Ellen Snow,

Mr. and Mrs. Burrill, and their children were made defendants, and answers were filed by all, admitting the truth of the allegations in the complaint.

Charles E. Gross, for Security Co. and others. John T. Hubbard and Charles D. Burrill, for defendants Alice D. and Charles D. Burrill. Alpheus H. Snow, in pro. per., and for defendant Ellen Snow.

BALDWIN, J. The main scheme of the whl in question was to make suitable provision for the testator's widow, and then divide his residuary estate equally between his three children; the shares of his daughters, in the event of their marriage, to be held to their sole and separate use. The codicil was made for the single object of placing the share of Alice under the control of his wife, as trustee for her benefit, with large discretionary powers. Mrs. Snow was directed to pay and convey the trust estate to Mrs. Burrill from time to time, as she, the trustee, might deem for the interest and welfare of Mrs. Burrill; and any portion of the estate "or the net income thereof" not so paid and delivered to her during her life was at her decease to go to her "lawful heirs." The trustee was not required to pay over the annual income from the trust estate to Mrs. Burrill during her life. The trust created was such that it might be terminated at any time during her life, at the discretion of the trustee. Whether it should endure for a few months or for many years was to be determined by Mrs. Snow, in view of what she might consider to be the true interest of Mrs. Burrill. The testator apparently thought it uncertain whether that would be promoted by her having in her own control either the entire principal or the entire income. He contemplated it as possible that part of the income might be withheld from her during her life, and made provision for that contingency, by the same gift in remainder, which he intended to carry to her lawful heirs any of the principal that might at her decease remain in the hands of the trustee. The death of Mrs. Snow before making over to Mrs. Burrill any considerable portion of the estate rendered it thenceforth impossible to promote his daughter's interest and welfare in the manner contemplated by the testator. The discretionary powers which he gave to his wife for that purpose were purely personal, and ended with her life. If the trust is to continue during Mrs. Burrill's life, there can be no further surrender to her of any portion of the principal, and either all the accruing income must be paid to her, or none. There is no express authority for paying over any of it, and, if authority can be implied from the evident purpose of the testator to provide for her proper support, it must be conceded without limits. The gift in remainder to her "lawful heirs" is void, by reason of the statute of perpetuities,

which was in force when the testator died, under the rule laid down in *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075.

If, then, the decease of Mrs. Snow left it possible to give the second article of the codicil any further effect, it can be only to keep the estate in the custody of the plaintiff during Mrs. Burrill's life, and give her meanwhile the entire income. This may amount to a greater sum than the testator thought it might be best for her to use under some circumstances, and a less sum than he thought it might be best for her to use under other circumstances. The person on whose judgment of her circumstances he depended for measuring out from time to time what on the whole would best promote her welfare is no longer in existence. His will, therefore, as expressed in this article, cannot now be carried out, as to the disposition either of the income or principal of the trust estate.

If the plaintiff can retain the fund until the decease of Mrs. Burrill, it must be under the doctrine of approximation; but this can never be invoked where its application would sacrifice the main object of a testator to one of his incidental purposes. *Hayden v. Connecticut Hospital*, 64 Conn. 820, 324, 30 Atl. 50. The main object of this article of the codicil was to benefit Mrs. Burrill, by giving her whatever it was best for her to receive, both of the principal and income, of a share in his estate equal to that left to his other children. The provision for her heirs was inserted in view of an incidental contingency. Nothing was to come to them which it might be deemed judicious to turn over to her. During the life of Mrs. Snow the trust might have been given full effect, but only by a transfer of the entire estate to Mrs. Burrill. That not having been done, it is no longer susceptible either of complete execution, or of partial execution in such a way as to satisfy the testator's design. The first article of the codicil expressly revokes the disposition made in the will in favor of Mrs. Burrill; but it is apparent that this was done, not to diminish her equal share in the estate, but to transfer it to a trustee, so as to secure it more effectually for her benefit. I give to my wife in trust, says the testator, "any and all property and estate which was given, bequeathed, and devised to my said daughter in and by virtue of said last will and testament." It being his manifest intention to revoke the provision in the will only for this purpose so far as the purpose fails of effect, the revocation must fall with it. Both articles of the codicil must be taken together to ascertain his true meaning. It was no part of this that he should die intestate in respect to the third of his residuary estate with which alone he was dealing. The revocation of his former provision for Mrs. Burrill was indissolubly coupled with the creation of the substituted provision. It may be given effect so far as

the substitution is valid, but no further, because so only can the plain purpose of the testator be attained, and the mutual dependence of the two articles of the codicil preserved. The whole instrument was a single testamentary act, and must be read as if the testator had expressly declared that he revoked the gift made to Alice in his will simply in order to put it in a different form. *Rudy v. Ulrich*, 69 Pa. St. 183; *Stickney v. Hammond*, 138 Mass. 116, 120; *Powell v. Powell*, L. R. 1 Prob. & Div. 208. The rule of construction upon which we proceed is analogous to that governing a revocation which is grounded on a state of facts which proves not to exist. It falls when its foundation falls. *Dunham v. Averill*, 45 Conn. 62. The case of *James v. Marvin*, 3 Conn. 576, which holds that a revoking clause in a second will destroys the first, whether the second ever becomes effective as a testamentary act or not, was decided before our present statute of wills was enacted, and is therefore inapplicable to the question before us. *Peck's Appeal*, 50 Conn. 562. The provision made in the will for Mrs. Burrill stands therefore unrevoked, except so far as her interest during the life of Mrs. Snow was placed under the latter's control. The trust was separable, and to that extent valid. *Wheeler v. Fellowes*, 52 Conn. 238, 247; *Morris v. Bolles*, 65 Conn. 45, 81 Atl. 538; *Ketchum v. Corse*, 65 Conn. 85, 81 Atl. 498. Mrs. Snow could withhold the estate from her in whole or part, but the plaintiff has no such power. Mrs. Burrill's absolute title under the will, which was temporarily abridged or suspended under the second article of the codicil, resumed its original character upon the decease of Mrs. Snow, and the plaintiff holds simply upon a resulting trust in her favor.

The superior court is advised that the gift over to the lawful heirs of Alice D. Burrill is void; that the trust terminated at the decease of the original trustee; that the discretionary power given to that trustee cannot be exercised by the plaintiff as her successor; and that Alice D. Burrill became entitled, at the decease of Mrs. Snow, to demand and receive from the plaintiff the whole of the trust estate, to be held by her to her sole and separate use. The other judges concurred.

(70 Conn. 195)

Appeal of CLARKE.

(Supreme Court of Errors of Connecticut.
Jan. 5, 1898.)

JUDGMENT—RES JUDICATA—WILLS—CONSTRUCTION—EQUITABLE CONVERSION—COURTS—RULES OF DECISION—INTERNATIONAL COMITY—TRUSTS—CREATION.

1. A decision that a will worked an equitable conversion of land of which testatrix died seized, in an action by C., as executor, and as trustee under the will of N., his infant daughter, against N., is not *res judicata* in a subsequent

proceeding by C. individually against C. as administrator of the estate of J., a deceased daughter, N., and P., the guardian ad litem of N., in which the same question arises.

2. A decision of the court of a foreign state when called on to construe the will of a citizen of such state, disposing of lands in that and other states, that the will worked an equitable conversion of the land, is not res judicata in a subsequent proceeding in Connecticut, where some of the land is situated, in which the same question arises, as affecting such land, since the subject-matter in the two cases is not the same.

3. A will gave the residue of the estate of testatrix to be divided equally among her husband and her children, "share and share alike, my husband and my children sharing per capita." He was to hold the children's shares in trust for each until the child became 25 years old, and then "to pay the whole sum over to" such child; and, should the child previously marry, half the share of such child was to "be paid" on such marriage, and "the other half" on becoming 25 years old, etc. Held not to work a conversion of the land of which testatrix died seized.

4. A general residuary devise and bequest cannot be given the effect of conversion, as respects lands in the state, unless from the whole scheme of the will or the particular language employed a power of sale is clearly implied.

5. The courts of Connecticut are not required by comity to accept the interpretation of a will by a court of a foreign state of competent jurisdiction, as to whether such will worked an equitable conversion of land situated in Connecticut, of which testator died seized, the question being one directly involving the mode of passing title to lands in the latter state.

6. A will gave the residue of the estate of testatrix to be divided equally among her husband and her children "share and share alike, my husband and my children sharing per capita." The husband was to hold the children's shares in trust for each child until he became 25 years old, and then "to pay the whole sum over to" such child; and, should the child previously marry, half the "share" of such child was to "be paid" on such marriage, and "the other half" on becoming 25 years old, etc. Held, that an effectual trust in land of which testatrix died seized was created under the statute of uses.

Appeal from superior court, Fairfield county; William T. Elmer, Judge.

Petition by Henry P. Clarke, as administrator of the estate of Julia Clarke, deceased, asking that the court of probate hear the claims of divers persons who claimed to be entitled to have certain real estate distributed to them, and determine to whom it should be distributed. Notice was given to Nancy B. Clarke, deceased's minor sister, and John H. Perry was appointed by such court her guardian ad litem. From a decree that Nancy B. Clarke was the sole heir and distributee, Henry P. Clarke appealed to the superior court, which also appointed Perry guardian ad litem of Nancy B. Clarke. Case reserved for the advice of the supreme court of errors on facts found in the superior court. Affirmance of decree of court of probate advised.

The finding stated the following facts:

Henry P. Clarke, the appellant, while domiciled in the state of South Carolina, intermarried with Julia Hurd, in the state of New York, in the year 1886, and the married

couple immediately returned to the state of South Carolina, which then became their domicile of marriage. In 1889, a daughter, Nancy B. Clarke, was born, who still survives, and is the appellee herein. In December, 1893, another daughter, Julia Clarke, the distribution of whose estate is now in question, was born. There were no other children born of said marriage. On February 10, 1894, the wife, Julia H. Clarke, died. On May 20, 1894, the daughter, Julia Clarke, died, leaving no creditors. At all times since said marriage, the state of South Carolina has been the domicile of the appellant and his family. During coverture, and at the day of the dates thereof, Julia H. Clarke executed the following will and codicil:

Will: "I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, state of South Carolina, being of sound and disposing mind and memory, do make and ordain this, my last will and testament, and hereby revoke all other wills by me at any time heretofore made. First, I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named. Second. I direct that a portion of my estate sufficient to produce one thousand dollars (\$1,000) annually shall be safely invested by my executor, and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York, in quarterly payments, during the term of his natural life. Third. I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Connecticut, the sum of ten thousand dollars (\$10,000). Fourth. I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand (\$5,000) dollars. Fifth. The rest, residue, and remainder of my estate, real and personal, of whatever description, or where-soever situated, I give, devise, and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband, in trust for my daughter Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But, if she shall marry before that age, with the consent and approval of her father, or, in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five. In case I shall leave surviving me one or more children besides my daughter Nancy, then I direct that the said rest, residue, and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing per capita, and the shares of said children to be held in trust, as above provided, in the case of Nancy, as being the only one. And I give, devise, and bequeath the said rest, residue, and remainder as aforesaid to each,

and to their heirs, and each of them, forever. I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this, my will, and direct that no bonds be required of him under either appointment. In witness whereof, I have hereunto set my hand and seal at Bridgeport, Connecticut, this twenty-fifth (25th) day of May, A. D. 1891. Julia H. Clarke. [Seal.]

Codicil: "I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and state aforesaid, but now residing in the city of Columbia, of said county and state, having made my last will and testament bearing date the twenty-fifth day of May, A. D. 1891, at Bridgeport, in the state of Connecticut, do now make this codicil to be taken as a part of the same: First. I hereby ratify and confirm my said will in every respect, save as far as any part of it is inconsistent with this codicil. Second. I hereby revoke the third item of said will, and in lieu thereof I will and direct that a portion of my estate sufficient to produce five hundred dollars annually shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life. Three. I further will and direct that after the death of Mrs. Laura Sherwood that the portion of my estate which shall at that time be invested for her benefit under the second item of this codicil shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that, if said Mrs. Laura Sherwood shall die before my death, then the investment directed for her benefit under item two of this codicil shall be, and is hereby, disposed of as directed in item five of my said will. Four. I further will and direct that after the death of my said father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit as directed in item two of said will shall then become a portion of my estate, and shall be disposed of as directed in item five of my said will; and I further direct that, if my said father shall die before my death, then the investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will. In witness whereof, I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items at Columbia, in the said state, this, the 11th day of November, A. D. 1893. Julia H. Clarke. [L. S.]"

Said will and codicil were duly established in the court of probate for Richland county, in the state of South Carolina, and copies thereof have become part of the files and records of the probate court for the district of Bridgeport, pursuant to the provisions of section 550 of the General Statutes. The daughter, Julia Clarke, owned no property in Con-

necticut at the time of her decease except such as had or should come to her under her mother's will. The property of the mother, Julia H. Clarke, possessed by her at the time of her decease, consisted of \$825.25 in personalty, the home plantation in South Carolina, valued at \$20,000, and real estate in Bridgeport, in this state, valued at \$138,000. This last-mentioned property was distributed to her the day before her death in a partial distribution of the estate of her grandfather, P. T. Barnum, who died April 7, 1891, leaving a will under which she took a legacy of \$100,000 (paid before said partial distribution) and one-sixth of the residue of his estate. She owed debts amounting to \$30,000 at the time of her decease. The estate of the daughter, Julia Clarke, referred to in the petition to the court of probate, consisted of an undivided one-third interest in the real estate so as above distributed to her mother. The value of the said Julia H. Clarke's entire interest in the estate of her grandfather was several hundred thousand dollars. Both real estate and personal property of large value remained in the said Barnum residue at the death of the mother, Julia H. Clarke, for future distribution. The real estate so remaining is situated in Connecticut, New York, and Kansas.

Henry P. Clarke (the appellant herein), "as executor of the last will and testament of Julia H. Clarke, and trustee of the estate of Nancy B. Clarke, his infant daughter, under said will," brought suit against Nancy B. Clarke (the appellee herein) in the circuit court for the Fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true construction of said will, and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises, and for such further relief as may be just and proper." A guardian ad litem was appointed for the infant defendant, who duly answered, and, after hearing had, the court "ordered, adjudged, and decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that the plaintiff, as executor, receive, administer, and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." This judgment was, upon appeal, subsequently affirmed by the court of last resort in South Carolina, as will appear by the report thereof in 46 S. C. 230, 24 S. E. 202, which was made by reference a part of the record in this cause; and said decision was considered by the court of probate for the district of Bridgeport.

By the law of the state of South Carolina,

the court to which the action was brought had jurisdiction both of the persons and of the subject-matter of that suit; and by a like law the appellant shared equally with his surviving child in the distribution of the estate of the deceased. The intestate was, at the time of her death, domiciled in the state of South Carolina, and her estate has, ever since the 1st day of February, 1897, been in due process of settlement in the proper courts of that state. Prior to May 29, 1897, letters of administration had been granted by the court of probate for the district of Bridgeport to Henry P. Clarke, as administrator of the estate of Julia Clarke, late of Columbia, S. C., but leaving real estate in said district, deceased, intestate, and he had duly qualified as such. On May 29, 1897, he, as such administrator, made written application to said court of probate, stating that divers persons claimed to be entitled to have said real estate set out and distributed to them, and praying that the court might hear their claims, and ascertain to whom the estate should be set out and distributed. Actual notice of this petition, and of the time set for the hearing thereon, was given to Nancy B. Clarke, and John H. Perry, Esq., was appointed by the court of probate as her guardian ad litem. After a full hearing, a decree was passed on July 3d, the material part of which is as follows: "Upon such hearing this court finds that the intestate was domiciled in the state of South Carolina at the time of her decease; that the entire inventoried assets of her estate in this state consist of an undivided interest in certain real estate situated in the town of Bridgeport, of the value of about \$——, which said interest was derived from the will of her mother, Julia H. Clarke, who died about four months prior to the decease of the intestate, domiciled in the state of South Carolina, an exemplified copy of whose will, 'and the decision of the supreme court of South Carolina interpreting the same in a case in which the petitioner herein was plaintiff and Nancy B. Clarke was defendant,' is on file and of record in this court, and hereby referred to, and whose estate is as yet unsettled and undistributed. Wherefore this court finds and decrees that the sole heir and distributee of the estate of the intestate is her aforesaid sister, Nancy B. Clarke." From this decree Henry P. Clarke appealed to the superior court, stating that he was a citizen of South Carolina, and the father and only surviving parent of said Julia Clarke, deceased, and an heir at law and distributee of her estate, and therefore aggrieved by the decree. By order of the court of probate, notice of the appeal was duly given to Henry P. Clarke, administrator on said estate, and to John H. Perry, guardian ad litem of Nancy B. Clarke, and also, by personal service of a copy of the process, to Nancy B. Clarke, at the place where she was temporarily residing, to wit, at Asheville, N. C. On the return of the appeal to the supe-

rior court, Mr. Perry was also there appointed her guardian ad litem, and "authorized and directed to appear and defend said action in her behalf."

The reasons of appeal were as follows:

First. "(1) The estate of the intestate in the state of Connecticut consisted of property all of which is, for purposes of distribution, and for the purpose of the ascertainment of heirs and distributees, personal estate. (2) The intestate was, at the time of her death, domiciled in the state of South Carolina, and her estate has, ever since the 1st day of February, 1897, been in due process of settlement in the proper courts of that state. (3) By the laws of South Carolina, the appellant was and is entitled to a distributive share in all the personal estate of the intestate."

Second. "(1) The court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate for the purpose of the hearing then before the court consisted of personal property, and the courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees."

Third. "(1) The court erred in not dismissing the petition for want of jurisdiction to grant the relief prayed for in the application."

Paragraphs 2 and 3 of the first reason assigned were admitted by the reply, and the residue of the reasons assigned were denied.

Le Roy F. Youmans and Goodwin Stoddard, for appellant. John H. Perry and Winthrop H. Perry, for appellee.

BALDWIN, J. Julia Clarke, of South Carolina, died there in infancy, and at the time of her decease was the owner of real estate in Connecticut. Her interest in it was derived from the will of her mother, Julia H. Clarke, who was also a citizen of South Carolina. This will was admitted to probate in the proper court of that state, and a suit for its construction afterwards brought there, before a court of equity having jurisdiction of the parties and the subject-matter, which resulted in a decree to the effect that it worked an equitable conversion of all the real estate of the testatrix, wherever situated. If this be the true construction of the will, the decree of the court of probate for the district of Bridgeport, from which the present appeal is taken, was erroneous.

The appellant contends that upon this point the South Carolina decree is conclusive, both on the ground that the matter thus became res adjudicata, and because to hold otherwise would be to deny full faith and credit to the judgments of a sister state. The only parties to that proceeding were Henry P. Clarke, as executor of the will of Julia H. Clarke, and trustee of the estate of Nancy B. Clarke, his infant daughter, under the will, as plaintiff, and Nancy B. Clarke as defendant. The parties to the present proceeding are Henry P. Clarke as the sole appellant, and, as appel-

lees, Henry P. Clarke, as administrator of the estate of Julia Clarke, deceased, by virtue of letters granted by the court of probate for the district of Bridgeport, Nancy B. Clarke, and John H. Perry, Esq., her guardian ad litem by appointment of that court. It is obvious that the parties thus before us are not the same as the parties to the South Carolina action. There Henry P. Clarke did not appear in his own right, and no one was brought in as a representative of the estate of his deceased daughter, Julia. Here Henry P. Clarke does appear in his own right, and is also present as the proper representative of that estate, but has not been brought in as the executor of his wife's will, or as a trustee under it for his daughter Nancy. If the South Carolina decree had been that the terms of the will did not work a conversion, Henry P. Clarke, in his own right, would have been free to contest that decision in other proceedings, and so would the administrator of the estate of his daughter Julia. One who occupies a representative position is, in that capacity, a person totally distinct, in the view of the law, from himself individually. In an action by an administrator, the plaintiff's admissions, made before the grant of administration, cannot be received. *Rockwell v. Taylor*, 41 Conn. 55. Had Mr. Clarke, before bringing his action in South Carolina, taken out administration there on his daughter's estate, and then made himself in that capacity one of the defendants, it is doubtful whether the judgment would have bound him, as administrator of her estate in Connecticut, when afterwards intrusted with that position, under the laws of another sovereignty, by the court of probate for the district of Bridgeport. *Story, Conf. Laws, § 522*. Had a different person been appointed administrator in each state, it is certain that there would have been no privity between them. *Stacy v. Thrasher*, 6 How. 44. Estoppels must be mutual. Nancy B. Clarke cannot be bound by the South Carolina decree unless Henry P. Clarke was bound by it, and Henry P. Clarke was bound by it only as executor and trustee under her mother's will. Nor can Henry P. Clarke, as a Connecticut administrator, be bound by that decree, as a rule for distributing an estate which, during the whole course of the suit in which the decree was rendered, had no representative to protect its interests before the court. A comparison of the South Carolina record with that in the case at bar shows also that the subject-matter of these actions is not the same. The South Carolina court was called upon to construe the will of a citizen of South Carolina, disposing of lands in that and other states. It had jurisdiction to make a final and conclusive disposition of the questions presented so far only as it had power to compel obedience to its decree, or as its judgment derived an additional force from the constitution and laws of the United States. Courts sit to determine causes, and to enforce their determination. It is a general rule that what they cannot enforce they

cannot decree. So far as concerns the extra-territorial effect of foreign judgments, this rule is a principle of international law, subject only to such exceptions as may be founded on the consent of parties or the exercise of judicial comity in the rare cases where no one country can accomplish the ends of justice by its own unaided authority. *Dacey, Conf. Laws, 38-42*. The courts of South Carolina could settle the construction of Mrs. Clarke's will, so far as related to the real estate in that state, and to the whole of her personal estate. But this personal estate is that only which she owned at the time of her decease, together with any for which the executor might become accountable by a lawful conversion of realty into personalty. They could not reach out into other states, and issue process to authorize the seizure there of lands to which she had a title. They could only exercise a restraining force upon the parties who were before the court, and only upon them in their relations to each other. *Carpenter v. Strange*, 141 U. S. 87, 105, 11 Sup. Ct. 960.

Bearing these principles in mind, it is not difficult to ascertain the subject-matter presented to their consideration, and disposed of by the judgment which they rendered. It was a definition of what, by the law of South Carolina, was the power, duty, and estate of the executor and trustee under the will as between him and Nancy B. Clarke. It was this, and nothing more, because the plaintiff could submit to them nothing more. Whether he had any power, duty, or estate with respect to lands situated in another state depended upon the laws of that state. Succession to the real estate of a deceased person is regulated at the will of the sovereign within whose territory it is embraced. It has always been regarded as a matter of grave political consequence. *Birtwhistle v. Vardill*, 7 Clark & F. 805. Ownership of land controls its occupancy, and largely influences the character of the population. It determines the source to which governments ordinarily look for their surest, if not their principal, means of financial support. It had, in former times, in England and in all her American colonies, an intimate relation to the right of suffrage, and in this state is still a qualification for it under at least one of our municipal charters. 9 Sp. Laws. 431. The laws of Connecticut must decide how the lands of Connecticut may be conveyed and inherited, and they make particular provision in cases of intestacy for the preservation of ancestral real estate in the line of family descent. *Gen. St. § 632*. Upon the death of a landowner, whether a citizen of the state or not, whoever takes title by succession takes it because these laws concede it to him; not as a right, but as a privilege. It is on this basis that succession taxes are upheld. They constitute part of the terms upon which the grant of the state is conditioned. *Mager v. Grima*, 8 How. 490. A devisee takes by an artificial perpetuation of a testator's will,

which survives him, for that purpose, with a vitality conferred and created by positive law. By that same law the form of its expression is prescribed and limited. Title to land can be conveyed under a testamentary power only when such a conveyance is sufficient under the laws of the territorial sovereign. The personal representative of Mrs. Clarke rightfully sought the direction of the courts of her domicile as to the effect of her will upon the estate for which he was or might become accountable before them. As to that matter, the courts of Connecticut could not instruct him. *Russell v. Hooker*, 67 Conn. 24, 34 Atl. 711. This was the subject-matter of the South Carolina action, and the decree rendered is conclusive upon those who were parties to it. On the other hand, the subject-matter of the case before us is the ascertainment of those who, by the laws of Connecticut, are entitled to succeed to certain Connecticut lands which form part of an intestate estate in course of settlement before a Connecticut court of probate. As to this the courts of South Carolina could give no instructions, and were asked for none. The whole decree must be taken together in determining its true scope and meaning. The adjudication that the will worked an equitable conversion of all the real estate of the testatrix wheresoever situated is immediately followed by the adjudication "that the plaintiff, as executor, receive, administer, and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." It is not to be presumed that the court intended to go beyond its jurisdiction. In directing the plaintiff, as executor, to receive, administer, and account for all his wife's real estate as personalty, his duty as to the real estate in South Carolina, and as to the proceeds of any sales that might be made, under the terms of her will, of real estate situated out of the state, was plainly laid down. These were the instructions which he needed for his protection, and if, in fact, he hereafter receives, under the letters testamentary issued to him by the probate court of South Carolina, any moneys to be accounted for before that court, from sales of real estate in other states, they will regulate his disposition of them. The decree relates solely to his powers and functions as an executor, and does not speak of those belonging to him as a trustee. The conversion was to be accomplished before any transfers were made to constitute the trust estate. The only subject of adjudication was the proper mode of administering upon the estate of Mrs. Clarke, so far as it was or should be in course of settlement before the courts of probate of her own state. Those courts could only deal with the property that had come or might come under their control.

-- *Cartney v. Osburn*, 118 Ill. 403, 9 N. E.

210. The South Carolina decree, therefore, did not estop Nancy B. Clarke from urging, in this action in support of her claims as heir of Julia Clarke under the Connecticut statute of distributions, that the real estate to be distributed was held by her sister as real estate, under their mother's will. Those questions had never before been litigated between her and Henry P. Clarke.

It is unnecessary to inquire whether, if he had been a party individually to the South Carolina suit, and the principal administrator of the estate of Julia Clarke had also been brought in, the court would have had jurisdiction to make a final and conclusive determination as to the effect of the will upon lands in other states and their descent upon the decease of those in whose favor the testatrix disposed of them. Under the conditions which in fact existed, its determination did not constitute a binding rule of decision for the court of probate for the district of Bridgeport in the present proceeding, either under the principles of general jurisprudence or the constitution and laws of the United States. *Aspden v. Nixon*, 4 How. 467, 497. The decree of that court, from which this appeal is taken, treated the real estate in this state left by Julia Clarke as being real estate to all intents and purposes. If, in truth, it had become, before her death, the subject of an equitable conversion, this decree must be reversed; and the reasons of appeal have brought this point directly before the superior court for decision. Equitable conversion results from the existence of a power to convert realty into personalty, or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it. The will and codicil of Mrs. Clarke directed her executor to pay her debts; to invest a portion of her estate sufficient to produce an annuity of \$1,000, to be paid to her father during his life; to make a similar investment of enough to yield an annuity of \$500, to be paid to another; and to pay a certain legacy of \$5,000. As to the residue of her estate, real and personal, wherever situated, she provided that it should "be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing per capita, and the shares of said children to be held in trust." The husband was made the devisee and legatee of the children's shares, in trust for each until the child should become 25 years of age, upon which event he was "to pay the whole sum over to" such child; and, should the latter previously marry, with his approval, or, in case of his death, that of a proper guardian, half of the "share" of such child was to "be paid" to him upon his marriage, and "the other half" when he became 25. These provisions were followed by a devise and bequest of the residuary estate "as aforesaid, to each, and to their heirs, and each of them, forever." The personal estate in possession of the testatrix at the time of her decease was inven-

toried at only \$825, but she was also entitled to a residuary interest worth over \$100,000, in a large estate, consisting of both realty and personalty, in course of settlement in this state. It was, therefore, uncertain whether it would be necessary to sell any of her real estate to meet debts and legacies, and we concur with the supreme court of South Carolina in the opinion that there was nothing in the will to work the out and out conversion for which the appellant contends, unless that be the result of the dispositions of the residuary clause. *Clarke v. Clarke*, 46 S. C. 230, 243, 24 S. E. 202. It was the view of that court that this result did follow from the commingling of the entire residuary estate, both real and personal, in one common mass, and the directions to divide it into equal parts, one to belong to the husband, and one to him in trust for each child; and that he "pay over the whole sum" of each daughter's share to her when she becomes 25, or, in case of her marrying sooner, with the consent of her father or guardian, that "one half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five." We have considered the grounds for this conclusion set forth in the learned opinion of Mr. Justice Pope with the care demanded by our respect for the distinguished tribunal for which he speaks, and find ourselves unable to yield assent to the train of reasoning, so far as it may apply to the effect of the will upon the real estate in Connecticut. In every case in which a testator, owning both real and personal estate, after making particular provisions for debts and legacies, disposes of all the residue of his estate in favor of one or more persons, this residue may be said to be thus commingled or blended in one common mass. He gives it as an entirety, and, unless he otherwise directs, it is given in the precise condition in which it exists, whether real or personal. Mrs. Clarke used apt terms to convey real estate. The phrase, "I give, devise, and bequeath," is used in the beginning of the residuary clause, and repeated at its close, with the addition of words of limitation descriptive of a fee-simple estate in lands, and unnecessary for any other purpose. The direction for an equal division between her husband and children is naturally applicable to a division of the property left, rather than of its proceeds. The only provisions, indeed, which are particularly relied on in support of the appellant's claims, are those as to paying over the whole sum belonging to each child's share upon her attaining the age of 25, and, in the event of her marriage under certain conditions, half of her share at an earlier period. It is unquestionable that these terms are appropriate only to a payment of money, but they must be read in connection with the rest of the will. No payment was directed until the beneficiary married, or attained the age of 25, and it was then to be made by the trustee, not by the executor. If a conversion of realty into personalty were required

in order to raise the sums so payable, it could not be requisite until one of those events was in immediate prospect. To turn either real or personal property into money at any earlier time, and keep it on hand as money, uninvested, would be of no benefit to the cestui que trust. No power of sale to be implied under the circumstances of the case could be exercised by the executor before the estate passed into the hands of the trustee. As the executor was not to make the payments in question, they could furnish no occasion for him to make a conversion, and, unless the testatrix cast either upon him or upon the trustee a power and duty of immediate conversion, the decree of the court of probate was correct.

The doctrine of equitable conversion is simply an application of the fundamental principle that equity regards that as done which ought to be done. Unless a sale of the Connecticut real estate ought to have been made as soon as practicable after the decease of the testatrix, it is not to be regarded as having the character of personal estate. If a sale ought to have been made, it is because a power to sell is implied from the terms of the residuary clause, and is necessary to give that clause its due effect. The heirs at law of Julia Clarke are not to be excluded from the inheritance by anything short of a clear implication from the provisions of the will under which her estate was derived. We are unable to find any implication of a power to make such a sale in favor of Mr. Clarke, either as executor or as trustee. The dominant and controlling words in the fifth article of the will are those by which the testatrix gives, devises, and bequeaths her residuary estate, "real and personal, of whatsoever description, and wherever situated," to her husband and children, to be divided equally between them per capita, "to each, and to their heirs, and each of them, forever." The provisions for a temporary trust in respect to the share of each child are subsidiary. They are for the sole benefit of the child, and it is highly improbable that they were intended to curtail the beneficial estate absolutely given to their father, by requiring that it should be turned into money, either before he received it or as soon as he received it. It is much more natural to suppose that the word "pay" was used for "transfer," and "sum" as the equivalent of what in the same sentence is described as a "share."

It is suggested that Mrs. Clarke must have known that her real estate was scattered through four states, and that the laws of some of these states as to the distribution of intestate estates differed widely from that of South Carolina, and therefore is to be presumed to have intended to provide for the event of the decease of one of her children during minority, by directing such a sale as would make their shares at once subject to the laws of her domicile. The appellant also contends that an obvious motive for direct-

ing such a conversion was securing the higher rate of income which would probably be derived from investments made in her own state, as well as the greater safety from having them more immediately under the eye of the trustee. It is evident that both the will and codicil were prepared by counsel familiar with the ordinary terms of testamentary disposition. The codicil was executed at her own home, and the utmost solicitude was evinced in it to protect the interest of those who were to receive her residuary estate, by stating explicitly what the law would have sufficiently implied,—that they should ultimately receive the funds set apart for the benefit of the two annuitants. Had it been the desire of Mrs. Clarke that her decease should be followed by an immediate sale of all her lands, her counsel could have found no difficulty in expressing this with equal distinctness.

The claim is made, and is not wholly without countenance in reported cases, that an intent to convert may be implied, in the absence of any positive direction to sell, or of any absolute necessity to sell, if the will so blends together real and personal estate as clearly to show that the testator meant to create a common fund out of both, and to bequeath it as money. *Hunt's and Lehman's Appeals*, 105 Pa. St. 128, 141. No general residuary devise and bequest can be given such an effect, as respects lands in Connecticut, unless from the whole scheme of the will or the particular language employed a power of sale is clearly implied. Conversion is effected by sale. Equitable conversion is effected by a power to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money, unless there is also, either in terms or by implication, a grant of the means of turning it into money. *Hobson v. Hale*, 95 N. Y. 588; *Hale v. Hale*, 125 Ill. 399, 17 N. E. 470. If the question were one not directly involving the mode of passing title to lands in this state, the rules of international comity might require us to accept the interpretation of the will established in the courts of South Carolina. *Rockwell v. Bradshaw*, 67 Conn. 814, 34 Atl. 758. Such would be the case, for instance, if the point in controversy were whether a certain devise of lands in this state, which was inoperative under our laws for want of some statutory formality, if accompanied by a legacy to the heir at law, might not impose upon him the personal obligation of electing whether to take the bequest, and give effect to the devise by a voluntary conveyance, or keep his land, and lose his legacy. *Trotter v. Trotter*, 4 Bligh (N. S.) 502. Similar considerations might apply to the construction of a legacy to a wife, in respect to whether it was in lieu of dower or not. *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Van Steenwyk v. Washburn*, 59 Wis. 483, 17 N. W. 289; *Lee v. Tower*, 124 N. Y. 370, 26 N. E. 943. So, if the power claimed

were one of appointment, that it affected lands in this state would not deprive the court of the domicile of its right to interpret authoritatively the meaning of the terms employed in the will, which, though drawn in Connecticut, was, by the codicil, republished in South Carolina. But the power which that court has found to be implied from the language of the testatrix is one of sale. An appointment under a power of appointment as to lands passes the title to them by virtue of the will, which is itself the conveyance, and the only one. A power of sale, on the other hand, imports only a power to convey by an independent conveyance drawn and executed with all the formalities, and subject to all the conditions, incident to ordinary deeds. That the will is duly executed for the disposition of real estate is sufficient to support the exercise of a testamentary power of appointment in the manner directed by the testator; but it is not sufficient to dispense with a deed of the ordinary form, where the power is one to sell and convey. The question then is no longer simply what wishes the testator has expressed, but whether he has so expressed them as to enable acts to be performed after his decease, by his authority, which will avail to effectuate these wishes according to the requirements of local law. If the will in question worked a conversion, it is because the executor or the trustee could, under its provisions, have executed a deed sufficient, under the laws of Connecticut, to transfer title to real estate. Whether this could have been done or not is necessarily a matter to be decided according to those laws, as they may be interpreted by the judiciary of Connecticut. *White v. Howard*, 46 N. Y. 144, 159; *Whart. Conf. Laws*, § 597. *Page's Estate*, 75 Pa. St. 87.

The case of *Ford v. Ford*, 80 Mich. 42, 44 N. W. 1057, in which the construction given to a Wisconsin will by a Wisconsin court (*Ford v. Ford*, 70 Wis. 19, 33 N. W. 188; 72 Wis. 621, 40 N. W. 502), as to its working an equitable conversion of the real estate of the testator situated in Michigan, was followed, stands upon two grounds: that the decision of the court of the testator's domicile was conclusive, and that it was correct. The latter was, of course, sufficient to support the judgment. Considerable reliance seems also to have been placed on the provision of the Code of Michigan that upon probate there of a foreign will, affecting property in Michigan, it should be disposed of according to the will, "so far as said will may operate upon it." Similar weight was properly accorded in *Guerrard v. Guerrard*, 73 Ga. 506, 509, to a section of the Georgia Code, making the law of the place where any writing is executed controlling as to its effect. In *Cru-soe v. Butler*, 36 Miss. 150, the deed of an executor under a power conferred by an Alabama will was held to pass title to lands in Mississippi, the power having been executed in a manner which the courts of Alabama

had adjudged to be sufficient, although not in accordance with the law of Mississippi. Here, however, the Alabama decision had been rendered in a suit between the same parties, or those with whom they were in privity, and that in Mississippi was plainly justified by the doctrine of *res adjudicata*.

One of the claims set up in behalf of Nancy B. Clarke remains to be noticed. It is that under the statute of uses no effectual trust in the lands in question was created, since no active duties were imposed upon the trustee. This position is untenable. The terms of the devise and bequest of his daughters' shares to Mr. Clarke in trust invested him with the legal title, and sufficiently implied a right to hold and manage these estates until the events should occur upon which they were to be turned over to their own control. So far as respects the share of Julia Clarke, her death in infancy has rendered the occurrence of these events impossible; but that Mr. Clarke has now become, as to that, the holder of a simple or naked trust, does not affect the fact that his trust was originally an active one. The legal estate devolving upon him and the beneficial estate given to his daughter were vested in each upon the decease of the testatrix. Upon the death of Julia Clarke, her interest in any lands in this state under her mother's will passed to her sole heir at law, in whose favor the decree appealed from was made. The superior court is advised to affirm the decree of the court of probate. The other judges concurred.

(70 Conn. 220)

In re WILCOX & HOWE CO.

(Supreme Court of Errors of Connecticut. Jan. 5, 1898.)

CONDITIONAL SALES—UNRECORDED CONTRACTS—RECEIVER—RELATION TO CORPORATION AND TO CREDITORS—PERSONAL REPRESENTATIVES—CONSTRUCTION OF STATUTES—CHATTEL MORTGAGES—NOTICE—ESTOPPEL.

1. An unrecorded contract, whereby machinery in possession of, and used by, a manufacturing company, is to become the property of said company when a certain number of periodical payments have been made, and containing a provision that the title shall remain in the vendor until all such payments have been made, is a conditional sale, within the meaning of Pub. Acts 1895, c. 212, § 1, 2, providing that contracts for the sale of personal property shall be in writing and recorded as chattel mortgages, and that conditional sales of property not in conformity with the statute shall be considered absolute sales, except as between the vendor and vendee.

2. The receiver of an insolvent corporation, generally speaking, occupies the relation of personal representative to the corporation; but, for the purpose of protecting all rights which they could have enforced prior to his appointment, he represents the general creditors.

3. Since the general creditors of an insolvent corporation could have sequestered, by attachment and levy, property in the possession of the corporation under a conditional contract of sale, which had not been recorded as required by Pub. Acts 1895, c. 212, § 1, providing that

such contracts shall be recorded as chattel mortgages, the receiver of the corporation is not the "personal representative" of the corporation, within the meaning of section 2, providing that conditional sales not recorded as provided by section 1 shall be considered as absolute, except as between the "vendor and vendee or their personal representatives."

4. A chattel mortgage, ineffectual as against third persons, because not recorded, does not, by being subsequently recorded, become effectual as against creditors whose rights have attached since its execution.

5. The fact that a corporation is estopped to deny the binding effect of a conditional sale does not estop its receiver to set up the defense that the sale, being unrecorded, was void as to creditors.

Case reserved from superior court, Fairfield county; William T. Elmer, Judge.

Application by the receiver of the Wilcox & Howe Company for advice concerning the allowance of certain claims against the company, which had been presented to him as receiver, for allowance. Upon an agreed statement of facts, the court reserved the case for the consideration and advice of this court.

The material facts in the agreed statement are these:

The Wilcox & Howe Company is a joint-stock corporation, duly organized under the laws of Connecticut, and located and having its place of business in the town of Huntington, in Fairfield county. It is largely indebted and insolvent. The receiver of said corporation was duly appointed on the 8th day of October, 1896, upon an application for the winding up of the affairs of said company, pursuant to the statute. Since the 8th of October, 1896, the receiver has been engaged in the duties of his said appointment, and the affairs of said corporation are now being wound up in the superior court for Fairfield county. All of the respondents to said application, except J. J. McCabe, who did not appear, now are, and at all times since the appointment of said receiver have been, ready and willing to perform the agreements made and to be performed by them, respectively, as set forth in the contracts hereinafter referred to. All of the parties respondent to said application notified said receiver, within a reasonable time after his appointment, that the several machines claimed to belong to them, respectively, as hereinafter described, were in the possession of said Wilcox & Howe Company at the time of his appointment, under the terms of the several contracts hereinafter set forth. The receiver, upon taking possession, under his appointment, of the property of the corporation, found in its shop, and in use by it, certain machinery which had been delivered to it by the parties hereinafter named, under the agreements hereinafter described.

The Waterbury Farrel Foundry & Machine Company, of Waterbury, in this state, had delivered machinery to the Wilcox & Howe Company, under three separate written agreements, in the form of, and called, "Conditional Leases," containing, among other things, an agreement that upon the payment

in full of the price of said machinery, in the form of rent, said machinery should become the property of the Wilcox & Howe Company. The leases also contained the following provisions, among others: "And the said Wilcox & Howe Co. agrees to have this lease recorded immediately, if by law required to be recorded in the state where said Wilcox & Howe Co. is located and doing business. And if default shall at any time be made in the payment of rent as aforesaid, or any of the agreements herein shall be violated, then this lease shall be void." Said three written agreements were dated, respectively, December 14, 1895, May 25, 1896, and June 25, 1896. Each was witnessed by one witness. None of them were acknowledged, and none of them were ever recorded in the town clerk's office of the town of Huntington, where said corporation, the Wilcox & Howe Company, was located. Prior to the appointment of said receiver, certain payments had been made under the first two leases, but nothing had been paid under the last one. Within the time limited by the court for the presentation of claims against the Wilcox & Howe Company, the Waterbury Company presented a claim to the receiver for the balance, with interest, due under said agreements, and also claimed that the payment of the amounts due was secured under said agreements, which it further claimed were binding on said receiver, as the same would have been on the Wilcox & Howe Company.

Merrill Bros., of Brooklyn, in the state of New York, had delivered machinery to said corporation under a written agreement which reads as follows:

"This agreement, made the 13th day of January, by us, the Wilcox and Howe Company, of Derby, Connecticut, witnesseth: That, in consideration of the sale and delivery to us of the drop hammers hereinafter mentioned by Merrill Brothers, of Brooklyn, New York, and of one dollar by said Merrill Brothers in hand paid, we have bargained and sold, by these presents, to said Merrill Brothers, two certain drop hammers now in our factory, at Derby, Connecticut, to them, their representatives and assigns, forever. This sale is conditional upon the payment by us of each and every of twelve promissory notes given in payment for said chattels, aggregating the sum of twenty-four hundred (\$2,400) dollars, to wit, one note due March 20th, 1896, for \$200, and eleven other notes, for \$200 each, due successively at the end of every succeeding thirty days thereafter, with interest. It is expressly agreed that upon default in the payment of the principal or interest of any of said notes, or the removal of said drops from said factory, or in case said Wilcox & Howe Company shall sell, incur, or suffer to be incumbered, by any lien or process, the said drop hammers, the whole of said principal sum shall become due, with interest, and said drop hammers shall become the property of said Merrill Brothers; and they may enter the premises where said drop hammers are, and take, carry

away, and dispose of the same. Upon payment of all of said notes and interest in the manner and at the time hereinbefore provided, and the due observation of the other condition herein, these presents shall have no effect. In witness whereof, we have hereunto set our hands and seal, the day and year first above written. The Wilcox & Howe Co. Isaac P. Howe, Sec. and Treas. [Seal.]

"Signed, sealed, and delivered in presence of: Edwin B. Gager. Helen E. Bailey."

This instrument was duly acknowledged, and was recorded in the office of the town clerk for the town of Derby, on the 9th day of March, 1896, and in the office of the town clerk for the town of Huntington, on the 6th day of January, 1897. Merrill Bros. claimed that the machinery described in said instrument either belonged to them, or that they had a chattel mortgage thereon to secure the sum due to them.

The Pratt & Whitney Company, of Hartford, in this state, had delivered machinery to the Wilcox & Howe Company, under a written agreement, dated June 8, 1896, in the form of a lease, containing, among other things, an agreement, in substance, that upon the performance of certain conditions, including the payment of the price of said machinery, with interest, said machinery should become the property of the Wilcox & Howe Company. This instrument was not acknowledged, but it was on the 24th of August, 1896, recorded in the office of the town clerk for the town of Huntington.

J. J. McCabe & Co., of the city of New York, had delivered certain machinery to the Wilcox & Howe Company, under and pursuant to the following writing:

"Order No.

"14 Dey Street, New York,

"Dec. 4th, 1895.

"Consignment Account, Stored at Wilcox & Howe Co.'s, Birmingham, Conn.

"To J. J. McCabe, Dr.

"Iron-Working Machinery.

To 1 new upright drill, 24" swing,	
with back gears * * *	\$150 00
1 new engine lathe, 14" swing, 6 ft.	
bed, with * * *	237 50
	<hr/> \$387 50

"Shipped via N. Y., N. H. & H. R. R.

"Terms: Rental 5% each month for 12 months. Same to apply on purchase if the machines are to be retained. Payments to include interest at 6%."

No contract or instrument in writing concerning the machinery described in said writing was ever recorded in the town clerk's office of the town of Huntington.

The New Haven Manufacturing Company, of New Haven, in this state, had delivered machinery to the Wilcox & Howe Company under and pursuant to a written agreement, in the form of a receipt, in which, in substance, it was agreed that the machinery

mentioned therein, which the Wilcox & Howe Company therein acknowledged it had received from the New Haven Company, should be and remain the property of said New Haven Company till the price of the same, stated in said agreement, should be paid in full, when said machinery should become the property of said Wilcox & Howe Company. This instrument was dated the 24th day of October, 1896, but it was not acknowledged, nor was it ever recorded in the town clerk's office of the town of Huntington.

The Farist Steel Company of Bridgeport, in this state, had delivered to the Wilcox & Howe Company a machine called a "Merrill Drop," under a parol agreement, by which the latter company was to pay to the steel company \$20 per month as a rental, and the title to said machine was to vest in the Wilcox & Howe Company when \$400, the purchase price, had been paid in full. There was no written contract as to said drop, and nothing is upon record pertaining to the same in the town clerk's office of the town of Huntington.

Prior to the appointment of the receiver, the Wilcox & Howe Company had made payments on account under said agreements to Merrill Bros., the Farist Steel Company, J. J. McCabe & Co., and the New Haven Manufacturing Company. Nothing had been paid on account to the Pratt & Whitney Company. Each of said last five named parties claimed that the amounts, with interest, due to them, respectively, under said agreements, were secured to each of them upon the machinery described in said agreements, and that said agreements were binding upon the receiver, as they would be upon the Wilcox & Howe Company. All of said machinery described in all of the agreements herein mentioned has hitherto remained, and still is, in the possession of the receiver, and has been used by him from time to time in the prosecution of the business of the company, as conducted by him, and he has paid nothing on account thereof.

The questions reserved are stated as follows: (1) Are the several contracts mentioned in said statement of facts binding upon said receiver in the same manner as they would have been on said Wilcox & Howe Company, or does said receiver hold said machines mentioned as the absolute property of said company? (2) Do said several parties mentioned in said statement of facts, or any of them, retain title to the machinery therein mentioned as against said receiver? (3) Ought said several claims to be allowed as general unsecured claims? (4) Shall said several sales mentioned in said statement be held to be absolute sales, as between the vendors and said receiver? (5) Do said Merrill Bros., as against said receiver, hold any title in a lien on the machines described in said agreement of January 18th?

Edwin B. Gager, for receiver. Nathaniel R. Bronson, for Waterbury Farrel Foundry & Machine Co. and another. John W. Bristol, for New Haven Mfg. Co. Carl Foster and A. B. Beers, for Farist Steel Co. Daniel E. McMahon, for Merrill Bros.

TORRANCE, J. (after stating the facts). The statute (Pub. Acts 1896, c. 212) under which the questions presented upon this reservation arise reads as follows:

"Section 1. All contracts for the sale of personal property, except household furniture, musical instruments, bicycles, and such property as is by law exempt from attachment and execution, conditioned that the title thereto shall remain in the vendor after delivery, shall be in writing, describing the property, and all conditions of said sale, acknowledged before some competent authority, and recorded within a reasonable time in the town clerk's office in the town where the vendee resides.

"Sec. 2. All conditional sales of personal property which shall not be made in conformity with the provisions of the preceding section shall be held to be absolute sales, except as between the vendor and the vendee or their personal representatives, and all such property shall be liable to be taken by attachment and execution for the debts of the vendee, in the same manner as any other property not exempted by law."

Leaving out of consideration for the moment the Merrill Bros. contract, there can be no doubt that all the others are, and were intended to be, conditional contracts of sale; for in each, by force of the contract, the general property in the subject-matter of the contract is ultimately to pass, for an agreed price in money, from its owner to the Wilcox & Howe Company, on the performance by it of certain conditions; and, where this is intended to be the effect, operation, and main purpose of the contract, it will, as a rule, be held to be one of conditional sale, without much regard to the name or the form the parties may give to it. *Hine v. Roberts*, 48 Conn. 287; *Loomis v. Bragg*, 50 Conn. 228; *Appeal of Beach*, 58 Conn. 464, 20 Atl. 475; *Robinson's Appeal*, 63 Conn. 290, 28 Atl. 40.

Counsel for Merrill Bros. claims that the contract with them also should be regarded as one of conditional sale, rather than as a chattel mortgage, and for the present we will so regard it. All of these contracts, then, are for the sale of personal property within the operation of the statute, and they are upon condition that the title thereto shall remain in the vendor after delivery, and are consequently conditional contracts of sale, within the meaning of the statute. None of these agreements fully complied with the provisions of the first section of the act in question. The Waterbury Company's agreements were not witnessed nor acknowledged nor recorded as the act requires. The Merrill Bros. agreement was not recorded in the town of Huntington till long after the receiver was appointed and qualified. The Pratt

& Whitney Company agreement was not acknowledged as the act requires, nor at all. The McCabe & Co. agreement can hardly be said to have been in writing, within the meaning of the statute, for it was a mere statement, signed by no one; and it was not witnessed nor acknowledged nor recorded as required by the act. The New Haven Manufacturing Company agreement was not witnessed nor acknowledged nor recorded as the act requires; and the Farist Steel Company's agreement was not in writing at all. This being so, the conditional sales evidenced by these conditional contracts of sale, by force of the statute, are to "be held to be absolute sales, except as between the vendor and the vendee or their personal representatives." Under the statute, then, as between all of these conditional vendors and the Wilcox & Howe Company, or the personal representatives of that company, these contracts remain conditional contracts of sale, with the property in this machinery still in the vendors; while, as between the vendors and the creditors of the Wilcox & Howe Company, the machinery covered by these contracts is the absolute property of that company. And the main important question in the case is whether the receiver is the "personal representative" of the company as to these contracts, within the meaning of the statute.

Experience has shown that great evils have resulted to creditors and bona fide purchasers from the existence, without notice to the world, of conditional sales, like those here in question; and, as this statute was evidently passed to remedy to some extent those evils, it should receive such a construction as will best carry out the purpose of the statute. One main purpose and object of the statute is to protect creditors of, and bona fide purchasers from, the vendee in such contracts. As to them, and as to those who by a limited or by a universal succession represent them, the sale is an absolute one. They take the benefits of the contract, without its burdens. As between the vendor and vendee and their personal representatives, the sale remains, as it was made, a conditional one. They, as between themselves, take alike the benefits and the burdens of the contract. The statute plainly embraces all contracts of the kind here in question; contracts made by natural persons, who may die and be represented by universal successors, known as executors or administrators; and contracts made by natural persons, whose estate, in their lifetime, may, through insolvency or bankruptcy proceedings, pass to trustees or assignees, as their limited successors and representatives; and contracts made by corporations, whose estate, during the existence of the corporation or after its dissolution, may, through like proceedings, be transferred to receivers or trustees or assignees, as the limited successors and representatives of the corporation.

Counsel for the receiver contends that the words "personal representatives," as used in this statute, mean executors and administrators

only, and it may be conceded that this is their usual and ordinary meaning when the personal representatives of deceased persons alone are spoken of. *Pixley v. Eddy*, 56 Conn. 336, 338, 15 Atl. 758. But the statute is dealing with all contracts of this kind, as well those made by natural persons, who after death can be represented by executors or administrators, as those made by corporations, who cannot be so represented; and to give to the words in question the narrow construction contended for would, to a certain extent at least, defeat the manifest intention of the legislature in the passage of this act. At common law, the heir succeeded to the real estate of the deceased ancestor, and was, for this reason, sometimes called a "real representative"; while the executor or administrator, who succeeded to the personal estate of the deceased, was, for this reason, called the "personal representative." *Card v. Card*, 39 N. Y. 317, 323. But the words "personal representatives," standing alone, do not necessarily include only executors and administrators. They have acquired no such fixed, definite, technical meaning. A trustee in insolvency or an assignee in bankruptcy, for many purposes, stands in the shoes of the debtor, and represents him, and, speaking generally, is, to the extent of the estate committed to his charge, and for such purposes, as truly the personal representative of the debtor as the executor or administrator is the personal representative of the deceased; and for all practical purposes, and speaking generally, no distinction can be made in this respect between a trustee in insolvency or an assignee in bankruptcy and a receiver appointed under our statutes. We think the words "personal representatives," as used in this statute, may reasonably be held to include, in addition to executors and administrators, at least, trustees in insolvency and receivers. For most purposes, the trustee in insolvency and the receiver stand in the shoes of the debtor, and represent him; but they also, for some purposes, stand in the shoes of creditors, and represent them. "While it is true that the trustee can exercise some rights which are not in the insolvent, such as the setting aside of preferences and the recovery of property conveyed in fraud of the rights of creditors, yet, as a general rule, he is entitled to have and do only what the insolvent could have had and done,—must take the estate with the burdens placed thereon by him, with all outstanding equities against it." *Merwin v. Austin*, 58 Conn. 22, 34, 18 Atl. 1030. "The receiver, for most purposes, represents and stands in the place of the corporation, and can enforce only such contracts and rights as it could enforce. But, when acts have been done by the corporation in violation of law and in fraud of creditors, the receiver, who, for all beneficial interests connected with the trust, is regarded as the representative of the creditors, may repudiate their acts, taking

care, however, that third parties who are without fault do not suffer. Such cases, however, are exceptions to a general rule, and it should clearly appear that the case is within the exception." *Greene v. Manufacturing Co.*, 52 Conn. 330, 361; *Bank v. Peck*, 29 Conn. 384; *New Haven Wire Co. Cases*, 57 Conn. 352, 18 Atl. 266.

As the receiver is thus the representative of the corporation for some purposes, and may for such purposes be called its "personal representative," within the meaning of the statute, and as he also represents creditors for some purposes, the precise question here is whether the receiver, quoad these conditional contracts of sale and the property covered by them, is the personal representative of the corporation, within the meaning of the statute; and we are of opinion that he is not. The commencement of proceedings for the appointment of a receiver of a corporation or of a co-partnership dissolves all attachments and all levies of executions, not completed, made within 60 days next preceding, on the property of the corporation or co-partnership. Pub. Acts 1895, c. 96. And, by the appointment of a receiver, the rights of creditors to attach or levy upon such property are suspended. *New Haven Wire Co. Cases*, 57 Conn. 352, 18 Atl. 266; *Longstaff v. Hurd*, 66 Conn. 350, 359, 34 Atl. 91. The law thus disables the creditors from interfering with that property, or from in any way appropriating it for their sole benefit. But, in so doing, it does not lessen their rights with respect to such property, nor does it destroy them; it merely provides for their protection and enforcement in another way. And whenever the law thus disables creditors from helping themselves, whether by proceedings in insolvency or bankruptcy, or by the appointment of a receiver, or otherwise, it provides for the enforcement of whatever rights they may possess against the property of the debtor through the instrumentality of its agent, the trustee, assignee, or receiver. For the purpose of enforcing any such right which the creditor could have enforced for his sole advantage, and for the purpose of holding or taking any property which a creditor could hold or take by law, or for recovering back any property of which a creditor could avail himself in payment of his debt, the trustee, assignee, or receiver is, in effect, the creditor, as this court has repeatedly decided. *Swift v. Thompson*, 9 Conn. 63; *Rood v. Welch*, 28 Conn. 157; *Shipman v. Insurance Co.*, 29 Conn. 245; *Gaylor v. Harding*, 37 Conn. 508; *Taylor v. Atwood*, 47 Conn. 498; *Shaw v. Smith*, 48 Conn. 306; and *Bank v. Peck*, *Greene v. Manufacturing Co.*, and *New Haven Wire Co. Cases*, *supra*.

It is of no importance, so far as the present discussion is concerned, whether such agent of the law takes the technical title to

the debtor's property, or takes only the possession of it. In either case he is the sole agent, through whom, and through whom alone, as a general rule, the rights of creditors can be protected and enforced; and, in protecting and enforcing those rights, he is the representative of creditors, and not of the debtor. In the case at bar, the machinery covered by the conditional contracts of sale was, as to the creditors of the Wilcox & Howe Company, the absolute property of that company. It was available to the creditors in payment of their debts, and could have been appropriated for that purpose by attachment and levy of execution. When it came into the hands of the receiver of the insolvent corporation, the law sequestered it, on behalf of the creditors and for the benefit of all of them, as the absolute property of the corporation, just as fully and just as effectually as the creditors could have sequestered it by attachment and levy. For the purpose of making that sequestration effectual, the receiver is the representative of the creditors, and holds the property, as they would have held it by proper proceedings, as the absolute property of the corporation. In a case like the present, a dispute as to the ownership of property, between the receiver and the conditional vendors, is, in effect, and must be regarded as, one between such vendors and the creditors of the conditional vendee; and in such a case the statute imperatively requires that the property in dispute shall be held to be the absolute property of the conditional vendee.

The claim is made on behalf of Merrill Bros. that, if not valid as a conditional sale, their contract may be good as a chattel mortgage. But it was not recorded, as such a mortgage is required to be recorded, until long after the receiver took possession; and therefore as to him, as the representative of creditors, it was not a valid mortgage under the circumstances.

It was also claimed on behalf of Merrill Bros. that the Wilcox & Howe Company would be estopped by the recitals in the contract from claiming that the contract was not properly recorded, as a chattel mortgage or conditional contract of sale, in the town of Derby. Whether the company would be so estopped or not we have no occasion to decide, for it is certain that the receiver, as the representative of creditors, is not so estopped.

The superior court is advised that all the machinery covered by all the contracts here in question should be held by the receiver as the absolute property of the Wilcox & Howe Company, so far as the same may be necessary for the payment of its debts, and that the claims of the conditional vendors should be allowed only as general unsecured claims. The other judges concurred.

(34 Conn. 221)

NATIONAL CASH-REGISTER CO. v. WOODBURY.

(Supreme Court of Errors of Connecticut. Jan. 21, 1898.)

INSOLVENCY — TRUSTEE — NOTICE — UNRECORDED CONDITIONAL SALE.

An unrecorded conditional contract of sale of personal property in the vendee's possession will be considered an absolute sale as to the trustee of the vendee in insolvency, and the fact that he had notice of the lien prior to his appointment will not impute notice to the creditors whom he also represents.

Appeal from court of common pleas, Hartford county; William S. Case, Judge.

Replevin by the National Cash-Register Company against Milo K. Woodbury. From the action of the court in sustaining a demurrer to the reply, and from a judgment for the defendant, plaintiff appeals. Affirmed.

The complaint was brought on the 15th day of March, 1897, to recover possession of "one cash register, number 101,221," which, it alleged, the defendant wrongfully detained from the plaintiff. The answer alleged, in substance, that the defendant, on the 24th day of February, 1897, was duly appointed, by a court of probate in this state, trustee of the insolvent estate of one Raiche, and had duly qualified as such, and accepted said trust; that among the assets and property of said Raiche, and in his possession, the defendant found the cash register in question, which he had inventoried and claimed to hold as part of said estate. The reply admitted the facts set up in the answer, with the exception of the allegation that the cash register was the property of Raiche, and then, in substance, proceeded as follows: Raiche obtained the cash register of the plaintiff on or about July 1, 1896, under the provisions of a conditional bill of sale, by the terms of which the register was to remain plaintiff's property until fully paid for by monthly installments, and, in default of any such payment, plaintiff might take possession of and remove said register, "of which facts the defendant, on or about February 13, 1897, and previous to the assignment in insolvency of said Raiche, had notice, by himself and by his attorney, George B. Fowler; that said monthly payments were not made by said Raiche as agreed, of which the defendant had notice on or about March 6, 1897; that the defendant, though often requested, and particularly on or about March 15, 1897, would neither pay the balance due on said register, nor allow the plaintiff to take possession of it; whereupon the plaintiff obtained possession of said cash register by this writ of replevin." To this reply the defendant demurred, on the ground that it was not averred, and did not appear, that the conditional bill of sale was either acknowledged or recorded as required by statute.

John Hamlin, for appellant. George B. Fowler, for appellee.

TORRANCE, J. (after stating the facts). In July, 1896, the plaintiff delivered to Raiche a cash register, under a contract of sale, conditioned that the title to the register should remain in the plaintiff after such delivery, until the price of the register should be paid. The contract was neither acknowledged nor recorded as required by the statute. In this condition of things, and while the price of the register remains unpaid, Raiche makes an assignment in insolvency for the benefit of his creditors under our statute; and his trustee, finding the register in Raiche's use and possession, inventories it, and holds it as part of the insolvent estate. If these were all the facts in the present case, it would be governed, as the plaintiff concedes, by the decision just made by this court in the case of *In re Wilcox & Howe Co.*, 39 Atl. 163, but the plaintiff claims that there is an additional fact in this case, which differentiates it from the *Wilcox & Howe Co.* Case, and that is the knowledge which it is alleged and admitted the defendant had of certain matters prior to and after his appointment as trustee. It is admitted that the defendant, prior to the assignment in insolvency, and, of course, prior to his appointment as trustee, had notice of the conditional bill of sale under which Raiche held the register, and of its terms so far as they are recited in the reply; and that, after his appointment as trustee, the defendant had notice that Raiche had not made the monthly payments as agreed. We are of opinion that this notice and knowledge on the part of the defendant, as alleged, is of no importance in the present case.

In his argument on this part of the case, the plaintiff assumes that if the creditors of Raiche, prior to the assignment, had had the notice and knowledge which it is alleged the defendant had, the conditional bill of sale would be available to the plaintiff as against them. Whether this would be so or not we have no occasion to consider nor to decide here; for we are of opinion that the knowledge of the defendant, prior to the assignment, was not the knowledge of the creditors at all, either in contemplation of law or otherwise. What he then knew of the conditional sale he knew simply as an individual, and not as an agent or representative of the creditors. If such knowledge could ever be imputed to the creditors, it clearly could not be so imputed until the defendant was appointed trustee, and began to act for them in that capacity. *Bank v. Payne*, 25 Conn. 444; *Farrel Foundry v. Dart*, 28 Conn. 376; *Platt v. Axle Co.*, 41 Conn. 255; *New Haven, M. & W. R. Co. v. Town of Chatham*, 46 Conn. 465. No claim is made that he communicated this knowledge to all or any of the creditors, and, for aught that appears, he was then as to them an unknown stranger.

Prior to the assignment, then, the creditors of Raiche were not affected by the knowledge possessed by the defendant as an individual; and they were, up to that time, so far as the

plaintiff is concerned, creditors without notice. The fact, then, that the defendant possessed such knowledge prior to the time of his appointment, cannot avail the plaintiff. Can the fact that he possessed such knowledge immediately after his appointment as trustee, as he undoubtedly did in point of fact, be of any avail to the plaintiff? We think not. So far as the creditors in the present case are concerned, such notice must be regarded as then coming to the trustee for the first time, and as coming too late. After the assignment, when the property of Ralche had been sequestered by law for the benefit of his creditors, notice of the conditional sale, other than that which the statute requires, came too late to be of any avail to the conditional vendor. The property then was in a position similar to that which it would have been in if it had been attached or levied upon by creditors without notice; and in such case, clearly, notice of the conditional sale other than that which the statute requires, coming to such creditor after the levy of attachment or execution, comes too late to be of any avail to the conditional vendor. The case at bar, then, is not distinguishable from the case of *In re Wilcox & Howe Co.*, and is governed by the decision in that case. There is no error. The other judges concurred.

(70 Conn. 235)

PORTER v. RITCH et al.

(Supreme Court of Errors of Connecticut:
Jan. 5, 1898.)

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—INSANE PERSONS—PROCEEDINGS—WHEN PENDING—ORDERS OF PROBATE JUDGE—VALIDITY—ACTION FOR CONSPIRACY—EVIDENCE—FINDINGS—DISCRETION OF COURT.

1. The act concerning insane persons (Pub. Acts 1889, p. 88), providing for the examination of persons as to their sanity, is not unconstitutional, as authorizing persons to be deprived of their liberty without due process of law, in so far as it authorizes the probate judge, "pending the proceedings for a hearing and examination," to "make and enforce such reasonable orders for the care and custody of the person complained of as said judge shall deem suitable and proper."

2. The act concerning insane persons (Pub. Acts 1889, p. 88) provides that, when any person is supposed to be insane, complaint may be made to any judge of probate; that, after receiving said complaint, the judge shall appoint a time within 10 days for a hearing, on reasonable notice; and that, "pending the proceedings for a hearing and examination," the judge may make such reasonable orders for the custody of the person complained of as he shall deem proper. *Held*, that the proceeding is "pending" as soon as the complaint is filed and before service of notice on the person complained of.

3. A complaint was made to the probate court alleging that one P. was insane. Complainant at the same time presented to said court an affidavit of P.'s family physician that P. was insane. The probate judge then made an order, pending the proceedings for a hearing, committing the custody of P. to two proper persons, who should confine him under suitable restraint in his home until said hearing. *Held*, that such order was not void on its face, though

it did not recite the affidavit of said physician, or the fact that proceedings for a hearing as to P.'s sanity were then pending.

4. In an action for damages for conspiracy, evidence for plaintiff of certain acts done by an alleged agent of one of defendants was inadmissible, where the complaint did not charge defendants with doing anything by their agent.

5. In an action charging that defendants conspired to obtain money from plaintiff, and pursuant to such conspiracy made a false complaint to the probate judge that he was insane, and had him committed, evidence was inadmissible, as hearsay, that plaintiff, within a year previous to such complaint, read a paper before a literary club; and that the paper "was considered by the members of the club as one of the strongest papers they had had."

6. The defendant who made the complaint to the probate court testified concerning his action in making it, and that he had done nothing except as directed by his counsel, who then asked him the question: "Did you in any way, directly or indirectly, instruct me as to the cause of procedure, or any steps I have taken in it, or any advice of counsel I have given in the matter?" The witness answered, "I never did." *Held*, that such evidence was admissible.

7. Where a hypothetical question to an expert involved assumptions concerning which no evidence had been offered, and the court excluded it because no foundation had been laid, it was within the court's discretion, on the offer of counsel to subsequently present the evidence laying the foundation, to refuse to admit the question until the basis was laid, and such refusal was not a ground of error.

8. In an action charging that defendants conspired to obtain money from plaintiff, and pursuant to such conspiracy made a false complaint to the probate judge that he was insane, and had him committed to the custody of two of defendants pending the hearing on such complaint, defendants set up an agreement made, pending such proceedings, between them, plaintiff, and others, settling all controversies, and providing for the dismissal of the proceedings. Plaintiff, by reply, claimed the agreement was obtained by duress, which was denied by a replication. The trial court found all the issues thus raised in favor of defendants. *Held*, that such finding was a bar to plaintiff's action.

Appeal from superior court, Fairfield county; Samuel O. Prentice, Judge.

Action by Timothy H. Porter against Thomas G. Ritch and others. From a judgment in favor of defendants, plaintiff appeals. *Affirmed*.

The complaint in this action is in three counts. The gist of the whole action is that the defendants conspired together to obtain from the plaintiff a very large sum of money, and that, in pursuance of such conspiracy, they made a false and malicious complaint to the judge of probate in the district of Stamford, in which district the plaintiff resided, therein representing that the plaintiff was insane and unfit to go at large, and obtained from the said judge an order that the plaintiff be committed to the custody of two of the defendants; that by reason of the said order they arrested the plaintiff, and kept him in imprisonment for three months, and until they had extorted from him more than \$100,000 in money; that by reason of said imprisonment the plaintiff was greatly injured in his health. All the acts for which relief is sought in the com-

plaint were done in the procuring or execution of the said order, and the conspiracy in pursuance of which it is alleged such acts were committed. The answer is in four defenses. There are four separate defenses, either one of which, if sustained, would defeat the plaintiff's action. They are the general issue; a plea in bar, which sets up a lawful order of the court of probate, in obedience to which all the acts were done; a former judgment; and a discharge. Summarizing all the facts of the answer, and putting them into one connected story, it is this:

On the 18th day of December, 1893, Schuyler Merritt, one of the defendants, acting in good faith, and fully believing that the plaintiff was an insane person, and that the safety of himself and of others required that he should be placed under restraint, or into the care and custody of some suitable person, made an application to the court of probate in the district of Stamford as follows, as appears by the records of said court: "In the Matter of the Complaint of Schuyler Merritt, for a Hearing, Regarding the Alleged Insanity of Timothy H. Porter. To the Honorable H. Stanley Finch, a Judge of Probate within and for the Probate District of Stamford, in the County of Fairfield, and State of Connecticut: The complaint of Schuyler Merritt, of said town of Stamford, in said county and state, respectfully shows: That Timothy H. Porter, now and for many years last past a resident of said Stamford, is now and has for a long time past been insane, and is a fit subject to be confined in an asylum. Wherefore your complainant prays your honor to inquire into the alleged insanity of the said Timothy H. Porter, and whether he is a fit subject to be confined in an asylum. Dated at Stamford, this 18th day of December, 1893. Schuyler Merritt." The said court of probate thereupon made an order that a hearing be had on said application at the probate office on the 26th day of December, 1893, at 10 o'clock in the forenoon, and that notice of the time and place of hearing, together with a copy of said application, be served on the said Timothy H. Porter, on or before the 19th day of December, 1893. The said Schuyler Merritt at the same time presented to the said court of probate the affidavit of Dr. Henry P. Gelb, as follows: "In the Matter of the Complaint of Schuyler Merritt as to the Alleged Insanity of Timothy H. Porter. I hereby certify that on the 14th and 15th days of December, 1893, I made a personal examination of Timothy H. Porter, of said Stamford, and from my knowledge of his case, having been his physician for a long time, and from the facts that have come to my knowledge regarding his condition, I am of the opinion that he is insane, and that he is unfit to go at large, and is a fit subject for confinement in an asylum or other suitable place of detention, for in my judg-

ment he is suffering from post-paralytic dementia, and his disease is at that stage where he might at any time be seized with homicidal mania, thereby endangering the lives of those with whom he might be thrown in contact, as well as his own. Dated at Stamford, this 18th day of December, 1893. Henry P. Gelb." This affidavit was sworn to before competent authority, and the court issued an order as follows: "In the Matter of the Complaint of Schuyler Merritt Regarding Timothy H. Porter, a Supposed Lunatic. It is hereby ordered that, pending the proceedings for a hearing and an examination on the foregoing complaint, the care and custody of the said Timothy H. Porter is hereby committed to Richard Bolster and Henry E. Schock, judicious and proper persons for that purpose, who shall confine the said Timothy H. Porter, under suitable and proper restraint, in his home in said Stamford, until said hearing and until further order is made. Dated at Stamford, this 18th day of December, 1893. H. Stanley Finch, Judge of the Court of Probate for the District of Stamford." In company with a proper officer, and with these papers, the said Bolster and Schock on said day went to the house of the plaintiff. The officer served the said order of notice, and thereafter Bolster and Schock made known to the plaintiff the order by which the care and custody of his person was committed to them. Acting on that order, and in the belief that it was a lawful one, and that the plaintiff was an insane person, they remained during the time named in the complaint in the home of the plaintiff, keeping him under suitable and proper restraint, and kept such watch of his movements as was necessary to prevent him from destroying property or doing injury to himself or others; but at no time did they, or either of them, assault him, or use any force upon his person, or offer him any indignity or incivility. On the 19th day of December, 1893, the plaintiff prayed out from the superior court in Fairfield county a writ of habeas corpus against the present defendants Merritt, Bolster, Schock, and Louis H. Porter, a son of the plaintiff. This writ required the said persons to appear before the said superior court on the 21st day of December, 1893. At that time all the respondents named in said writ appeared before the superior court. The said Merritt and Louis H. Porter made return denying all the allegations of the plaintiff's application, so far as they were charged. The said Bolster and Schock made return setting out all the said proceedings of the said probate court, and assigned the same as the cause of their detention and imprisonment of the plaintiff. To this latter return the plaintiff made reply, denying the jurisdiction of the probate court to make the order, and alleging that the order was void on its face, that it was made without hearing, was unreasonable,

etc. To this reply the said Bolster and Schock demurred. The superior court found the issue for the said Merritt and Porter, that they had "not in any manner detained or restrained the plaintiff [said complainant], or deprived him of his liberty," and also sustained the demurrer by said Bolster and Schock to the reply of the plaintiff to their return, and upon the issue formed by said demurrer found that the said judge of the court of probate had jurisdiction of the proceedings set forth in the said return of said Bolster and Schock, and possessed the power under the statute law of the state to make the order set forth therein placing the plaintiff in the care and custody of the said Bolster and Schock, pending the proceedings for a hearing and examination, as therein mentioned, and that said order was reasonable, and remanded the prisoner to the care and custody of the said Bolster and Schock to be held by them under the said order. From the judgment on this latter issue an appeal was taken by the plaintiff to the supreme court of errors, but no appeal was taken from the judgment on the issue made by the return of the said Merritt and Porter. On the same day—i. e. the 19th day of December, 1893—an application was made to the court of probate in the district of Stamford by Louis H. Porter, Blachley H. Porter, and Arthur K. Porter, minor sons of the plaintiff, by their next friend, Schuyler Merritt, praying for the appointment of a conservator over said plaintiff, on the ground that he was mentally unsound, and incapable of managing his affairs, which application was duly served and returned, and the said probate court ordered the same to be heard before the court on the 3d day of January, 1894. By reason of the said habeas corpus proceedings in the superior court, and the appeal to the supreme court, the several matters and applications in the probate court were continued from time to time, until they were all finally terminated as is hereafter stated. On the 21st day of December, 1893, the plaintiff brought a complaint in the superior court in Fairfield county against the said Merritt, Bolster, Schock, and Louis H. Porter, praying that they and each of them be enjoined from interfering with his books and papers, and for other relief, upon which a temporary injunction was issued by a judge of the superior court, which, with the said complaint, was served on the persons therein named as defendants. On the 2d day of January, 1894, Schuyler Merritt and Thomas G. Ritch, executors of the last will of Louisa H. Porter, the deceased wife of the plaintiff, and trustee under the same, and Louis H. Porter, Blachley H. Porter, and Arthur K. Porter, being persons interested in the said will, brought their complaint to the superior court in Fairfield county, alleging that the plaintiff was wasting and conveying away the property of the said estate, and demanding \$250,000 damages. The complaint was

served and returned to the said superior court. On the 21st day of February, 1894, while all the said suits, applications, actions, and appeals were pending in the said mentioned courts, and were all being prosecuted, and while other differences, controversies, and disagreements existed between the parties, or some of them, the plaintiff, the defendants, and Louis H. Porter and Blachley H. Porter, sons of the plaintiff, who were interested in the said matters, questions, and differences aforesaid, met together, with the purpose and intention of making a final and complete settlement, adjustment, and end of all the said differences, controversies, suits, and claims, and entered into an agreement in writing, which was executed and delivered by all of the said parties, and is spoken of as the "Family Agreement." The defendants thereupon performed all the provisions and undertakings on their part to be performed, and caused all the said applications to be withdrawn and discontinued; and they aver that by said agreement and the proceedings thereunder, and by the performance by the defendants of the provisions and conditions thereof on their part to be performed, and by said acts of the defendants, the subject-matter of the present suit, and the plaintiff's claims or alleged right of action described in his said complaint, and all the controversies, questions, and claims between the plaintiff and the defendants, were fully and finally adjusted, settled, satisfied, and ended. The plaintiff, in reply, admitted the making and execution of the said family agreement, but says he executed it under duress,—the duress of imprisonment mentioned in the complaint. All the issues were found in favor of the defendants. The plaintiff brings this appeal.

The finding of facts, omitting those paragraphs which speak only of evidential facts, is as follows: "(13) The defendant Merritt married the only sister of the plaintiff's said second wife. (14) Said Merritt, with his wife, has for many years resided near to the plaintiff, in Stamford, and prior to 1893 was on close terms of intimacy and confidence with the plaintiff and his family. Since this date there has been an estrangement on the part of the plaintiff, growing out of conditions and circumstances which have led up to and culminated in the present controversies; while, on the other hand, and for the same cause, he has been drawn into even closer relations with the other members of the plaintiff's family, who have come to rely upon him as their confidant, adviser, and friend. * * * (18) On December 18, 1893, the defendant Merritt, after consultation with his attorney, Samuel Fessenden, Esq., and acting upon his advice, signed, and, through his attorney, filed with the court of probate for the district of Stamford, the application appearing in the copy of the records of said court, hereto annexed, and therewith the physician's certificate, likewise appearing in

said copy of record, which had been made by Dr. Geib, the family physician, upon application of Mr. Merritt or his attorney for a certificate setting forth his opinion of the plaintiff's mental condition, which he had previously expressed to said Merritt. (19) Said application and affidavit having been filed as aforesaid, said court forthwith issued an order for a hearing thereon, to be held on December 26, 1893,—being the order appearing in said annexed copy of record,—and delivered the same to Edward Gorman, a constable of said town, for service, and immediately thereupon said court, upon the motion of the defendant Merritt's said attorney, and relying upon said affidavit, issued the preliminary order for the custody of the plaintiff, likewise appearing in said annexed copy of record, and delivered it to said Bolster and Schock for service. (20) Said Gorman, Bolster, and Schock thereupon proceeded together to the plaintiff's house. Having been in the ordinary course admitted to the plaintiff's presence, said Gorman made due service of said order for a hearing, pursuant to its directions. (21) Said Bolster and Schock thereupon presented the order which they had in their hands as aforesaid, and read it to the plaintiff, in the hearing of his attorney, James H. Olmstead, Esq., who was present. Upon Mr. Olmstead's request, the order was then handed to and examined by him, who then advised the plaintiff that it was his duty to recognize it. The plaintiff thereupon submitted to the authority of said Bolster and Schock under said order, and they forthwith entered upon their duties as the plaintiff's custodians thereunder. * * * (32) On December 19th plaintiff's counsel obtained from the superior court a writ of habeas corpus returnable December 21st. (33) Upon the occasion of the hearing upon said writ, it was agreed between counsel that Judge Stoddard, one of the plaintiff's then counsel, should take possession of the securities and valuable papers in the plaintiff's house, which was immediately thereafter done. This agreement having been made, the terms and conditions of the judgment entered in said proceedings were consented to by the defendants therein. * * * (36) All the acts of the defendants Bolster and Schock, during the period of the plaintiff's restraint, as aforesaid, which are the acts complained of, were performed by them as officers of the law, in the execution and under and within the authority of said order, and in good faith, and in a full belief in the validity of said order, and with an honest desire on their part to execute it, and in its reasonable execution under the circumstances, as they appeared to them at the time. (37) None of the acts of said Bolster and Schock aforesaid were done by them as the agents of said Merritt and Ritch, or either of them, unless the law implies such an agency from the facts herein found. * * * (43) During the period that said Bolster and

Schock remained in charge of the plaintiff as aforesaid, hearings were from time to time had before the court of probate upon said original application, the plaintiff being present, and represented by his counsel, Messrs. Stoddard and Olmstead. (44) Early in January, and before the case for the applicant had been concluded, Judge Stoddard made to the opposing counsel suggestions of a settlement of the existing differences and controversies. These suggestions were so urgently pressed by Judge Stoddard that it was agreed between counsel that the hearing should be suspended, pending an effort by Judge Stoddard to bring about a settlement. (45) This was done, and Judge Stoddard set about the difficult task which he had set for himself in opposition to views of the parties concerned. * * * (47) Judge Stoddard persisted, however, and through the influence which he, with other friends, brought to bear upon the plaintiff, and his appeals to Mr. Merritt and his sons, the latter of whom yielded only with the greatest reluctance, it finally came about that said family agreement, which was prepared and drafted by Judge Stoddard himself, and which contained provisions which for the most part he suggested, was signed and executed. * * * (50) Said family agreement was executed by the plaintiff freely and voluntarily, and under the advice of his friends and counsel, and without any influence having been brought to bear upon him by any person or persons, save only his friends and counsel, who, acting solely in his interest, advised and urged him to its execution. (51) None of the defendants, nor any other person acting for them or in their interests, said any word or did any act whatsoever. (52) During the negotiations which resulted in the execution of said family agreement, neither of the defendants, nor their counsel, nor any person for or in their behalf, had any interview with the plaintiff, or correspondence with him: All the negotiations leading to said settlement were conducted on his part by his said counsel, Judge Stoddard, and on the part of the others by Mr. Merritt, said two sons, and their counsel. (53) It was understood, intended, and agreed, by all the parties to said negotiation and settlement and to said family agreement, that the same should accomplish a full and final settlement and adjustment of all the existing claims, questions, and differences between the parties thereto, and of all legal proceedings then pending, and the subject-matters thereof, and of all matters arising out of the proceedings instituted by the defendant Merritt, as set forth in paragraph 18, in favor of or against whatever party, and including all the matters covered by the plaintiff's complaint, all of which antedated said settlement. (54) Upon said March 5th, and immediately upon the delivery of the family agreement, the legal proceedings hereinbefore described, all of which were still pending, were withdrawn, and the

restraint exercised over the plaintiff by the presence of the defendants Bolster and Schock, and their deputies, in the plaintiff's house or otherwise, at once terminated, and the plaintiff fully restored to his liberty. (55) The defendants Merritt and Ritch have performed all the things required of them to be performed by the terms of said agreement. (56) No party to said agreement, except the plaintiff, has sought to repudiate it, or done any act to repudiate it. * * * (76) The said defendant Ritch in no manner participated in, authorized, instigated, or advised the making of said application to the probate court,—Exhibit B,—or the procuring of said preliminary order, or the placing of the defendants Bolster and Schock in the plaintiff's premises as aforesaid, or any of the acts described in the complaint. He had no knowledge whatever that said proceedings, or any proceedings of similar character, were contemplated, until after their institution, when he learned of it as a matter of common notoriety. (77) Said defendant Merritt did not personally participate in the performance of any of the acts done in the execution of said order,—Exhibit B,—or in the restraint or detention of the plaintiff, or give any of the directions thereto relating. (78) All the acts herein recited as done by the defendant Merritt's attorney were done by said Merritt's authority and with his approval. (79) The defendant Merritt, and he alone, was the party immediately responsible for the bringing of said application, and its prosecution and continuance, as heretofore set forth. (80) In so bringing, prosecuting, and continuing said application, and in obtaining said temporary order of restraint, and in all that he did in the premises, the said Merritt acted in good faith, and in the full and reasonable belief that said proceedings were legal and valid, and that said steps and proceedings were necessary for the protection of the person and property of the plaintiff and his family. (81) During the year 1893 said Merritt was, by the circumstances existing in the plaintiff's family, brought into especially close relations with its members. By them and others he was, during the time, constantly advised of the plaintiff's conduct. This information, upon which he relied, together with the matters which had come within his own observation and knowledge, and the statements of the family physician, led him naturally and reasonably to the conclusion, which he honestly entertained, that the plaintiff's mind was unsound, and that he ought, in the interests of himself and his family, to be subjected to restraint in some proper institution. Said Merritt's fears, as the result of this information and observation, were that the plaintiff, by reason of his unsound mental condition, was, as he was advised by the family physician, liable to do violence; that he, as evidenced by the extensive correspondence with women, discovered by his sons, was in danger of contracting an

ill-advised marriage; and that he was liable to waste, squander, misuse, or jeopardize the properties in his keeping, if he was not already doing so, as was believed."

Upon the trial the plaintiff claimed, as matter of law, as follows: "(a) That chapter 162 of the Public Acts of 1889 is unconstitutional and void, and affords the defendants no legal justification for their said acts. (b) That said act, if not unconstitutional in its entirety, is unconstitutional in the provision it makes for the custody of the alleged lunatic pending the proceedings. (c) That said original proceedings were not legally pending until notice thereof had been given to the plaintiff of such pendency. (d) That said order, issued as and when it was, afforded no justification to any of the defendants for the acts claimed to have been done by them under it, because said court was at the time of its issuance without jurisdiction to issue it. (e) That the defendants Merritt and Ritch, having by their attorney, fully authorized by them, prayed out said illegal order, are liable to trespass for all that was done under it. (f) That said Bolster and Schock were chargeable with knowledge of its illegality, and therefore not justified by it. (g) That said order, being issued by the said court without any jurisdiction, it could in law afford no justification to any one for any act done or attempted under it, whether such person actually knew of such want of jurisdiction or not. (h) That, even if said law was constitutional and valid, and said order legal, the defendants are liable in trespass for the acts done by them to the plaintiff, because said acts were in excess of the authority conferred by said order. (i) That by reason of such excess all the defendants became trespassers ab initio, and were liable for all the acts of imprisonment as though no order had been issued. (j) That the facts in the case in law constitute a conspiracy, between the defendants Merritt and Ritch and the two elder sons of the plaintiff, to represent him to be insane for the purpose of depriving him of his liberty to marry and of managing his property. (k) That the facts in the case establish and constitute in law a conspiracy between said persons to take some measures to restrain the plaintiff on the ground of his alleged insanity, and that the defendant Ritch, as well as the defendant Merritt, is chargeable in law with all that was in fact done in said insanity proceedings. (l) That the defendants Bolster and Schock, having acted as agents of the other defendants, are jointly liable with them as co-conspirators. (m) That said contract known as the 'Family Agreement' was void, as obtained by duress. (n) That said pretended contract was void, as being without consideration. (o) That said pretended contract was void, as founded upon an illegal consideration. (p) That said pretended contract, having as an essential part of its consideration an agreement by a minor, which said minor forthwith repudiated and violated, said

contract was therefore void, and not binding upon any one. (q) That said pretended contract, having as an essential part of its consideration an agreement by executors and trustees of the estate of Louisa H. Porter to abdicate their trust, and turn over for an indefinite time all the trust property to other hands, was therefore illegal and void, and not binding upon any one. (r) That said contract did not release or in any manner constitute a bar to the present cause of action. (s) That all the defendants, having joined in a special defense of justification, if said defense upon the facts of the case were bad as to any of the defendants, it was bad as to all, and the plaintiff is entitled to judgment against all upon that issue. (t) That upon the facts found the plaintiff is entitled to judgment against all defendants. (u) That upon the facts disclosed by the plea of *res adjudicata* in the third defense, and the exhibits therein referred to, said defense of *res adjudicata* could not be sustained. Notwithstanding said claims of the plaintiff, the court, upon the facts aforesaid, rendered judgment for the defendants, as on file."

Robert E. De Forest and Stiles Judson, Jr., for appellant. Goodwin Stoddard and Samuel Fessenden, for appellees.

ANDREWS, C. J. There is quite a long list of reasons of appeal, but it will not be necessary to consider them in detail. They are only an expansion of the claims made by the plaintiff at the trial, and these may all be disposed of by considering a few general propositions. If the act of 1889 was constitutional, especially that part of it which is relied on to support the order made by the judge of probate in Stamford on the 18th day of December, 1893, and if the law is so that the proceeding was pending at the time that order was made and the order was not void on its face, and if there was no error in the rulings on the evidence, or if the causes of action were discharged by the "family agreement," then there is no material error on which the appellant is entitled to have a new trial. Everything else is included in the finding of facts.

At its January session, 1889, the legislature passed "An act concerning insane persons" (Pub. Acts 1889, p. 88), which enacted that "any judge of a probate court within his probate district, shall have power to commit any insane person residing in said district, to an asylum in this state in the manner herein after provided," and that, "except when otherwise specially provided by law, no person shall be committed or admitted to an asylum without an order signed by a judge of probate, as hereinafter provided." The act then proceeded to details, and enacted that: "Whenever any person in this state shall be insane, or shall be supposed to be insane, any person may make complaint in writing to any judge of probate, within whose dis-

trict the person complained of shall reside, alleging that such person is insane and is a fit subject to be confined in an asylum, and when any insane person, who ought to be confined, shall go at large in any town, any person may, and the selectmen thereof shall, make a like complaint to the judge of probate within whose district such town is included. After receiving said complaint, the judge of probate to whom it is made shall forthwith appoint a time, not later than ten days after the receipt of said complaint, and a place within said district, for a hearing upon said complaint, and shall cause reasonable notice thereof to be given," etc. The act also specifies many other details to be observed by the judge of probate in respect to such hearing, for adjournments, for the certificate of physician, what shall be done in case the person complained of is found to be insane, and in its sixth section says: "Pending the proceedings for a hearing and examination, said judge may make and enforce such reasonable orders for the care and custody of the person complained of, as said judge shall deem suitable and proper." The complaint made to the judge of probate for the district of Stamford concerning the plaintiff was made under this legislation, and the proceedings were pursuant to its provisions. There is a general claim by the plaintiff's counsel that the whole act is unconstitutional. It is, however, so obviously within the power of the legislature to make provisions for insane persons, and for their commitment to and confinement in an asylum for treatment and care, that we suppose counsel intend to attack this act no further than the provision respecting the care and custody of the person complained of pending the proceedings is an essential feature of it.

It is strenuously insisted that so much of the act as is relied on to justify the order given to Bolster and Schock is unconstitutional, for the reason that it may, as in this case it is claimed that it did, deprive a person of his liberty without due course of law. That constitutional provision is invoked which says that no person shall be deprived of his life, his liberty, or his property without the due course of law. Nothing can well be dearer to the law than the right of each person to his life, his liberty, and his property. For more than 600 years the law has been zealous and astute to protect these rights. The words of *Magna Charta*, which declare that every person shall be protected in the enjoyment of his life, his liberty, and his property, except as they might be declared to be forfeited by the judgment of his peers or the law of the land, furnish the rule. In some form of words this principle is now found in every one of the American constitutions. No one does, or can, deny its binding force. But constitutional provisions, however often repeated, do not give to any one an absolute estate in even these high privileges which he can enjoy to the exclusion of others. These priv-

illeges must be enjoyed with just limitations, —with such limitations as are necessary to make their enjoyment by each consistent with the like enjoyment by all. The right of all is superior to the right of any one. These limitations are not deprivations of the right. They are regulations, so that no one person can insist on a right to the enjoyment of any one of these privileges, to the exclusion or the infringement of the right of any other person to the like enjoyment. The taking of life itself by a private person, and without warrant, may sometimes be justified. One may lawfully kill an assailant, if necessary to save his own life, or the life of his wife or children. *Morris v. Platt*, 32 Conn. 75. A burglar who, in the night season, is attempting to break into a dwelling, may be killed, if his attempt can be frustrated in no other way. A husband or father who finds one attempting to commit rape on his wife or daughter may lawfully kill him to prevent the crime. 4 Bl. Comm. 179, 180. Examples of this sort of regulation are more often found in the laws and ordinances which apply to property than elsewhere. Among them are the very many statutes and regulations which concern the use of property. The constitutional provision just stated has never been regarded as incompatible with the principle, equally vital, being essential to the permanent safety of society, that all property is held subject to the power of the state to regulate the use by the owner when that use is found to be injurious to the community. *Mugler v. Kansas*, 123 U. S. 623, 665, 8 Sup. Ct. 273; *Beer Co. v. Massachusetts*, 97 U. S. 25, 32; *Com. v. Alger*, 7 Cush. 53. There are many cases in which the rights to the use of property must be exercised subservient to the public welfare. The maxim of the law is that a private mischief is to be endured rather than a public inconvenience. On this ground rest the rights of public necessity. Thus, if a common highway be out of repair, a passenger may lawfully go through an adjoining private inclosure. So it is lawful to raze houses to the ground to prevent the spreading of a conflagration, without being responsible in trespass or otherwise. *Russell v. Mayor, etc.*, 2 Denio, 461. There are many other like conditions. See 12 Coke, 13, 63; *Maleverer v. Spinkel*, 1 Dyer, 36b; Vin. Abr. tit. "Necessity"; 2 Kent, Comm. 338; *Governor, etc., v. Meredith*, 4 Term R. 794, 797; *Respublica v. Sparhawk*, 1 Dall. 357, 363; *Vanderbilt v. Adams*, 7 Cow. 349; *Cooley, Const. Lim.* 739. So, too, public nuisances may be abated by any one who is injured thereby. *Van Wormer v. Mayor, etc.*, 15 Wend. 262; *Wood, Nuis.* 768. To the same rule the vindication of our law that the property of a defendant in a civil suit may be attached on mesne process, and held till final judgment, must be referred. The various rules and statutes authorizing these limitations to the rights of property owners have always been regarded as police regulations, although they curtail

its owner's use in some degree, and not unconstitutionally.

The right to personal liberty ought, perhaps, to be regarded as on a higher plane than the right of property; but the constitutional protection to the one is precisely the same as to the other. The right to enjoy liberty is always limited by the duty which requires every one to use his liberty in such a way as not to be detrimental to the public. There are many cases in which a man may be restrained of his liberty by any one and without warrant. "It is justifiable if a man hold another to restrain him from mischief." *Com. Dig. "Battery," A.* In *Gleever v. Hynde*, 1 Mod. 168, a private person without a warrant removed one who was disturbing a funeral service. His action was justified. In *Hall v. Planner*, 1 Lev. 196, the church warden removed the hat from the head of one who refused to uncover his head during divine service in a church on a Sunday. This was held to be justifiable. In *Handcock v. Baker*, 2 Bos. & P. 260, the defendant broke and entered into the house of the plaintiff to prevent him from murdering his wife. This was justified. A person dwelling in a house infected by any contagious disease may be required by a constable to keep within his house, and if he disregard such command it may be enforced by a watchman, and if any hurt ensue by such enforcement the watchmen are thereby indemnified. 4 Bl. Comm. 161. The health officer of a city may confine one who has been exposed to the smallpox to prevent the spread of that disease. *Harrison v. Mayor*, 1 Gill, 264. "A private person may, without an express warrant, confine a person disordered in his mind, who seems disposed to do mischief to himself or any other person." *Bac. Abr. "Trespass," D.*, p. 573. "It is universally conceded that every man may, for his own protection, restrain the violence of a lunatic; and any person may, at least temporarily, place any lunatic under personal restraint whose going at large is dangerous to himself or others." *Tied. Lim.* 108. Clearly, this may be done as preliminary to the institution of judicial proceedings, by which a judgment for a permanent confinement may be obtained. 6 South. Law Rev. (N. S.) 568; 3 Am. Law Rev. 193; *Colby v. Jackson*, 12 N. H. 526; *Davis v. Merrill*, 47 N. H. 208; *Keleher v. Putnam*, 60 N. H. 30; *Williams v. Williams*, 4 Thomp. & C. 261; *Look v. Dean*, 106 Mass. 116, 120; *In re Doyle*, 16 R. I. 537, 538, 18 Atl. 159; *Lawson, Rights, Rem. & Prac.* § 1066; 11 Am. & Eng. Enc. Law, p. 112; *Cooley, Torts*, 179; *Com. v. Kirkbride*, 3 Brew. 393; *Van Deusen v. Newcomer*, 40 Mich. 90. "The right to restrain an insane person of his liberty is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others. In the delirium of fever, or in the case of a person seized with a fit, unless this was the law, no one could be restrained against his will. And the necessity which

creates the law creates the limitation of the law. In the case of an application to have a guardian appointed over the person and estate of an insane person, under the statute, some time must necessarily elapse before the appointment can be made, and during that time restraint may be necessary. If there is no right to exercise that restraint for a fortnight, there is no right to exercise it for an hour. And if a man may be restrained in his own house, he may be restrained in a suitable asylum, under the same limitations and rules. Private institutions for the insane have been in use, and sanctioned by the courts,—not established by any positive law, but by the great law of necessity and humanity. Their existence was known and acknowledged at the time the constitution was adopted. The provisions of the constitution in relation to this subject must be taken with such limitations, and must bear such construction, as arise out of the circumstances of the case." Chief Justice Shaw, in *Re Oakes*, 8 Law Rep. 122, 124.

Limitations to the use of property, or to the personal liberty of another. In the different classes of cases to which the instances we have cited may be referred, have always been held not to infringe the constitutional provision now invoked. In none of them is there any deprivation of the right, but only its just regulation. These limitations serve to prevent such a use by one of his property or of his liberty as takes away from others their equal right to the use of their own. One who is prevented from injuring another cannot justly assert that he has himself been deprived of any right. An insane person, whose going at large is dangerous to others or to himself, and who is restrained, cannot maintain that he has been deprived of any right, or that he has suffered any injury. In most of the cases cited the act placing a restriction upon the liberty of another was by a private person, and the act has been held to be justified. But a private person can act only in an emergency, and then only at his peril,—the peril of being unable to prove the existence of the emergency which is his justification. Restrictive conditions of this kind upon the liberty or the use of property are sometimes absolutely necessary to the safety of all. A wise administration of government does not leave it to private persons to decide when these restrictions shall be exercised. Private persons may not be willing to take the hazard, and so statutes are passed which directly name or authorize a municipal board to appoint some one to judge of the emergency and direct the performance of those acts which any individual might do at his peril without any statute. Such a one is the agent of the law, and incurs no personal liability. Statutes of this kind, and in many states, have been upheld, and, so far as we know, without exception. *Raymond v. Fish*, 51 Conn. 80; *Dunham v. City of New Britain*, 55 Conn. 378, 11 Atl. 354; *Russell v.*

Mayor, etc., 2 Denio, 461; *Van Worrler v. Mayor, etc.*, 15 Wend. 262; *Coe v. Schultz*, 47 Barb. 64; *City of Taunton v. Taylor*, 116 Mass. 254; *Train v. Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929; *Ex parte Shrader*, 33 Cal. 279; *Harrison v. Mayor*, 1 Gill, 284; *Cooley, Const. Lim.* 720, 721. That part of the sixth section of the act of 1889 under which the judge of probate acted is a statute of this kind. It named the judge of probate in each district as the agent of the law to decide whether such conditions existed as made it necessary to confine a person supposed to be insane for a temporary period. It does not violate any constitutional provision. It is clearly within the police power of the state.

The statute authorizes the judge to make reasonable orders for the custody of the person complained of, "pending the proceedings for a hearing and examination." If we should assume that this language did not authorize the order made on the 18th of December upon the mere presentation of the complaint, it clearly did authorize the order as modified and confirmed on the 22d of that month, after a full hearing of all parties. The action of the judge upon the hearing was at least equivalent, so far as concerns the defendants Bolster and Schock, to the order of that day. We might, therefore, deem it immaterial to pass upon the validity of the order when first issued,—not because it could only affect the claim for damages for the unlawful custody from the 18th to the 21st, but because the statute under which it arises has since been altered, and the claim for damages, if valid, has been discharged by the family agreement.

It is further claimed that the order to Bolster and Schock was void for the reason that no proceeding for a hearing was pending at the time it was made. The "proceeding" was the application to the court of probate to have Mr. Porter declared insane and a fit person to be confined in some suitable asylum. This application was made to the court on the 18th day of December, 1893. With this application there was also presented to the court the affidavit of Dr. Gelb that in his opinion Mr. Porter was insane, and liable at any time to do injury to himself or others. The court of probate thereupon made an order fixing the time for a hearing on the application, together with an order of notice to be given to Mr. Porter, and immediately thereafter, and before the same was served on Mr. Porter, issued the said order to Bolster and Schock. It appears that Bolster and Schock did not attempt to enter upon their duties under the said order to them until after service of the said application and order of notice had been made on Mr. Porter, so that the "proceeding for a hearing" was pending at all times while they were exercising any care or control of the plaintiff. But the argument is that the said order for care and control was void, for the reason that the proceeding was not pending at the moment

that order was made; service on Mr. Porter not then having been made. The argument depends on the case of *Jencks v. Phelps*, 4 Conn. 149, and the several cases in later reports which follow that one. It was held in that case that an "action" was not commenced till service had been made on the defendant. It was said by Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264, 407, that an action or suit is the prosecution of some demand in a court of justice. An "action," then, requires two parties,—one who prosecutes the demand, and the other against whom the demand is prosecuted,—and something sought to be obtained by the former of the latter. In this sense it is no more than just that an action shall not be deemed to be commenced, so as to affect the defendant, until service has been made upon him. This is what was done in *Jencks v. Phelps*. It seems to us that the proceeding before the court of probate in the district of Stamford on the 18th day of December, 1893, was not an "action," in the sense in which that word was there used, and that the rule of *Jencks v. Phelps* does not apply. There were no parties; there was no demand,—nothing sought to be recovered by one against another. It is obvious that the definition of an "action" given by Chief Justice Marshall does not include, and was not intended to include, proceedings or actions in rem, nor proceedings in the nature of an inquest of office, and other like proceedings. By the said act of 1889 the judge of probate is made an agent of the law to decide whether or not a person complained of was insane and ought to be committed to an asylum. The judge was to act on the complaint in writing of any person; but the person complaining did not thereby become a party to the proceeding. The statute requires the judge of probate to give notice of the time and place of hearing to the party complaining, as much as it does to the party complained of. At no time in the progress of the inquiry is there any "action" pending in the court, nor are there any "parties," in the sense that these words are used in the case of *Jencks v. Phelps*. The proceeding was the inquiry by the court as to the sanity or insanity of the person complained of. It was an inquest of insanity. It was in the nature of a police regulation, for the care and restraint of a person insane or supposed to be insane. The proceeding was commenced when the court received the written complaint. So far as the court of probate was concerned, the proceeding was then pending. Any proceeding once commenced in any court in the regular way is pending in the court until it is in some way terminated. *Webst. Dict.* Until it is terminated the proceeding is in suspense; it is depending. *Wentworth v. Farmington*, 48 N. H. 207; *Littlefield v. Canal Co.*, 8 Cliff. 371, Fed. Cas. No. 8,400. Our own case of *Huntington v. McMahon*, 48 Conn. 174, shows clearly what the term "pending" means

when applied to a court. Complaint had been made to a justice of the peace in the town of Winchester for the condemnation of certain liquors. The liquors had been seized, notice was given, and a hearing was had before the justice, at which certain parties appeared who claimed to be the owners of the liquors. The justice condemned the liquors to be destroyed. The owners took an appeal to the district court, and the liquors were committed to the keeping of a person named by the justice. The next day, or within a day or two, the owners brought a replevin for the liquors, and took them out of the possession of the person so named as the keeper. The case cited was an application to the said district court by the state's attorney that all the persons concerned in the action for replevin be punished for contempt of that court. On the hearing of the contempt proceedings, one claim made by the parties was that there could be no contempt of the district court, for the reason that the appeal was not pending in that court at the time the replevin was served. This court held that the appeal was pending in the district court as soon as the appeal was regularly taken from and allowed by the justice court, although it was long before the return day to the district court, and although it appeared that the appeal papers had not been filed with the clerk of that court, and that they had not even been made out by the justice, and that the bringing and serving of replevin was a contempt of the district court. We are of the opinion that the proceeding for a hearing was pending at the time the order to Bolster and Schock was issued.

The plaintiff argues that the order given by the judge of probate to Bolster and Schock was void on its face, and cites largely from authorities to sustain his claims. We are not able to agree with the plaintiff. It seems to us that he misjudges the character of that order. It is not a judgment. It is a temporary order, provisional, issued only as a precaution to provide against an emergency deemed liable to arise,—an order in its nature interlocutory, rather than final. It is a part of the procedure, and does not enter into the judgment or decree. It is not an adjudication. It is true that this order does not recite the affidavit of Dr. Gelb, nor does it recite the fact that proceedings for a hearing as to the sanity of Mr. Porter were then pending. But the superior court could not shut from its eyes, nor can this court, the fact, which the record of the probate court discloses, that that court had that affidavit before it at the time this order was issued, and acted on it, nor that the proceedings for the hearing were at that time actually pending. To be sure, the order committed the plaintiff to the care and custody of the persons named; but it was not an order of commitment in execution, and therefore was not to be construed with the same strictness as

are final orders. *Rex v. Gourlay*, 7 Barn. & C. 669. It was not void. In the case of *Van Wormer v. Mayor, etc.*, 15 Wend. 262, an order was made by the board of health of that city declaring certain premises to be a nuisance, and ordering the same to be abated, because of the Asiatic cholera then prevailing in the city; and thereupon the mayor pulled the house down. The order was sustained, although it did not appear that it had ever been reduced to writing, or recorded, except by way of recital in an ordinance by the board.

During the trial the plaintiff offered evidence of certain acts done by one Thoms, on the ground that Thoms had been deputed by Bolster to do those acts. The defendants objected to this evidence, for the reason that the complaint did not charge the defendants with doing anything by their agent. The court sustained the objection. This ruling was in accordance with the rules established under the practice act. *Prac. Book*, p. 14, rule 3, § 1.

The Reverend Mr. Scoville testified that the plaintiff, within a year next before he was placed in custody, read a paper on John Calvin before a literary club in the city of Stamford, and that the paper "was considered by the members of the club as one of the strongest papers they had had." The defendants asked that this evidence be stricken out. The court so ordered. We think the evidence was rightly stricken out. It was hearsay.

Mr. Merritt testified concerning his action in making the complaint to the probate court, and in reply to a question by Mr. Fessenden, who was his counsel in this action, said: "I laid the facts before you, as my counsel, and before Dr. Gelb, at your suggestion, as a competent medical man, and as the family physician. Since that time I have done absolutely nothing, except as you directed me. I have been a mere instrument since that. In fact, I was a mere instrument before." Mr. Fessenden then asked this question: "Did you, in any way, directly or indirectly, instruct me as to the course of procedure, or any step I have taken in it, or any advice of counsel I have given in the matter?" The plaintiff objected to this question, but the court admitted it, and the witness answered: "I never did." This evidence was admissible. Mr. Merritt was charged with acting maliciously in making this complaint to the probate court. He had the right to show that he acted on the advice of counsel.

Counsel for the plaintiff asked of an expert witness, one Dr. Cowles, a hypothetical question. It was conceded, and the fact was so, that it involved assumptions concerning which no evidence whatever had been offered. The court excluded the question for the reason that a foundation for it had not been laid; and, upon the offer of counsel to subsequently present such evidence, the court decided not to admit the question until the basis for it

had been laid. This ruling was no more than an exercise by the court of its discretion as to the order in which evidence should be put in. It is not a ground of error.

One part of the defendants' answer is a discharge of all the causes of action alleged in the complaint by the agreement of the parties. This defense sets up the agreement called the "Family Agreement." After stating the purpose for which that agreement was entered into, its execution and delivery, and setting it forth in full as a part of the defense by making it an exhibit, and alleging that the defendants had fully kept and performed all their part of said agreement, this defense concludes in this way: "And the defendants say, upon the facts aforesaid, that by said agreement, and the proceedings thereunder, and by the performance by the defendants of the provisions and conditions thereof on their part to be performed, and by said acts of the defendants, the subject-matter of the present suit, and the plaintiff's claims or alleged rights of action described in plaintiff's complaint, and all of the controversies, questions, and claims between the plaintiff and the defendants, were fully and finally adjusted, settled, satisfied, and ended." The plaintiff, in his reply, admits the execution and delivery of the said agreement, and substantially admits the performance by the defendants of their part thereof, but asserts that "the execution of the said paper by the plaintiff was procured, induced, and compelled under the circumstances and by the false imprisonment and duress set forth in the various paragraphs of the complaint, and by the conspiracy, malicious arrest, fraud, and duress therein stated." To this replication the defendants rejoined by a denial. The issue so formed, as were all the other issues in the case, was found in favor of the defendants. The finding of facts on this part of the case is as explicit and clear as language can make it. The court says: "It was understood, intended, and agreed by all the parties to said negotiation and settlement, and to the said family agreement, that the same should accomplish a full and final settlement and adjustment of all the existing claims, questions, and differences between the parties thereto, and of all the legal proceedings then pending, and the subject-matter thereof, and of all the matters arising out of the proceedings instituted by Mr. Merritt,—the said complaint and application made to the judge of probate on the 18th day of December, 1893,—in favor of or against whatever party, and including all the matters covered by the plaintiff's complaint, all of which antedated the said settlement." We are not able to see why this finding of the issue and of the facts is not a complete and absolute bar to the plaintiff's entire action. Had he desired to make the claim that the "family agreement" did not of itself operate to bar his action, because its terms do not warrant such a construction, and that the alleged in-

tention that it should so operate was unavailing, because not so expressed in it, he should have demurred. So far as the plea of duress is concerned, the plaintiff was never in such a situation that it was legally impossible for him to make an agreement which would be binding on him. All those circumstances with which he was surrounded, so graphically and impressively set forth by his counsel in their brief, which constitute the duress and imprisonment complained of, and which would be likely to affect his freedom of action, were for the consideration of the trial court. From the finding of facts we know that the trial court did consider them, and, having so considered them, has found that "said family agreement was executed by the plaintiff freely and voluntarily, and under the advice of his friends and counsel, and without any influence having been brought to bear upon him by any person or persons, save only his friends and counsel, who, acting solely in his interests, advised and urged him to its execution." It seems to us that the plaintiff is bound by the family agreement; that he ought to keep it, and that he has no right of action for anything alleged in the present complaint. There is no error. The other judges concurred.

(70 Conn. 295)

KASHMAN v. PARSONS.

(Supreme Court of Errors of Connecticut. Jan. 21, 1896.)

EJECTMENT—RES JUDICATA—IDENTITY OF ISSUES
—SPECIAL FINDINGS—PLEADING—APPEAL
—REVIEW—BOUNDARIES.

1. In ejectment for a small piece of land claimed to be a part of a conveyance by defendant to plaintiff, the record of a former judgment, showing a finding adverse to defendant on an issue of mutual mistake in the description in the deed, is admissible in support of a denial that plaintiff knew that the land in question was not intended to be included in the conveyance.

2. Where a reply alleged that in a former suit, involving the same subject-matter, defendant filed a cross complaint and a request for a finding of facts, embracing all averments of fact contained in her answer, which allegation was denied by the rejoinder, plaintiff might introduce a copy of the request, irrespective of whether the former proceedings resulted in a judgment conclusive of the controversy afterwards presented; the issue being whether such request was made.

3. In an action of ejectment, evidence that certain fences were a boundary or monument is properly excluded, where they are not referred to in the deed.

4. In an action of ejectment, an objection to evidence that certain fences were a boundary or monument, on the ground that it might have been litigated in a former action, is untenable, where the issue in the former action was a mistake in the deed of conveyance, and, in the second action, estoppel of plaintiff to assert title.

5. It is error to refuse to permit defendant in ejectment to show that plaintiff is estopped from asserting title on the ground that such question might have been adjudicated in a former action of ejectment, wherein defendant had a perfect defense on the ground that the

legal title rested in her, and wherein she also pleaded mutual mistake in the deed.

6. A special finding in an equitable action, distinct from the judgment, and made to facilitate the taking of an appeal, is not conclusive in any collateral suit, except so far as resort may be had to it to explain the scope of the judgment.

7. Questions not raised by the pleadings will not be considered on appeal.

Appeal from city court of Hartford; Leonard Morse, Recorder.

Ejectment by Isaac Kashman against Betsey M. Parsons. From a verdict for plaintiff, defendant appeals. Reversed.

The following facts appeared from the finding: In 1895 the plaintiff brought a former action of ejectment against the defendant in the same city court, respecting the same land. The parcel in controversy was situated in Hartford, and was a narrow, triangular piece, running to a point on Main street. To that action a general denial was pleaded, and a cross complaint was also filed. In the latter the defendant alleged that in 1894 she owned a house on the corner of Main and Canton streets, the lot being bounded west 60 feet, more or less, on Main street, north on Canton street 147 feet, more or less, and wholly surrounded by a substantial fence; that she also owned the adjoining land on the south and east; that she employed a broker to sell the house lot as fenced in; that the defendant bought it; that the deed, by mistake of the scrivener, was so drawn as to describe the lot conveyed as 60 feet wide in the rear, and 147 feet deep on each side, whereas in truth the lot so fenced in was only about 54 feet wide in the rear; that the defendant, relying on the accuracy of the scrivener and her broker's representation that the description was correct, executed the deed without reading it or knowing of the mistake; that the deed was thus made, by a mutual mistake of both parties, to include the triangular parcel now demanded; and that she first discovered the mistake in December, 1895, and then requested the plaintiff to correct it, which he declined. The prayer was for a reformation of the deed, and damages. The plaintiff answered, denying any mistake. The cross complaint was tried separately, in March, 1896, and dismissed. The court, in the judgment filed, found the issue for the original plaintiff, and "that there was no mutual mistake in the description and boundary of the land conveyed by said deed mentioned in the complaint; and further found that the allegations of the defendant, Betsey M. Parsons, and contained in said cross complaint, that there was a mutual mistake in the description and boundary of the land conveyed by said deed, are not true in fact." A special finding of facts was also filed for purposes of an appeal. In this the following facts, among others, were stated: The house lot was fenced in at the date of the bargain for the sale and of the deed, which was in 1894. The difference in width between the front and rear was not

strikingly apparent, owing to a long shed near the east line. The broker told the plaintiff that the corner lot for which he was bargaining was 60 feet wide and 147 feet deep. The fences were never alluded to. The plaintiff knew that the defendant owned the land adjoining the corner lot on the south. A mortgage back was given for part of the price, and followed the deed in describing the bounds. Both conveyances were read over to the defendant, and she knew the deeds gave the plaintiff a width of 60 feet in the rear. Soon after his purchase, the plaintiff rebuilt the rear fence from a distance of 60 feet from Canton street, and the defendant, at his request, paid half of the bill. Afterwards, in October, 1895, he employed an architect to prepare plans for a building to be put up on his lot, and measurements were made, which first showed him that the lot as fenced was only 53 or 54 feet wide in the rear. He did not then know, however, that the defendant claimed that she had only meant to convey to him the lot as fenced in. In November, 1895, the defendant began to put up a barn in the rear of her lot on the south. The barn reached to within 57 or 58 feet of Canton street. The plaintiff, within a reasonable time, sent her a written notice that she was encroaching on his premises, and also told the builder the same thing; but she replied that he owned nothing south of the fence. In June, 1896, the original cause came on for trial upon the plea of a general denial, and the defendant set up her mortgage title, which was still outstanding, and obtained judgment on that issue. Subsequently the plaintiff, having paid up the mortgage, and obtained a release thereof from the defendant, brought the present action. The answer was, first, a general denial, and then a second defense of estoppel. This alleged that the defendant sold the plaintiff only the lot as fenced in; that at the time of her conveyance she claimed the triangular parcel now demanded as part of her home lot on the south of the premises conveyed, which the plaintiff well knew; that in October, 1895, he well knew that his rear boundary was only 54 feet wide; that in November, 1895, she began to erect a barn, partly on the triangular parcel, and finished it in December; that the plaintiff during all this time resided on Canton street, within 50 feet of the barn, and in plain view of it; that he passed it, and saw it many times each day, but that he never intimated to the workmen or the defendant that the barn was on his land. A reply was filed, containing—First, a denial of most of the defendant's averments; and, second, such a denial, together with a claim of *res adjudicata* based upon the judgment on the cross complaint in the former action, and alleging that in that complaint and a request she filed for a finding of facts upon the hearing thereon every fact now set up in her answer was made the subject of a claim for relief. The defendant rejoined, admitting the filing of the cross complaint in the former action, denying the other

allegations in the second part of the reply, and averring that the only ground of relief set up in the cross complaint was a mutual mistake entitling her to a reformation of the deed. The plaintiff surrejoined by a denial. Upon the trial the plaintiff introduced the deed, mortgage, and release of mortgage, and proof of the disseisin. He also offered the record of the former action, claiming that it was material to, and decisive of, the issues on trial. The defendant objected on the ground that it was not material, that the issues in the two actions were different, and that the final judgment in the former action was in her favor. The court admitted the evidence. The plaintiff then offered in evidence a request for a finding of facts filed in the former action upon the ground that such request was a part of the record, and contained relevant admissions on the part of the defendant as to the matters set up in the amended answer in this case, which matters were, or might have been, litigated and decided in said former action. To the admission of this evidence the defendant objected on the grounds above stated, and upon the ground that such request was not a part of the record in said former action; but the court overruled said objection, and admitted the evidence. The defendant claimed that the land described in the deed was bounded on two sides by streets, and on the other two sides by land of the defendant; that the former land was separated from the latter land by well-defined fences so clearly and distinctly as to make such fences a boundary or monument which should be or might be considered by the jury as more reliable than the distances stated in said deed, and offered evidence in support of such claim. To this evidence the plaintiff objected on the ground that the matter of such boundary, monument, and distances had been, or might have been, litigated and decided in said former action, and on the ground that it appeared from the pleadings relating to and constituting said cross complaint, and the judgment and finding thereon in said former action, that the court had therein decided that the land in question had been included in said deed. The court sustained the objection of the plaintiff, and rejected the evidence. The defendant then offered evidence to prove that the plaintiff lived near the premises in question, and that in November and December, 1895, he knew that said barn was in process of erection on the land in question, and other matters relating to the erection of said barn. The plaintiff objected on the ground that the matters claimed to be evidenced thereby were, or might have been, litigated and decided in said former action. The court sustained the objection, and excluded the evidence. The defendant offered no evidence as to disseisin, nor any further evidence. The court then submitted the cause to the jury, with instructions to return a verdict for the plaintiff, which they accordingly did, assessing his damages at one dollar.

Charles E. Perkins and Timothy E. Steele, for appellant. Lewis E. Stanton and Hugh O'Flaherty, for appellee.

BALDWIN, J. (after stating the facts). The cross complaint in the first action of ejectment was based upon a claim of a mutual mistake. It set up that neither party supposed at the time that the land bargained for included the triangular parcel now in dispute, or that the deed embraced it in its terms of description. These allegations were put in issue, and the issues found for the present plaintiff. In the present action the defendant's second defense is, rested on estoppel, and in its support she pleads that she claimed this parcel as hers at the time of the conveyance, which the plaintiff well knew, and that all she sold him was the lot as then fenced in. These averments were denied, and the record of the former judgment was admissible and conclusive in support of this denial. Rules under the practice act (Practice Book, p. 17, rule 4, § 12). It showed a finding adverse to the defendant on a point put directly in issue, and material both in that action and in this,—in that, because what each party supposed to be the subject of the sale at the time of the transaction bore immediately upon the question of mistake; in this, because the knowledge and supposition of the defendant at that time tended to show what his knowledge and supposition was later, when his omission to object to the erection of the barn was set up as a ground of estoppel. The second part of the reply, after setting up the institution of the defendant's cross complaint, proceeds to aver that she "afterwards in said cause filed also a certain request for a finding of facts in the cause. In said cross complaint and request for finding of facts she set up each and every averment of fact which is now contained in her amended answer, and claimed relief therefor." The averments quoted were denied by the rejoinder, and the plaintiff had a right in support of them to introduce a copy of the request for a finding, irrespective of the question whether the proceedings in which it was filed did or did not result in a judgment conclusive of the controversy presented in the suit on trial. *Adams v. Way*, 32 Conn. 100. It is true that such a request constitutes no part of the record of a cause, except upon an appeal from the judgment founded on exceptions to which it is relevant; but it may contain statements which will be receivable in a subsequent action as admissions by the party in whose behalf they were prepared. Whether there were such admissions in this particular request was a matter which had not been put in issue by the pleadings; whether such a request was ever filed had been put in issue.

The evidence offered to show that the fences were a boundary or monument which the jury could consider as sufficient to control the distances stated in the deed was

properly excluded. The monuments which control courses and distances are those to which the conveyance itself refers. A reference to the adjoining land of the grantor as a boundary cannot be treated as describing a monument intended to control the dimensions stated because of the existence of a fence, which is not mentioned in the deed.

The objection taken by the plaintiff to the introduction of this evidence, that the matter was or might have been litigated in the former action, was untenable. That proceeding was to correct a mistake in the deed under which the plaintiff claimed, and the only mistake alleged was the description of the real boundary as 60 feet long. It was not contended then, as it is now, that the deed itself was consistent with the defendant's claim of title. But, as the evidence was incompetent to vary the written contract, for the reason already stated, the ruling of the court can constitute no ground of appeal.

There was error in excluding the evidence offered by the defendant to prove the estoppel set up in her answer. The circumstances and conduct of the plaintiff, which she sought to prove, could not have been made the subject of final determination with respect to this question of estoppel in the former action. They were material there only as evidential of what he knew or supposed at the time of the execution of the deed. The defendant's claim then was that he acted as if he had understood his purchase to be limited to the lot as fenced in; that is, as if the deed had been drawn as it was by mistake, and did not follow the terms of their bargain. Her claim now is that, notwithstanding he did not share her mistake, but understood his purchase to cover the parcel in dispute, still, by his subsequent silence, under circumstances and at a time calling for an assertion of his title, he so far misled her as to preclude him from a recovery upon it in this action. As to this she had a right to be heard under the issues closed.

The special finding of facts under the cross complaint is not referred to in the judgment rendered. That is complete in itself, and sets forth upon what findings it is based. A special finding in an equitable action, distinct from the judgment, and made, as was that now in question, to facilitate the taking of an appeal, has no conclusive effect upon the parties in any collateral suit, except so far as resort may be had to it to explain the scope of the judgment, where that is doubtful upon its face, by showing what facts were the subject of inquiry and adjudication. For that purpose it is the best evidence, and takes the place that would be otherwise occupied by a witness. The judgment on the cross complaint was expressed in terms that are clear and definite. Its recitals state that all the issues were found for the plaintiff, and that there was no mutual mistake. The

special finding was not needed to explain it, and the evidential facts which it sets forth spent their force when the ultimate facts were determined, upon which the judgment rests. The finding would not have been admissible, even as tending to show such evidential facts in answer to the evidence which the defendant offered, had that been admitted. Much less could it avail to exclude it altogether.

The plaintiff contends that the defense of estoppel was one of which the defendant might have availed herself in the former suit, and therefore cannot now be made the subject of litigation. To that action there was a perfect defense under the general denial, namely, that the legal title was in the defendant by virtue of a deed from the plaintiff. She had, therefore, no occasion to set up any estoppel in bar; nor could it properly have been introduced into her cross complaint. If the deed was to be reformed, such relief could only be granted on proof of a mutual mistake at the time of its execution. It is also argued that the defense of estoppel was untenable, because, when the defendant built her barn, she held the legal title to the ground as mortgagee, and could not have been prevented by the mortgagor, had he made the endeavor, from improving her security at her own expense. Neither this question, nor that of the sufficiency of the averments of the second defense to found an estoppel, was raised by the pleadings. The defense was denied, and it was not so manifestly unsubstantial or immaterial as to warrant the court in refusing to listen to any evidence of what had been alleged. There is error, and a new trial is ordered. The other judges concurred.

(70 Conn. 274)

SWEENEY v. PRATT et al.

(Supreme Court of Errors of Connecticut. Jan. 21, 1898.)

JUDGMENT—LIEN—FINDING OF FACT—CONCLUSIVENESS—SERIES OF NOTES—PAYMENT—ESTOPPEL—NOTICE.

1. Under Gen. St. § 3034, providing that a judgment shall only be a lien on such real estate as can be levied on under an execution on the same judgment, no lien attaches upon land for which the judgment debtor has only a bond for a title, and has no equitable right to have a title.

2. A finding of the court of a fact from evidence to which no objection was made is conclusive.

3. Where the owner of a series of notes receives a payment thereon, his letter to the maker, written upon receipt of the payment, containing an itemized statement of the manner of application of the money to the various notes, is admissible, as evidence of the application, against the maker of the notes.

4. Where the payee of a series of notes secured by mortgage, who is also the payee of another note by the same maker, applies a payment of money first to the satisfaction of the one note, and next to the satisfaction of as many in the series as the amount will pay, and sends the canceled notes to the maker's agent,

together with an itemized statement of the manner of the application of the money, the maker cannot, five years afterwards, for the first time, assert that the money was not applied in the manner agreed upon at the time of payment.

5. Notice to an attorney of the manner of compliance with a contract is notice to the client.

6. Estoppel by conduct is not created where there is no error on one side, and no fraud or fault on the other.

Appeal from district court, New Haven county; Albert P. Bradstreet, Deputy Judge.

Bill by John M. Sweeney against David Pratt and others, to foreclose. From the judgment of the court, all parties appeal. Affirmed.

This was a complaint praying for the foreclosure of a mortgage on a certain piece of land in the town of Naugatuck. The complaint alleged that on the 1st day of August, 1891, the defendants D. & H. Pratt made 20 of their promissory notes, each for the sum of \$200, payable to the order of the Cheshire Manufacturing Company (the first 1, one year from the date, and the other 19, one each six months thereafter, with interest at the rate of 5 per cent. per annum, payable semi-annually, together with all taxes on said notes laid against said manufacturing company, or the holders of the notes); that said notes were secured by a mortgage of the tract of land sought to be foreclosed; that 13 of said notes had been paid in full, and the sum of \$117.72 on the fourteenth, so that there was unpaid, in whole or in part, 7 of said notes, being those in the said series the last payable, and amounting in the whole to the sum of \$1,282.28; that on May 19, 1892, the said company was compelled to pay, and did pay, the sum of \$70 taxes on the property mortgaged, and which had been laid against the said D. & H. Pratt; that on October 2, 1896, the said manufacturing company duly assigned the said 7 unpaid notes, and the mortgage securing them, to the plaintiff; and that he was now the actual and bona fide owner and holder of the said unpaid notes and said mortgage. The complaint, in a second count, prayed for the foreclosure of a judgment lien on the same land. Curtis Thompson, of Bridgeport, and Catherine A. Pratt, of Naugatuck, were made parties defendant, each of whom, it is alleged, had acquired some interest in said land, which accrued after the rights of the plaintiff. The answer of D. & H. Pratt and Catherine A. Pratt alleged that the said Pratts had, in the land on which the judgment lien was placed, at the date thereof, no such interest as could be taken or affected thereby; alleged, also, that the said company had discharged D. & H. Pratt from the payment of said taxes, and that 16 of said notes had been paid in full, and a part of the seven-teenth. The answer of Curtis Thompson alleged that there had been paid the sum of \$3,400 on said notes, and applied in payment

of those which the soonest became due, so that there was at that date due only the sum of \$600 of the whole amount of the said notes; that he loaned to the said D. & H. Pratt on the 28th day of May, 1894, the sum of \$570, and took as security therefor a second mortgage on the said tract of land now sought to be foreclosed, in the belief that only \$600 was due on the principal of said 20 notes; and that he had no knowledge or suggestion that any more was due. The trial court denied the prayer of the plaintiff for a foreclosure of the said judgment lien; denied the plaintiff's claim to have a foreclosure as to the said sum of \$70; found that 7 of the said notes were unpaid, in whole or in part, and the principal sum of these notes was not, by their terms, due, but that there was due on said notes the sum of \$315.22 of interest; rendered judgment that, unless the defendants paid the said sum so due, they should be foreclosed of all right to redeem the said premises. From this judgment, both parties appealed. The facts of the case, so far as necessary, are stated in the opinion.

E. P. Arvine and George E. Beers, for plaintiff. Curtis Thompson and Edmund Zacher, for defendants.

ANDREWS, C. J. (after stating the facts). We think that the trial court decided correctly as to the judgment lien. At the time that lien was placed on the land (May 28, 1890), the said D. & H. Pratt had no interest in the land which could have been levied upon under an execution on that judgment. They had only a bond for a deed. They had paid nothing whatever on the notes mentioned in the bond. They had no title to the land. They were not even equitably possessed of any right to have a title. Gen. St. § 3034; *Beardsley v. Beecher*, 47 Conn. 408, 412; *Loomis v. Knox*, 60 Conn. 843, 22 Atl. 771; *Hobbs v. Simmonds*, 61 Conn. 235, 23 Atl. 962.

The trial court has, in effect, found that the Cheshire Manufacturing Company had discharged the said D. & H. Pratt from the payment of the said sum of \$70 paid for taxes; and this finding is on evidence to which no objection was made. We think that this finding was conclusive.

As respects the 20 notes mentioned in the complaint, the only question was and is, how many of them are unpaid? Are there 7 unpaid? or are there only 3 or 4? As to these notes, the plaintiff is the assignee of the Cheshire Manufacturing Company. He has just such right in the notes and in the mortgage—neither greater nor less—as that company would have if it was the plaintiff. Indeed, to ascertain the plaintiff's rights in this case, we must inquire what rights of that company were conveyed to the plaintiff by its assignment to him. There is no claim that he has parted with anything since he became

the assignee. The right so assigned to the plaintiff will be made to appear by an examination of the several transactions which have been had between the said company and the said D. & H. Pratt, and they are as follows: On the 16th day of August, 1888, the said company gave to the said Pratts a bond for a deed of the land now in question. The condition of this bond was that the said Pratts should pay to said company their 16 certain notes, each for the sum of \$437.50, amounting in the whole to \$7,000, and payable as was therein specified. On the same day the said D. & H. Pratt made and delivered to the said company 8 other notes, each for the sum of \$625, amounting in the whole to \$5,000, and secured the payment of said last-mentioned notes by a chattel mortgage of certain machinery in a factory then occupied by the Pratts in Naugatuck. On the said series of 16 notes the said Pratts never paid anything, and never had, and were never entitled to have, a deed, by virtue of the said bond for a deed. In 1891 negotiations were had between the said company and the Pratts which resulted in a compromise. The said 16 notes were surrendered. The said company gave a warranty deed of the land to the Pratts. The Pratts, in payment therefor, made the said 20 notes described in the complaint, and secured the payment thereof by the mortgage now in suit, and also a chattel mortgage on the machinery before mentioned. This machinery was in the factory on the land mortgaged. On the — day of —, 1892, the factory and machinery were totally destroyed by fire, and some dispute arose as to whom the insurance money should be paid to. On the 14th day of May of that year, at a meeting at which the said company was present by its duly-appointed officer, and its attorney, E. P. Arvine, Esq., and at which the said D. & H. Pratt were present with their attorney, N. R. Bronson, Esq., an agreement was entered into and executed in duplicate, the material parts of which are as follows: "This agreement witnesseth: That whereas, said Herbert Pratt and David Pratt are indebted to said Cheshire Manufacturing Company in sundry notes, secured by mortgage on real and personal property situated in said Naugatuck; and whereas, a certain factory situated in said Naugatuck, being a portion of the real estate upon which the said Cheshire Mfg. Co. held a mortgage securing twenty of said notes, was consumed by fire, and a portion of the machinery likewise mortgaged to said company to secure notes was also destroyed; and whereas, said property was insured by policies payable to said Cheshire Mfg. Co. as their interest might appear, and also to the said Pratts; and whereas, said losses have been adjusted, and there is due on account of the same on said policies the sum of three thousand four hundred dollars: Now, therefore, it is agreed that said three thousand four hundred dollars shall be immediately paid to said Cheshire Mfg. Co., to

be theirs absolutely, and that if, within six months from date hereof, the said Pratts shall pay to said company the further sum of six hundred dollars, with interest from date to date of payment, said company shall deliver to said Pratts, or to any person by them requested, all notes which it now holds against said Pratts, and which shall fully discharge and release all claims under said mortgages securing said notes, or any other claims against them, or shall assign and transfer the said interests and said claims against said Pratts, and any securities for said claims, to any person or persons by said Pratts suggested; and that if said Pratts shall fail within six months from date to pay said sum of six hundred dollars, with interest as aforesaid, all the notes held by said Cheshire Mfg. Company shall be payable according to their tenor, and said sum of three thousand four hundred dollars shall be applied, as on the date of its reception by said company, in discharge of the notes so held by said company as aforesaid that shall be then due, and that shall soonest become due, so far as said money shall extend, and the notes so discharged shall be regarded as paid on the date of the payment to said company of said thirty-four hundred dollars." This agreement was dated May 14, 1892, and was executed by all said parties. It is conceded and is found that the said Pratts did not, within six months after said agreement, pay, nor have they at any time since paid, said sum of \$600. At that time it was supposed that the sum to be paid on the insurance policies was \$3,400. The amount in fact paid was a little less, viz. \$3,383. At this time there was due from the said D. & H. Pratt to the said company the said 20 notes mentioned in the complaint, and the sum of \$542.82 on the last note of the said series of 8 notes, dated on the 6th day of August, 1886, and secured by the chattel mortgage,—in all, 21 notes. The said last-mentioned note was not then in the possession of the said company. It was in the hands of its agents, Porter Bros. & Co., for collection. It was to be recalled from said agents by the counsel of the said company. The trial court finds that it was agreed between the parties that the amount due by said note should be paid from the insurance money, and the balance applied towards said 20 notes upon those first to become due, and, after said balance had paid as many notes in full as it could, the remainder should be indorsed on the note next to become due, and that the insurance money did pay the said sum of \$542.82, and 13 of the said series of 20 notes, dated August 1, 1891, in full, and \$117.72 to be applied on the fourteenth of said notes. A few days after the 14th of May, 1892, counsel for the Cheshire Manufacturing Company recalled the said note from Porter Bros. & Co., and sent it, together with the 13 of said 20 notes, to Mr. N. R. Bronson, counsel for the said Pratts, in a letter as follows:

"New Haven, Conn., May 17th, 1892.

"Messrs. Terry & Bronson—Gentlemen: Inclosed you will find the New York note, with statement of Porter Bros.; amount due, \$542.82. We have received from the insurance companies \$3,383, not \$3,400.

\$3,383 00

less 542 82

leaves \$2,840 18 towards canceling the notes secured by real estate; that is to say, the 20 notes.

13 of these notes		
amount to	\$2,600 00	\$2,840 18
Interest to May 14,		
'92, 6%	122 48	less 2,722 72

Total \$2,722 48 \$ 117 72

"Leaving \$117.72 to be indorsed on the 14th note. I send the old note and the 13 secured by mortgage on real estate, and have indorsed \$117.72 on the 14th note.

"Respectfully, yours, E. P. Arvine."

This letter, with the notes inclosed was received by Mr. Bronson, and by him made known to his clients, the Pratts, or one of them. Neither Mr. Bronson nor either of the Pratts made any objection to the application of said insurance money which had been made by the Cheshire Manufacturing Company, as indicated in said letter, till the trial of this case, a period of nearly five years. On the 21st day of July, 1892, the Cheshire Manufacturing Company released the chattel mortgage by which the said series of 8 notes had been secured. Of this series, the said \$542.82 note was the last. No payment, either of principal or interest, has been made on the said 7 notes—the last to become due of the said series of 20—since the said 14th day of May, 1892. They are all still due and unpaid. And there is of interest due from said May 14, 1892, to April 14, 1897, the sum of \$815.22. The said Cheshire Manufacturing Company conveyed all its interest in said 7 notes, and in the mortgage security therefor, on the 3d day of October, 1896, to the plaintiff, who has been ever since, and is now, the owner of the same. On the 28th day of May, 1894, the defendant Curtis Thompson loaned to the said D. & H. Pratt the sum of \$570, and, to secure their note therefor, took a second mortgage on said land. At that time Thompson examined the land records. The Pratts showed him the said agreement of May 14, 1892, and represented to him that the sum of \$3,400 had been paid on said 20 notes, so that there was then due on the said notes, and secured by the prior mortgage, only \$600. The mortgage to Thompson was at once recorded. Upon the trial the defendant offered the testimony of the said David Pratt and Herbert Pratt, and claimed to have proved thereby that it was the intent of the parties to the said agreement of May 14, 1892, not to have any part of the insurance money applied in payment of the said \$542.82 note. In rebuttal of this testimony the plaintiff offered the letter of May 17, 1892, and in connection therewith the testimony that since said letter was received the Pratts had never objected to the application of the insurance money

by the Cheshire Manufacturing Company as was therein stated. We think that this letter, with the evidence, was properly admitted. If the Pratts really understood that the said note was not to be paid out of the insurance money, it is incredible that they should not have so stated when this letter came to Mr. Bronson. Their conduct then was an admission that that note was to be paid out of that money. And in this respect the fact that the letter was shown only to one of the Pratts is not of much consequence. Bronson was the attorney of both in this agreement. His knowledge of the application of the money made by the Cheshire Manufacturing Company was the knowledge of the Pratts. The knowledge of an attorney, gained in the very business in respect to which he is attorney, is imputed to his client. The notice to Mr. Bronson given by the said letter was notice to his clients. *Melms v. Brewing Co.*, 93 Wis. 153, 66 N. W. 518; *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. 631.

The defendant Thompson claims that the plaintiff is estopped to assert that there is more than \$600 due on said series of 20 notes. We are not able to find any ground for this claim. The recording of the mortgage to Thompson did not affect any right of the Cheshire Manufacturing Company in the land, or in the unpaid notes. The plaintiff sues to enforce a right which came to him from the Cheshire Manufacturing Company. No estoppel can exist against him unless one could have been set up against that company, had it been the plaintiff. An estoppel by conduct always presupposes error on one side, and fault or fraud on the other. *Morgan v. Railroad Co.*, 96 U. S. 716, 720. However much the defendant Thompson may have been in error, there is not the slightest pretense of any fault or fraud on the part of the manufacturing company, nor, indeed, on the part of the plaintiff. There is no error. The other judges concurred.

(20 R. I. 367)

BARKER v. ALMY.

(Supreme Court of Rhode Island. Jan. 19, 1898.)

LARCENY—CONVICTION—CIVIL LIABILITY—ACTION ON THE CASE—TRESPASS—PLEADING—AMENDMENT.

1. A defendant who has been sentenced on a plea of *nolo contendere* is deemed convicted, within Gen. Laws, c. 233, § 16, which provides that a person convicted of larceny shall be liable to the owner of the property taken for twice the value thereof, unless the same be restored, and for the value thereof in case of restoration.

2. A declaration charging that defendant, "with force and arms, and against the peace, did unlawfully take, retain, convert to his own use, and embezzle" money on account of which the action is brought, "and other wrongs to the plaintiff did, against the peace," etc., sounds in trespass.

3. Since Gen. Laws, c. 233, § 16, permits the owner of stolen property to bring either trespass or case against the wrongdoer, a declara-

tion in case under said statute, which is faulty in that it sounds in trespass, may be amended by striking out the allegations peculiar to the latter action.

Exceptions from district court, Providence county.

Action by Arthur C. Barker against Charles E. Almy. A motion in arrest of judgment for plaintiff was sustained, and plaintiff brings exceptions. Reversed.

John H. Flanagan, for plaintiff. Brennan & Holland, for defendant.

MATTESON, C. J. This is an action on the case, brought under Gen. Laws R. I. c. 233, § 16, which provides that "whenever any person shall be convicted of larceny he shall be liable to the owner of the money or articles taken for twice the value thereof, unless the same be restored, and for the value thereof in case of restoration." The declaration sets forth, with technical averments of time and place, that the defendant, being in the employment of the plaintiff as a clerk, and by virtue of his employment as clerk, and in his capacity as clerk, having in his possession \$87.31 lawful money of the United States, to the plaintiff belonging, with force and arms, and against the peace, did unlawfully take, retain, convert to his own use, and embezzle said money, and other wrongs to the plaintiff did, against the peace, etc. It also sets forth that the defendant was indicted by the grand jury, and pleaded *nolo contendere*, and was sentenced to pay a fine of \$20 and costs; that by reason of the nonrestoration of the money to the plaintiff, and by reason of the conviction of the defendant, the plaintiff is entitled to recover double the amount of the money embezzled. Gen. Laws R. I. c. 279, § 16, provides that "every officer, agent, clerk or servant or person to whom any money or other property shall be entrusted for any specific purpose, who shall embezzle or fraudulently convert to his own use or shall take or secrete, with intent to embezzle and fraudulently convert to his own use, any money or other property which shall have come into his possession or shall be under his care or charge, by virtue of such employment or for such specific purpose, shall be deemed guilty of larceny, and may be tried, sentenced and punished as for any other larceny." At the trial in the district court of the Sixth judicial district the defendant moved in arrest of judgment: (1) Because sentence on a plea of *nolo contendere* is not such a conviction as the statute contemplates; and (2) because the declaration sounds in trespass, while the action purports to be in case.

It is true that the word "convicted," as contended by the defendant, is commonly used merely to signify the finding of the jury that the accused is guilty; but it is also frequently used in a more technical sense, to include the judgment and sentence of the court on a verdict or confession of guilt. *Com. v.*

Gorham, 99 Mass. 422. A plea of *nolo contendere* is an implied confession of guilt, and has the same effect as a plea of guilty so far as the proceedings on an indictment are concerned. Hence a defendant who has been sentenced on such a plea is to be deemed convicted of the offense for which he was indicted. *Com. v. Horton*, 9 Pick. 206; *Com. v. Ingersoll*, 145 Mass. 381, 14 N. E. 449. In the latter case it is said: "A plea of *nolo contendere*, when accepted by the court, is, in effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt only, and cannot be used against the defendant as an admission in any civil suit for the same act. The judgment of conviction follows upon such a plea as well as upon a plea of guilty, and such a plea, if accepted, cannot be withdrawn, and a plea of not guilty entered, except by leave of the court. But there is a difference between the two pleas, in that the defendant cannot plead *nolo contendere* without the leave of the court. If such plea is tendered, the court may accept or decline it in its discretion. If the plea is accepted, it is not necessary or proper that the court should adjudge the party guilty, for that follows as a legal inference from the implied confession; but the court proceeds thereon to pass the sentence of the law." And see *State v. Conway*, 20 R. I. —, 38 Atl. 656. We are of the opinion, therefore, that the sentence of the court on the defendant's plea of *nolo contendere* was a conviction of the defendant, within the contemplation of the statute.

We think the declaration is bad in that, the action being case, the declaration sounds in trespass. Inasmuch, however, as the statute (*Gen. Laws R. I. c. 233, § 16*) under which the suit is brought permits the bringing of either trespass or case, so that case is a proper remedy, we think that we may properly permit an amendment of the declaration by striking out the allegations of "force and arms" and "against the peace," which will change the declaration from a declaration in trespass to one in case. *Id. c. 235, § 4*; *Hobbs v. Ray*, 18 R. I. 84, 25 Atl. 694; *Wilson v. Railroad Co.*, 18 R. I. 598, 29 Atl. 300; *Bank v. Irons*, 18 R. I. 718, 30 Atl. 420. The motion in arrest is overruled, and the case is remitted to the district court of the Sixth judicial district, with direction to permit the plaintiff to amend his declaration by striking out the allegations of "force and arms" and "against the peace," and, when so amended, to enter judgment for the plaintiff for double the amount of the money embezzled.

(20 R. I. 338)

BRADY v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Rhode Island. Jan. 5, 1898.)

INJURY TO EMPLOYEE—CONTRIBUTORY NEGLIGENCE.

At the time of an accident, plaintiff's intestate was employed in defendant's freight houses as a general laborer. He, together with several

other employes, was directed to remove the snow from around the passenger station. The men were in charge of a boss, who distributed them in gangs of two or three. Plaintiff's intestate and another were at work on the platform, between two tracks, when a locomotive passed down one of the tracks alongside the platform to a switch near by, and thence immediately back again on the other side of said platform, near to the edge of which plaintiff's intestate was working, with his back towards the locomotive, as it approached him. He was struck by it, and mortally injured. The boss cautioned the men, before they went to work, to look out for themselves. Locomotives and trains were almost constantly passing. The bells of the locomotives were rung, and the whistles frequently blown, and the bell on the locomotive which struck plaintiff's intestate was rung immediately before he was struck. There was no evidence that the locomotive was running at a dangerous rate of speed at the time of the accident. *Held*, that deceased was guilty of contributory negligence justifying a nonsuit.

Action by Kate Brady, administratrix, against the New York, New Haven & Hartford Railroad Company, to recover damages for the death of plaintiff's intestate, caused by alleged negligence of defendant. A nonsuit was directed by the common pleas division, and plaintiff petitions for a new trial. Petition denied, and case remanded, with direction to enter judgment for defendant for costs.

Walter B. Vincent, for plaintiff. James M. Ripley, Henry W. Hayes, and John Henshaw, for defendant.

TILLINGHAST, J. At the time of the accident in question the plaintiff's intestate, Thomas McGrail, was employed by the defendant in and about its freight houses in the city of Providence as a general laborer. He had been in the employ of the defendant in the same capacity for a considerable time. On the 19th of February, 1896, he, together with several other employes of the defendant, was directed to remove the snow from the platforms and crossings in the immediate vicinity of the passenger station in said city. The men were in charge of one Thurber, the boss, or "railroad policeman," as he was called, who distributed them along the platforms and crossings in gangs of two or three; beginning at the north end of the station, and working down towards the south end. At the time of the accident, two of the men (plaintiff's intestate and another) were at work on the platform between two tracks opposite to the south end of the station platform, and separated from it by a track. The platform where they were working was known as the "Express Platform" and was from 12 to 15 feet wide, and 70 to 80 feet long. While plaintiff's intestate was working here a locomotive and tender passed down one of the tracks alongside the platform to the switch near by, and thence immediately back again on the other side of said platform, near to the edge of which plaintiff's intestate was working with his

back towards the locomotive as it approached him. He was struck by the engine, and mortally injured. One of his fellow workmen, who was some distance away, seeing the dangerous position in which he was working, shouted to him; but, instead of turning from the track, he turned towards it, and was instantly struck by the engine. Said Thurber cautioned the men before they went to work that morning to look out and take care of themselves. The evidence shows that locomotives and trains of cars were almost constantly passing and repassing the various platforms where the men were at work; that the bells of the locomotives were rung, and the whistles frequently blown; and that the bell on the locomotive which struck the plaintiff's intestate was rung immediately before, if not at the very instant when, he was struck. There is no evidence that the locomotive was running at an unusual or dangerous rate of speed at the time of the accident. The case was tried in the common pleas division, and, after the plaintiff's evidence was put in, the court, on motion of the defendant, directed a nonsuit. It is now before us on a petition for new trial on the ground of alleged error of the court in granting the nonsuit.

The main contention of the plaintiff is that, taking into account the nature of the employment, which was such that the men could not keep a constant outlook for approaching trains, and at the same time attend to their work, it was the duty of the defendant to warn them of danger. And, specifically, the claim is that the defendant owed to plaintiff's intestate the duty of warning him of the approach of its train, (1) through said Thurber, who was in charge of the gang, and placed the men in the position where he wanted them to work; and (2) through the engineer, who had charge and control of the engine.

We fail to see that the defendant owed any legal duty to the plaintiff's intestate which it did not perform. Having been employed for some time in and around the freight house of a great railroad, the deceased must have been aware of the dangers incident to the service, and needed no special warning relative thereto. The evidence shows, however, that he was specially cautioned before commencing the work aforesaid to look out for himself; and, this being so, he had no right to rely on the boss or any other person to look out for him. He knew that engines and trains of cars were liable to pass along where he was at work at any moment; and in fact the proof shows that they were passing back and forth nearly "every other minute," as stated by one of the plaintiff's witnesses, alongside the platforms on which the men were at work, with all the accompanying noise from the ringing of bells and blowing of whistles which is incident to a busy railroad station, especially at that hour of the day when the accident happened, viz. between 7 and 8 o'clock in the morning. It

is evident that the boss could not personally have looked out for the men, as they were divided into small groups, or "gangs," as the counsel denominates them, of two or three each, and were thus separated and scattered along the extensive platforms at various points, so that it became necessary for each man to look out for himself. And while it is true that they could not give their undivided attention to their work in such circumstances, as argued by plaintiff's counsel, still, this was not their fault, as they could only be required, and evidently only were required, under the order of their boss, to do what they could, and look out for themselves. As to the contention of plaintiff that the engineer did not give the usual warning, by ringing the bell, we do not think that it is tenable, under the proof. The witness John Coffey testifies that the bell was ringing when the engine was going down towards the switch (that is, just previous to the accident); that it immediately came back on the other side of the platform, where plaintiff's intestate was; that he noticed it about two seconds before it struck McGrail; and that witness, who was in the neighborhood of 100 feet distant, did not hear the approach of the engine. But in answer to the question, "Did you hear any bell or any whistle," he replied, "Yes, sir." In cross-examination the following questions were asked: "You knew it went down to the switch and backed up? Ans. Yes, sir. Q. And it was ringing the bell, was it not, when going along? Ans. Yes, sir." The witness Glancy, in answer to the question whether he heard any bell or whistle, says: "No, sir; I didn't pass any notice,—there were so many passing up and down. I didn't really notice any one more than the other." But even conceding that the bell was not rung immediately before the accident, and that the defendant owed it to plaintiff's intestate to give him notice of the approach of the engine by such a signal, or in some other manner, yet it is clear that he was guilty of contributory negligence in working, as he did, with his back towards the track, and so near thereto that an approaching engine would strike him. He evidently took no precaution whatever for his own safety, although expressly charged to look out for himself; but, on the contrary, although knowing that engines and trains were constantly passing to and fro, and knowing, also, as he must have known, that neither the boss nor any one else was then present to look out for him, he suffered himself to become oblivious to his dangerous situation, and thereby most unfortunately lost his life. Such negligence, however sad the result may be, is wholly inexcusable, from a legal standpoint, and precludes any recovery.

The case of Railroad Co. v. Gross, 133 Ill. 37, 24 N. E. 563, cited by plaintiff's counsel in support of his contention that the defendant owed the duty to the intestate of warning him of the approach of the engine, is

quite different from the one at bar. There the plaintiff's intestate, while engaged in taking up old rails and replacing them with new, was struck by one of defendant's engines and mortally injured. There was a dispute as to whether intestate had timely warning of the approach of the train. There was evidence, however, that the boss of the gang with which deceased was working repeatedly informed the men that they should pay no attention to trains, but go on with their work. And it was held that it was proper in that case to submit the question of contributory negligence to the jury. It will at once be seen that in that case the plaintiff's intestate had the right to rely on the boss to warn him of the approaching train. The late case of *Felice v. Railroad Co.* (Sup.) 43 N. Y. Supp. 922, is more nearly in point as an authority in support of plaintiff's position, but the facts are so different that it is readily distinguishable from the case at bar. There the plaintiff was working with a gang of men in a tunnel, a long way from the entrance, so that no daylight could penetrate from the entrance, and the only means for lighting the tunnel were the few torches with which the men were furnished to throw light upon the ditches where they were at work. While they were digging, a train came from the south, of which they had notice, and they left their work for the purpose of getting out of the way of that train. As that train was passing, a light engine running backwards, came from the north. This engine was not perceived until it was almost upon the men; and Felice, not being able to get out of the way, was struck by it and killed. The evidence showed that, while the smoke and steam from the engine of the north-bound train had filled the tunnel so that it was almost impossible to distinguish objects through the dim light given by the torches, and the tunnel was filled with the noise and rattle of the train, a light engine, running at the rate of 15 miles an hour, came down upon the other track, running backwards as aforesaid, with no light upon the rear of the tender, and giving as a warning only the ringing of the bell. In view of these facts, the court held that the jury were justified in finding that sufficient warning was not given of the approach of the engine to enable plaintiff's intestate to get out of its way, and refused to set aside the verdict which had been rendered in favor of the plaintiff. It is true that in that case, as in this, the men were warned to look out for themselves. But the effect of such a warning in a case like that, where it was practically impossible for a man to protect himself, is very different from what it is in a case like the one before us, where the plaintiff's intestate had only to use his senses in the ordinary way to do so. We think the case at bar is one in which the negligence of plaintiff's intestate is so clearly shown, by the testimony for the plaintiff alone, that no verdict

in his favor could be allowed to stand, and, hence, that the nonsuit was rightly granted. Petition denied, and case remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

(30 R. I. 344)

LIND v. APPONAUG BLEACHING, DYEING & PRINTING CO.

(Supreme Court of Rhode Island. Jan. 7, 1898.)

CONTRACTS — BREACH — PLEADING — SALES — CONSTRUCTION OF CONTRACT — TIME.

1. The declaration alleged an agreement by defendant to pay plaintiff a certain salary in consideration of the latter's furnishing drawings necessary to construct dyeing machines, and all information necessary to produce goods as good as a sample agreed upon, and any information desired regarding the colors in the sample. *Held* that assuming these allegations to be like the statement in the contract itself respecting the nature of services, they were sufficient.

2. A dyeing company agreed to buy sufficient color to finish 30,000 pieces of cloth, the color to be bought as the company should consume it, until said number of pieces had been dyed. *Held*, that the contract required the company to purchase the color within a reasonable time, in the usual course of its business.

Assumpsit by James A. Lind against the Apponaug Bleaching, Dyeing & Printing Company. Submitted on demurrer to the declaration. Overruled.

Brennan & Holland and John J. Walsh, for plaintiff. Charles J. Arms and Charles C. Mumford, for defendant.

MATTHESON, C. J. This is assumpsit for breach of contract to purchase dye. The declaration, in its first count, avers, in technical form, that on August 7, 1893, the defendant, in consideration that the plaintiff, at the request of the defendant, would render certain services to the defendant, and furnish drawings necessary to construct dyeing machines, and all information necessary to produce goods as good as a sample agreed upon, and also to give said defendant all the information it might desire regarding the colors in the sample, agreed to pay the plaintiff \$100 per month, payable monthly, for the term of six months, and to buy from him color at \$1.25 per pound, which would produce Arabian Turkey red as good as the sample, necessary to finish 30,000 pieces, the color to be bought of the plaintiff as the defendant should consume it, till 30,000 pieces had been dyed. The account further avers that the plaintiff has performed all things on his part to be performed, and has rendered to the defendant all the services required of him, and has furnished drawings necessary to construct the dyeing machines, and all the information necessary to produce goods as good as the sample referred to, and has given the defendant all information desired by it regarding the colors on the sample; but that the defendant has neglected and refused, and still

refuses, though requested by the plaintiff, to perform its part of the agreement, in that it has refused to purchase of him the color aforesaid at the price aforesaid, though the plaintiff has always been ready and willing to furnish, and has tendered it to the defendant, and though 30,000 pieces of the color of the sample have long since been dyed. The second count is the same as the first, except that it avers a refusal of the defendant to purchase the color, though a reasonable time for its consumption has long since elapsed. The defendant has demurred to the declaration on several grounds, which for the present purpose may be resolved into two: (1) That the nature of the service required of the plaintiff should have been averred; (2) that the second count is fatally defective, in that it does not aver that any number of pieces of the stipulated color have been dyed.

The counts in the declaration apparently set forth the contract between the parties, though the contract itself is not made a part of either count by reference. We have therefore no knowledge from the record of what the contract declared on is, other than that afforded by the declaration. While the rule of pleading is doubtless, as contended by the defendant, that, in the statement of an executory consideration, a greater degree of certainty and minuteness is required than when the consideration is executed, since the court would otherwise be unable to judge whether the performance averred is sufficient (1 Chit. Pl. *303), we do not think that any greater degree of certainty or particularity should be required in the pleading than the parties themselves have adopted in the contract. If, then, the contract does not specify the nature of the services which the plaintiff was to render, we see no reason for requiring such specification in the counts. Assuming that the contract does not specify the nature of the services, and that the counts pursue the contract in this respect, we think that the statement of the consideration, in so far as it relates to the services to be rendered, is sufficient.

Defendant contends that the correct construction of the contract is that it was under no obligation to use the color for dyeing the 30,000 pieces in any particular time, or even to continue the dyeing of goods of the color specified at all, so long as it acted in good faith, and did not fraudulently evade its performance of the contract. We think, however, that such a contract would be a very unreasonable one for the plaintiff to have made, since it might be years before its fulfillment; and it even might never be fulfilled, since it would be optional with the defendant whether it would dye goods of a Turkey red color at all. It seems to us the more reasonable view that the dyeing of the 30,000 pieces was to begin at once, and was to proceed in

the usual course of the defendant's business, till the whole number of pieces had been dyed, and that the dye should be purchased of the plaintiff from time to time as it should be consumed. In this view of the contract, the second count, which avers a refusal to purchase the color, though a reasonable time for its consumption has elapsed, sufficiently states a breach of the contract. Demurrer overruled.

(20 R. I. 351)

McADAM v. HONEY et al.

(Supreme Court of Rhode Island. Jan. 11, 1898.)

TAXATION — ASSESSMENT — PAYMENT — DEVISEES — RIGHTS INTER SE.

1. An assessment is deemed to have been made the day following the last day on which the taxpayers are notified to bring in an account of their ratable estate.

2. When the whole tax covering several parcels of land taxed to devisees is paid by one of them to prevent a sale of his parcel, he is entitled to recover from the others an equitable proportion of the tax.

Petition by Samuel McAdam, collector, against Samuel R. Honey and others.

Wm. P. Sheffield, for petitioner. Samuel R. Honey, for respondents.

MATTESON, C. J. The questions submitted assume that the assessment was made on May 10, 1897, on which day the assessors signed the assessment roll, and deposited it with the city clerk. We think, however, that the assessment must be deemed to have been made on February 27, 1897, the day following the last date on which the taxpayers were notified to bring in an account of their ratable estate. The property of a taxpayer and his financial condition are liable to change from day to day. For this reason, it may well be doubted whether notice to taxpayers to bring in their accounts in February would give validity to an assessment made so long afterwards as May 10th. *McTwiggan v. Hunter*, 18 R. I. 777, 30 Atl. 962. Moreover, to require the assessors to follow all changes that might take place in the holdings of property while the preparation of the assessment roll was in progress would be exceedingly inconvenient, if not impracticable. The assessment, in legal contemplation, having been made as of February 27, 1897, the subsequent conveyances referred to in the statement are subject to it. If the whole tax covering the several parcels taxed to the devisees of John S. Langley is paid by the holder of one of the parcels, to prevent the sale of his parcel, we think he would be entitled to recover from those who have acquired the other parcels the proportions of the tax which equitably should be paid on account of those parcels.

(20 R. I. 352)

CAMPBELL v. METCALF et al.

(Supreme Court of Rhode Island. Jan. 12, 1898.)

LIS PENDENS—ATTACHMENT—EQUITY PRACTICE—MOTIONS.

1. Gen. Laws, c. 246, § 6, providing for the recording in the land records of a notice in the nature of a lis pendens in proceedings in which title to real estate is involved, does not, nor does any statute, authorize plaintiff in a suit for an accounting to record a notice setting forth the filing and nature of his bill, and stating that the decree which might be obtained would be levied on certain land belonging to defendants named in the notice; such notice being intended to operate in lieu of an attachment.

2. Where plaintiff in a suit for an accounting recorded in the land records a notice setting forth the filing and nature of his bill, and that any decree which might be obtained in the case would be levied on certain land belonging to certain defendants, the court has jurisdiction, on motion in the suit, all the parties being before it, to declare such notice illegal.

Suit for an accounting by Annie Campbell against Henry B. Metcalf and others. On motion by defendant Daniel McNiven to expunge a record. Granted.

Sigourney Butler, John T. Wheelwright, and Claude J. Farnsworth, for complainant. W. W. & E. W. Blodgett and Hugh J. Carroll, for respondent.

MATTESON, C. J. This is a bill for an account, etc. After it was filed, and after the denial of the prayer for a preliminary injunction, the complainant filed a motion for a writ of attachment, in which the damages were to be laid at \$100,000. An intimation was given complainant's counsel, by the justice to whom the motion was presented, that no writ, or, at any rate, for so large an amount, would be granted. The motion for the writ was not pressed, but shortly afterwards the complainant, by her counsel, caused to be recorded in the land records of Pawtucket a notice setting forth the filing and nature of the bill, and that any decree which might be obtained in the case would be levied on certain specified lots of land belonging to certain of the defendants who were named in the notice, one of whom, Daniel McNiven, now moves that the record of the notice be canceled and expunged.

The recording of the notice was an attempt to get indirectly the benefit of an attachment which the court had intimated would not be granted, at least to the extent which the complainant desired. We think that it was wholly without warrant of law or justification, and a nullity. Gen. Laws R. I. c. 246, § 6, to which reference has been made in its support, is limited to proceedings, orders, decrees, and judgments concerning title to real estate; i. e. in which title to real estate is involved as the subject of the suit. It was designed to modify the doctrine of lis pendens, which in many instances might operate unjustly on the rights of persons having no actual knowl-

edge of proceedings in courts affecting title to real estate, by charging them with constructive notice of such proceedings, and to provide a convenient method by which knowledge of such proceedings may be had. It was not intended to serve the purpose of an equitable attachment in a suit to recover money due on an accounting.

The point is taken that the court cannot grant relief by motion in this suit, but that the respondent must proceed by a bill for relief. We think, however, that as the recording of the notice was an incident of the present suit, and as all parties are before us, we have jurisdiction to declare the notice a nullity, without putting the respondent to the necessity and expense of a separate suit. An order may be entered declaring the notice illegal and of no effect, and providing for recording it by the complainant and at her expense.

(20 R. I. 364)

LUCIER et al. v. GRANGER, City Treasurer, et al.

(Supreme Court of Rhode Island. Jan. 14, 1898.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—PLEADING—COURTS—RULES OF DECISION.

1. A declaration which names the city treasurer and other individuals as defendants, and alleges that they unlawfully and negligently set off skyrockets on the Fourth of July, resulting in plaintiff's injury, does not state a cause of action against the city itself.

2. When a declaration is insufficient in failing to charge the city itself with a negligent act, the supreme court will not, on demurrer, decide the question of the city's liability, had it committed such act.

Trespass on the case by Henry Lucier and others against Daniel L. D. Granger, city treasurer, and others. Submitted on demurrer to the declaration. Sustained.

Conley & Cronin, for plaintiffs. Francis Colwell and Albert A. Baker, for defendants.

TILLINGHAST, J. This is an action of trespass on the case, for negligence. It is brought against Daniel L. D. Granger, treasurer of the city of Providence, and Charles A. Borden, Jason P. Stone, Lyman B. Messenger, William A. Hickie, Edward G. Burrows, Robert B. Little, Dennis F. McCarthy, and Arthur H. Watson. The declaration sets out that at said Providence, on the Fourth of July, 1893, the said defendants unlawfully and negligently, on the Dexter Training Ground, a public place, in the center of a densely-populated district, set off and discharged, over and against the houses and other buildings of residents in and about said Dexter Training Ground, certain dangerous and deadly missiles, to wit, heavily charged and highly explosive skyrockets, and thereby created and maintained a public nuisance, dangerous to the life, limb, and property of the residents in and about said training ground, and then and there, carelessly, unlawfully, and in vio-

lation of the rights of the plaintiffs, fired and discharged a deadly and dangerous missile, to wit, a skyrocket, heavily charged with combustible matter, and at a high velocity, over and against the houses and other buildings occupied by the said plaintiffs, near said Dexter Training Ground, and said skyrocket, while the plaintiff Rosalie was on her premises, and while she was in the exercise of due care, struck and seriously injured her. To this declaration the defendant Daniel L. D. Granger, city treasurer, has filed a demurrer, specifying various grounds upon which he claims that the city is not liable, and particularly because the acts complained of were not done in pursuance or exercise of any corporate power, but that they were done in pursuance of, or as incidents in the exercise of, a statute of the state which authorizes towns and cities to celebrate the anniversary of American Independence; that such celebration was a purely public act; that no element of consideration inured to the city; and, hence, that the acts complained of did not constitute a nuisance, and the city cannot be held liable for any negligence in connection with the carrying out of a public celebration of this sort.

The defendants other than the city treasurer have filed pleas in bar, so that the only question now raised is as to the liability of said city in its corporate capacity. Upon examination of the pleadings, however, we are of the opinion that this question is not properly before us, and, hence, that we ought not now to attempt to decide the same. The declaration in the case makes no charge whatever against the city of Providence, but only against Daniel L. D. Granger, city treasurer; that is to say, the charge is simply against him as an individual, and not against the city at all. Of course, the declaration is clearly demurrable on this account; for while the action must be brought against the city treasurer, if it is sought to charge the city with liability (*Valcourt v. City of Providence*, 18 R. I. 160, 28 Atl. 45; *Saunders v. Pendleton*, Index TT, 45, 36 Atl. 425), yet the declaration, in so far as it charges negligence, must charge it against the city, or its servants or agents, which is the same thing. It is true, this point has not been taken in the argument of counsel; but, as the declaration shows no case against the city, any decision which we might render upon the important question, which has been very fully and learnedly argued by counsel upon both sides, would be a mere dictum, and hence we think it wiser to simply sustain the demurrer on the general ground set up therein, viz. that it does not state a cause of action against the city of Providence, leaving the plaintiffs to obtain leave, if they can, to so amend their declaration as to properly raise the question as to the city's liability in the premises. Whether, in case the declaration shall be so amended as to state a case, the questions which have been discussed at the bar can be determined on

demurrer, unless the declaration shall set out the acts of the city in connection with said celebration, and also that they were done and performed in pursuance of the statute, as was done in the case of *Tindley v. City of Salem*, 137 Mass. 171, quere. Demurrer sustained, and case remitted to the common pleas division for further proceedings.

(20 R. I. 366)

ORANDALL v. GAVITT.

(Supreme Court of Rhode Island. Jan. 18, 1898.)

UNLAWFUL ARREST—DECLARATION—DEMURRER.

Where the declaration in an action for false arrest shows that the arrest complained of was made upon process which was regular on its face, and does not allege that any privilege or exemption from arrest was claimed by plaintiff, either at the time of the arrest or afterwards, the declaration is demurable.

Action by Oscar M. Orandall against William B. Gavitt for false arrest. Demurrer to declaration of plaintiff sustained.

J. W. Mathewson, for plaintiff. A. B. Crafts, for defendant.

PER CURIAM. We think that the demurrer should be sustained. The declaration shows that the arrest complained of was made upon process which was regular upon its face, and which commanded the officer to arrest the defendant in the former suit (who is the plaintiff in this); and the declaration does not allege that any privilege or exemption from arrest was claimed by the plaintiff, either at the time of the arrest or afterwards, by way of plea in abatement or otherwise, or even that the defendant knew or was informed that he was a qualified voter. If he neglected to claim his exemption from arrest in some way in connection with the former suit, as it was clearly his privilege to do, he waived his right thereto, and cannot now be heard to complain of the arrest. Demurrer sustained, and case remitted to the common pleas division for further proceedings.

(20 R. I. 362)

ANDERSON v. TAFT, Town Treasurer.

(Supreme Court of Rhode Island. Jan. 13, 1898.)

DEFECTIVE HIGHWAY—CHANGE IN CONDITION—COMPETENCY OF EVIDENCE.

Evidence that the highway on which plaintiff was injured had been used in the same condition it was in on the night of the accident for 20 years, without accident, is incompetent on the question of negligence.

Action by Seymour Anderson against Cyrus Taft, town treasurer. To the action of the court in refusing to admit certain evidence defendant excepted, and urges the exception as a ground for a new trial. New trial denied.

S. S. Lapham and F. P. Owen, for plaintiff. Charles E. Gorman, for defendant.

MATTESON, C. J. This is an action of trespass on the case for negligence of the town of Cumberland in failing to keep one of its highways safe for travelers. At the trial in the common pleas division the defendant offered testimony that the highway had been used in the same condition it was in on the night of the accident for upwards of 20 years, without accident. The court refused the offer, and thereupon the defendant excepted, and now urges the refusal as a ground of his petition for a new trial.

There are cases which, expressly or impliedly, sanction the defendant's contention that the testimony is competent evidence on the question of negligence. *Quinlan v. City of Utica*, 11 Hun, 217, 74 N. Y. 603; *Hubbell v. City of Yonkers*, 104 N. Y. 434, 10 N. E. 858. But the weight of authority, and, as it seems to us, the better reasons, support the opposite view. *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Aldrich v. Inhabitants of Pelham*, 1 Gray, 510; *Kidder v. Inhabitants of Dunstable*, 11 Gray, 342; *Blair v. Inhabitants of Pelham*, 118 Mass. 420; *Bailey v. Town of Trumbull*, 31 Conn. 582; *Rassett v. Shares*, 63 Conn. 39, 27 Atl. 421; *Association v. Giles*, 33 N. J. Law, 260; *Elliot, Roads & S.* 648. If the defendant had been permitted to put in the testimony, the plaintiff would have been entitled to rebut it by testimony that accidents had happened within the 20 years. The defendant might then have shown that the accidents were caused, not by the defective condition of the highway, but because of the want of due care on the part of the traveler. Apart from the consideration that other accidents would be *res inter alios acta* as to the plaintiff, it is apparent that such testimony, could the parties be prepared to meet it, might introduce into the case numerous collateral issues bearing only remotely on the main issue, which would tend to greatly protract the trial, distract the attention of the jury from the issues involved in the suit, and impose great and unnecessary expense on the parties. The opinion in *Association v. Giles*, 33 N. J. Law, 264, states the difficulties liable to be encountered from the admission of such testimony as follows: "The evidence excluded furnishes a forcible illustration of the necessity of the rule to the trial of causes before juries. The offer was to show that ten thousand persons passed these premises in each year since the hall was erected, without accident. The admission of this evidence would carry with it the right to cross-examine as to the circumstances under which each individual of the multitude passed, and the degree of caution and circumspection used by each, and also the right to introduce evidence of the dangers encountered, and, by the exercise of superior vigilance, avoided, by each one of these individuals, together with evidence that some one or more of them had met with accidents at the place,—in turn opening the way for evi-

dence as to the degree of care exercised by such as had not been so fortunate as to escape; and when the parties, wearied in their endeavors to exhaust this vast field of investigation, rested the cause, the judge would have been compelled to direct the jury to determine whether or not the area was a nuisance, from the character of the footway, the situation of the area with reference to it, and the means taken to guard against accident from its proximity to the sidewalk."

The other ground of the petition for new trial is that the verdict is against the evidence. The testimony was conflicting, and such that different minds might honestly reach different conclusions upon it. There is nothing to show that the verdict was not the fair exercise of the judgment of the jury, and in such cases we are not at liberty to disturb their finding. New trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

HARRIS et ux. v. EARLE

(Supreme Court of Rhode Island. July 27, 1889.)

INSOLVENT ESTATE—PROSECUTION OF CLAIM.

The supreme court, under Pub. St. c. 221, § 8, can grant a trial in a case in which a party has neglected to prosecute his appeal from the judgment of the commissioners of an insolvent estate.

In the matter of the estate of Frank D. Earle. Petition by Isabel T. Harris and Joseph A. Harris to determine the validity of a claim of Harriet P. Earle against said estate. Granted.

The petition states that the petitioner's wife, Isabel T. Harris, was formerly the wife of Frank D. Earle, who deceased in 1878, leaving a will, a copy of which is annexed, that was proved and allowed by the probate court; that in the residuary clause thereof he bequeathed to his said wife, Isabel T. Earle, all the rest and residue of his estate, and appointed her his executrix, but, at the time of his death, she, being married to the petitioner, was ineligible, under the laws of this state, and one Walter A. Earle was appointed administrator c. t. a.; that subsequently he reported the said estate to be insolvent, and thereupon the probate court appointed three commissioners to hear and allow the claims against said estate; that said commissioners met and allowed claims, among them being a claim of Harriet Earle for \$1,577; that the petitioners had no notice of said meetings, nor of the allowance of said claims, with other claims, until the final meeting of said court of probate, and there learned that said court of probate had no authority to revise said report and the allowances made, whereupon they appealed to this supreme court; that subsequently this court decided that said

appeal was not prosecuted according to law; that said claims allowed were unjust and exorbitant; and intended to deprive this petitioner Isabel T. Harris from deriving anything under the residuary clause of said will, by swallowing the whole estate by pretended claims; and that this petition is within one year of the decision of this court. Wherefore they pray that said claim of Harriet Earle for \$1,577 may be tried and determined by this court.

Edward C. Dubois, for plaintiff.

PER CURIAM. Petition for trial granted, without costs, on condition that the petitioner shall enter the case in this court and file a certified copy of the proceeding on or before the 2d day of the October term, 1889, and shall also cause a citation to appear to be served on the adverse party at least 10 days prior to said October term.

(20 R. I. 54)

STATE v. WATSON.

(Supreme Court of Rhode Island. Jan. 12, 1893.)

ADULTERY—INDICTMENT—DIVORCE—VACATION OF DECREE—CRIMINAL LAW—PLEADING—FORMER CONVICTION.

1. Where plaintiff in a decree of divorce remarries, and cohabits with his second wife, he may be convicted of adultery on the setting aside of the decree for fraud in procuring it.

2. A decree of divorce will be set aside when obtained by fraud of the party in whose favor it is rendered, and the other party is not implicated therein.

3. A plea to the jurisdiction in a criminal case must precede the plea of not guilty.

4. After defendant pleads not guilty, he cannot file any other plea without leave of court.

5. Partial endurance of punishment, under a defective indictment, is no bar to a new trial for the same offense, if the proceedings are reversed on defendant's motion.

6. A plea of former conviction, to be effectual, must allege a conviction for an offense the same in law as well as in fact.

7. A motion to quash an indictment or other criminal process is addressed to the discretion of the trial court.

8. Matters dehors the record cannot be set up in a motion to quash an indictment.

9. It is not necessary, in a prosecution for adultery, that both parties should be indicted.

Francis C. Watson was convicted of the crime of adultery, and he petitions for a new trial, and moves in arrest of judgment. Petition denied, and motion overruled.

Asst. Atty. Gen. Stearns, for the State. Denison & McKenna, for defendant.

TILLINGHAST, J. The defendant, who has been convicted of the crime of adultery with one Mary A. Watson, now petitions for a new trial on numerous grounds, the substance of which, so far as we are able to understand them from the confused statement thereof, is that the verdict is against the evidence, and that the court erred in certain rulings which will be hereinafter mentioned.

The uncontradicted testimony offered by the

state shows that the defendant lived with the said Mary A. Watson as his wife for nearly six years, during two of which he lived with her in Hopkinton, in this state, and that he had three children by her. While the defendant does not attempt to deny that he lived with said Mary as his wife, yet he contends, and sets up as a defense to the indictment, that such cohabitation was not adulterous, because, as he alleges, he had obtained a divorce from his former wife, and that he was lawfully married to said Mary at that time; and the vital question, therefore, is as to the validity of said divorce. The facts are these: In 1870 the defendant was lawfully married to Melinda Buddington, in the state of Connecticut. On the 21st day of May, 1889, the superior court of Windham county, Conn., upon a petition filed by him, granted a decree divorcing him from his said wife. On the 23d day of May, 1889, two days after the said decree was granted, the defendant married said Mary A. Watson, in Sterling, Conn., and subsequently lived with her as his wife, as aforesaid. Shortly after said divorce was granted, the respondent therein filed a petition in said superior court, asking that said decree be set aside, and the case re-entered upon the docket, which motion, after notice and hearing, was on the 18th day of June, 1889, granted, the court finding that the respondent therein was prejudiced by the decree; that she had a good defense to the action, and was prevented, by mistake and accident, from appearing to oppose the same. The court also found that said respondent had employed counsel to oppose the granting of the petition for divorce, and that her counsel had actually appeared to defend the suit, but had not entered his appearance upon the docket; and also that the petitioner knew that the respondent had so appeared. In view of these facts, the court (Douglas, J.) charged the jury in the case at bar that said Melinda Watson continued to be the wife of this defendant from the time of said first-mentioned marriage, in 1870, except, at most, during the interval from the 21st of May, 1889, to the 18th of June, 1889; and that what the relations of the parties were under the law of Connecticut during the term at which the decree of divorce was entered it was not necessary for the jury to consider, as it did not affect the case.

The defendant's counsel requested the court to charge as follows: (1) "That a man who in good faith marries a woman when he was divorced from his former wife, and the divorce was believed by both of them (parties to the second marriage) to be valid and conclusive, he cannot be convicted of adultery with her (second wife) if neither he nor she were married persons, but single, at the time of their marriage to each other, unless they had been divorced from each other since their marriage, and before the alleged adultery." (2) "After a divorce from a former wife, a man does not, by cohabiting as man and wife under his second marriage, or by having car-

nal knowledge of the body of his second wife, commit the crime of adultery. But the indictment should allege the second marriage, and all the other facts constituting bigamous cohabitation, if the second marriage took place in another state; and, if the jury find these facts to be true, there is a variance between the evidence and the pleadings, and verdict should be 'Not guilty.' " In reply to these requests, the court said: "I understand the first request to apply in this way: That if, during the time that the decree of divorce was in force,—that is to say, from May 21st, 1889, to the 18th of June, 1889,—that on the 23rd of May, when the ceremony of marriage was gone through, these parties were not living in adultery. I will charge you for the purposes of this case that that is so. But you see that is not the time that this indictment charges them with having committed adultery." "The second is that, after the divorce from the former wife, the man does not, by cohabiting as man and wife under his second marriage, or by having carnal knowledge of the body of his second wife, commit the crime of adultery. That I refuse." We do not see that the defendant has any ground to complain of this instruction. After the decree of divorce was set aside in manner aforesaid, it is clear that the first-mentioned marriage was in full force; and therefore the defendant was a married man and had a wife living at the time of the commission of the alleged crime of adultery, if, indeed, such was not the case at the date of his second marriage.

It is evident, from an inspection of the record of the divorce proceedings, that the Connecticut court was imposed upon and deceived by the defendant in connection with the granting of said decree,—in short, that the decree was obtained by fraud; and, upon this fact being shown by the respondent in that case, said court promptly righted the wrong thus perpetrated, and placed the parties to the suit where they were before. That, as a general proposition, courts have power to set aside, vacate, modify, or amend their judgments for good cause, no one will question; such power being inherent in the court, as a part of its necessary machinery for the due administration of justice. And whenever a judgment is obtained by the fraud of the party in whose favor it is rendered, and the other party is not implicated therein, of course this constitutes a good and sufficient cause for vacating the judgment. Decrees in divorce suits are not exempted from the operation of this rule, although courts are more reluctant to disturb a decree of divorce, especially after a second marriage involving the interest of third persons. A full discussion of the general question involved may be found in the cases cited in 2 Bish. Mar., Div. & Sep. § 1552, note 3; also, 1 Black, Judgm. § 320. In *Bradstreet v. Insurance Co.*, 3 Sumn. 604, Fed. Cas. No. 1,793, Story, J., says: "I know of no case where fraud, if established by

competent proofs, is not sufficient to overthrow any judgment or decree, however solemn may be its form and promulgation." In *Adams v. Adams*, 51 N. H. 388, which is a leading case upon the subject under consideration, Bellows, C. J., says: "This doctrine in regard to impeaching judgments and decrees for fraud has been applied in numerous cases to decrees in divorce suits and suits for nullity of marriage, and the weight of authority is greatly in favor of such application. Upon principle, there is no solid ground for any distinction between decrees in divorcesuits and other judgments; or, if there be any, it is to be found in the much greater danger of fraud and imposition in divorce cases, as compared with others; thus adding largely to the necessity and importance of preserving the power to correct or vacate decrees that have been obtained by fraud and imposition. Accordingly, it is laid down in Bish. Mar., Div. & Sep. § 699, that if a tribunal has been imposed upon, and in consequence of the fraud a judgment of divorce has been wrongfully rendered, it may vacate this judgment, when, upon a summary proceeding, it is made cognizant of the fraud." To the same effect are *Edson v. Edson*, 108 Mass. 590; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341; and *Wisdom v. Wisdom*, 24 Neb. 551, 39 N. W. 594. It is clear, then, that, whatever the status of the defendant was between the time of the granting of said decree of divorce and the annulment thereof, yet the said Melinda Watson was his lawful wife during the time covered by the indictment in this case.

The next error alleged to have been committed by the presiding justice is that he overruled the defendant's plea to the jurisdiction of the court. The record shows that on March 23, 1896, the defendant was arraigned and pleaded "Not guilty"; and that on May 19, 1896, without having asked or obtained permission to retract this plea, and without permission to file any further plea, he filed a plea to the jurisdiction, as he styles it (although in fact it is plea of *autrefois convict*, which is a plea in bar), in which he sets up former jeopardy and former punishment for the same or a kindred offense. On June 8, 1896, the defendant also filed a motion to dismiss the indictment for want of jurisdiction, on the ground of former jeopardy. On June 10th he filed what he denominates a "Motion to Quash, in the Nature of a Substantial Demurrer," on the ground that the indictment charges no offense known to the law, and for various other reasons not appearing of record. On the same day he made a motion for leave to withdraw his plea of "Not guilty," which was denied by the court, whereupon the trial of the case proceeded, and the jury found the defendant guilty.

First, then, as to said plea to the jurisdiction. This plea was filed too late. The rules of criminal pleading require that a plea to

the jurisdiction, like a demurrer, plea in abatement, plea in bar, or any other special plea whatever, shall precede the plea of not guilty. If the special plea is determined against the defendant, the practice is to then allow him to plead over. *State v. Edgerton*, 12 R. I. 108. Moreover, after a plea of not guilty, the defendant cannot file any other plea without leave of court. *Com. v. Blake*, 12 Allen, 188; *Com. v. Lannan*, 13 Allen, 563. We have, however, examined said plea to the jurisdiction, but do not find that it would have been of any avail if it had been filed in season. It sets out, or attempts to set out, a former conviction of the defendant for bigamous cohabitation with the said Mary A. Watson, the indictment in which case covers and includes the same time on which the offense is laid in the one before us. It also sets out that the defendant was imprisoned for six months and ten days for said offense, and he refers to the record of said case in support of his allegation. As that case was before this division on habeas corpus, we can properly take notice of the facts therein, and they are these: The defendant was convicted of bigamous cohabitation with said Mary A. Watson, as alleged in the plea, and was sentenced therefor to imprisonment for the term of four years. Some time after he was committed, he obtained a writ of habeas corpus, on the ground that the indictment stated no offense known to the law; and, after hearing thereof, this court decided that the indictment was fatally defective, and ordered the defendant discharged from imprisonment. See *In re Watson*, Index RR, 163, 33 Atl. 873. It will at once be seen, therefore, that said "Plea to the Jurisdiction," so called, is without any force or validity. The indictment on which he was tried, convicted, and sentenced was not only for another and distinct offense from that with which he is charged in the indictment now before us, but, by reason of being fatally defective in the manner aforesaid, was a mere nullity. "Where there is no jurisdiction," as said by Mr. Wharton in his work on Criminal Pleading and Practice (9th Ed., § 507), "or where the indictment is defective, even in a capital case, it is agreed on all sides the defendant has never been in jeopardy, and consequently, if judgment be arrested, a new indictment can be preferred, and a new trial instituted, without violation of the constitutional limitation. Even partial endurance of punishment under a defective indictment will be no bar when the proceedings are reversed on the defendant's motion, although it is otherwise when the judgment is unreversed. But a judgment erroneously arrested on a good indictment may be a bar." See, also, *Kohlhelmer v. State*, 39 Miss. 548, cited by counsel for defendant. Moreover, a plea of autrefois convict must allege that the two offenses are the same; for when the offenses charged in the two indictments are distinct, though committed concurrently, they are separably pros-

ecutable. Thus, the fact that a person has been convicted of keeping a drinking house and tipping shop is no bar to an indictment for presuming to be a common seller, although both indictments cover the same period of time, and are supported by the same acts of illegal sale. *State v. Inness*, 53 Me. 536. Blackstone says that the pleas of former acquittal or former conviction must be upon a prosecution for the identical act and crime. 4 Bl. Comm. 336. And Chief Justice Shaw says that, in considering the identity of the offense, it must appear by the plea that the offenses charged in both cases are the same in law as well as in fact, and that the plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact. *Com. v. Roby*, 12 Pick. 496; *Rice*, Cr. Ev. § 385, and cases cited; *Com. v. Putnam*, 1 Pick. 136, at page 140.

As to the defendant's motion to dismiss, it is sufficient to say that it is based upon the same ground as the plea which we have just passed upon, and hence requires no further consideration.

The defendant's "Motion to Quash, in the Nature of a Substantial Demurrer," was properly overruled. A motion to quash an indictment or other criminal process is addressed to the discretion of the trial court, and, as said by Ames, C. J., in *State v. McCarthy*, 4 R. I. 84, "is never granted unless by this short dealing the ends of justice can be as well attained, and the rights and equities of the parties as well observed as by allowing the cause to go on to its termination in the accustomed mode." See, also, *Chit. Cr. Law*, 300-308. We have, however, examined the indictment in the case at bar, and find that it is in the ordinary form, and clearly and technically sets out and charges the crime of adultery.

As to that part of the motion which sets up matters dehors the record, we reply that, in the first place, it sets out no ground of defense, and, in the second place, even if it did, the matter should have been set up by plea, and not by motion to quash, as the latter can be granted only for defects apparent on the record. *Howland v. School Dist.*, 15 R. I. 184, 2 Atl. 549, and 8 Atl. 337. See, also, *State v. Drury*, 13 R. I. 540; *State v. Maloney*, 12 R. I. 251; *Whart. Cr. Pl. & Prac.* §§ 86-88.

The only remaining motion to be considered in this case is that in arrest of judgment, which is merely a rehash of the defendant's "Plea to the Jurisdiction," so called, and of his subsequent motions which we have already considered. The motion is coupled with an argument to the effect that the defendant, if indictable at all, should have been indicted for some other offense than that of adultery, and also that one of the guilty parties cannot be indicted without the other. It would not seem to require a very thorough knowledge of criminal pleading in order for

counsel to avoid mistakes of this sort, as well as those hereinbefore pointed out. The motion in arrest of judgment is overruled.

We have examined the numerous other grounds contained in the defendant's petition for new trial, but do not find that they are entitled to any serious consideration. Petition denied, and case remitted to the common pleas division for sentence.

(20 R. I. 347)

ISLAND SAV. BANK v. GALVIN et al.
(Supreme Court of Rhode Island. Jan. 11, 1898.)

OBLIGATION OF CONTRACTS—IMPAIRMENT—CHANGE OF REMEDY—MORTGAGES—SALE—FRAUD.

1. Pub. St. c. 204, § 28, providing that the representative of one jointly bound with another was chargeable by virtue of such obligation, in the same manner as the representative might have been charged if the obligors had been bound severally, "provided that the plaintiff shall first pursue the surviving debtor to final judgment and execution," was amended by Judiciary Act 1893, c. 13, § 17, which limits the proviso to partnership contracts. *Held*, that the amendment affects only the remedy; for if a creditor should under the last law sue a representative first, when the surviving debtors are able to pay, the representative could compel contribution, and the result is the same as though they had been first sued, and had then compelled contribution from the representative.

2. The remedy of a creditor may be changed without impairing the obligation of the contract.

3. In an action for a balance due on a note signed by several joint obligors, against the representative of one, deceased, evidence that the sale of the premises mortgaged to secure such note was fraudulent, in that it sold for an inadequate price to a joint obligor and mortgagor, is inadmissible on behalf of the representative, where such party has been decreed in another suit to reconvey back to the heirs of deceased his share of the premises, subject to the mortgage given in payment of the price bid at the sale.

Action by the Island Savings Bank against Catherine Galvin, executrix of the will of Daniel Galvin, and others. There was a judgment for plaintiff. Petition for new trial. Denied.

Wm. P. Sheffield, Jr., for plaintiff. Charles Acton Ives, for defendants.

STINESS, J. The plaintiff sued for a balance due on a promissory note given to it by Patrick H. Horgan, Charles C. Pierce, and Daniel Galvin, August 8, 1892, for the sum of \$10,000, secured by mortgage on real estate in Newport. Daniel Galvin died August 8, 1894, and afterwards the real estate was sold under the mortgage for the sum of \$6,700. On motion of the defendant Catherine Galvin, executrix, the surviving joint debtor, Horgan, was summoned in; the other, Pierce, not being within this jurisdiction. At the trial, the plaintiff produced the note, proved the amount due upon it, and rested. Catherine Galvin then asked the court to rule that she was entitled to a verdict, because

the plaintiff had not pursued the surviving debtors to judgment and execution, which request was denied.

Under Pub. St. R. I. c. 204, § 28, in force at the date of the note, the representative of one jointly bound with another was made chargeable, by virtue of such obligation, in the same manner as such representative might have been charged if the obligors had been bound severally as well as jointly: "provided, that the plaintiff shall first pursue the surviving debtor to final judgment and execution." The claim is that this proviso fixed the liability of the parties so as to make the liability of a deceased party subsequent to that of the surviving debtors, and that this liability could not be affected by the provisions of the judiciary act (c. 13, § 17), passed May 19, 1893, which limited the proviso to partnership contracts, thus leaving the representatives of other joint debtors to be pursued as under a several contract. We do not think that the claim of the defendant is tenable. Under both the former and subsequent laws, each debtor was chargeable severally. There has been no change in the liability. The only change has been in the remedy. Under the former act, the representative could not be sued until after judgment and execution against the surviving debtor, and under the later act he may be sued before such judgment and execution. In both cases the right and liability to contribution and the ultimate liability for the whole, if the surviving debtors are unable to pay, remain the same. The change is simply in the time when the representative may be sued, and this is clearly a change of remedy only. No right is affected, for if a creditor should, under the present law, first sue a representative when the surviving debtors are able to pay, the representative may compel contribution; and the result is the same as though they had been first sued, and then compelled contribution from the representative. The proposition that changes may be made in a remedy is too plain for argument. The subject was fully discussed in *Re Penniman*, 11 R. I. 333.

The request for a ruling, upon the ground stated, having been denied, the defendant proceeded to offer testimony. Without attempting to follow the numerous exceptions which were taken, it is sufficient to say that the defense to the claim for a balance due on the note was by way of recoupment for damages arising from the improper conduct of the plaintiff's agent in the sale, on account of which the property was sold for a sum far below its value, whereas a fair sale would have produced more than enough to pay the note. It appeared that the sale of the property was intrusted by the plaintiff to Edward Newton, then its treasurer, who bid in the property for himself for the sum of \$6,700. Much testimony was offered to show the relation between Newton and Horgan in regard to the property after the sale.

in support of the charge of a fraudulent sale, which was excluded upon the ground that after the sale Newton was no longer agent for the bank, and that what he did with the property was immaterial. So far as the matter of agency is concerned, the ruling was clearly correct; but, still, the subsequent conduct of the parties might show that they were acting in collusion and fraudulently as regards the Galvin interest. When testimony goes to show that the buyer at the sale was only a nominal purchaser, and that Galvins co-debtor continued to exercise all the appearance of ownership, and to use the estate as his own, it is quite a different thing from testimony which would show the same state of affairs between the buyer and a stranger to the estate. The difference lies in the relationship of joint obligors between Horgan and Galvin, which presents an element of fraud when the sale is made for the benefit of one, and to the detriment of the other; whereas a sale for the same sum for the benefit of a stranger might show, *prima facie* at least, only inadequacy of price. Proof of such collusion would most naturally appear in conduct after the sale had been made, but it would tend to show that it existed and operated at the time of the sale. But even if this is so, and if some of the testimony offered by the defendant was pertinent to what she wanted to prove, still we do not see how we can grant a new trial in this case.

The defendant Galvin put in evidence the record in the suit in equity brought by her against Newton, reported in Index RR, p. 12, 36 Atl. 3, in which it was decreed that Newton should convey to the complainants, heirs at law of Daniel Galvin, one-fourth of the estate bought by him at the sale under the mortgage, subject to the new mortgage of \$7,000 given by him in payment therefor, and also should account for the surplus of said mortgage over the purchase money, and for rents and profits. Thus, the plaintiff, as representative of Daniel Galvin, having been reinstated to her proportionate ownership in the estate, stands as though no sale had been made. She has therefore suffered nothing by the sale. She cannot have her property back, and at the same time be exempt from liability for the debt. Thus, all the testimony relating to a fraudulent sale was irrelevant, and constituted no defense, because testimony showing the improper conduct of the plaintiff's agent in the sale can be of no consequence when, by reason of it, the defendants have already been restored to their rights in the property. The usual course in such cases is for the party injured to set aside the sale, and redeem the mortgage. The debt is thereby paid, and the property which would otherwise have been sacrificed is restored. In this case, as the purchaser was himself the wrongdoer, he was held to be the trustee of the complainants for their interest in the property,

and, since it has been restored to them, they cannot claim to be absolved from the debt any more than they would have been if the sale had been set aside and the mortgage redeemed. The complainants, being heirs at law of Daniel Galvin, took the estate subject to his liabilities, and not in a separate interest. We are therefore of opinion that, upon the facts shown, the defense set up by the executrix cannot avail, and that the petition for a new trial must be denied.

(89 Vt. 228)

CRAMPTON v. D. L. KENT & CO.'S ESTATE.

(Supreme Court of Vermont. Bennington. Oct. Term, 1896.)

INSOLVENT FIRM—PROOF OF CLAIMS.

The assignee of an insolvent firm, composed of three or four persons, can prove a claim against another insolvent firm which is composed of two of the members of the claimant firm, where all dividends recovered are for the benefit of such claimant firm's creditors.

Exceptions from Bennington county court; Start, Judge.

Action by John W. Crampton, as assignee of the estate of the S. F. Prince Company, insolvent, against the estate of D. L. Kent & Co., insolvent. From a judgment for defendant, plaintiff excepts. Reversed.

Batchelder & Bates, for plaintiff. Butler & Moloney, for defendant.

TYLER, J. The plaintiff, as assignee of the insolvent estate of S. F. Prince & Co., filed a claim in the court of insolvency against the insolvent estate of D. L. Kent & Co. The claim was disallowed, and the plaintiff appealed to the county court, where he filed a declaration in the common counts in assumpsit, and the defendant filed two pleas thereto,—the first alleging that the claimant was a co-partnership composed of Samuel F. Prince, John F. Prince, and Charles B. Kent, and that the defendant was a co-partnership composed of the same Samuel F. Prince and John F. Prince; that, during the time when the alleged causes of action accrued, both firms were engaged in the business of quarrying, manufacturing, and selling marble at Dorset, in this state, and had mutual dealings; that advancements and loans of money, and advancements, loans, and sales of marble, were during that time made between the two firms so composed in respect to members; and that the alleged causes of action accrued solely by reason of such loans, sales, and advances,—and claimed that the demands, for the reasons alleged, were not provable. The second plea differs from the first only in that it alleges that E. L. Hawley was also a member of the claimant firm. The plaintiff demurred to both pleas, and the case comes here upon the judgment of the court below overruling the demurrer, and adjudging the pleas sufficient.

The only question presented is whether the assignee of one insolvent firm composed of the three or four persons named in the pleas can prove a claim against another insolvent firm which is composed of two of the members of the claimant firm. It must be understood by the pleas that the claimant firm was engaged in a business separate and distinct from that of the defendant. The claim that is sought to be proved is a debt due to the firm of S. F. Prince & Co. from the firm of D. L. Kent & Co., and therefore is not affected by the rule that a partnership firm cannot prove a claim against the individual estate of an insolvent partner, nor by the rule that a member of a firm cannot prove a claim against the firm of which he is a member. The case presents no question as to the liability of the property of individual members of the defendant firm for the payment of the claim, nor of the right of individual members of the claimant firm to share in the assets of the defendant. Whatever dividend may be received for the claimant firm will not be for the benefit of its individual members, nor for their creditors, but for the benefit of the creditors of the claimant firm. Section 2164, V. S., provides that the net proceeds of the property of the insolvent partnership shall be appropriated to the payment of the creditors of such partnership, and that the net proceeds of the separate estate of each partner shall be appropriated to the payment of his separate creditors, which is for the reason that credit was presumably given by partnership and private creditors, respectively, by reason of their reliance upon partnership and private assets, which, by the credit given, they have respectively increased. This statute is founded upon the equitable rule given by Lord Hardwicke in *Twiss v. Massey*, 1 Atk. 67, that joint creditors, as they gave credit to the joint estate, have first their demand on the joint estate, and separate creditors, as they gave credit to the separate estate, have first their demand on the separate estate. The firm of S. F. Prince & Co. being a creditor of the defendant, and all dividends recovered being for the claimant's creditors, the claim is provable. This holding is in accordance with *Potters Works v. Minot*, 10 Cush. 592, and the other Massachusetts cases cited by counsel, decided under a statute like our own, and also with the elementary works upon partnership cited. Judgment reversed, demurrer sustained, pleas adjudged insufficient, and cause remanded.

(69 Vt. 231)

SMITH v. JOHNSON.

(Supreme Court of Vermont. Rutland. Sept. Term, 1896.)

LIBEL—PRIVILEGED COMMUNICATIONS—CANDIDATES FOR OFFICE.

Where defendant had said that he had given money to plaintiff, a justice of the peace, with the understanding that plaintiff was to favor

defendant in prosecutions before the former for illegal liquor selling, defendant could not justify on the ground that the words were spoken, without malice, concerning plaintiff's fitness for a public office for which he was a candidate, but he could defend only on the ground of the truth of the words.

Exceptions from Rutland county court; Rowell, Judge.

Action on the case by Otis F. Smith against Robert M. Johnson for slander. From a pro forma judgment overruling a general demurrer to defendant's special plea, plaintiff excepts. Reversed.

The declaration alleges that the slanderous words were spoken concerning the plaintiff in his office of justice of the peace, with the meaning that the plaintiff had received the money, liquor, and gloves with the corrupt understanding that he should favor the defendant in prosecutions before the plaintiff for violation of the law against liquor selling. The plea admits the speaking of the words in the sense charged, but attempts to justify their use by alleging that they were spoken without malice, and with a belief in their truth, by way of answer to one who inquired of the defendant concerning the plaintiff's fitness to hold the said office; the plaintiff then being a candidate for appointment thereto. The words charged are recited in the opinion.

W. H. Button and C. M. Wilds, for plaintiff. Butler & Moloney, for defendant.

TAFT, J. The question before us is as to the sufficiency of a plea to the declaration. It is alleged in the declaration that the defendant spoke maliciously of the plaintiff that he (the defendant) had paid the plaintiff \$5, and what liquor the plaintiff wanted, from a pint to a quart a month, while Curley Parker was in his saloon; that he (the defendant) had enclosed a \$10 bill in a letter mailed to the plaintiff; that he took a \$5 bill out of his pocketbook, and put it into a new pair of gloves which Curley Parker had, and gave to the plaintiff; and that he did these things for his protection. The defendant alleges in his plea that he spoke the words with no malice whatever, and that he had good reason to, and did, believe that said words were true. The defendant knew whether the words of the libel were true or false. He had knowledge thereof, because they related to acts which he states that he did. Whether he did the acts, or not, was a fact within his knowledge, and belief in respect to it is not predicable of knowledge. The plea is defective in not alleging the truth of the words. If these matters related to acts done by third parties, the plea, in its present form, might be sufficient, under the ruling in *Posnett v. Marble*, 62 Vt. 488, 20 Atl. 813, but upon the facts stated in the declaration the plea is defective. The defendant can only stand upon the truth of the words alleged. He must therefore plead their truth. The demurrer

should have been sustained, and the plea adjudged insufficient. The pro forma judgment reversed, and cause remanded.

(69 Vt. 234)

WESTCOTT v. WESTCOTT'S ESTATE.

(Supreme Court of Vermont. Rutland. Oct. Term, 1896.)

IMPLIED CONTRACTS FOR SERVICES—EVIDENCE—TRIAL—OFFER OF PROOF—WITNESSES—COMPETENCY.

1. After becoming of age, plaintiff went from home to another state, where he married and spent a few years. His father then sent for him, stating that he had a good deal of land, and that plaintiff had better come home to work on the farm; and plaintiff then returned, and performed various kinds of labor on the farm for his father's benefit. *Held*, that the question of implied contract was for the jury.

2. Where a question put to a witness is excluded, and the questioner makes no offer of proof, so that it does not appear what the answer would have been, the ruling will not be reviewed.

3. In an action on a claim against a solvent estate, the residuary legatee is a party in interest, and hence his wife is not a competent witness.

4. In assumpsit by a son against his father's estate for services rendered, as the son claimed, upon his father's request to return home to work, defendant, after showing the loss of certain letters written by plaintiff to his mother, and shown by her to the father, offered to show that plaintiff wrote in those letters that he was in want, and was unable to make a living, and asked for assistance, and that, in consequence, his father sent him money to return home, which he did. *Held* competent to show the mutual understanding and expectation of the parties.

Appeal from probate court, Rutland county; Taft, Judge.

Assumpsit by Eugene L. Westcott against the estate of Daniel P. Westcott for services rendered deceased. Judgment for plaintiff. Defendant appeals. Reversed.

The declarations of the decedent, referred to in the opinion, were to the effect that he had sent for the plaintiff to come home and work on the farm, for the reason that he could do better there than in the West, where he had been. The defendant requested the court to instruct the jury that there was no evidence from which they could infer any expectation that the plaintiff should be paid for his services beyond the value of the board of himself and family. The court ruled that there was such evidence, and the defendant excepted.

W. H. Preston and F. S. Platt, for plaintiff. Henry A. Harman and Butler & Moloney, for defendant.

START, J. The question of whether there was any evidence tending to support the plaintiff's claim is presented for consideration by the defendant's request to charge. The plaintiff's evidence tended to show that he was a son of the deceased, David Potter Westcott; that, after he became 21 years of

age, he left his father's home, where he had formerly resided, and went to Michigan, where he was married and spent a few years; that his father sent for him to come home; that his father stated he had a good deal of land, and the plaintiff had better come home to work on the farm, as he could do better here than in the west; that he did come home, and become an inmate of his father's house, and perform various kinds of labor upon his father's farm, such as haying, harvesting, milking, teaming, drawing wood, etc., for his father's benefit; that his services were worth from \$18 to \$20 per month. While this testimony did not tend to show an express promise on the part of the father to pay for the services of the son, we think the circumstances under which the son returned to his father's home, after being away for several years, and the circumstances under which he thereafter continued to live with his father and perform services for his father's benefit, taken in connection with the father's declarations and statements, were for the consideration of the jury upon the question of whether there was a mutual understanding and expectation that the services were to be paid for, and that the case was properly submitted to the jury.

If the parties mutually understood and expected that the services were to be paid for, the relation of debtor and creditor existed; and, if the jury so found, the plaintiff was entitled to recover the balance due him for his services. It was not necessary to show an express agreement to pay. It was sufficient to show that the father expected to pay for the services, and that the son expected payment; and such expectation could be shown by the circumstances under which the services were performed, the situation and surroundings of the parties, their pecuniary circumstances, and the declarations of the party sought to be charged. In *Sawyer v. Hebard's Estate*, 58 Vt. 376, 3 Atl. 530, it is said: "An examination of these cases shows that no definite rule has been, or can be, laid down, in regard to what the circumstances must be to show mutual expectation to pay for such services or support, and that each case, in this respect, is made to turn largely upon its own peculiar circumstances." In *Doane's Ex'r v. Doane*, 46 Vt. 485, the son had means in his hands, belonging to his father, with which, if paid over, the father could provide his own support. The son furnished the support, and it was held that these circumstances would "help the implication that it was to be paid for." In *Freeman v. Freeman*, 65 Ill. 106, it is held that when a son, some time after reaching his majority, left his parents, and commenced business on his own account, and was afterwards induced by his father to return, all his other sons having left him, and he continued to labor for his father for many years, managing his affairs, and supporting his parents, for which he received nothing but his board, scanty clothing,

and a little spending money, it was but reasonable to presume that the father intended to pay, and the son to receive pay, for his labor, either in money or by devise in his father's will.

The witness Jennie Westcott was properly excluded. Her husband was the residuary legatee and devisee named in the will of David Potter Westcott. The estate was solvent, and a recovery in this case would directly diminish the sum he would otherwise take under the will. He was therefore a party in interest, and his wife was not a competent witness. *Baallister v. Ovitt*, 64 Vt. 580, 24 Atl. 1117.

The defendant made no offer in connection with the testimony of Heman Stannard, and it does not appear what his answer would have been respecting the loan of money to the plaintiff if it had been given. Therefore error does not appear. *Roach v. Caldbeck*, 64 Vt. 593, 24 Atl. 989.

The defendant, after showing the loss of certain letters written by the plaintiff to his mother, and shown by her to the deceased, offered to show that the plaintiff wrote in these letters that he was in want, needed money, was unable to make a living, and asked for assistance; that in consequence of the information received, and with a view of relieving the plaintiff's wants, the deceased sent him \$100, to enable him to return to his former home, in the family of the deceased; and that the plaintiff shortly afterwards did return. This testimony was excluded, and the defendant excepted. This testimony, if admitted, would have tended to show the plaintiff's necessities, his situation and circumstances while in the West and just before he came to his father's house, the reason for his coming, the circumstances under which he entered his father's family, and explain and rebut the circumstances disclosed by the plaintiff's evidence. It was admissible upon the issue respecting the mutual understanding and expectation of the parties, and it was error to exclude it; and for this error a new trial must be granted. Judgment reversed, and cause remanded.

(69 Vt. 239)

WELCH et al. v. RICKER et al.

(Supreme Court of Vermont. Caledonia. Oct. Term, 1896.)

EVIDENCE — ADMISSIBILITY — PAYMENT OF ANOTHER'S DEBT — ERROR — ACCOUNT BOOKS.

1. In an action on a purported agreement to pay for goods delivered to another, it is error, for the purpose of controverting plaintiff's claim that the liability had been acknowledged, to admit evidence of a subsequent separate transaction between the same parties which had been fully settled after the indebtedness in controversy was incurred.

2. Evidence that defendant was on a farm, and interested in its management, is admissible to substantiate the claim that goods were sold to another, who was interested in the same farm, upon representation by the defendant that he would pay for the same.

3. Where all the books of a firm were introduced for the purpose of proving a claim, and the manner of keeping them was explained in full, testimony as to whether the ledger introduced was the only book upon which plaintiffs charged goods which were not paid for was inadmissible.

4. The entries in the books of a business firm are not conclusive as to whom credit was in fact given at the time the goods were delivered.

Exceptions from Caledonia county court; Ross, Chief Judge.

Assumpsit by Welch & Darling against B. M. Ricker and Ira O. Ricker. From a verdict and judgment for defendants, plaintiffs except. Reversed.

With respect to the exception last mentioned in the opinion, the record shows that the plaintiffs offered to have the plaintiff Welch testify "that the ledger was the only book upon which the plaintiffs charged such goods as were not paid for." The court ruled that the witness could not state that the ledger entry was the only charge, and excluded the offer.

Dunnett & Slack, for plaintiffs. Bates & May, for defendants.

THOMPSON, J. The defendant Ira O. Ricker being in insolvency, the case in the court below proceeded against the defendant B. M. Ricker alone. The plaintiffs sought to recover for the price of a quantity of feed delivered to Ira O. Ricker by virtue of certain representations made prior to delivery by B. M. Ricker, as the plaintiffs claimed, which rightly gave them to believe and understand that he would become jointly responsible with Ira O. for the payment thereof. The defendant B. M. Ricker denied having made such representations, and his liability to pay for the goods. The feed was delivered from time to time from November, 1892, to November, 1894. Late in the fall of 1894 the defendant B. M. Ricker denied his liability to the plaintiffs, and refused to pay for the feed which had been delivered to Ira O., but then agreed to pay for all feed which they might thereafter furnish him. As tending to controvert the claim of the plaintiffs that he had ever acknowledged any liability on his part for the feed in controversy, he was permitted to show, under the exception of the plaintiffs, that on July 17, 1895, he paid them for all the feed which they furnished to Ira O. under the agreement made in the fall of 1894. This agreement and transaction had no connection with the one under which it was claimed the account in suit accrued. By the ruling under which this evidence was admitted, the jury might well have understood that they had a right to infer and reason thus: The defendant always pays as he agrees, because he paid pursuant to his agreement in the fall of 1894. He did not pay for the feed delivered prior to that agreement, but refuses so to do. Therefore he did not promise to pay as alleged by the plaintiffs. Infer-

ences are not to be drawn from one transaction to another that is not specifically connected with it; merely because the two resemble each other. They must be linked together by the chain of cause and effect, in some assignable way, before an inference can be drawn. *Steph. Dig. Ev. (May's Ed.)* p. 55, art. 10; *Id.*, p. 200, note 6. No inference in respect to the alleged agreement in controversy could legitimately be drawn from the fact that the defendant had performed another contract, about which there was no dispute. Hence it was error to admit this evidence for the specific purpose stated. *Boyden v. Brookline*, 8 Vt. 284; *Phelps v. Conant*, 30 Vt. 277; *Bishop v. Wheeler*, 46 Vt. 409; *Hitt v. Slocum*, 37 Vt. 524; *Harris v. Howard's Estate*, 56 Vt. 695; *Alken v. Kennison*, 58 Vt. 635, 5 Atl. 757; *Jones v. Ellis' Estate*, 68 Vt. 544, 35 Atl. 488.

The exception to the refusal of the court below to order the defendant to produce his book of accounts showing his deal with Ira O. cannot be sustained, as the record shows that the book was produced, submitted to the plaintiffs, and the defendant examined in respect to the same. The record does not disclose that this was not all done before the close of the cross-examination of the defendant.

The defendant B. M. Ricker testified that the control and management of the farm sold by him in 1889 to his son Ira O. Ricker, and on which the latter lived while the account in controversy was accruing, was the same for the years 1893 and 1894, down to 1895. The plaintiffs offered to show by D. R. Darling that he worked on the farm during the winter of 1894 and 1895, after the dispute between them and B. M. Ricker, and after they had begun to furnish feed on his special promise to pay for the same, and that he was on the farm, and hired Darling, directed his labors, and paid him. This evidence was excluded, to which the plaintiffs excepted. The evidence of the plaintiffs tended to show that as a part of the representations made to them by B. M. Ricker, under which they furnished the feed on the joint credit of himself and Ira O., he made such representations as gave them the right to understand and believe that he was jointly interested with Ira O. in the management and control of the farm. If this were true, it rendered more probable the claim of the plaintiffs that he agreed to become jointly liable with Ira O. for the feed. In view of the testimony of B. M. Ricker in respect to the control and management of the farm during the years 1893 and 1894, the evidence excluded tended to show that he was jointly interested with Ira O. in the control and management of the farm, and it was error to exclude it. *Armstrong v. Noble*, 55 Vt. 428; *Tenney v. Smith*, 63 Vt. 520, 22 Atl. 659; *State v. Burpee*, 65 Vt. 1, 25 Atl. 984.

We fail to discover any error in respect to

permitting the plaintiffs to testify about the charging the feed on their books. The books were produced, and the entries shown. The plaintiffs were allowed to testify fully as to their method of keeping their books, and how it happened that on the memorandum or sales book the feed was charged to Ira O. Ricker, while on the ledger it was charged to Ira O. and B. M. Ricker. Neither entry was conclusive as to whom the credit was in fact given at the time of the delivery of the goods. *Scott v. Shepherd*, 3 Vt. 104; *Goodrich v. Drew*, 10 Vt. 187. The plaintiffs were permitted to show that they in fact sold the goods on the joint credit of both the Rickers. It was for the jury to say whether the plaintiffs' books, as kept, corroborated their claim. Judgment reversed and cause remanded.

(39 Vt. 243)

WATSON v. WATSON.

(Supreme Court of Vermont. Windham, Oct. Term, 1896.)

GIFT—EFFECT OF DELIVERY—SAVINGS BANK BOOK—ACTION TO RECOVER DEPOSIT.

1. Delivery of property which transfers to the donee either the legal or equitable title is sufficient to effectuate a gift.

2. The delivery of a savings bank deposit book, issued to the depositor as evidence of and which shows the actual indebtedness of the bank, consummates the gift, and no other formality is necessary to vest the possession and title in donee.

3. An action against a savings bank for a deposit which has been transferred by delivery of the deposit book can be maintained by the donee in the name of the donor, if living, and, if dead, in the name of the donor's administrator; but the recovery in either case would be for the donee's benefit.

Exceptions from Windham county court; Rowell, Judge.

Action by John D. Watson, as administrator, against Lydia J. Watson, for trover of a savings bank deposit book. To a judgment for defendant, plaintiff excepts. Exceptions overruled.

The intestate died in 1880. Some time before, she delivered a savings bank deposit book to defendant, with directions to keep it, and permit the deposit to remain, until the plaintiff, a son of the intestate, was dead, and then to divide the deposit among her other children. The defendant accepted, and has ever since held, the book for that purpose.

Waterman, Martin & Hitt, for plaintiff. K. Haskins and John H. Watson, for defendant.

THOMPSON, J. The question determinative of this case is whether or not the delivery of her deposit book by the plaintiff's intestate to the defendant was a consummated gift of the bank deposit to the defendant, in trust, as stated in the finding of facts. In savings banks, in this state, such deposit books are issued to the depositors as evi-

dence of the indebtedness of the banks. Withdrawals of deposits are entered in the same books, so that the deposit book always, with the addition of interest, shows the actual state of the accounts between the bank and the depositor, and the entire indebtedness of the bank. The general rule in this country and England is that the delivery of property which transfers to the donee either the legal or equitable title is sufficient to effectuate a gift, and hence it has been held that the mere delivery of nonnegotiable notes, bonds, mortgages, or certificates of stock, is sufficient to effectuate a gift. The deposit book, in the case of a savings bank, answers the same purpose as a certificate of deposit in the case of other banks. In this case the delivery of the deposit book to the defendant consummated the gift, and no other formality was necessary to constitute the actual delivery of the bank deposit, and vest the possession and title in the donee. *Grover v. Grover*, 24 Pick. 261; *Pierce v. Bank*, 129 Mass. 425; *Camp's Appeal*, 36 Conn. 88; *Hill v. Stevenson*, 63 Me. 364; *Bidden v. Thrall*, 125 N. Y. 572, 26 N. E. 627; *Tillinghast v. Wheaton*, 8 R. I. 536; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898. In case the donor is living, the donee can maintain an action against the savings bank for the deposit, in the name of the donor. If the donor is dead, the action can be brought by the donee in the name of the donor's administrator. *Pierce v. Bank*, 129 Mass. 425. In either event the suit would be controlled by the donee, and the recovery had for his benefit. Hence the plaintiff's contention that he is entitled to the deposit book to collect the deposit, even though it belongs to the defendant, cannot be maintained. Judgment affirmed.

(69 Vt. 225)

PINGREE v. JOHNSON.

(Supreme Court of Vermont. Windsor. Oct. Term, 1896.)

EVIDENCE—ADMISSIBILITY—MEMORANDUM MADE BY THIRD PARTY—COMPETENCY OF WIFE AS WITNESS—AGENCY.

1. In an action on an account, where defendant alleged that certain payments made by his wife and by his direction were received in due settlement, he cannot be corroborated by a memorandum made by the wife at the time.

2. Under the statute permitting a wife to testify to transactions in which she acted as the agent of her husband, a wife was not competent to testify on behalf of her husband to a payment of money made by her in his presence and by his direction, as such transaction must be regarded as conducted by him, and not by her as his agent.

Exceptions from Windsor county court; Rowell, Judge.

Assumpsit by Samuel E. Pingree, administrator, etc., against Nelson S. Johnson, for money due on account. Pleas, the general issue, accord and satisfaction, and payment. There, were verdict and judgment for plaintiff, and defendant excepts. Affirmed.

The action was brought to recover a balance claimed to be due from the defendant to the plaintiff's intestate upon account. The defendant's evidence tended to show that a payment of \$10, made by his wife to the plaintiff's attorney in the defendant's presence and by his direction, was made and received in full settlement; that his wife, as his agent, kept all his books, and at the time of this payment made a memorandum concerning the transaction on the stub of the defendant's receipt book, from which the receipt for said payment was taken; that this memorandum was made in pursuance of her general employment, as such agent, without direction from the defendant, and without his knowledge as to its contents at the time. The memorandum was as follows: "May 8, '93, N. S. Johnson from Alex. P. Nelson, in full for the J. J. Simonds Acct., \$10.00." The memorandum was offered by the defendant as corroborating his own testimony, but was excluded.

Hunton & Stickney, for plaintiff. William Batchelder, for defendant.

TAFT, J. 1. The memorandum was not admissible as evidence confirmatory of the defendant's testimony. It was not the entry of a transaction creating an indebtedness, like the sale of goods or performance of services, regularly charged upon the account book of a party, but a memorandum made upon the stub of a receipt book. It can be regarded in no other light than a private memorandum made to preserve the fact in the recollection of the party making it. As the defendant did not know what the memorandum was, it could not be used to strengthen his memory. It had not the force of independent evidence, and could only be used, had the witness known its contents when made, to refresh his recollection, and in that connection allowed to go to the jury as confirming his testimony. His recollection could not be refreshed by a fact of which he was ignorant, and never had knowledge.

2. The wife of the defendant was not a competent witness. The sole purpose of the statute permitting a wife to testify to transactions by her, in which she acted as agent of her husband, is to enable the husband to prove transactions of which he has no personal knowledge. Whatever is done by the wife in the presence of the husband is done by him, and not by her as his agent. *Barrett, J.*, in *Estabrooks v. Prentiss*, 34 Vt. 457, says that the "entire scope and language of the statute indicates that the purpose of that provision was to enable proof to be made of transactions of which the husband had not personal knowledge, and the wife had, for the reason she personally negotiated as a substitute for and in the place of her husband in such transactions." The rulings of this court have since that time been in accord with that case. In *Lunay v. Vantyne*, 40 Vt. 501,

the transaction testified to by the wife occurred in the absence of the husband, and she was held competent. In *Pierce v. Bradford*, 64 Vt. 219, 23 Atl. 637, the acts shown by the wife were done by her in the absence of the husband, and of which he had no personal knowledge, and her testimony was admitted. In *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1018, the transaction was conducted in his presence and under his direction; and, although it was conducted by his wife, the court say: "The transaction must be regarded as conducted by himself. It cannot be said that this business was had with or conducted by his agent, when he was present, and directed to be done just what was done. The statute clearly has reference to business transactions conducted by the wife, as the agent of her husband, of which he has no personal knowledge." The ruling that the wife was incompetent in the case before us was correct. He was present when his wife paid the money, and he directed her to pay it. Judgment affirmed.

(55 N. J. E. 771)

MARTLING et al. v. MARTLING et al. (two cases).

(Court of Errors and Appeals of New Jersey. Jan. 4, 1898.)

TRUSTS—TERMINATION—CONSTRUCTION OF TRUST DEED—RULE IN SHELLEY'S CASE.

1. P. executed a deed of land in trust to permit M. to receive the rents during her life, subject to the "limitation hereinafter mentioned"; to sell, lease, or mortgage as M., by writing, might direct; to invest the proceeds of any sale, and pay M. the interest, or to reinvest in other realty, as M. might direct, to be held according to the trusts; and on the death of M. to convey the land, or such part as might remain, or the proceeds thereof, to such persons as M., by will, may have appointed, and, in default of such appointment, unto her "heirs at law or next of kin." Held that, since the ultimate destination of the trust estate is in M.'s heirs at law or next of kin, the trust was a continuing one, and could not be terminated during M.'s lifetime.

2. The words "heirs at law" and the words "next of kin," in such deed, were synonymous, and the rule in Shelley's Case did not apply.

3. The words "next of kin" cannot be rejected because the power of converting the estate into money had not been exercised, for the purpose of bringing the rule in Shelley's Case in force, and giving M. a fee simple in the land.

Appeal from court of chancery.

Bill by Elizabeth Martling, a cestui que trust, against Stephen V. R. Martling, infant trustee, David Martling, and others, to have a trust declared terminated, and the legal title held by the infant trustee conveyed to her by him without consideration, etc. From a decree for defendants (31 Atl. 27), complainant appeals. Affirmed.

C. Christie and Gilbert Collins, for appellant. W. B. Williams, for respondents.

DEPUE, J. The bill in this case was filed for the construction of certain trusts created by a deed of conveyance of land. The prayer

is (1) that the trust may be declared surrendered and determined; (2) that the infant trustee (the original trustees being dead) may be decreed to convey without consideration to such person as Mrs. Martling may direct; and (3) that new trustees be appointed in lieu of the infant trustee. The premises described in the trust deed were conveyed to the trustees subject to two mortgages,—the one given by Henry Van Glahn and wife to Abraham Van Valen, dated December 8, 1849, to secure the payment of \$1,000; and the other given by the said Peter Acker to Henry Van Glahn, bearing date May 1, 1850, to secure the payment of \$1,500. The deed is to the trustees, their heirs and assigns, and the trusts declared are: (1) To permit Elizabeth Martling (now living) to have, receive, and enjoy the rents, issues, and profits thereof during her natural life, free from the control of her present or any future husband, and to her separate use, subject, however, to the limitation thereafter mentioned. (2) To sell and convey in fee simple the whole or any part thereof, lease, rent, or mortgage the same, or any part thereof, to such person or persons, for such term or terms, for such sum or sums, and on such conditions, as the said Elizabeth, by writing under hand of her own free will, may direct. (3) In case of a sale and conveyance as aforesaid, to invest the net proceeds, after paying said incumbrances, upon good and sufficient security, and pay her, the said Elizabeth, the interest accruing thereon yearly and every year, or to reinvest said net proceeds in the purchase of other real estate, as the said Elizabeth, by writing, may direct, to be held according to the trusts in the said deed declared. (4) In further trust, to sell and convey, if necessary, the whole or any part of said premises, to pay off, satisfy, and discharge the incumbrances now being and existing on the same as aforesaid. (5) In further trust, upon the death of the said Elizabeth, to convey the lands held under the trusts therein declared, or such parts thereof as may then remain, or, if the same shall then have been sold, to dispose of the proceeds thereof unto such person or persons as the said Elizabeth, by writing in the nature of a last will, executed by her in her lifetime, may have appointed and directed, and, in default of such appointment, unto her heirs at law or next of kin, as may be.

The lands embraced in this conveyance were purchased with the separate estate of Elizabeth Martling, and by her and her husband conveyed to Richard Paulson, her brother, who made the deed which is the subject of consideration in this case. The deed, and the facts upon which this litigation arose, are fully set out in the opinion of the vice chancellor. See 31 Atl. 27. The grantee named in the deed by force of the conveyance took the legal estate in the premises conveyed, subject to the trust declared. The trust upon which the conveyance was made

was not a use executed by the statute of uses (27 Hen. VIII. c. 10), so as to transfer the legal estate to the cestui que use. This statute was, in substance, re-enacted in this state by the seventh section of the act of March 17, 1714 (Revision, p. 163, par. 66); *Montgomery v. Bruere*, 4 N. J. Law, 296; *Micheau v. Crawford*, 8 N. J. Law, 90-113; *Melick v. Pldcock*, 44 N. J. Eq. 526-544, 15 Atl. 3. The settled doctrine in the construction of this statute, as established at an early period of the common law, is that the statute executes only the first use, on the principle that a use cannot be limited upon a use. *Price v. Sisson*, 13 N. J. Eq. 168, 17 N. J. Eq. 476; *Croxall v. Sherard*, 5 Wall. 268. And where the conveyance is by bargain and sale, and the trustees have active duties to perform which require a legal estate,—such as to sell and convey, and invest the proceeds of such sale; to lease, rent, or mortgage, to sell and convey, and the like, in the execution of the trust,—the legal estate becomes vested in the trustees, and remains in them until the trusts are completely performed. 1 Cruise, Dig. 386, etc.; *Zabriskie v. Railroad Co.*, 38 N. J. Eq. 22. There is a distinction between a use executed by the statute of uses and an executed trust. Trusts are classified as executed and executory on other considerations than those that arise under the statute of uses. An executed trust, as distinguished from an executory trust, is one in which the limitations and trusts are fully and perfectly declared; an executory trust is where the limitations are imperfectly declared, and the intent of the grantor is expressed in general terms. In an executed trust the duty of the trustee is to carry into effect the trust as declared; in an executory trust the manner in which the intent of the grantor is to be carried into effect is left substantially in the discretion of the trustee. The trusts set out in the deed are fully and perfectly declared, and, in the sense here defined, are executed trusts, and, the legal estate being in the trustees, an equitable state became vested in Mrs. Martling. *Cushing v. Blake*, 30 N. J. Eq. 689.

The contention on the part of the appellants is that, the trusts having been completely executed, and the estate of the trustees thereby terminated, Mrs. Martling was entitled to have the legal estate conveyed to her. The ultimate destination of the trust estate or its proceeds, as directed by the limitations contained in the deed, is to Mrs. Martling's heirs at law or next of kin. The trust, therefore, has not determined, and is a continuing trust until completely executed by the transfer of the estate to those who shall be ultimately entitled. It is also clear that the power to sell and convey as she may direct, construed in connection with the succeeding words directing the trustees to invest, etc., and pay interest, etc., or reinvest in the purchase of other real estate, to be held according to the original trusts, imports a sale for a consideration,—a bona fide

price. The opinion of the vice chancellor on this head is entirely satisfactory.

The other contention on the part of the appellants is that under this deed Mrs. Martling took a fee under the rule in *Shelley's Case*. This contention presents the real question in this case. In equity, equitable estates are construed as legal estates, and are subject to the same incidents, properties, and consequences as, under like circumstances, belong to similar estates at law; and in giving effect to the limitations of trusts courts of equity adopt the rules of law applicable to legal estates. Among these rules is the rule in *Shelley's Case*; and a limitation which at law would create a fee, under the rule just mentioned, will have a like effect with respect to an equitable estate. *Cushing v. Blake*, supra. The rule of law as laid down in *Shelley's Case* is that, where the ancestor takes an estate of freehold with a remainder, either mediate or immediate, to his heirs, or the heirs of his body, the word "heirs" is a word of limitation of the estate, and not of purchase; that is, that upon such a remainder the estate vests in the ancestor himself, and the heir, when he takes, shall take by descent from him, and not as a purchaser. Under *Shelley's Case*, where a prior estate of freehold is given to the ancestor, and a subsequent limitation contained in the same instrument is expressed to be to his heirs, whether general or special, the general rule is that no estate is taken by the heirs, but an estate of inheritance, corresponding in quantum to the class of heirs specified, is taken by the testator. *Challis*, Real Prop. 124. In other words, under the rule in *Shelley's Case*, where lands are given to A. for life, with a limitation over of an estate which in terms is expressed to be given to his heirs, the estate of the ancestor, though expressly given for life, is, by force of this rule, enlarged to a fee, the remainder over being executed immediately in the ancestor. The rule in *Shelley's Case* is a rule of positive law, and not of construction. Where, upon the construction of a deed or devise, the rule is found to be applicable, it cannot be controlled by any expression of a contrary intent. In such cases the devolution of the estate is irresistibly fixed. But whenever the word "heirs" is used in a conveyance or devise, and the rule in *Shelley's Case* is invoked, a preliminary question arises whether the word "heirs" has been used in such a sense as will make the rule in *Shelley's Case* applicable. The scope of this inquiry, and the manner in which it is to be conducted, will appear in the authorities hereinafter cited.

Mr. Hargrave, in his discussion of the rule in *Shelley's Case*, uses this language: "The rule in *Shelley's Case* can no longer be treated as a medium, either for finding out intention or for assisting to execute it. On the contrary, the rule supposes the intention already discovered, and to be, that the gift or conveyance in question has first given to some person an estate of freehold, and then super-

added a succession to the heirs general or special of that same person, by making him or her the ancestor, terminus, or stirps, by reference to which the whole generation and posterity of heirs is to be accounted. Whether the conveyance has or has not so constituted an estate of freehold with a succession ingrafted upon it is a previous question, which ought to be adjusted before the rule is thought of. To resolve that point is not the office of the rule in *Shelley's Case*; nor from its nature can it contribute any assistance whatever. * * * What the donor or testator means by 'heir,' or 'heirs,' or 'heirs male of the body,' or 'issue,' should be first adjusted, without the least reference to, or thought of, the rule. Till that meaning shall be settled, it is uncertain whether the rule in *Shelley's Case* may not be quite a foreign consideration. * * * When, indeed, it is once settled that the donor or testator has used words of inheritance according to their legal import, has applied them intentionally to comprise the whole line of heirs to the tenant for life, has really made him the terminus or ancestor by reference to whom the succession is to be regulated, then, too, it will appear that, being considered according to those views of policy from which it originated, it is perfectly immaterial whether the testator meant to avoid the rule or not; and that to apply it, and to declare the words of inheritance to be words of limitation, to be words vesting an inheritance in the tenant for life, and to be words vesting a remainder in fee or in tail in him as the ancestor and terminus to the heirs, is a mere matter of course. * * * On the other hand, if it shall be decided that the testator or donor did not mean, by the words of inheritance after the estate for life, to use such words in their full and proper sense; did not mean to involve the whole line of heirs to the tenant for life, and to include the whole of his inheritable blood; did not mean to ingraft a succession on his preceding estate, and to make him the ancestor or terminus for the heirs; but, instead of this, intended to use the word 'heirs' in a limited, restrictive, and untechnical sense; intended to point at such individual person as should be the heir or heir of the body of the tenant for life at the moment of his decease; intended to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs to constitute him or her the ancestor terminus and stock for the succession to take its course from,—in every one of these cases the premises are wanting upon which only the rule in *Shelley's Case* interposes its authority. It is clearly a case in which the remainder to the heirs of the tenant for life having the premises belonging to a purchaser cannot inure by limitation or descent; and thus the rule in *Shelley's Case* becomes quite extraneous matter." *Harg. Law Tracts*, 574-576.

Mr. Butler, in his note (2 Co. Litt. 376b), discusses this subject at length. His comment

is based largely on the opinion of Mr. Justice Blackstone in *Perrin v. Blake*, 1 W. Bl. 672, and the line of reasoning he pursues and the conclusion he adopts are the same as those stated by Mr. Hargrave in the extract above quoted. Equally explicit is the language of Mr. Hayes. He says: "The question whether the word 'heirs' is used as a word of limitation is to be solved by the ordinary rules of interpretation, without reference to the rule of *Shelley's Case*, to which it would be highly impertinent to advert until this question is disposed of. Nor can the application of the rule ever be a matter of doubt when the intention to create the above species of limitation is once fixed." *Hayes, Real Estate*, 7, 13.

The great authority of Mr. Fearnie must not be overlooked. He says: "Nothing can be better founded than Mr. Hargrave's doctrine that the rule in *Shelley's Case* is no medium for finding out the intention of the testator; that, on the contrary, the rule supposes the intention already discovered, * * * which ought to be adjusted before the rule is thought of; that to resolve that point the ordinary rules for interpreting the language of wills ought to be resorted to; that when it is once settled that the donor or testator has used words of inheritance according to their legal import, has applied them intentionally to comprise the whole line of heirs to the tenant for life, and has really made him the terminus or ancestor, by reference to whom the succession is to be regulated, then comes the proper time to inspect the rule in *Shelley's Case*; that then, too, it will appear that * * * it is perfectly immaterial whether the testator meant to avoid the rule or not; and that to apply it, and declare the words of inheritance to be words of limitation vesting an inheritance in the tenant for life, as the ancestor and terminus of the heirs, is a mere matter of course." *Fearnie, Rem.* 188.

The ruling cases in the English courts are *Perrin v. Blake*, *Harg. Law Tracts*, 490; *Jesson v. Wright*, 2 Bligh, 1; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823. In *Perrin v. Blake*, Mr. Justice Blackstone divides the rules for ascertaining the intention of a devise or deed into three classes, the first of which consists of rules that are of an essential, permanent, and substantial kind, considered as the indelible landmarks of property, irrevocably established by the well-weighted policy of the law, and which cannot be shaken or disturbed by any whim or caprice of a testator, however fully or emphatically expressed. The other two classes of rules are rules of interpretation or evidence to ascertain the intention of parties; by annexing particular ideas of property to particular modes of expression. These rules, he declares, are of a more flexible nature than those of the preceding kind, and admit of many exceptions. "Nor, if the intention of the testator be clearly and manifestly contrary to the legal import of the words which he has thus hastily

and inadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator. * * * But then this intention of the testator, which is to rule over and control the legal operation of his own words, must be manifest and certain, and not obscure." Among the latter class of rules is placed the rule in *Shelley's Case*. The same views are expressed by Lord Eldon and Lord Redesdale in *Jesson v. Wright*, as will appear by their opinions in the report of the case on pages 31 and 53, 2 Bligh. The same remark will apply to the opinion of the judges in *Roddy v. Fitzgerald*. In the course of his opinion in that case Lord Cranworth said: "Where the testator shows upon the face of his will that he must have used technical words in other than their technical sense, there is no rule that prevents us from saying that he may be his own interpreter." The subject is discussed in the same light in *Bowen v. Lewis*, 9 App. Cas. 890.

In *Doe v. Galligani*, 5 Barn. & Adol. 621, Lord Denman states the doctrine in these words: "The more correct mode of stating the rule of construction is that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense." In a later case, *Cockburn, C. J.*, in speaking of the rule in *Shelley's Case*, and the conditions under which it should be applied, uses this vigorous language: "When once the donor has used the term 'heirs,' or 'heirs of the body,' as following on an estate of freehold, no inference of intention, however irresistible, no declaration of it, however explicit, will have the slightest effect. The fatal words once used, the law fastens upon them, and attaches to them its own meaning and effect as to the estate created by them, and rejects, as inconsistent with the main purpose which it inexorably and despotically fixes on the donor, all the provisions of the will which would be incompatible with an estate of inheritance, and which tend to show that no such estate was intended to be created; although all the while it may be clear as the sun at noon-day that by such a construction the intention of the testator is violated in every particular." But he adds: "Although the rule thus established is inflexible to the extent here stated, there is, nevertheless, one quarter from which it permits light to be let in, and effect to be given to the real intention of the testator. This is where, by some explanatory context, having a direct and immediate bearing upon the term 'heirs,' or 'heirs of the body,' the deviser has clearly intimated that he has not used these words in their technical, but in their popular, sense, namely, that of sons, daughters, or children, as the case may be." *Jordan v. Adams*, 9 C. B. (N. S.) 483-490. This doctrine was recognized

by Chief Justice Whelpley, in *Kennedy v. Kennedy*, 29 N. J. Law, 185-187, in these words: "The rule in *Shelley's Case* was adopted as a rule of interpretation to give effect to the paramount intent of the testator. The words 'heirs of the body' or 'heirs' will yield to a particular intent that the estate shall be only for life, and that may be from the effect of the superadded words, or any expressions showing the particular intent of the testator, but that must be clearly intelligible and unequivocal."

The rule in *Shelley's Case* is a technical rule, and the words "heirs" is a technical expression interpreted according to canons of descent. The word "heirs" undoubtedly indicates succession to the estate of the ancestor by those who may be his descendants, but it may be a succession by descent, creating either an estate in fee or in tail in the ancestor, or the selection of those persons who, by the canons of descent, would be heirs, as a mere designation personarum of the objects of his bounty, in which event the heir or heirs take by purchase. Whether the word "heirs" is used in its technical sense, or in the limited, restrictive, and untechnical sense, intended to point at such individual person as should be heir or heir of the body of the tenant for life at the moment of his decease, is a matter of construction. *Harg. Law Tracts*, 576. The solution of the problem whether the word "heirs" is used in the one or the other sense is determined by a construction of the terms of the grant or devise, to ascertain whether the word "heirs" is used in the one sense or the other,—in its technical sense or as a mode of indicating persons; for, as was said by Mr. Hargrave: "To insist that men shall only use words in one certain sense would be a monstrous tyranny; and there is such an infinite variety in the language and circumstances which may occur to distinguish one case from another that to lay down one general rule of interpretation so absolute as to be indispensable would be making legal interpretation to torture like the bed of the fabulous Attic robber Procrustes, and so every instrument would be cruelly stretched or curtailed into the same meaning." *Harg. Law Tracts*, 575. In *Perin v. Blake*, Mr. Justice Blackstone said: "The true question of intent [in the construction of an instrument] will turn, not upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs of the body. That the ancestor was intended to take an estate for life is certain. That his heirs were intended to take after him is equally certain. But how those heirs were intended to take—whether as descendants or as purchasers—is the question. If the testator intended they should take as purchasers, then the ancestor remained only as tenant for life; if he meant they should take only by descent, or had formed no intention about the matter, then, by operation and consequence of law,

the inheritance first vested in the ancestor." The discussion of this subject has been mainly in the construction of devises, but the doctrine is equally applicable to deeds of conveyance to uses. Sir Moyle Finche's Case, 6 Coke, 64, 65; Carter v. Ringstead, Cro. Eliz. 208; 4 Cruise, Dig. 275-281; Evans v. Evans [1892] 2 Ch. 178. In the extract from Mr. Hargrave's comment that learned lawyer applies the same rule of construction and interpretation to conveyances to uses as to devises. The cases are collected in 10 Eng. Ruling Cas. pp. 714-758; note to Jesson v. Wright, and in an elaborate note in 22 Am. & Eng. Enc. Law, pp. 498-524, title "Shelley's Case." In applying these rules of construction it is fully settled that the fact that the estate of the ancestor is expressly for life only, and no longer, or that he shall not sell or dispose of the estate for any longer time than his life, and like expressions, applied to the estate of the tenant for life, will not prevent the application of the rule in Shelley's Case. In Lippincott v. Davis, 59 N. J. Law, 241, 28 Atl. 587, this court held that the rule in Shelley's Case applied to a devise of lands to J. G. "during his natural life, and afterwards to descend *unincumbered* to his lawful heirs,"—the words in italics being equivalent to the words "none of my children [to whom a life estate was given] should sell and dispose of my estate for longer time than his life," which were held in Perrin v. Blake not to operate to exclude the rule in Shelley's Case. But it is equally well settled that the construction to determine the meaning of the testator or donor in using the word "heirs" shall be from the entire language of the instrument. In Jordan v. Adams, 6 C. B. (N. S.) 748-761, the case under consideration presented the construction of a devise to W. J. for life, and after his decease to the heirs male of his body in such parts as W. J., their father, shall by deed or will appoint or direct. Earle, C. J., in delivering the opinion of the court, said that the words "heirs male of his body" created an estate tail, "unless the judicial mind sees with reasonable certainty from other parts of the will the testator's intention that these words should not operate as words of limitation of the inheritance, but should be words of purchase, creating an estate in remainder in the persons coming within the designation of the words 'heirs male of the body,' and also within the further description contained in the will." He added: "We proceed, therefore, to examine the other parts of the will, for the purpose of ascertaining the intention; and for this purpose all the parts of the will should be considered together, and effect given to every part, unless there should be absolute inconsistency. * * * The devise to William is for life, and, although this is of no avail where the rule in Shelley's Case applies, still, until it is ascertained that the testator intended by the word 'heirs' to pass the inheritance, that rule has no application.

Here that intention is the point in dispute; and in weighing both sides the expression of intention to devise to W. J. for life operates against inferring an intention to give an estate tail." Nor will an unexecuted power, which, if executed, would divert the estate from the channel of succession indicated by the words of the grant or devise, of itself supersede the rule in Shelley's Case; for such a power, abstractly considered, may or may not indicate the intention of a grantor or devisor to use the word "heirs" or "heirs of the body" in a technical sense. The terms in which such a power is expressed, and the purpose for which the grantor or devisor intended that it shall be exercised, are not, however, to be rejected.

The power of sale conferred upon the trustees by Mrs. Martling's directions was to be a sale, the net proceeds of which the trustees were required to invest upon good and sufficient security, paying her the interest thereon yearly and every year, or to reinvest in real estate, as she might direct; but the proceeds of such a sale, however invested, remained part of the trust estate, to be held upon the trusts declared in the deed. The power to sell and convey is not a power vested in Mrs. Martling during her lifetime to divert the estate from the persons who, in default of her disposition by will, would be entitled to it. The proceeds of the sale of the trust estate invested on security, as well as the lands in which such proceeds might be reinvested, are to be held for the benefit of the heirs at law or next of kin, in compliance with the terms of the trust. Doe v. Martin, 4 Term R. 39-66. The power is, in substance, a power in her by this method to appoint the estate between her heirs and next of kin. A construction which would give to the word "heirs" its strict technical meaning, and vest in Mrs. Martling an estate in fee, would entirely defeat the purpose for which this power was conferred. The estate given to Mrs. Martling is expressly made subject to the limitations thereafter contained in the deed. The only limitation in the deed to which Mrs. Martling's estate can be said to be subject is that, if she procures a sale and conveyance of the trust estate, the proceeds thereof shall remain in trust for the benefit of her heirs at law or next of kin in default of her appointment by will; as she may direct the investment to be made. Who shall answer the description of next of kin of Mrs. Martling can be ascertained only at her death, and whether the trust estate or its proceeds shall go to her next of kin or heirs at law, and in what shares or proportions, will depend on the condition of the trust estate at her death. In the face of these contingencies the words "heirs at law" cannot, on any reasonable grounds, receive a construction different from the words "next of kin" with respect to the point of time when the class of beneficiaries is to be ascertained. Suppose a sale of part of the premises by the trustees under the power re-

ferred to, and the proceeds invested simply on good security, would the proceeds so invested go to the next of kin, and the remaining lands be vested in Mrs. Martling in fee? Such a distribution of the trust estate could only be accomplished by mutilation of the trust. Furthermore, the conveyance and the trusts declared were made by a deed, and no rule of law is more firmly established than that in deeds conveying to uses the word "heirs" is necessary to pass a fee, and no synonym can supply the omission of the word "heirs." *Melick v. Pidcock*, 44 N. J. Eq. 525-540, 15 Atl. 3. The words used indicating succession to the estate after the death of Mrs. Martling, and on her failure to devise it, are "heirs at law, or next of kin, as may be." A deed of conveyance to A., habendum to his heirs and next of kin, as a legal conveyance would be an anomaly, and could only create an estate for life in A. The illustration is apt. The operation of the rule in *Shelley's Case*, when in fact it applies, eliminates all estates and powers intervening between the ancestor's estate for life and the limitation over. A grant to A. for life, following by estates less than freehold or unexecuted powers, in default, etc., to his heirs, is, as a legal proposition, read as a grant to A. and his heirs,—in this case it would be to A. "and his heirs at law or next of kin, as may be,"—a rendering that demonstrates that the rule in *Shelley's Case* cannot, on any principle of construction, be applied to this deed. Independently of the technical consideration just mentioned, and construing this trust from all the limitations and provisions contained in it, it is clear that the terms "heirs at law" and "next of kin," in providing for the ultimate destination of the estate, although the disjunctive "or" intervenes, should receive the same construction as to the point of time when these two classes of beneficiaries respectively are to be ascertained, and that the words "heirs at law," as well as "next of kin," should be construed to mean persons who, either as heirs at law or next of kin, come into existence at Mrs. Martling's death. But it is said that, inasmuch as the power of converting the estate into money has not yet been executed, the words "next of kin" should be rejected, and by force of the words "heirs at law" Mrs. Martling be given a fee in the premises. No case justifying the rejection of words for the purpose of bringing the rule in *Shelley's Case* in force has come under my observation. In *Jordan v. Adams* it was conceded that the words "heirs of his body" would create a fee tail. The court decided that the subsequent language, providing for a division among heirs of the body by the appointment of their father, reduced the words "heirs of his body" to sons and children, and therefore gave only an estate for life. An argument was unsuccessfully made that the words "heirs of his body" were of themselves sufficient to create a fee tail, and that, inasmuch as the appointment might

be made by the father, who was then living, by deed or will, the clause providing for the division among the heirs at law was either unimportant or should be rejected.

On the construction of the entire trusts contained in this deed, we think that the persons who are to take in succession as heirs at law are to be ascertained as of the time of Mrs. Martling's death, and that, therefore, those words are not words of limitation, within the rule in *Shelley's Case*, but a designation personarum of those who shall be her heirs at the moment of her decease, and that, consequently, Mrs. Martling took only an estate for life. The decree of the court of chancery was that the trusts expressed in said deed still existed, and that the lands and real estate held under the trust descended, and became vested in Stephen Van Rensselaer Martling, an infant under 21 years, as heir at common law of the last surviving trustee, and that the said infant trustee should be removed, and a new trustee appointed in his place. The decree should be affirmed.

(124 Pa. St. 419)

HUSTON v. REGN.

(Supreme Court of Pennsylvania. Jan. 17, 1898.)

DEED OF REAL ESTATE—MORTGAGE—WHAT CONSTITUTES.

1. A paper in the form of, and called in the acknowledgment, an assignment, assigned all of plaintiff's "right, title, and interest, of whatsoever kind or nature," in the estate of his mother, grandmother, and grandfather, "and to all and every part of each and every of said estates, and the proceeds thereof." It also constituted the assignee plaintiff's attorney to receive said right, title, legacies, and estates. Held that, in the absence of any showing that any of the estate consisted of real estate, or that any interest conveyed was an interest in real estate, the court was justified in holding that the assignment was not a "deed for real estate," within Act June 8, 1881, providing that no defeasance to any deed for real estate shall have the effect of reducing it to a mortgage, unless made in writing at the time the deed is made, acknowledged, delivered, recorded, etc.

2. Plaintiff gave defendant an assignment of all his interest in certain estates for \$500, and defendant gave plaintiff an agreement, dated the next day, to reassign for a consideration of \$530 within one year. Both papers were delivered contemporaneously on receipt by plaintiff of a check for \$300. Held to constitute a mortgage of plaintiff's interest in said estates.

Appeal from court of common pleas, Philadelphia county.

Bill by John P. P. Huston against John Regn to set aside an assignment by plaintiff to defendant of his interest in certain estates, and to compel a reassignment. From a decree for plaintiff, defendant appeals. Affirmed.

The adjudication and decree, including the finding of facts and conclusions of law, are as follows (Beitler, J.):

Adjudication and decree: "The bill in this case sets out that plaintiff applied to the de-

defendant for a loan of \$300, which he (defendant) consented to make; that the defendant's counsel drew certain papers, which the plaintiff supposed were the customary papers, to secure the loan of money, and which he executed, thereupon receiving \$300; that subsequently, upon applying to his trustee for the payment of income due him, he learned that it could not be paid to him, as the paper he had signed was an assignment of all his interest in the estate to the defendant; that he has since learned that the paper he signed was an actual and absolute assignment, in consideration of \$500, of all his estate which he had derived from his mother and grandparents; that he was misled in signing said paper; that the consideration of \$500 recited is false, and that he never received any sum but \$300, and that as a loan; that the defendant executed a paper, agreeing to retransfer the interests for \$530 within a year; that on 21st July, 1896,—within the year,—he tendered defendant \$300 and one year's interest thereon, and \$50 to cover costs and expenses, and demanded a reassignment, which the defendant refused. The bill alleges that plaintiff's interest assigned is worth \$6,000. The answer denies that a loan was made, and asserts that plaintiff offered to sell the interest for \$500, which offer the defendant accepted upon condition that the plaintiff should pay all necessary expenses; and that the plaintiff was not misled. The answer also denies that the plaintiff tendered the \$530 upon receipt of which the defendant was ready to make reassignment of the interests conveyed to him."

Finding of facts: "The testimony taken shows that about April, 1895, the plaintiff applied to the law firm of Thomas J. Martin & Bro. (composed of Thomas J. Martin, Jr., Esq., and Frank P. Martin, Esq.) to secure a loan on his interest in his mother's and grandfather's estate; that the firm made efforts to secure the loan, but for a time without any success. In July, 1895, the defendant did pay to the plaintiff \$300. What this payment was for is a disputed question. The plaintiff says that it was a loan. The defendant says it was paid for the purchase of the interest. Mr. Frank P. Martin says that early in July, 1895, he informed the plaintiff that he could not secure the loan, and that subsequently the plaintiff and defendant concluded their negotiations (having met in the firm's office), and that the defendant acted in the matter upon information as to the quantity and value of the plaintiff's interest in the estate referred to, given to him by the firm. The papers that were finally executed show that, whatever the parties called the transaction, it was, in effect, a pledge of the plaintiff's interest in his grandfather's, his grandmother's, and his mother's estate, for, while he, by one paper, assigned this interest to the defendant, the latter agreed to reassign at any

time within a year upon payment to him of \$530, which is the consideration named in the assignment, and with one year's legal interest added. The plaintiff received but \$300. The defendant, however, paid \$173.20 to Thomas J. Martin & Bro. for attorney fees and expenses. The plaintiff admits that he agreed, when seeking the loan, to pay a bonus of \$200, and both Frank P. Martin and the defendant testify that the plaintiff agreed to pay all the legal expenses, and was told that they would be \$200. Just what these services were worth was not shown, but it appeared that to ascertain what estate the plaintiff had and its value involved the study of three wills, the examination of the title to three or four properties, and an ascertainment of their value, besides inquiry as to the value of his personal estate in the trustee's hands. The plaintiff has requested the trial judge to find as matter of fact that \$50 would be a proper sum to charge for legal fees, expenses, and costs. No testimony has been produced to show that such would be a proper charge. The trial judge, upon the testimony before him, is unable to find that the sum paid by the defendant to Thomas J. Martin & Bro.—that is, \$173.20—is an unreasonable or excessive charge. Besides, the plaintiff seemed willing to pay \$200 to secure the loan. While he terms it a 'bonus' it seems fair to conclude that he expected to have to pay \$200, and it would seem to be corroboration of the defendant's statement that the plaintiff knew the expenses would be \$200. The conclusions reached on the testimony are: (1) That the assignment by James P. P. Huston to John Regn, bearing date the 29th day of July, A. D. 1895, for a consideration of \$500, and agreement by John Regn to reassign to James P. P. Huston for a consideration of \$530, bearing date the 30th day of July, A. D. 1895, within one year from that date, both delivered contemporaneously on receipt of check for \$300, together constitute a mortgage of the interests of James P. P. Huston in the said estates of Sarah Huston, deceased, William S. Perot, deceased, and Mary W. Perot, deceased. (2) That the plaintiff owes the defendant \$300 and \$173.20, with interest on the \$473.20 since July 29, 1895."

Conclusions of law: "The defendant contends that he is the absolute owner of the plaintiff's interest in the three estates referred to, and denies that the paper executed by him, agreeing to reconvey within one year upon payment of \$530, has any validity of binding effect. As authority he cites the act of June 8, 1881, which provided: 'No defeasance to any deed for real estate, regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in

the office for the recording of deeds and mortgages in the county wherein the lands are situated within sixty days from the execution thereof; and such defeasance shall be recorded and indexed as mortgage by the recorder.' This, however, seems to have been a thought suggested by the learned counsel representing the defendant, and even with him would appear to be of recent birth, for in the answer filed the defendant admits the execution of the agreement to reassign, and adds, that he has always been ready and willing to comply with the terms of the agreement. The answer was filed September —, 1896. There was then no idea in the mind of client or counsel that the agreement to reassign was not valid and binding. In *Brown v. Beecher*, 120 Pa. St. 590, 15 Atl. 608, the supreme court held that the act applies to deeds for real estate only. The paper executed by the plaintiff is in form an assignment. It is so called in the acknowledgment. It assigns all the plaintiff's 'right, title, and interest of whatsoever kind or nature, either at law or in equity, of, in, and to the estate of' the plaintiff's mother, grandmother, and grandfather, 'and to all and every part of each and every of said estates, and the proceeds thereof.' It likewise constitutes the defendant the plaintiff's attorney to recover and receive the said 'right, title, interest, legacies, gifts, and estates.' Whether there is a power of sale in the grandfather's will, with directions to convert the real estate into money; whether there is any of the mother's estate in real estate now; whether the interest conveyed by the assignment is an interest in real estate, even in part,—the defendants have not shown, and the trial judge feels justified in holding, therefore, that the assignment was not a 'deed for real estate,' and that, therefore, the act of 1881 does not apply. This conclusion is strengthened by the acts of the parties. If the interest conveyed was real estate, the Messrs. Martin would have prepared a deed describing the real estate. They would have left out much that was put in the assignment, and (this seems conclusive on the subject) they would have seen to it that the agreement to reassign was drawn and executed and acknowledged and recorded in strict compliance with the act of 1881. Not to have done so would have been an act of chicanery on their part, so utterly at variance with their duty to the plaintiff, by whom they were being well paid for their professional services, that it would be a serious reflection upon them as members of the bar to sustain the defendant's present contention. The plaintiff should therefore have a reassignment upon payment by him of the sum borrowed, and the expenses incurred by the defendant; and, as he did not tender the defendant the full amount which he should have tendered, he should pay the costs. It is therefore ordered and decreed that, upon payment by the plaintiff to the defendant of the sum of \$473.30, with

interest thereon since July 29, 1895, and the costs of this suit, that the defendant execute and deliver to the plaintiff a full and ample assignment of the interests and estates assigned to him by the assignment of July 29, 1895."

Modified decree: "And now March 20, 1897, the first, second, third, fourth, fifth, sixth, seventh, and ninth exceptions are dismissed. The eighth exception is sustained, and the decree is modified to read: It is therefore ordered and decreed that upon payment by the plaintiff to the defendant of the sum of \$473.30, with interest thereon since July 29, 1895, and the costs of suit within thirty days from this date, that the defendant execute and deliver to the plaintiff a full and ample reassignment of the interests assigned to the defendant by the assignment of July 29, 1895. If the plaintiff shall not within thirty days from this date pay the said sum and interest and costs, then the bill to be dismissed."

The assignments of error are as follows: "(1) The learned judge erred in finding of facts as follows: 'The papers that were finally executed show that, whatever the parties called the transaction, it was, in effect, a pledge of the plaintiff's interest in his grandfather's, his grandmother's, and his mother's estate, for which, while he by one paper assigned his interest to the defendant, the latter agreed to reassign at any time within one year upon the payment to him of \$530.' (2) The learned judge erred in finding as a matter of law: 'That the assignment by James P. P. Huston to John Regn. bearing date the 29th day of July, 1895, for a consideration of \$500, and agreement by John Regn to reassign to James P. P. Huston, for a consideration of \$530, bearing date the 30th day of July, 1895, within one year from date, both delivered contemporaneously on the receipt of a check for \$300, together constitute a mortgage.' (3) The learned judge erred in finding as follows: 'Whether there is a power of sale in the grandfather's will, with directions to convert the real estate into money; whether there is any of the mother's estate in real estate now; whether the interest conveyed by the assignment is an interest in real estate, even in part,—the defendant has not shown, and the trial judge feels justified in holding, therefore, that the assignment was not "deed for real estate," and that, therefore, the act of 1881 does not apply.' (4) The learned judge erred in his conclusion of law that the assignment and agreement to reassign constituted a mortgage. (5) The learned judge erred in not finding that the assignment from plaintiff to defendant was an absolute and unconditional transfer of all his interests in his grandfather's, his grandmother's, and his mother's estate; and that the agreement to reconvey, not being complied with within the time therein specified, was void, and unenforceable in law or equity. (6) The learned judge erred in allowing plaintiff's counsel, during his examination of William G.

Hannis, Esq., a witness in behalf of plaintiff, to take him aside, hold a private conversation with witness, and replace him on the stand, and continue his examination. (7) The learned judge erred in entering a decree that upon payment by plaintiff to the defendant of the sum of \$473.30, with interest thereon since July 29, 1895, and costs of suit within thirty days from this date, that the defendant execute and deliver to the plaintiff a full and ample reassignment of the interests assigned to the defendant by the assignment of July 20, 1895. (8) The learned judge erred in not dismissing plaintiff's bill."

Thos. J. Martin, Jr., and John A. Bickel, for appellant. Joseph T. Bunting, for appellee.

PER CURIAM. There is no substantial error, either in the findings of fact or in the legal conclusions of which the modified decree in this case is predicated; nor is there anything in either of the specifications of error that requires discussion. For reasons given by the learned judge who presided at the hearing in the common pleas, the decree is affirmed, and appeal dismissed, at defendant's costs.

(184 Pa. St. 274)

COMMONWEALTH v. RODDY et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

JURY — QUALIFICATION OF JURORS — HOMICIDE — EVIDENCE — INSTRUCTIONS — DYING DECLARATIONS — NEW TRIAL — DISCRETION OF COURT.

1. A juror in a murder case stated on his voir dire that he had heard part of the evidence on a former trial, and had read summaries in the local newspapers; that he had formed and expressed an opinion as to defendants' guilt, but that it would not prevent his rendering a verdict in accordance with the evidence. *Held*, that a ruling that he was competent would not be revised.

2. On the trial of persons charged with the murder of B., it appeared that his house was broken open by the murderers, who were masked, and that B. and his wife were bound, and B. was tortured to compel them to tell where their money was kept. Defendants set up an alibi. B.'s tenant who occupied the farm testified that his barn had been broken open in the night of the murder, and certain straps were taken; that the straps were discovered at B.'s house, where they had been used to bind him; that the horses and other stolen property were found eight or nine miles away, in a field, near a road leading from B.'s house to defendants' home; that the ground at B.'s showed that during the night the horses had been tied and fed near by, and had been ridden by the robbers along said road, and abandoned where they were found. *Held*, that such evidence was admissible.

3. Evidence was admissible of the possession by B., prior to the robbery, of a certain Confederate note, and the possession, on the day after the robbery, by one of defendants, of a note similar in appearance, and of the same denomination, which was destroyed by him, in connection with said defendant's declaration as to how he came by the note and why he destroyed it.

4. Dying declarations are not rendered inadmissible because the commonwealth is under

no necessity to use them by reason of the exigency of the case.

5. Where deceased stated that certain men came into his room at night, and, tying him to a chair, tortured him by burning his feet in an attempt to discover where he concealed his money, and they were in his presence for some time, a statement in the declaration that "I am satisfied that the two R. boys brought to my house by the officers are the same men that robbed and tortured me" is sufficient identification, where such boys were the persons on trial, in view of the opportunity deceased had to see them, and to recognize their figures and general appearance.

6. Such declaration was not inadmissible because deceased gave no reasons for thinking the R. boys were the men who robbed and tortured him.

7. Nor was it inadmissible because a mask was put on the faces of the R. boys, when brought into deceased's presence for identification, so as to leave the same portions of the head and face open for examination that was left of the heads and faces of the robbers when the crime was committed, the mask being used at deceased's request, and without objection from any one.

8. The use in the court's charge of the word "claimed" instead of the word "stated," in referring to the testimony of certain witnesses who saw two men at a certain place, whom they did not then know, but whom they said at the trial resembled defendants, was not error, where the court was not attempting to give the purport of their testimony, but only to refer the jury to the general class to which they, among other, witnesses belonged, and it referred the jury to their own recollection of the testimony.

9. The refusal of a motion for a new trial is an error of law only when it is apparent that such refusal amounts to a clear abuse of discretion.

Appeal from court of oyer and terminer, Somerset county.

James Roddy and John Roddy were convicted of murder, and appeal. Affirmed.

Coffroth & Ruppel and Chas. F. Uhl, Jr., for appellants. A. J. Colborn, Dist. Atty., L. C. Colborn, Kooser & Kooser, and Koontz & Ogle, for the Commonwealth.

WILLIAMS, J. The evidence before the court and jury on the trial of the defendants in this case disclosed a murder of shocking barbarity, and as useless to the murderers as it was cruel. It appeared that the dwelling house of David Berkey and his wife, situated in Paint township, Somerset county, was forcibly entered on the night of June 2, 1896, by two masked men. They demanded money. Berkey and his wife were taken from their bed, bound, beaten, and threatened with death if they did not at once tell the place where their money was kept. These modes of persuasion were supplemented by subjecting David Berkey to torture. Fires made by lighted papers, and afterwards candles and a kerosene lamp, were kept burning under his feet until he was so terribly burned that he died from his injuries within a few months. The murderers secured about \$125 in money as the result of their horrible night's work, and, after feasting upon such delicacies as the house could afford, in the presence of their victims, they took their de-

parture. So far the facts were not involved in controversy. The burglary, the robbery, the burning which resulted in death, were none of them the subject of doubt or conflict on the trial. The great question about which the controversy raged before the jury was whether the defendants on trial were the persons by whom this succession of crimes had been committed. The commonwealth alleged this to be so, and gave a large amount of evidence tending to establish the allegation. The defendants denied all connection with the crimes, and all knowledge of them, and endeavored to establish an alibi. A large amount of testimony was given in the effort to satisfy the jury that they were not guilty. The great question in the case was over the identification of the defendants. The course of the trial, the arguments of counsel, and the charge of the learned judge gave prominence to this question, and the verdict is a determination of it adversely to the defendants. On a previous trial the same question had been contested, and with the same result. This question of fact has been settled, therefore, by the proper tribunal, and, unless the verdict may have been influenced by some mistake of omission or commission on the part of the learned trial judge, it should be allowed to stand, and the defendants should suffer the penalty which the law affixes to the crime of which they have been convicted. The defendants allege that such mistakes were committed at the trial, and have assigned seven errors to the rulings of the trial judge which we will consider in their order.

1. The first error assigned is to the action of the judge in overruling the challenge for cause made to E. B. Maurer, who was called as a juror, and who was challenged peremptorily by the defendants after the challenge for cause had been overruled. Upon examination on his voir dire the juror stated that he had been present for a day or two as a spectator at the previous trial, and heard a portion of the evidence on the part of the commonwealth; that he had also read such summaries of the evidence at that trial as had appeared in the local newspapers; and that from what he had so seen and heard he had formed an opinion in relation to the guilt or innocence of the defendants, and had expressed it to others. He further stated, in substance, that this was a provisional opinion, resting on what he had heard and read, and would not prevent his sitting as a juror at the trial, and rendering a verdict in accordance with the evidence submitted. The challenge was a denial of his ability to do what he testified he could do, viz. give to the defendants an impartial trial, and decide upon their guilt or innocence under the evidence in the case. The trial of this issue was the presiding judge. He had seen the juror, his general bearing, the manner of his answers, and he had heard the examination. The question for his decision was, "Is it true

that this juror stands disinterested, and is able to give the defendants an impartial trial?" He believed the juror, and accordingly held him to be qualified to sit on the trial of the case. Now, we cannot bring before us the tones, the manner, and apparent spirit and character of this juror, and for that reason we cannot review the influence such considerations exercised upon the mind of the learned judge. We have the answers only. Unless, therefore, the answers were conclusive upon this question, as a matter of law, we have nothing before us on which assignment can be sustained. But the answers were not conclusive. It is putting their effect as strongly against the juror as we are justified in doing if we say they raised a presumption, *prima facie*, of bias against the defendants, when they showed him to have formed and expressed an opinion. This presumption was removed if his further answers and his manner satisfied the learned judge that his mind was not fixed in the opinion expressed, but was still open to the influence of the testimony to be offered. The judge was so satisfied. He believed the juror to be capable of divesting his mind of opinions resting on imperfect knowledge of the facts, and judging impartially upon all the evidence that should come before him. We cannot say that he was not justified in reaching this conclusion. Impartiality is not, ordinarily, occasioned by ignorance. The ability to read periodicals, and to think and talk about what one reads, is not a disqualification for jury duty. Other circumstances being equal, it should be regarded as affording some guaranty of fitness. It is prejudgment of the question about to be considered that disqualifies. If Maurer was able to hear the whole case impartially, and decide it according to the evidence, he was properly qualified to sit as a juror, and the judge was right in overruling the challenge.

2. The next assignment of error complains of the admission of the testimony of William J. Horner. He was the tenant of David Berkey, occupying his farm. In the morning after the robbery he discovered that his barn had been broken open during the night, and a pair of horses, bridles, a saddle, and a blanket had been taken away. He also found that the straps had been removed from his fly nets, and were not in the barn. The straps were soon after discovered at Berkey's house, where they had been used to bind his limbs while he was undergoing torture. The horses, with the other stolen property, were found later in the morning, some eight or nine miles away, in a field at the side of a road leading from Berkey's house to the home of the defendants. An examination of the ground about Berkey's home showed that during the night the horses had been tied and fed near by, and had been ridden by the robbers along the highway to the point at which they were found, where it was evident they had been abandoned, their riders completing their journey

on foot. The testimony of Horner was offered for the purpose of laying these facts before the jury. It was objected to because it related to another offense than that for which the defendants were indicted, and because it was not proposed to show that the defendants were seen in possession of the horses. But the relevancy of this testimony did not depend on whether it tended to show the commission of another crime, but on whether the facts were so connected with the crime under investigation as to throw any light upon its history. We think it clear that this testimony was explanatory of facts that were before the jury, and that it tended to show how, and by what route, the robbers fled from Berkey's house, and how it was possible for the defendants to have been seen so early in the morning of the third of June at points where witnesses placed them, consistently with the allegation of the commonwealth that they were the perpetrators of the crimes at Berkey's house. It was also relevant as showing part of the pertinent history of the crime under investigation, and the deliberation with which it had been planned in all its details.

3. The third assignment of error is to the admission of the testimony relating to the possession of Berkey, prior to the robbery, of a \$10 Confederate note, and the possession, on the day after the robbery, by James Roddy, of a note similar in appearance, and of the same denomination, which was carefully destroyed by him. This assignment cannot be sustained. The evidence, together with Roddy's declaration about the bill or note, how he came by it, and why he destroyed it, was relevant upon the question of identity. It was not conclusive upon that question, but it related to it, and, with the other facts relating to the same subject, was properly submitted to the jury as part of the chain of circumstances tending to identify the defendants as the perpetrators of the crimes committed on the night of the 2d of June.

4. This assignment is directed at the admission of the dying declarations of David Berkey. Six objections, reducible to four, are made against their admission. The first of these alleges that the commonwealth was under no necessity to use the dying declarations, and therefore had no right to use them. This rests on a misapprehension of the rule relating to their admission. The "necessity" to which the text-books and the cases refer is not the exigency of any particular case, but a public necessity, which civilized society feels the pressure of, for the protection of human life by the punishment of manslaughter. Before the offense of murder is completed, the victim must die. While he feels death to be impending, but while consciousness continues, what he declares as to the origin of his injuries, and the person at whose hands he has received them, is competent, not in a particular case, where the defendant could not otherwise be convicted, but in all cases, no mat-

ter how ample the evidence of identification through other sources may be. But the second objection is that "the simple statement contained in the declaration, 'I am satisfied that the Roddy boys, brought to my house by the officers, are the same men that robbed and tortured me,' is not a sufficient identification of the persons on trial." This objection should be read in connection with the whole statement or declaration as made by Berkey. It runs thus: "Two men came into my bedroom. I asked them what they wanted here, and one of them said, 'Money, by God, and will have it.' Both men had revolvers, and said, 'Do you see these?' I said, 'Yes.' They told me if I had any prayers to say, I was to say them, that they would shoot me. I told them to shoot, but they did not. Then they tied me, both hands and feet, and carried me out of bed into a rocking chair, and hit me in the mouth, knocking a tooth loose. Then they ransacked the safe. I told them my money was in my vest. They got it. It was about one hundred and twenty-five dollars in paper and silver. They burned my feet some before getting my money. They continued to burn my feet, demanding more money or government bonds. They first burned my feet with paper; afterwards, with oil lamps and tallow candles. They ransacked the house from cellar to attic. They went to the cellar, brought up pies, cakes, and milk, and eat and drank. Then they left my house, and I am satisfied the two Roddy boys, brought to my house by the officers, are the same that robbed and tortured me." This is a vivid statement of the occurrences of that night, showing the opportunity Berkey had to see his torturers, to know their voices, their figures, their movements, their eyes, the color of their hair, and their relative size and manner. Every peculiarity of each of them must have been literally burned into the memory of both David Berkey and his wife. They were brought to the house of their victim. He looked at them, to see if they were the same men he had seen on the night of the 2d of June. His conclusion is: "Yes, I am satisfied they are the same men. My mind is at rest on the subject. I have no doubt." This was a distinct identification, and plainly admissible. The third objection is that Berkey gave no reasons for thinking the Roddy boys were the men who robbed and tortured him. He gave his opportunities for observing the robbers on the night of the crime fully. He examined the Roddy boys, and then he said, "Yes, they are the same." This was enough. His belief rested on his opportunities for observing the men, and he gave these fully. The last objection is to the fact that a mask was put on the faces of the Roddy boys, so as to leave the same portions of the head and face open for examination as was left of the heads and faces of the robbers on that night. This was at the request of Mr. Berkey. He also desired the defendants to speak. He seems to have desired to "satisfy" himself

upon the question of identity before expressing an opinion. The mask was used without objection or remonstrance from any one, and apparently with the honest purpose of deciding, after a careful examination, whether the defendants were the criminals by whom the robbery and burning had been committed or not. We do not see that, even if the propriety of the use of the mask on the defendants was questionable, it would be a valid objection to the admission of the dying declarations of David Berkey. It might affect the credit to which it would otherwise be entitled, but not its admissibility. But we are by no means prepared to concede that the use of the mask, under the circumstances, was questionable. The handkerchief fell from the face of one of the defendants on the night of the robbery, and remained off for some considerable time. The face of the other was not seen except with the handkerchief upon it. His appearance, as they saw him move about with the mask on, was fixed indelibly on their minds. It is easy to see that they might be able to identify him much more easily and certainly if allowed to see him dressed and disguised as he had been during the night of the 2d of June than by seeing him without disguise, and as they had never before seen him.

5. The criticism upon the charge of the learned judge which constitutes the fifth assignment of error is merely verbal. Possibly the word "stated" would have been preferable to the word "claimed" in referring to the testimony of the witnesses who saw two persons near the Osborne Cut whom they did not then know, but whom they said at the trial resembled the defendants. But the learned judge was not attempting to give the purport of their testimony, only to refer the jury to the general class to which these, among other, witnesses belonged. Their testimony related to the identification of the defendants, and he referred them to their own recollection of the testimony.

6. The learned judge did not undertake to recount the witnesses on either side, or to restate their testimony. The facts had been discussed at great length by counsel, and the evidence had been marshaled in support of their respective theories. It remained only for the court to give appropriate legal instructions, and to indicate the questions for the determination of the jury. This was all the learned judge attempted to do, other than to refer in the most general way to the several lines of testimony applicable to the several questions submitted to them. This was carefully and correctly done.

7. The refusal of a motion for a new trial is an error in law only when it is apparent that such refusal amounts to a clear abuse of discretion. This is not alleged in this case, nor do we see any reason why it should be. There was conflict in the evidence. The proper tribunal to settle that conflict, and determine where the truth lies, is the jury. That tribunal, with the aid of the fullest argument,

and an impartial charge, has, by its verdict, settled the conflict by finding that the defendants were the two men who broke into the house of David Berkey in June last, robbed him of his money, tortured him, and, as a result of this torture, murdered him. This is a second conviction. It is based on testimony that, if believed, justifies the verdict, and we are of opinion that it should not be disturbed because of the reasons presented to us on this appeal. The judgment is therefore affirmed, and the record remitted for further proceedings according to law.

(184 Pa. St. 318)

JENNINGS et al. v. LOEFFLER et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

PLEDGES—RIGHTS OF GENERAL CREDITORS—MARSHALING ASSETS.

1. Where a creditor of an insolvent is secured by a first judgment lien on land, and also by collateral, he is not disintituled to the collateral, as against general creditors, because he presents no claim to the auditor for payment out of the funds arising from sale of such land on subsequent judgments.

2. Where a creditor of an insolvent has a prior right to two funds, on only one of which there are junior liens, he is not bound to resort to the latter, and leave the other intact for payment of general creditors.

Appeal from court of common pleas, Allegheny county.

Bill by Jennings, Friedman & Stevens and others, for the use of the Mercantile Trust Company, assignee, against William Loeffler and others. Before trial, the bill was discontinued as to all defendants except Loeffler. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

The findings of fact of the court of common pleas are as follows:

"On the 1st day of August, 1891, William Loeffler, the defendant, entered of record in the prothonotary's office of this county, at No. 84, October term, 1891, D. S. B., a judgment note against William E. Schmertz, for the sum of one hundred thousand dollars (\$100,000). Afterwards, on August 7, 1891, execution was issued on this judgment, and a large amount of the personal property of Schmertz was levied upon and sold, the amount realized therefrom being something over sixty-five thousand (\$65,000) dollars. At the time Schmertz gave the judgment to Loeffler, he (Schmertz) was insolvent; and on August 7, 1891, the day upon which the execution was issued on Loeffler's judgment, other judgments were entered up against Schmertz, and subsequently executions issued upon them. Schmertz's life was insured for a large amount, and, at the time of the delivery of the judgment note to Loeffler, Schmertz assigned to Loeffler, as security for his indebtedness, two policies, for the sum of twenty-five thousand (\$25,000) dollars each, in the Mutual Life Insurance Company of New York. Schmertz lived until July 13, 1893: and from the date

of the assignment of these policies, until Schmertz's death, Loeffler kept them alive, and paid in premiums therefor, out of his own funds, the sum of \$7,374.80. Schmertz's indebtedness to Loeffler on August 1, 1891, amounting to one hundred and seventy-nine thousand nine hundred (\$179,900) dollars, was composed of the following items: (1) Loeffler had indorsed for Schmertz, and discounted for him, to the total amount of fifty-three thousand six hundred and fifty (\$53,650) dollars. (2) Loeffler had loaned to Schmertz 250 shares of the capital stock of Standard Plate-Glass Company, which at the time of the loan was worth one hundred to one hundred and five dollars per share, or twenty-five thousand (\$25,000) dollars. (3) Schmertz had been appointed guardian of the minor children of R. E. Schmertz, and Loeffler was surety upon several bonds for said Schmertz as guardian, amounting altogether to the sum of one hundred and one thousand two hundred and fifty (\$101,250) dollars. After the failure of Schmertz, the safe-deposit and trust company was appointed guardian of these minor children, and the liability of the sureties upon Schmertz's bonds was liquidated and fixed at twenty-two thousand nine hundred sixty-six dollars and sixty-six cents (\$22,966.66), of which Loeffler's proportion was ten thousand two hundred and forty-three dollars and nine cents (\$10,243.09), which sum was paid by Loeffler to the safe-deposit and trust company, the guardian. So the total indebtedness of Schmertz was as follows:

Indorsements	\$53,650 00
250 shares plate-glass stock.....	25,000 00
Liability paid on Schmertz's bonds as guardian	10,243 09
Premiums paid on insurance policies held as collateral.....	7,374 80
Interest on various accounts.....	3,609 50
	<hr/>
	\$99,877 39

When Schmertz died, in July, 1893, the original bill in this case was filed, and before the proceeds of the two policies of insurance upon Schmertz's life were paid to Loeffler, the agreements marked Exhibits A and B, attached to the plaintiff's amended bill, were executed. These agreements provide that the proceeds of the two policies, amounting to eighty-one thousand one hundred and eighty-nine dollars and fifty-two cents (\$81,189.52), should be paid to Loeffler, and that Loeffler should retain in his hands the sum of \$7,347.80, which sum he had expended in keeping the policies alive, and the further sum of twenty-five thousand (\$25,000) dollars which he claimed was due him on account of two hundred and fifty (250) shares of the stock of the Standard Plate-Glass Company, which said Schmertz borrowed from said Loeffler, and lost the same by sale thereof under said pledge, which claim of said Loeffler as to its validity or amount is disputed by the assignee of W. E. Schmertz; and it is the sum of twenty-five thousand (\$25,000) now in the hands of the defendant Loeffler that is the matter of dispute. Loeffler,

after retaining the amounts agreed upon, paid over the balance, thirty-two thousand three hundred and seventy-four dollars and eight cents (\$32,874.08), to the assignee. Prior to the failure of Schmertz, Loeffler loaned him two hundred and fifty (250) shares of the Standard Plate-Glass Company, worth from one hundred to one hundred and five dollars per share; and afterwards—also prior to his (Schmertz's) failure—Loeffler demanded a return of his stock, which was refused; nor was Loeffler ever tendered the stock. After Loeffler's judgment was entered and execution issued upon it, and levy made on personal property, Schmertz's real estate was levied upon by the judgment creditors immediately behind Loeffler; and, at the distribution before the auditor, Loeffler made no claim on the lien of his judgment, and did not share in the distribution.

"Loeffler's judgment was one hundred thousand dollars, and the indebtedness on said note was as follows:

Indorsements	\$53,650 00
250 shares Standard Plate-Glass stock	25,000 00
Paid guardian on Schmertz bond...	10,243 09
Premiums paid on policies held as collateral	7,374 80
Interest on these various amounts..	3,609 50
	<hr/>
Net indebtedness	\$99,877 39

"On account of this indebtedness, Loeffler has received the following sums:

December 19, 1891, on his execution on personal property, in court No. 2	\$53,650 00
February 18, 1893, on his execution in same case, by decree of court, 'that the said balance remaining in registry of the court, realized upon the execution aforesaid, be forthwith paid over to plaintiff, on account of the judgment held by him, and upon which said execution was issued,' and which we find the plaintiff had the right to apply to his judgment	12,276 49
Proceeds of policies now in his hands, on account of loan of 250 shares of Standard Plate-Glass Company, which we find he is entitled to	25,000 00
Return of premiums paid to keep the policies alive	7,374 80
	<hr/>
Total amount received.....	\$98,301 29

"Balance still due on Loeffler's judgment: Fifteen hundred and seventy-six dollars and ten cents (\$1,576.10)."

Conclusions of Law.

"It is contended by the learned counsel for plaintiff that Loeffler was bound to present his claim to the auditor for distribution out of the funds realized on the sale of the real estate of Schmertz, he having the first lien; and, having neglected to do this, he cannot now retain the \$25,000 in his hands. We do not agree with him in this. We think Loeffler had a right to rely on the collateral that he held, and was not bound to present his claim before the auditor. The recovery of judgment upon the principal debt does not affect the

pledgee's right to hold and enforce the pledge taken to secure that debt. It is the very nature of collateral security that it may be resorted to for a satisfaction of the principal debt, if its payment shall not otherwise be obtained. Jones, Pledges, § 591.

"Again, it is contended that the offer of Mr. McCook, for the assignee of Mr. Schmertz, to return the stock, at a time that it had depreciated to less than one-half its value, which was refused by Mr. Loeffler, was equivalent to a tender. Mr. Loeffler had, before the failure of Mr. Schmertz, demanded a return of his stock, and had been refused, and we think he was not bound to accept an offer to get the stock, and to accept it at its depreciation. It was in no sense a legal tender. Having found that the defendant is entitled to retain the twenty-five thousand (\$25,000) dollars in dispute, and that, after giving all credits of money received on his judgment, it is not yet paid in full, the bill is dismissed, at costs of the plaintiff."

To the foregoing findings of fact and conclusions of law the plaintiffs except, and at their instance a bill is sealed; also, an exception and bill to the decree dismissing the bill.

Joseph A. Langfitt and Albert York Smith, for appellants. Geo. C. Willson, Wm. D. Evans, and M. W. Acheson, Jr., for appellees.

STERRETT, C. J. The general subject of contention presented by the amended bill, etc., in this case, is whether the defendant William Loeffler is entitled to retain \$25,000 on account of the 250 shares of Standard Plate-Glass Company stock loaned by him to William E. Schmertz, and not returned. The court below held that he was, and accordingly dismissed the bill at plaintiffs' costs. The decree might well be affirmed on the learned trial judge's concise and accurate findings of the controlling facts, in connection with the conclusions briefly, but correctly, drawn by him therefrom; but it may not be amiss to notice some of the questions involved.

The sum above stated is in defendant Loeffler's hands, retained by him out of the proceeds of life insurance policies assigned to him by W. E. Schmertz (since deceased) as collateral security against sundry liabilities for and on account of said assignor, including the plate-glass stock in controversy. The residue of the insurance money was paid over by Loeffler to the use plaintiff, for the benefit of the creditors. It follows, therefore, that, if Loeffler is entitled to the \$25,000, the bill was rightly dismissed.

In its printed argument, the use plaintiff states that "the testimony on the part of the plaintiff is that a tender of the stock in question (same amount and kind) was made by * * *, the original assignee of Schmertz, * * * and that Loeffler refused to accept it." The testimony of Mr. McCook, one of the assignees referred to, further shows that the stock, at the time he offered to return it,

had depreciated in value so that it was not worth more than 50 cents on the dollar. It is true, the same witness also testified that defendant Loeffler "had not, to my knowledge and according to my information, ever demanded a return of that stock from Mr. Schmertz until after the failure, and that the stock immediately on his failure fell to as low a point as it was then." But Loeffler testified that he had made a demand for the return of the stock before Schmertz's failure, and that it was refused. The court specifically finds this fact. While this finding of fact is embraced in the second assignment, the conclusions of law alone are specified as errors. But, even if treated as covered by this assignment, the finding of the court could not be reversed, because in that respect Loeffler's testimony was not contradicted by that of McCook.

Unless there is something else in the case, the decree, under the authorities, was right. In *Coal Co. v. English*, 86 Pa. St. 253, it was said: "The rights of the parties were definitively fixed when the breach occurred." In *Musgrave v. Beckendorff*, 53 Pa. St. 310, it was held that the measure of damages for the breach of a contract to replace borrowed stock is the highest price it had reached between the breach and the trial. In the present case the highest price was the ruling price at the time of the demand and refusal. It is contended, however, by the beneficial plaintiff, that there are other facts in the case which will preclude Loeffler from paying himself out of this fund. Briefly stated, these facts are that defendant held Schmertz's bond for \$100,000, as security for the same debts that are covered by the assignment of life insurance policies. The judgment on this bond was a first lien on Schmertz's real estate. Subsequent to that were two other judgments, upon which executions were issued and the land sold. Before the auditor charged with distribution of the fund thus raised, no claim was made by Loeffler, and no part of the fund was awarded to his judgment; and it is contended that he thereby forfeited his right to payment out of the insurance fund. On that question the learned trial judge rightly refused to sustain the use plaintiff's contention, and his ruling is not specifically assigned as error. But, if it were, it is sufficiently vindicated in the opinion of the court below. In addition to the authority there cited may be added *Ayres v. Wattson*, 57 Pa. St. 380, to the effect that a creditor may hold an unlimited number of collaterals, and avail himself of any of them, as long as the debt remains unpaid. "A person may, if he chooses, relinquish a collateral security altogether, without the consent of other creditors of his debtor. It is a matter resting entirely between him and his debtor, with which others have nothing to do." In *re Dyott's Estate*, 2 Watts & S. 490.

It was further contended that, as Loeffler

had a prior hold on two funds, he should have resorted to the other, leaving this one intact for the payment of general creditors. But the junior lien creditors might with propriety have urged the same considerations in relation to the realty fund. If the defendant had participated in that fund, the junior lien creditors might have asked to be subrogated to his rights in the present fund. Ramsey's Appeal, 2 Watts, 228; Mason's Appeal, 89 Pa. St. 402; Tubb's Estate, 161 Pa. St. 252, 28 Atl. 1109; Addams v. Heffernan, 9 Watts, 542.

Inasmuch as defendant's debt is not yet paid in full, it is not necessary to consider the allowance on account of the amount claimed to have been appropriated from the proceeds of the sale of personal property to the claim in controversy. By the decree of court in those proceedings, it was ordered to be paid over on account of "defendant's judgment," and it has been here properly treated as so paid. In any view that can be reasonably taken of the case, the result in the court below was substantially correct, and the decree should be sustained. Decree affirmed, and appeal dismissed, at appellant's costs.

(184 Pa. St. 414)

In re STANHOPE'S ESTATE.

Appeal of MILLER.

(Supreme Court of Pennsylvania. Jan. 17, 1898.)

VENDOR AND PURCHASER—MORTGAGES—SUBROGATION.

S. gave her daughter H. a mortgage on certain land, and afterwards devised to H. a one-half interest in the land. The mortgage had been assigned to a third person, to keep it alive. After S.'s death, H. sold her interest in the land subject to the mortgage, and also sold and assigned said mortgage to the grantee. H. and her sister were the sole devisees and legatees of S. Held that, on settlement of the estate, H. was entitled, as against the grantee, to one-half the amount due on said mortgage by subrogation, since the purchaser of land subject to a mortgage is bound to indemnify the vendor from loss growing out of the mortgage debt.

Appeal from orphans' court, Philadelphia county.

Settlement of the account of Mary E. Heisler and another, executrices of the estate of Jane G. Stanhope, deceased. From a decree sustaining exceptions to and modifying the adjudication of the auditor, Charles W. Miller appeals. Affirmed.

The first adjudication was as follows:

"The testatrix bequeathed \$200 to the Cedar Hill Cemetery Company, the interest of which she directed to be used in the keeping of her burial lot in order. She gave certain described pieces of real estate to her daughters, Mary E. Heisler and Maria L. Lukens, respectively, in fee, and the residue of her estate to the said daughters in equal shares, absolutely; the devise to Mary L. Lukens, however, subject to the payment of a cer-

tain mortgage for \$3,000, with the interest due thereon upon other real estate of decedent. The testatrix died March 17, 1896. The credit of \$1,123 for expenses of proceedings against the city of Philadelphia for damages done by a change of grade was objected to by the assignee, Charles W. Miller. The suit was begun in decedent's lifetime, and lasted nearly two years, resulting in a compromise, by which the estate received \$6,828. The items of expense were a counsel fee of \$630, searches, etc., \$28, and the sum of \$465, paid to Joseph C. Lukens, husband of one of the accountants, for his services and expenditures. He was shown to have been intrusted with the business of prosecuting the claim by the decedent. He procured the necessary plans and searches, furnished stone gravel for the grading, laid the foundation, put in a drain, and he also attended at every meeting, except one, held by the jury. The auditing judge thinks that the accountants were justified in their payment of this sum, and he approves the credit. Mary E. Heisler, a daughter and accountant, by agreement dated April 9, 1896, assigned her interest in certain real estate of testatrix, and in a mortgage owned by decedent for \$5,000, reduced to \$4,250, and taken by the assignee at \$4,500, to Robert H. Foerderer, which mortgage is held by Charles W. Miller for the use of Foerderer. Mary L. Lukens presented a claim on decedent's promissory note, in her favor, for \$1,300, dated May 16, 1890, and payable one day after date. The note, at the death of the decedent, was not barred by the statute, and the claimant might, as executrix, have paid herself, as creditor, immediately thereafter. She did not press for payment, however, but continued to be paid interest upon it regularly. The claim is allowed.

The account was vouched, showing a balance remaining with accountants of	\$4,483 01
Add award in Est. of Hiram Stanhope	2,499 46
	<u>\$6,982 47</u>

Deduct counsel fee	\$150 00
" clerk's cost, and for copy of adjudication	12 50
" gas bills due	13 45
" Cedar Hill Cemetery Co.	200 00
	<u>375 95</u>
	<u>\$6,606 52</u>

"Counsel will attach a schedule of distribution, which, when approved, will form part hereof. And now, July 8, 1896, the accountant is confirmed nisi. [Signed] W. N. Ashman."

Exceptions to the adjudication: "Mary E. Heisler excepts to the adjudication filed in the above estate for the following reasons: (1) The learned court erred in awarding to Joseph C. Lukens the sum of \$465 out of the sum collected from the city. (2) The learned court erred in not finding that Mrs. Heis-

ier is entitled to be subrogated to the rights of Charles W. Miller, who is holder for the use of Robert H. Foerderer, to one-half the amount due upon a mortgage of \$5,000, made by decedent. (3) The learned court erred in awarding to Maria L. Lukens the amount of a promissory note made by decedent for \$1,300, dated May 16, 1890. (4) The learned court erred in not surcharging the accountants \$500, not accounted for, paid the accountants in June, 1896. (5) The learned court erred in not awarding counsel fees to the attorneys for exceptant. John W. Savage, Charles L. Smyth, Attorneys for Mary E. Heisler."

"And now, to wit, October 20, 1896, the above estate having been called, and counsel for the exceptant, Mary E. Heisler, not appearing, the court hereby enters a decree dismissing the exceptions filed by her, and confirms the adjudication of the auditing judge therein. [Signed] Wm. B. Hanna, P. J."

"And now, to wit, October, 24, 1896, the decree of the court dismissing the exceptions in the above estate is revoked, and the exceptions are reinstated, and ordered on argument list. [Signed] Wm. B. Hanna, P. J."

Amended adjudication: "The account in this case was referred back to the auditing judge for the taking of evidence touching a disputed point. At the original audit a paper signed by counsel for a claimant named Foerderer was handed up, by which it was agreed that Mrs. Mary E. Heisler, 'if lawfully entitled,' should be subrogated to one-half of the amount of the bond which the claimant held against the estate, and which formed the basis of his claim. As no evidence was presented, nor hinted at, even, to show that Mrs. Heisler was not lawfully entitled; and as the paper was presumably submitted because it had some connection with the case, the auditing judge found in the adjudication that Mrs. Heisler was entitled to be so subrogated. Exceptions were filed to this ruling, and they were argued at some length by counsel. This argument, curiously enough, referred to a variety of facts and transactions about which not a syllable of testimony had been uttered, nor a scrap of paper produced, at the audit. The court in bank therefore was forced to sit like a moot court in a law school, to listen simply to oratory,—a pastime which would have been more or less pleasurable if matters of business had not been pressing for attention. The result is that two audits, followed by two arguments and two decisions, will be required to dispose of a case which is barren of any serious legal complications. The facts developed at the second hearing were these: The decedent gave to Mary E. Heisler her bond and mortgage dated January 1, 1887, for \$5,000, with interest from January 1, 1886. The mortgage was secured upon certain premises, one-half interest in which was afterwards devised to Mrs. Heisler by the testatrix. In April,

1896, Robert Foerderer purchased from Mrs. Heisler, for \$30,000, her right and title in one-half of the said premises, together with the bond and mortgage for \$5,000, and her half interest in a certain verdict for \$7,500, which had been recovered against the city. Something had previously been paid on account of the mortgage, and it was valued at \$4,500. The net one-half amount of the verdict was taken at \$3,500; and, deducting brokerage, the actual cash consideration for the real estate was \$21,500. Foerderer's purpose in buying the mortgage was said to be to secure for himself control over the real estate, because he thereby owned one-half of the premises, and a mortgage which bound the half owned by Mrs. Lukens, the other devisee. The mortgage had been assigned to Charles W. Miller to keep it alive as against claimant's own share of the real estate. The agent of Mrs. Heisler declared that a part of the bargain was that the bond was not to be presented for payment, and that the real estate alone was to be resorted to upon the mortgage. This was denied by the agent for the purchaser. The reason of the thing seems to lie with the latter. A promise of the sort would have been without consideration, and, at all events, it would have been in contradiction of the instrument, which was unconditional in its terms. The contract, while a very peculiar one, was in reality very simple of comprehension. Foerderer paid \$21,500 for the real estate of Mrs. Heisler. He also paid her \$4,500 for a mortgage of \$5,000, reduced by a payment on account of \$500. He apparently bought this mortgage, not for a speculative purpose, but as a method of controlling the disposition of the property of his co-owner. Whether there was a merger as to one-half when the title to the mortgage and to one-half of the real estate mortgaged met in the same person, is a question of intention. That the holder of the mortgage did not believe that it had merged is proved by her sale of it for its full face value, and by her declaration of no set-off. The present holder is entitled to payment out of the personal estate, that fund being primarily liable. If the mortgage alone can be sued upon, the purchaser will recover upon that security only half of what he paid for it. If this finding of facts and the inference drawn therefrom are correct, the auditing judge is at a loss to imagine why the agreement of counsel for Charles W. Miller was ever drawn. It was agreed that the accountants should be surcharged with \$500, being an amount which had been withdrawn from the estate by Mrs. Heisler, and which was returned by her after the filing of the account. Some testimony was produced at the rehearing, showing that Mr. Savage, as counsel for Mrs. Lukens, one of the accountants, rendered services in the settlement of the estate, which had not at the audit been brought to the notice of the audit-

ing judge. The auditing judge thinks they were fairly worth \$75, and he directs the payment of a counsel fee by the accountants of \$225, instead of \$150, as fixed by the adjudication. He has not graded the compensation by the number of the accountants having the estate in charge, which is never a factor in such a question, but solely by what he considers to be the value of the services which were rendered to the estate. And now, December 10, 1896, the adjudication is amended to conform herewith. [Signed] W. N. Ashman."

Exceptions: "And now, January 2, 1897, Mrs. Mary E. Heisler excepts to the readjudication in the above estate for the following reasons: (1) The auditing judge erred in deciding that 'the present holder of the bond presented, Robert H. Foerderer, is entitled to payment out of the personal estate; that fund being primarily liable.' (2) The auditing judge erred in not deciding that the exceptant was entitled to be subrogated to the credit of one-half of the amount awarded to the said Robert H. Foerderer. (3) The auditing judge erred in not awarding to exceptant one-half of the amount of the bond presented by the said Robert H. Foerderer, with interest. John W. Savage, Counsel for Exceptant."

Sur exceptions to adjudication (Penrose, J.): "The purchase of the interest of one of the devisees in the property, subject to the mortgage of the testatrix, from whom she acquired it, imposed upon the purchaser, as has often been decided (Buckley's Appeal, 41 Pa. St. 491; Burke v. Gummey, 49 Pa. St. 518; Moore's Appeal, 88 Pa. St. 450), the obligation of indemnifying his vendor from all loss or liability growing out of the mortgage debt; and this, even though there has been no assumption of the mortgage by the purchaser (Trevor v. Perkins, 5 Whart. 252), for in such case the land, as between vendor and purchaser, is made the primary fund for payment, and the vendor becomes surety merely (Harris v. Jex, 68 Barb. 232; Freeman v. Auld, 44 N. Y. 50). This duty of the purchaser to indemnify is not dependent upon contract, but grows out of principles of justice and equity. As was said by Lord Eldon in *Waring v. Ward*, 7 Ves. 337: 'The purchaser of an equity of redemption means at the time of the contract to buy the estate subject to the mortgage. * * * If he enters into no obligation with the party from whom he purchases, neither by bond nor contract of indemnity to save harmless from the mortgage, yet this court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to pay money due upon the vendor's transaction of mortgage, for, becoming owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage.' The reason is very obvious. Having bought only what remains after the mortgage has been paid, if permitted to take advantage of recovery by the mortgagee upon the personal contract of

the mortgagor, he would, without additional payment, get the property clear of incumbrance. And hence it is well settled that a mortgagor, who, after sale, has been compelled to pay by suit on his bond, is entitled to be subrogated to the rights of the mortgagee against the mortgaged estate. That the purchaser in the present case became also the purchaser of the mortgage does not affect the result. Ordinarily, such a purchase would operate as an extinguishment; but, as the mortgage covered the entire property, of which he bought only one-half, it was proper to keep it alive, not to permit suit on the bond, but in order that the other half of the land should not be discharged. The devisees were also the sole legatees of the decedent, and thus, in effect, the parties paying her personal obligations; and it is clear, therefore, that the share of personalty of the one who sold her interest in the real estate subject to the mortgage cannot be taken from her by the purchaser through the instrumentality of the bond. His rights as holder of the mortgage do not change his obligations as purchaser of the land bound by it. The debt, to the extent of one-half, has become the debt of his share of the land, and he cannot, of course, compel another to pay it, much less the person whom he is bound to indemnify against any payment whatever. This follows, also, as a consequence of the principle of equity which, in the distribution of a fund, forbids payment of a prior lien as against a subsequent execution creditor standing to the owner of the first in the relation of surety (Worrall's Appeal, 41 Pa. St. 524; Datesman's Appeal, 77 Pa. St. 243; Rynd v. Pittsburgh Natatorium, 173 Pa. St. 237, 38 Atl. 1041), and this is precisely the relation which the vendor bears to the purchaser in this case. The agreement was that Mrs. Heisler should receive for her interest in the land bound by the mortgage \$23,147.50, and for the mortgage \$4,250. If the purchaser can, by proceeding on the bond of the testatrix, take from Mrs. Heisler, as legatee, one-half of the amount required to pay, it is evident that she receives just \$2,125 less than he agreed she should have; while the land for which he paid \$23,147.50 would, by reason of the removal of the burden, be increased to \$25,272.50. The exceptions are sustained, and the adjudication modified accordingly."

Assignments of error on behalf of Charles W. Miller: "First. The learned court below erred in sustaining the exceptions filed on behalf of Mary E. Heisler. Second. The learned court below erred in deciding that Mary E. Heisler was entitled to subrogation as to one-half of the balance of \$4,250, due on the bond of \$5,000 from Jane G. Stanhope to Mary E. Heisler. Third. The learned court below erred in awarding Mary E. Heisler one-half of the balance of \$4,250 due on the said bond of \$5,000. Fourth. The learned court below erred in not awarding to appellant the entire balance of \$4,250 due on the said bond of \$5,000."

Isaac D. Yocum, for appellant. John W. Savage and Alex. Simpson, Jr., for appellee.

PER CURIAM. We find no error in the decree from which this appeal was taken. Neither of the specifications of error requires discussion, or even special notice. The questions involved were fully considered and correctly disposed of by the learned court below, and on its opinion the decree is affirmed, and the appeal dismissed, at appellant's costs.

(184 Pa. St. 462)

BROMLEY v. LIPPINCOTT.

(Supreme Court of Pennsylvania. Jan. 24, 1898.)

FRIVOLOUS APPEAL—COSTS.

In case of frivolous appeal, rule to show cause why penalty prescribed by Act May 19, 1897 (P. L. 72), § 21, for appeal sued out merely for delay, should not be awarded, will be made absolute.

Appeal from court of common pleas, Philadelphia county.

Action by Thomas Bromley against Howard Lippincott on a note. Plaintiff had judgment for want of a sufficient affidavit of defense, and defendant appealed, the record, however, not being brought up, and no assignments of error filed, and no paper book served on plaintiff. January 7, 1898, plaintiff filed petition, and rule was granted to show why penalty, under Act May 19, 1897 (P. L. 72), § 21, should not be awarded. Rule made absolute.

J. Frederick Hartmann, for petitioner. John Sparhawk, Jr., for defendant.

PER CURIAM. The act of 1897, last clause of section 21, under which this rule was granted, is a substitute for the act of May 25, 1874 (P. L. 227), and provides as follows: "In all cases where the appellate court shall be of opinion that the appeal was sued out merely for delay, it shall award, as further costs, additional attorney's fees of twenty five dollars and damages at the rate of six per centum per annum in addition to legal interest." This case appears to come clearly within the mischief intended to be remedied by the clause of section 21, above quoted. If properly enforced, this act will have a wholesome effect in preventing frivolous appeals, that are too frequently "sued out merely for delay." The rule is therefore made absolute, and penalty awarded as provided by the act.

(184 Pa. St. 484)

MORRISON v. SEAMAN et al.

(Supreme Court of Pennsylvania. Jan. 24, 1898.)

On rehearing. Denied.

For former report, see 38 Atl. 710.

WILLIAMS, J. A motion has been made in this case for a reargument, but we can

see no reason why it should be entertained. The principal reason urged in support of it is that the division line between tracts Nos. 3,721 and 3,725 of the Morris surveys, as fixed by this court, is substantially coincident with that adopted by the court below. This cannot now be determined. The methods adopted for locating it are not the same, and the results may not be. The tracts embraced in the third and fourth tiers west from the district line must be located in the order in which they were put upon the ground by the deputy surveyor in August, 1793. The north and south lines separating the tracts belonging to these tiers should be parallel with the east lines of the tracts in the third tier, wherever these are found to correspond with the courses which they call for in the returns of survey. But the east lines are fixed by the marks of the surveyor. The west lines bear no marks, and must be located by the courses and distances shown by the return of survey. Each tract must be inclosed by the original work upon its marked lines, and by the courses, distances, and calls returned for its unmarked lines, until the southwest corner of No. 3,721 is reached. No. 3,725 was located one day later than 3,721, and called for it as adjoining on the east. The west line of 3,721 was adopted therefore as the east line of 3,725 by the deputy surveyor, as the return of survey shows. So, also, the south line of 3,721 was adopted as the north line of 3,731, which was a younger survey, occupying the space between 3,721 and the Holland Land Company, and exercising no influence whatever upon the lines of 3,721 against which it was placed.

(184 Pa. St. 459)

KIERZENKOWSKI v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 24, 1898.)

STREET RAILWAY—INJURY TO CHILD—INSTRUCTION.

1. Portions of a charge complained of must be considered in connection with the other parts thereof.

2. Where a child suddenly and unexpectedly appears near a street-car track some distance from a crossing, under such circumstances that the driver of a car cannot discover its presence in time to avert the accident, the company is not liable for its injury.

Appeal from court of common pleas, Philadelphia county.

Action by Mary Kierzenkowski, by her father and next friend, Aldebert Kierzenkowski, against the Philadelphia Traction Company. Judgment for defendant. Plaintiff appeals. Affirmed.

The charge, with the portions complained of inclosed in brackets, is as follows:

"Gentlemen of the Jury: This action you have heard is a suit brought on behalf of this child against the traction company, to recover damages for an injury she complains

was caused by negligence of the defendant in this case.

"As you probably heard me say in the other cases tried within your hearing, the first point to be established is whether the accident was caused by the negligence of the defendant. It is not enough to show a very painful accident has happened, and therefore the person who caused the accident has to be punished. You must be satisfied it was caused by the negligence of the person who is the defendant in the case. Now, in this case it is contended by Mr. Strohle, a witness on behalf of the plaintiff, as to the nature of this accident, that he saw the accident as you have heard, and that this car was going at an unusual and improper rate of speed,—running, he calls it; and, I suppose, by that he means very fast, but exactly the gait he cannot clearly state, but that the car was running at a great rate of speed; and at sixty or sixty-five feet from this crossing, with nothing to obstruct the view of the driver, the driver negligently ran the child down. That is his testimony. Of course, that would make, as I have had occasion to state (the other side not having been presented), a case of apparent negligence proper for you to decide.

"The defense in this case is that this was an unavoidable accident. In a few words, that is the defense. The question you have to decide in these cases generally is—First. Is the defendant guilty of negligence? And, in the second place, is the person who has complained of the injury guilty of negligence? Has he contributed to the injury he has sustained? If he has, the law don't undertake to show which is the most to blame; but, if the plaintiff is to blame, he has no right to recover. Of course, that rule of law does not apply to children of the age of this one. The law don't allow that they can be guilty of contributory negligence; but you are obliged to consider the case as to the negligence alone of the defendant. There is, however, this apparent exception, although not a real exception, to the rule: [If you were driving along the street with your horse and wagon, and a child runs under the feet of the horses, and the child is killed, you are not responsible; not because the child is guilty of contributory negligence, but because you are not guilty of negligence. If it is an unavoidable accident, you are not responsible. And so, in this case, consider the testimony of the three ladies, who have testified here. If you should consider that this child 'popped up suddenly out of the ground,' as one of the witnesses says, before the driver, and it was so sudden and unexpected that he was unable to pull in his horses sufficiently to prevent the accident, you would have no right to attribute negligence to him.]

"[Now, this is the testimony of the defendant's witnesses, these three ladies and the driver of the car. The driver told you dis-

tinctly what he was doing, and I don't agree with the counsel for the plaintiff in this case that if the driver put his hand back to adjust his chair, that that constituted such carelessness or negligence as would justify a verdict against the defendant. You might as well say a man has no right to blow his nose, because he cannot be looking ahead while he is doing it. The law says that, as long as a man is attending to the business of his road, he is not guilty of negligence; and for such an act as that you would not be justified, in my opinion, to say that the mere fact of a man adjusting his chair to consider him guilty of negligence.]

"If you think the defendant has not been guilty of negligence, and this was an unavoidable accident, that would be the end of your consideration of the case. If, however, you should take the view that the child was injured through the negligence of the defendant, then the question of damages will have to be considered by you. Of course, all accidents are more or less painful to hear recited; but accidents to little children are particularly painful, and nothing is more apt to excite one's sympathy than an accident to a helpless child. But, of course, gentlemen, you are not selected to try this case on your sympathy, but, gentlemen, you are here to decide the case according to the evidence; and you have no right to either diminish the damages, or increase them to a large extent, because you feel a great deal of sympathy for the person injured. Your judgment in that would not be fair, for every case must be founded upon the evidence and upon your judgment as business men and citizens of the community.

"If you consider the case in this way, I have no doubt you will arrive at a proper conclusion.

"I believe I have covered all the points, and they need not be gone over by me. I refuse all except the first."

A. S. Ashbridge, Jr., for appellant. Thomas Leaming, for appellee.

PER CURIAM. The first and second specifications, alleging error in certain portions of the charge quoted therein, cannot be sustained. Considered in connection with other parts of the charge, there is no error in either of said excerpts of which the plaintiff has any just reason to complain.

As to the two remaining specifications, it is sufficient to say that there is no merit in either of them. In view of the facts which the testimony tended to prove, the instructions were adequate and free from error. In affirming defendant's first point, the learned president of the common pleas said: "If the jury believe from the evidence in this case that the child suddenly and unexpectedly appeared in the vicinity of the track, under such circumstances that the

driver of the car could not have discovered its presence in time to avert the accident, the verdict must be for the defendant." This instruction was fully warranted by the evidence, and it fairly presents the main, if not the only, question of fact, upon which it was necessary for the jury to pass. That question was settled, in favor of the defendant, by their verdict. Much as the injury which unfortunately befell the child is to be regretted, the defendant company should not be held liable in damages unless it, through its employé, was guilty of negligence which was the proximate cause of the injury. There is nothing in the record on which a reversal of the judgment can be based. Judgment affirmed.

(184 Pa. St. 443)

DAVIS v. GALBRAITH.

(Supreme Court of Pennsylvania. Jan. 24, 1898.)

SALES—ACTION FOR PRICE—EVIDENCE.

In an action on a note given for the price of the contents of a drug store, defendant set up that he was deceived by misrepresentations of the seller that certain boxes were full, when they were practically empty. *Held*, that it was not error to admit evidence that said boxes, if they had been filled with articles used in the drug business, would, as compared with the whole stock supposed to be in the store, have had a substantial value.

Appeal from court of common pleas, Philadelphia county.

Action by Charles E. Davis against William H. Galbraith on a note executed by defendant to Smith & Co., who indorsed and delivered it to plaintiff after maturity. From a judgment for defendant, plaintiff appeals. Affirmed.

In March of 1896, Smith & Co. sold to the defendant the contents and fixtures of a drug store, and certain formulæ for making special medicines. The purchase money was \$4,000, \$2,000 of which was paid in cash, and the balance by a note for \$2,000, which is the note in suit. It appears that the said drug store, about four years prior to the date of said sale, had been the property of the plaintiff, who was the owner of the said formulæ; and when the sale took place, in March of 1896, it was agreed that the formulæ be transferred to the purchaser. The defense to the note was as follows: First. That the defendant was deceived by allegations made by Smith, in stating that the sales of the store had been, for about nine months previous, on an average of \$17.50 per day, when, as a matter of fact, they had been but \$12.50 per day. Second. That the defendant had been deceived by misrepresentations made by Smith as to the contents of certain boxes in the cellar of the store; Smith saying either that they were full, or that they were stocked, when, as a matter of fact, they were practically empty. Third. That the defendant had not received the formulæ. The sixth specification of error is as follows: "The learned court erred in overruling the plaintiff's objec-

tion to the following question and answer: 'By Mr. Simpson: Q. State whether or not the boxes which were pointed out to you in the cellar, if they had been filled with articles used in the drug business, would have, as compared with the whole of the articles and things supposed to be in the store and cellar, have had a substantial value, not in dollars and cents, but in articles? (Objected to. Objection overruled. Exception by plaintiff.) A. Yes, str.'"

Mellick & Potter, for appellant. Alex. Simpson, Jr., for appellee.

PER CURIAM. We find nothing in this record that would justify a reversal of the judgment entered on the verdict in favor of the defendant. The first four specifications allege error in the excerpts from the learned trial judge's charge recited therein. The subject of complaint in the fifth is "that the charge, as a whole, was inadequate, and tended to mislead the jury." These specifications may be disposed of together, in a few words. Considering the charge as a whole, we find no error therein of which the plaintiff has any just reason to complain. It is neither inadequate nor misleading. There is nothing in either of these specifications that requires further notice. Neither of them is sustained. There was no error in permitting the witness to answer the question recited in the sixth and last specification. Judgment affirmed.

(184 Pa. St. 426)

CALLAHAN v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. Jan. 24, 1898.)

STREET RAILWAYS—COLLISION WITH TEAM—CONTRIBUTORY NEGLIGENCE.

It is not negligence, as a matter of law, for one approaching a crossing of a street railway, in the business part of a city, to go on, though seeing an approaching car, where it is 250 feet away, and he, in order to cross the tracks, has to go not more than a tenth of that distance.

Appeal from court of common pleas, Philadelphia county.

Action by Charles Callahan against the Philadelphia Traction Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Thad. L. Vanderslice and Thomas Leaming, for appellant. A. S. L. Shields, for appellee.

FELL, J. Both specifications of error relate to the refusal of the court to give binding instructions for the defendant. From the plaintiff's testimony it appeared that he was driving east on Cherry street, and that when he reached the corner of Thirteenth street he brought his horse nearly to a stop, and, looking south down Thirteenth street, saw an electric car which had crossed Arch street, and was about 250 feet from him. He did not notice whether the car was in motion or was standing at the Arch street crossing. He drove forward, and, when his horse reached

the tracks on Thirteenth street, the car was close to him, and running with great rapidity. He turned his horse up Thirteenth street, but was unable to avoid a collision with the car. There was evidence that the car was running at two or three times the usual speed of street cars. After it struck the plaintiff's horse and wagon it ran 150 feet before it was brought to a stop. Cherry street is 40 feet wide, and, being clear of railway tracks, is a thoroughfare much used by wagons. The sum of the appellant's contention is that as the plaintiff saw the car, and attempted to cross Thirteenth street ahead of it, he took the chance of being able to do so, and cannot recover. The chance which the plaintiff took was that of crossing the street in safety in advance of a car which approached at the usual rate of speed; it was not the chance of being run down by a car propelled at an unusually high rate of speed, of which he had no notice and which was not checked as the car approached the crossing. A person about to cross a street at a regular crossing is not bound to wait because a car is in sight. If a car is at such a distance from him that he has ample time to cross if it is run at the usual speed, it cannot be said, as matter of law, that he is negligent in going on. The rule to "stop, look, and listen," applicable to the crossing of steam roads, applies only in part to the crossing of street railways. There is always a duty to look for an approaching car, and, if the street is obstructed, to listen, and in some situations to stop. *Omslaer v. Traction Co.*, 168 Pa. St. 519, 32 Atl. 50. And the plaintiff must be held to have seen that which was obvious. To attempt to cross the tracks of a steam road in front of an approaching train is generally such negligent conduct as will prevent a recovery. *Myers v. Railroad*, 150 Pa. St. 386, 24 Atl. 747. The intervals between the running of trains offer an ample opportunity to cross, and there can be no accurate calculation of the speed of an approaching train from observation merely. But in the use of the streets of a city, where cars are constantly passing, crossings must of necessity be made in front of approaching cars, and, as they run at a nearly uniform rate of speed, it is not difficult to determine whether it is prudent to attempt to cross. This, of course, applies only to city streets and at regular crossings, and does not relieve even those about to cross at regular crossings from the exercise of a high degree of care. No error, in a close calculation of chance, can relieve from the charge of contributory negligence. The use of cable and electric cars has greatly increased the danger of travel on city streets, and of this increased danger all persons have notice. Such cars are intended to run at a higher rate of speed, and the convenience of the public in their use cannot be made subordinate to the convenience of persons walking or driving on the streets. The plaintiff testified that the front wheels of his wagon were

on the foot crossing at Thirteenth street when he first saw the car, 250 feet from him. In order to cross the tracks, he had to go only about one-tenth of that distance. The crossing is in the business center of the city. Both streets are in constant use, and an unusual amount of travel by vehicles is diverted to Cherry street because of the absence of car tracks on it. The situation was one calling for unusual vigilance and caution on the part of the motorman. Whether, under the circumstances, the plaintiff was negligent in attempting to cross, or in the manner in which he attempted to cross, was, we think, for the jury, and both questions were submitted to a charge, to which no exception was or could be made by the defendant. That the accident happened in the manner in which the plaintiff described it is highly improbable, but it is possible, and, if the jury believed the plaintiff's testimony, there was ample ground for the verdict. The judgment is affirmed.

(184 Pa. St. 36)

PITTSBURGH GAUGE CO. v. ASHTON VALVE CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

MEASURE OF DAMAGES — BREACH OF CONTRACT — EVIDENCE.

1. In an action for breach of a contract which constituted plaintiff sole agent for the sale of certain goods within a defined territory at 10 per cent. commission, for three years from June 1, 1894, it appeared that defendant annulled the contract on November 1, 1895. *Held*, that the measure of damages was not the amount of commissions plaintiff would be entitled to receive, under the contract, on such sales as were made, and also on such sales negotiated, at the time of the alleged breach, as the action was not for commissions earned, but for breach of contract.

2. The value of the contract was the measure of the plaintiff's damages; and evidence which related to the business done by plaintiff under the contract, and to the business done by defendant's agent in the same territory, was competent.

Appeal from court of common pleas, Allegheny county.

Action by the Pittsburgh Gauge Company against the Ashton Valve Company for breach of contract. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The assignments of error are as follows: "(1) The court erred in its answer to appellant's first point, which point and answer were: 'Under all the evidence the verdict must be for the defendant.' Answer: 'Refused.' (2) The court erred in its answer to appellant's third point, which point and answer were: 'The measure of damages is the amount of commissions (10 per cent.) plaintiff would be entitled to receive, under the contract in evidence, on such sales as are proven to have been made or consummated, and also on such sales negotiated, at the time of the alleged breach, so far that it could be ascertained with certainty that they

would be completed and the amount thereof. Mere expectations to sell, without definite assurances of intention to purchase, and opinions as to what sales could or would probably have been made, are speculative, and cannot be taken into consideration by the jury in estimating the damages sustained by plaintiff.' Answer: 'This is refused as a whole. The first part of it, in reference to special sales, is not the rule of damages, in my judgment. "Mere expectations to sell, without definite assurance of intention to purchase, and opinions as to what sales could or would probably have been made, are speculative, and cannot be taken into consideration by the jury in estimating the damages sustained by plaintiff." This is affirmed, so far as it is a rule for estimating the damages, but what may appear in the evidence as probable may be considered in estimating the value of the contract.' (3) The court erred in its answer to appellant's fourth point, which point and answer were that: 'There is no evidence in the case as to the value of the business, or contract, at the time of the alleged breach. The value of the contract, based upon the volume of business before and after the alleged breach, is speculative.' Answer: 'This is refused.' (4) The court erred in charging the jury as follows: 'Unlike ordinary business, the amount of profit on it is fixed. Upon whatever business they did, they were to have 10 per cent. compensation. Now, that is not like the sale of ordinary goods. In an ordinary business, it depends upon sales, upon the point of manufacture, and upon the profit on the goods sold, whether bought or manufactured, and those things are necessarily indefinite. But here the amount of their profit is fixed by the contract at 10 per cent., and the only element of uncertainty in the matter would be the amount of business which would likely be transacted.' To which answers to the points, and portion of the charge, counsel for defendant excepts; and at his instance bill of exceptions is sealed."

James R. Sterrett, for appellant. W. B. Rodgers and J. R. McCreery, for appellee.

McCOLLUM, J. The contract between the plaintiff and the defendant was for the term of three years from the 1st of June, 1894. It constituted the former sole agent for the sale of certain goods of the latter within the territory defined by it. The compensation fixed for the services to be rendered was a commission of 10 per cent. on the amount of the sales. On the 30th of September, 1895, the defendant mailed a notice to the plaintiff of its intention to annul the contract on the 1st of November, which notice was received by the plaintiff on the 2d of October. This intention was carried out, in accordance with the notice. During the 17 months in which the contract was in force the sales amounted to \$21,816.17, the commissions to \$2,181.82, and the business

was increasing. This suit was brought for the damages the plaintiff sustained by the defendant's annulment or breach of the contract. It resulted, on the trial in the court below, in a verdict for the plaintiff, and from the judgment entered thereon this appeal was taken by the defendant.

The questions to be considered on the appeal are whether there was error in the refusal of the defendant's first point, and, if there was not, whether there was error in the instructions in regard to damages. An affirmance of the point in question would have involved a holding by the court that the annulment of the contract was justified by the conduct of the plaintiff. The evidence did not warrant the ruling called for by the point. It raised a question for the determination of the jury, which was fairly submitted to them by the court. We are not convinced of any error in the answers of the court to the defendant's third and fourth points. We do not think that the portion of the third point which the court refused to affirm presented a measure of damages adapted to the case. Commissions earned before November 1, 1895, are not damages arising from the rescission or breach of the contract, and they are not claimed in this suit. The evidence referred to in the fourth point was competent. It related to the business done by the plaintiff under the contract, and to the business done by the defendant's agent, in the same district, after the annulment of it. It was evidence for the consideration of the jury in ascertaining the value of the contract at the time the defendant wrongfully annulled it. The attention of the jury was directed to all the elements affecting its value, and they were instructed that, if they found the defendant was not justified in breaking it, the plaintiff was entitled to recover the value of it at the time of the breach. The instructions were clear and impartial, and the defendant has no cause to complain of them, unless it appears that the court erred in holding that the value of the contract was the true measure of the plaintiff's damages.

The sole contention of the defendant as to the measure of damage is expressed in the portion of the third point to which reference has already been made. It is a contention which practically denies any liability of the defendant to the plaintiff for damages arising from the breach of the contract. No decision of this court, or of any other court in Pennsylvania, has been cited to sustain it. Four decisions of the courts of other states are referred to, but it is not clear that they are applicable to the case at bar, which appears to be distinguishable on its facts from the cases in which the decisions were made. *Reiter v. Morton*, 96 Pa. St. 229, was an action brought by one of two partners upon articles of partnership to recover damages for the wrongful dissolution of the partnership by the defendant, and it was held competent, in estimating the value of the contract as a measure of damages, to show the actual condition and situation of the business and

assets of the firm, together with proof as to the actual results accomplished in the business before the breach; the true measure being what the interest of the party aggrieved would sell for. This was the measure applied to the case in hand. The evidence affecting the value of the contract as a measure of damage was of the same nature, and admitted for the same purpose in each case. The evidence in the case at bar did not relate to conjectural or speculative profits, but to the amount of business done, and it showed, as we have already seen, that it was an increasing and prosperous business while the contract was in force. It also showed that within the territory designated by the contract there was a regular and increasing demand for the goods of the defendant which the plaintiff was authorized by the contract to sell. Without further elaboration of the subject, our conclusion is that the learned judge of the court below did not err in the instructions as to the measure of damages. All the assignments are overruled, and the judgment is affirmed.

(184 Pa. St. 429)

In re DEVEREUX'S ESTATE.

Appeal of STAFFORD et al.

(Supreme Court of Pennsylvania. Jan. 24, 1898.)

PAYMENT—PRESUMPTION—EVIDENCE TO REBUT.

1. The legal presumption of payment from lapse of 20 years merely shifts the burden of proof on the creditor.

2. Presumption of payment from lapse of 20 years is overcome by evidence that during that time the debtor was absolutely without means to pay any part of his debt.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of James Devereux, deceased. From a decree affirming the allowance of the claim of Richard G. Devereux against the estate, Anna F. Devereux and Mary L. Stafford, distributees, appeal. Affirmed.

A. E. Stockwell and F. Carroll Brewster, for appellants. N. Dubois Miller and Biddle & Ward, for appellee.

FELL, J. The legal presumption of payment arising from the lapse of 20 years, in the case of a bond or specialty, does nothing more than shift the burden of proof. "Within twenty years, the law presumes that the debt has remained unpaid, and throws the burden of proving payment upon the debtor. After twenty years, the creditor is bound to show, by something more than his bond, that the debt has not been paid; and this he may do, because the presumption raises only a prima facie case against him. It must be borne in mind that the presumption from lapse of time is not that there is no contract existing between the parties. If it were, proof of a new contract might be necessary. It is only an inference that the debtor has done something to discharge the debt, to wit,

that he has made payment." *Reed v. Reed*, 46 Pa. St. 239. While the evidence to overcome the presumption must be of a satisfactory and convincing character, the same precision of proof is not required as is required to remove the bar of the statute of limitations. *Gregory v. Com.*, 121 Pa. St. 611, 15 Atl. 452. Each case must necessarily be determined on its own peculiar facts, and in each the question is whether the presumption of law that the debt has been paid is overcome by proof of facts and circumstances which tend to show that it has not been paid. The complete legal presumption does not arise short of 20 years, but a shorter period, aided by circumstances which contribute to strengthen the presumption, may furnish ground for inferring the fact of payment. The ability of the obligor to pay, and the pressing need of the obligee for money, have been recognized as circumstances which aid the presumption of payment. *Hughes v. Hughes*, 54 Pa. St. 240. On the other hand, it was held in *Tilghman v. Fisher*, 9 Watts, 441, that one of the intervening circumstances which may rebut the presumption is the inability of the debtor to pay within 20 years; and proof of a continued inability to pay was recognized in *Taylor v. Megargee*, 2 Pa. St. 225, as sufficient to rebut the presumption. There are convincing reasons for the ruling that proof of the insolvency of the debtor, alone, will not rebut the presumption. An insolvent may be possessed of property, or be in receipt of an income, and have the means of payment; but proof of positive inability to pay is, in effect, proof that payment could not have been made.

The judgment in this case was for \$31,377.64, and was entered in 1875. The decedent died in 1878. Before 1875 he had become involved, by reason of indorsements for a large amount, and had lost all his property except a farm, which was incumbered for its full value, the house in which he lived, which was mortgaged for nearly its value, and personal property found to be worth less than \$200. His dwelling was in bad repair, owing to his want of means, and he was obliged to borrow money from his children to pay the interest on his mortgages. After 1875 he was out of business. He earned nothing, and was in receipt of no income. It is as clear as testimony can make it that after the date of the judgment he was absolutely without means to pay any part of it. This conclusion does not rest on the testimony of those who had no real knowledge of his affairs, and could only guess that he had not paid because he did not appear to have the means to pay, but on the testimony of his counsel, and of members of his family who knew his circumstances and contributed to his support. After his death there was no estate from which payment could have been made. The only assets which came into the hands of his administrator were two shares of stock, worth \$15, and, four years after his death, a dividend from an assigned es-

tate, of \$632, which was applied to the payment of interest on the mortgage on his dwelling house. The sum now in controversy was received by the administrator in 1896, on the termination of the life estate of the decedent's mother. The decree is affirmed, at the costs of the appellants.

(184 Pa. St. 375)

MUSICK v. BOROUGH OF LATROBE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

DEFECTIVE ALLEY—NEGLIGENCE—PERSONAL INJURY—DAMAGES—OPINION EVIDENCE—INSTRUCTIONS.

1. In an action for personal injuries from a defective alley, the defect being one which admits of full and adequate description, opinion evidence as to whether the condition was dangerous is not admissible.

2. A requested instruction that if plaintiff's conduct was negligent, and if his negligence contributed to his injury, he could not recover, does not encroach on the province of the jury, but merely raises the question of the legal effect of contributory negligence, and should be given.

3. A requested instruction, asking the court to pass on the effect of certain enumerated facts in establishing plaintiff's contributory negligence, is properly refused.

4. Municipalities are not bound to the same degree of care on an alley as on its streets, unless by its use it has in fact become a public street.

5. Though pain is an element of damages for personal injuries, it should be considered in connection with all the attending circumstances, with a view to making practical compensation to the party for his actual loss.

Appeal from court of common pleas, Westmoreland county.

Action by Allen P. Musick against the borough of Latrobe for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

John F. Wentling, David A. Miller, Frank B. Hargrave, and Edward B. McCormick, for appellant. W. S. Byers and Albert H. Bell, for appellee.

WILLIAMS, J. The general rule is well settled that the province of a witness is to state facts, and that of the jury is to draw conclusions from them. There are some exceptions to this rule, particularly when the facts are of such a character as to make it necessary, or at least helpful, that the jury be guided in drawing their conclusions by the testimony of persons possessing superior knowledge of the subject under investigation. In such cases the opinions of expert witnesses are given to the jury as to the effect of certain given facts, or their own conclusions drawn from a personal examination of some object. Witnesses have also been allowed to express opinions upon the safe or unsafe character of machinery, or of the condition of a highway, when an oral description by witnesses would not adequately present the situation to the jury. But, if the defect or obstruction complained of is such as admits of a full and adequate description, the question whether it is dangerous or

not is not a question of skill or art requiring the aid of expert testimony, but, like other questions of fact, is to be determined by the jury. They must learn the facts from the witnesses, and then draw their own conclusions as to the dangerous character of the highway, as well as to the contributory negligence of the traveler who suffers an injury. In all ordinary cases, it would be as appropriate for a witness to give his opinion about whether the plaintiff's conduct amounted to contributory negligence or not as to whether a situation fully described by him is dangerous in its character.

The first assignment of error, which complains of the admission of such testimony in this case, is sustained. The defendant's third point asked an instruction to the effect that, if the conduct of the plaintiff at the time of his injury was negligent, and if his negligence "contributed in any degree to his injury," this should preclude a recovery of damages by him against the defendant. The learned judge refused this point, saying: "This point would require us to dispose of the whole case. Under all the facts of this case, that question is to be disposed of by the jury." This was not an answer to the point. The question raised was over the legal effect of contributory negligence, if found to exist, on the plaintiff's right to recover. It was clearly a question of law, upon which it was the duty of the court to give the jury distinct and definite instructions, which it was as clearly the duty of the jury to accept and act upon. It is probable that, in the haste of the trial, the effect of the point was misapprehended, but the answer was none the less erroneous. The fifth assignment of error, which is directed to this answer of the learned judge, is sustained.

In the sixth point, the question on which the court was asked to pass was the effect of certain enumerated facts in establishing the contributory negligence of the plaintiff. The effect of these facts was for the jury, and the instruction was properly refused. The same may be said of the ninth point. It asked the court to declare the conduct of the plaintiff in entering the alley on that night to be negligence as matter of law. This was promptly declined, because, on all the evidence, the question was one of fact for the jury. The sixth and twelfth assignments of error relate to the instructions of the court in regard to the duties of municipalities in the care of streets and alleys. They are not sustained. Ordinarily the alleys in a borough are little used by the public, and do not need to be kept in the same state of repair as the traveled streets. The care of the municipality over them should be proportioned to the public use that is made of them. The alley in which the accident happened was apparently safe during the day. If it was in use during the night as a thoroughfare, that fact was one of which the borough was bound to take notice. The general statement that the municipality was bound to the same degree of care over its alleys as over its

streets is not correct. The care to be bestowed upon each must be measured by the public use. When an alley does in fact become a public street by its use, it should receive the attention that a public street requires; but, until it becomes a traveled thoroughfare in fact, it is not incumbent on the borough authorities to treat it as such. The measure of care is proportioned to its character and the public needs. We cannot say there was error in the instructions relating to the measure of damages.

Some further explanations would have been helpful to the jury, perhaps, especially in regard to compensation for pain. Pain is not susceptible of exact compensation by any pecuniary standard. It is, however, an element to be considered in determining the amount of injury which the plaintiff has sustained. It should be considered in connection with all the attending circumstances, with a view to making practical compensation to the plaintiff for his actual loss. Estimates of a fanciful or sentimental character are to be carefully avoided. It is not every twinge of pain that can properly be made a subject of compensation, but the actual injury sustained by the plaintiff, including the loss of time, the personal injury inflicted, and its consequences in suffering and impairment of earning power. All these should be considered in a practical, businesslike way in making up the verdict. The judgment is reversed, and a venire facias de novo awarded.

(184 Pa. St. 296)

BELL v. ALLEGHENY COUNTY.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

RES JUDICATA — TREASURER OF ALLEGHENY COUNTY—COMPENSATION.

1. Act May 1, 1861 (P. L. 450), as supplemented by Act March 11, 1870 (P. L. 373), fixed the salary of the treasurer of Allegheny county at \$4,500 per year. Act March 31, 1876 (P. L. 13), and the supplement of June 13, 1883 (P. L. 113), passed pursuant to Const. art. 14, § 5, requiring the compensation of county officers to be regulated by law, fixed the salary of the treasurer of counties of the population of Allegheny in 1890 at \$10,000 per year. In an action by the treasurer of said county, whose term of three years began in 1891, to recover of the county his salary for the first three quarters of his term at \$10,000 per year, the supreme court decided that the acts of 1861 and 1870 were not impliedly repealed by the acts of 1876 and 1883, and his compensation was only \$4,500 per year, as claimed by the county. In a subsequent action by such treasurer to recover of the county for the last nine quarters at \$10,000 per year, he claimed to be entitled to it on the ground that the acts of 1861 and 1870 were impliedly repealed by the two later acts, because of a certain local act, which, construed with the acts of 1861 and 1870, rendered those acts repugnant to the acts of 1876 and 1883. *Held*, that the questions in the latter action were res judicata, though such local act was not noticed in the former case, and did not appear either in the pleadings or argument.

2. Act April 3, 1872 (Laws 1872, p. 848) § 20, requires the treasurer of Allegheny county to furnish liquor licensees with printed blank bonds at his expense, and provides that he shall "receive therefor a fee of \$1." *Held*, that such fee is not a compensation for services, but is

intended to reimburse the treasurer for money expended in procuring the blanks.

Appeal from court of common pleas, Allegheny county.

Action by John A. Bell against Allegheny county for services as county treasurer. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

D. T. Watson and John F. Sanderson, for appellant. N. S. Williams, Co. Sol., for appellee.

DEAN, J. John A. Bell was elected county treasurer of Allegheny county in November, 1890, for the term of three years. He assumed the duties of the office the first Monday of January, 1891, and served out his term. By the census of 1890 the population of the county was 551,959. The plaintiff claimed that his salary, in a county of this population, by the act of March 31, 1876 (P. L. 13), and the supplement of June 13, 1883 (P. L. 113), was fixed at \$10,000 per year. The defendant contended that his salary was fixed, by a special act relating to Allegheny county, of May 1, 1861 (P. L. 450), and by a supplement of March 11, 1870 (P. L. 373), at \$4,500 per year. The plaintiff filed statement of his demand, which was for the last nine quarters of his salary for the term, the first three quarters having been demanded in another suit. The amount claimed for the last nine quarters was \$22,500, being at the rate of \$10,000 per year. Suit was brought January 2, 1897. On September 22, 1897, the county filed a demurrer to the claim, denying plaintiff's right in law to recover the amount demanded. The court below sustained the demurrer, and entered judgment for defendant, saying: "We regard the questions raised by the demurrer as having been settled by the case of Bell v. Allegheny Co., 149 Pa. St. 391, 24 Atl. 209, and the orders made therein by the supreme court."

What was settled by the case cited? This same officer, claiming that his salary was fixed at \$10,000 by the general acts of 1876 and 1883, brought suit against the county for the first three quarters of the same term for which he now claims the remaining nine quarters. Demurrer was filed, averring the same obstacles to recovery as now,—the special acts of 1861 and 1870, fixing the salary of the county treasurer of Allegheny county at \$4,500. Then the court below was of opinion that the special statutes were repugnant to the general law, and were repealed by it. The demurrer was overruled, and judgment entered for plaintiff. The county appealed to this court. In an opinion rendered by Justice Heydrick, we reversed the judgment, for the reason that there was no such repugnancy between the local and general statutes, so far as relates to the county treasurer, as repealed, by implication, the former. Both statutes established fixed salaries for county officers,—among them, the county treasurer; and it was said: "The mandate of section 5, art. 14, of the constitution, that the compensation of county officers shall be regulated by law, was satisfied, in respect to the

treasurer of Allegheny county, by the special act of 1861, and its supplement; and, so far as that officer was concerned, the legislature was not bound to act, and therefore cannot be presumed, contrary to the well-known canons of construction, to have intended to act." That is, by the act of 1861, and its supplement, the county treasurer was compensated by a fixed salary. That was all that was intended by the constitution and act of 1876, viz. to compensate all officers in counties of a certain class, of which Allegheny county was one, by fixed salaries. Bell, in his statement in that case, averred that his office was a county office, to be compensated by a fixed salary, but that the salary was fixed by the general, and not by the special, act. The demurrer filed admitted the facts, but not the legal conclusion. The facts being established, the legal conclusion from them, by this court, was that he was entitled to a salary of \$4,500 per year, under the special acts, and judgment was finally ordered to be so entered. The opinion in *Bell v. Allegheny Co.* was handed down May 23, 1892. On October 3, 1894, the opinions in *McCleary v. Allegheny Co.*, 163 Pa. St. 578, 586, 587, 30 Atl. 120, were handed down, deciding that these officers came under the provisions of the general act of 1876, because, under the local acts, they were compensated by part salary, and in part by fees; that as the intent of the general act was to compensate these officers solely by a fixed salary, and to compel the payment of all fees into the county treasury, there was an irreconcilable repugnancy between the two acts, and the local act must go down, in face of the general act passed in obedience to a constitutional mandate. Mr. Bell, the plaintiff, then discovered that, in addition to the fixed salary of \$4,500, he was compensated by a fee under a local liquor act of April 3, 1872, the twentieth section of which reads as follows: "The county treasurer of Allegheny county, is hereby required to perform all the duties imposed upon him by the provisions of this act, and to furnish the licensees with printed bonds to be filled up by them as required by this act. The blank bonds to be furnished at the expense of the said county treasurer, who shall receive therefor a fee of one dollar." Laws 1872, p. 848. We do not think this provision directs payment of a fee as compensation for services. The primary intent of the act, evidently, was to promote uniformity in the framing of the bond, by directing the blanks to be prepared and issued by a particular officer. The act would have expressed the same intent had it directed that the bonds should be furnished by the county treasurer at the actual cost thereof, to be paid by the licensees, or that they should be furnished by the county treasurer at an expense to the licensees not exceeding one dollar. The obvious intent was, not to compensate the treasurer, but to reimburse him for money laid out in procuring the printed blank bonds. He may have a profit, or may not; depending on the quantity of printed matter, the style of print-

ing, the quality of paper, and printer's charges. If he have a profit, that was not, apparently, the purpose of the act. Its purpose was to reimburse him for the expense, which is not the less plain because the word "fee" is used.

But, whatever construction is placed on this act, we do not base our judgment upon it. We prefer to decide the case on the main question: Is the judgment in *Bell v. Allegheny Co.*, supra, res adjudicata? Is the issue in this case settled by the judgment in that case? To warrant that judgment, it must have been adjudged that under the local acts the county treasurer was compensated solely by a salary. If the fact were that "the compensation was partly by fees and partly by salary, we were bound to render a judgment for plaintiff, under the act of 1876. How can it then be argued that the fact now urged, if it existed, was not passed on? It is urged that the fact of the act of 1872 was not noticed, and appeared neither in the pleadings nor argument. Concede it; the fact that the office was salaried under the local act at \$4,500 clearly appeared, as no fact of compensation by fee was either pleaded or argued, legally, and, so far as affects the judgment, no such fact existed, and that is an inevitable inference from the judgment. The court then further adjudged that, as the officer was compensated exclusively by salary, his compensation was not affected by the general act. And that case settled this, because the cause of action, the point on which the contention turned, and the parties, are the same. The cause of action in the first case was the right of plaintiff to demand, either a yearly salary of \$4,500 or \$10,000, and the obligation of defendant to pay one or the other. The contention was, which amount was allowed by law. And this is precisely the controversy between the parties before us. That additional or cumulative evidence is presented of a fact necessarily adjudicated in the former case, or that the demand is for compensation as to subsequent months of the same official term, leaves it still the same cause of action, to be adjudicated on the same statutes and the same fact,—though, as to the last, not the same evidence. If the fact was necessarily determined, it is a bar. *Holley v. Holley*, 96 N. C. 229, 1 S. E. 553; *Harryman v. Roberts*, 52 Md. 74. In *Wilson v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004, the action was by the landlord on a lease for a term, the rent payable monthly. The defendant had guarantied the payment of the rent. In an action against him for the first month, he defeated a recovery on evidence that the lease was obtained fraudulently. In another action against him, for the rent of subsequent months, it was held that the first judgment was a bar to recovery, Justice Field saying: "It [the first judgment] determined, not merely for that case, but for all cases between the same parties, not only that there was nothing due for the month of December, but that the lease itself was procured by fraud." The matter in controversy was the lease. Making separate demands and institut-

ing separate suits for the monthly installments as they fell due did not change the one cause of action, the written instrument, on which depended the right of plaintiff and the obligation of defendant. That being settled by the first judgment, the defendant could not be harassed with suits for the subsequent monthly installments. In *Killeffer v. Herr*, 17 Serg. & R. 319 (an action on the case for continuance of a nuisance), it appeared from a record offered in evidence by plaintiff that 10 years before there had been a suit between the same parties on the same pleas, and concerning the same controverted matter, in which the plaintiff obtained judgment. The defendant's plea on the second trial, among others, was a license from plaintiff for the erection of the dam or nuisance complained of, which antedated the first suit. At the second trial he had new and significant evidence, tending to show that he had not exceeded, in the height of his dam, the scope of his license. This court says: "The first question which presents itself is the conclusiveness of the record of the verdict in the first suit, and on this part of the case the court entertain no doubt. A verdict for the same cause of action, between the same parties, is conclusive; for, when a court of competent jurisdiction has adjudicated directly upon a particular matter, the same point is not open to inquiry in a subsequent suit for the same cause, and between the same parties. It may be a great misfortune, as in this case, that, from causes over which he had no control, the party may not have been properly prepared for trial. It is, however, a misfortune which this court cannot remedy, as the rule is settled, on the principle that there must be an end of litigation, and to provide against the loss of testimony; and, as the defendant had an opportunity of showing the truth of the fact, he shall not afterwards be permitted to contradict a record to which he is a party. He is estopped to deny that which has been solemnly ruled against him. We shall therefore take it as settled that the erection of the dam complained of in the first suit is not open to inquiry in an action for the continuance of the nuisance. All the plaintiff was bound to do was to give in evidence the former recovery, to prove that the dam had undergone no alteration, but continued the same, and his right of action was complete." To the same effect is *Long v. Long*, 5 Watts, 102, also a second action for continuance of a nuisance. *Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 493, 21 Atl. 982, cited, and so confidently relied on by appellant, has no application to the case in hand. There, under the act of 1859, the railway company was required to pay to the city 6 per cent. of its dividends, whenever its dividends exceeded 6 per cent. of its capital stock. Afterwards, by the act of 1872, the amount of tax was lessened, by requiring the company to pay only 6 per cent. of the dividends in excess of 6 per cent. on its capital stock. The company defaulted in payment under the second act, for the years 1872 to 1879, inclusive; and

the city brought suit for the taxes of these years, under the act of 1872. The company admitted its liability under the act, but contended that a proper construction of it made it answerable only when any single declared dividend exceeded 6 per cent. of its capital stock. The city contended that under such construction the city might derive no revenue, and the manifest intent of the act would be defeated. On this question the case came before this court, and it was decided that the company's liability was to be determined, not by the single dividends, but by the aggregate of the annual dividends. This was all that was adjudicated. The constitutionality of the act was not questioned. See *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 102 Pa. St. 190, decided in 1883. Afterwards, in 1889 (see *Ridge Ave. Pass. Ry. Co. v. Philadelphia City*, 124 Pa. St. 219, 16 Atl. 741), in a contention between the city and railway company as to the obligation of the latter to pave streets, this court declared the act of 1872 unconstitutional and void. Then the city brought suit for the taxes of the years 1880 to 1888, inclusive; computing them, not under the act of 1872, but under the act of 1859, which imposed the higher rate. The company defended on the ground that in *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 102 Pa. St. 190, the city having brought suit under the act of 1872, and this court having adjudged and determined the construction of that act in the city's favor, the whole matter was *res adjudicata*, and the city's demand must be determined by the act of 1872. This court said, "No;" that while that suit settles the taxes for the years preceding the act of 1872, under which act the suit was brought, notwithstanding its unconstitutionality, yet the city was not barred by that judgment from alleging the unconstitutionality of the act as to the taxes of subsequent years. Nor could there well have been any other decision. After the act of 1872, in another suit, had been declared unconstitutional, in *Ridge Ave. Pass. Ry. Co. v. Philadelphia City*, 124 Pa. St. 219, 16 Atl. 741, in a legal sense there was no such act in existence. The right of plaintiff and the obligation of defendant were wholly statutory, and the only valid statute establishing both was that of 1859. And while the validity of the act of 1872 was impliedly admitted by both parties, and assumed by the court, in the first suit, and a judgment entered by virtue of it, which bound all parties in that subject of contention, yet, after it was declared void, it bound not the parties, as to their future conduct, nor the courts, as an adjudication in demands maturing subsequently. If in this case the local salary act of 1861 had been declared unconstitutional, after the decision in *Bell v. Allegheny Co.*, *supra*, the appellant might forcibly argue that the only act having a legal existence, fixing his salary, is that of 1876; and, to sustain this position, *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.* might be pointedly cited. But the law impelling the court to the decision in *Bell v. Allegheny Co.*

has not been one whit changed since that decision was rendered.

The point made by appellant, that City of Philadelphia v. Ridge Ave. Pass. Ry. Co. sustains his position that his present suit is for a different cause of action than the first, as we have before noticed, is not sound. The first action proceeded on the assumption that the act of 1872 was constitutional; the second, that it had no existence, and the city's claim was fixed by act of 1859. The unconstitutionality of the act gave rise to a new cause of action,—that fixed by the first act: 6 per cent. of the 6 per cent. dividends declared, instead of 6 per cent. of dividends in excess of 6 per cent. If the act of 1872 had been valid, the first judgment would have barred the city from any other or greater demand than was asserted in that case, because the right of the city and obligation of the defendant would have been, precisely the same; but wiping that act from the statute book changed the cause of action, as to the succeeding years, to one based on an entirely different statute, and of course the judgment was no adjudication of this demand.

The suggestion of the hardship resulting from an insufficient compensation to a competent officer performing such onerous and responsible duties as are imposed upon the county treasurer of the second most populous county of the state is without weight. No man is compelled to accept the office at an insufficient salary. If he do accept, he then voluntarily undergoes the hardship. If competent men decline the office because of the meager salary, and it falls into the hands of the incompetent, the people can easily cure the evil by moving the legislature to repeal the local statute, which would at once raise the salary to \$10,000.

The language of this court in *Marsh v. Pier*, 4 Rawle, 273, on the rule of *res adjudicata*, is forcible, in view of the character of this litigation: "A judgment of a proper court, being a sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries, ever afterwards, as long as it shall remain in force and unreversed." And in the same case: "A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness." All the assignments of error are overruled, and the judgment is affirmed.

(184 Pa. St. 373)

DOWNES et al. v. McALLISTER.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)
FORCIBLE ENTRY AND DETAINER.—JURISDICTION OF ALDERMAN.

In a proceeding in an alderman's court to obtain possession of land, it appeared that plain-

tiff purchased at sheriff's sale on a judgment against B., obtained a sheriff's deed October 17, 1896, and gave notice on March 12, 1897, under Act June 16, 1836, to defendant, as tenant in possession. Defendant made affidavit that he held only a certain part, designated by him, and that he held such part under one D. After summons, D. made affidavit that he did not claim under the defendant as whose property the same was sold, but by a different title, "to wit, by a deed from S., sheriff," dated March 13, 1897. Held, that the affidavit was sufficient to stay proceedings before the alderman, under Act June 16, 1836, § 115, providing that, if the person under whom a tenant in possession claims to hold makes oath that he believes that he is entitled to the premises, and that he does not claim under the defendant, the justice shall forbear to give judgment.

Appeal from court of common pleas, Allegheny county.

Proceeding by James McAllister against Frank Downs to obtain possession of land, commenced in an alderman's court. Pending the action in such court, H. F. Doris became a party defendant. There was a judgment in favor of plaintiff, and defendants removed the case, on error, to the court of common pleas. From a judgment reversing the judgment of the alderman, and awarding restitution, plaintiff appeals. Affirmed.

On August 4, 1896, James McAllister, the appellant, purchased at sheriff's sale certain property in the Twentieth ward, Pittsburg, Pa. (the same having been sold as the property of Daniel Boyle), which deed was duly acknowledged October 17, 1896, and recorded the same day. On March 12, 1897, the appellant served a notice, under the act of June 16, 1836, on Frank Downs, tenant in possession, to deliver up the premises at the end of three months. At the expiration of the time, proceedings were instituted before John Groetzinger, alderman in and for the county of Allegheny, to gain possession of the premises. On the day set for the hearing, Frank Downs made an affidavit, under the act of June 16, 1836, that he did not hold possession of the whole of the premises, but only a certain portion; that he did not hold the same under the defendant in the execution, but under one H. F. Doris. The alderman issued a summons to H. F. Doris, who appeared and made an affidavit that he did not hold the same under the defendant in the execution, but by a different title, viz. a deed from Harvey A. Lowry, sheriff of Allegheny county (setting out the place of record, etc., and showing its date to be March 13, 1897, which was subsequent to the notice given to the tenant in possession), and also offered a recognizance. The alderman was of the opinion that the affidavit was not sufficient to cause the same to be certified to the common pleas court. Upon hearing, the alderman and jury found that the appellant was entitled to possession of the property, as against the parties claimant, and a writ of possession was duly issued and executed. The appellees on July 1, 1897, caused a writ of certiorari to be issued; and, upon exceptions to the record, the judgment of the alderman was reversed, and restitution was awarded.

The act of June 16, 1836, § 115 (Purd. Dig. pp. 859, 860), is as follows: "If the person in possession of the premises shall make oath or affirmation before the justices that he does not hold the same under said defendant, but under some other person, whom he shall name, the said justices shall forthwith issue a summons to such person, requiring him to appear before them, at a certain time therein named, not exceeding thirty days thence following, and if, at such time, the said person shall appear and make oath, or affirmation, that he verily believes that he is legally entitled to the premises in dispute, and that he does not claim under the said defendant, but by a different title, or that he claims under the said defendant by title derived before the judgment aforesaid, and shall enter into a recognizance with sureties, as aforesaid, in such case, also, the justice shall forbear to give judgment."

The opinion on the exceptions to the alderman's record is as follows (Shafer, A. J.): "Upon a judgment against Daniel Boyle, James McAllister, the defendant in error, sold the land described in the proceedings, and purchased the same from the sheriff, and having obtained a sheriff's deed on October 17, 1896, gave notice on March 12, 1897, under the act of June 16, 1836, to Frank Downs, as tenant in possession. On March 13, 1897, the sheriff acknowledged a deed for the same property to H. F. Doris. After the expiration of three months, these proceedings were instituted by McAllister. They are admittedly regular, up to the appearance of Downs, who made affidavit that he did not hold all the premises, but only a certain part, which he designated, and that he held that part under H. F. Doris, and not under Boyle. A summons was then duly issued to Doris, as required by the act. He appeared, and made affidavit that he did not claim the same by, from, or under the defendant as whose property the same was sold, but by a different title, 'to wit, by a deed from Harvey A. Lowry, Esq., sheriff'; setting out the place of record, etc., and showing its date to be March 13, 1897. It does not appear from the affidavit that the land was conveyed to him by a sheriff's deed founded on a judgment against Boyle, nor whose interest was conveyed to him by the deed. The alderman, however, allowed the deed to be put in evidence before him by the petitioner, and it thereupon appeared to be a deed for the interest of Boyle in the land. If Doris had confined himself to the terms of the act, without specifying his title, there would be no question that it was error in the justice to proceed. *Hawk v. Stouch*, 5 Serg. & R. 159. There is nothing in the affidavit itself which contradicts the general allegation that he does not hold under the defendant; and it was held in *Hawk v. Stouch*, supra, that, after affidavits taken in the terms of the act, the justice could not go further into the inquiry, either by the cross-examination of witnesses, or on the testimony. But we are not satisfied that one who purchases land from the sheriff can be properly

said to claim the same by, from, or under the defendant, in the sense of the act; and, where there are two or more sheriff's sales of the property, it may well be that the second sale conveys the better title, by reason of the priority of the lien on which it was founded, or for other reasons. It certainly was never intended that such questions should be tried by justices of the peace. We are of opinion that the affidavit of Doris was sufficient to stay the proceedings, because it conformed to the terms of the act, and nothing to the contrary appeared on its face; and, further, because, even if the magistrate had a right to inquire further, and to discover that Doris claimed by a subsequent sheriff's sale of the defendant's land, that would not destroy the effect of his affidavit. The first assignment of error must be sustained. The others, except so far as they cover the same ground as the first, are dismissed. And now, September 13, 1897, the judgment of the alderman herein is reversed, and restitution awarded."

The assignments of error are as follows: "(1) The court erred in sustaining the first assignment of error of the plaintiffs in error, which was as follows: 'Plaintiffs in error having filed affidavit, and tendered bond, and performed every matter and thing as required by the act of assembly of June 16, 1836, the jurisdiction, ipso facto, was ousted, and it was error to proceed and determine said action upon its merits.' (2) The court erred in making the order of September 13, 1897, which order was as follows: 'And now, to wit, September 13, 1897, the judgment of the alderman herein is reversed, and restitution awarded.'"

A. N. Hunter, for appellant. L. O. Barton, for appellees.

PER CURIAM. We find no error in this record. For the reasons given by the learned judge of the common pleas, the judgment of that court should not be disturbed. Judgment affirmed, and record remitted.

(184 Pa. St. 435)

CITY OF ERIE v. GRISWOLD.

(Supreme Court of Pennsylvania. Jan. 24. 1898.)

PAVING—DISTRIBUTION OF COST—ORDINANCES—REPEAL—CONSTITUTIONAL LAW.

1. An ordinance providing that in the assessing of taxes on lots fronting on a street which shall be paved at expense of the owners of property fronting thereon, under an ordinance, an annual abatement on all lots fronting on the improved part shall be made in city taxes of 5 per cent. of the cost for 10 years, is not repealed by a later ordinance providing for paving of a street and assessment of the cost on the abutting property.

2. An ordinance providing that, where cost of street paving is paid by owners of the abutting property, an abatement of 5 per cent. thereof shall be made yearly for 10 years in the city taxes on said property, is within the authority conferred on the city by Act May 9, 1871 (P. L. 630), to exonerate from city taxes, so far as

it may see fit, property fronting on a street which shall have been previously paved at the expense of such property owners.

3. Act May 9, 1871 (P. L. 630), authorizing a city having power to pave streets at the expense of the city or of abutting property owners, or partly at the expense of each, to exonerate from city taxes, so far as it may see fit, property fronting on a street which shall have been previously paved at the expense of such property owners, does not, so far as it authorizes an abatement of the city tax equivalent to a portion of the assessment, contravene the provisions of Const. art. 9, §§ 1, 2, requiring uniformity of taxation, and forbidding laws exempting property from taxation.

4. An ordinance providing that thereafter no abatement of city taxes shall be allowed on a lot by reason of its fronting on a street paved at the expense of the owners of abutting property, can have no effect, so far as concerns the vested rights of one who owns a lot abutting on a street paved under ordinances imposing the cost in the first instance on the abutting lots, but providing that, to the extent of 50 per cent. of such cost, there shall be an abatement of city taxes on the lots.

Appeal from superior court, Erie county.

Action by the city of Erie against M. Griswold. Judgment for defendant was affirmed by the superior court, and plaintiff again appeals. Affirmed.

The agreed facts, the ordinance of October 5, 1892, and the opinion of the superior court are as follows:

Case Stated.

"And now, to wit, March 15, 1897, it is hereby agreed by and between the parties to the above suit that the following case be stated for the opinion of the court in the nature of a special verdict, to wit:

"First. That the city of Erie, the plaintiff in this case, was duly incorporated by an act of assembly of the commonwealth of Pennsylvania approved April 14, 1851 (P. L. 631), and is now governed by the said act and those supplementary thereto and amendatory thereof.

"Second. That in March, 1878, the city of Erie duly accepted the provisions of the act of assembly entitled 'An act dividing cities of this commonwealth into three classes, regulating the passage of ordinances, providing for contracts for supplies,' etc., approved May 23, 1874 (P. L. 230), and the supplements thereto, and is now a city of the third class under the laws of this commonwealth.

"Third. That by an act of assembly approved May 9, 1871, entitled 'A further supplement to an act to incorporate the city of Erie' (P. L. 630), it was provided as follows: 'It shall be lawful hereafter for the mayor and councils of said city in the levy and assessment of taxes laid or imposed on any lots or lands in said city to discriminate between property fronting on or adjacent to any street or streets which shall have been previously paved in whole or in part, at the expense of the owner or owners thereof, and said mayor and councils shall have power to wholly or in part exonerate any lot or property so fronting on or adjacent to any

street wholly or in part so paved from the payment of all or of so much city tax as they may deem proper.'

"Fourth. That by an ordinance approved April 1, 1890, duly passed by the municipal authorities of the city of Erie, it was provided as follows:

"(1) That in the levy and assessment of taxes upon any lot or lots fronting on a street or streets which shall be hereafter paved from curb to curb, at the expense of the owners of property fronting thereon, under and by virtue of any ordinance or ordinances of the city of Erie, an annual abatement on all lots fronting on the improved part of such street or streets shall be made in city taxes of five per centum of the cost of the pavement per foot lineal, for the term of ten years, and thereafter said abatement shall cease and determine: provided, that in no case shall the amount of said abatement in any one year exceed three-fourths of the city tax levied on any one lot fronting on any street paved or to be paved: and provided further, that if in estimating the abatement there shall be a fractional part of a cent per foot, the amount of fractional parts for the whole term shall be added to the abatement of the first year, and disallowed for the remainder of the time.

"(2) As to streets already paved, the abatement shall remain as now provided by ordinance until such time as said abatement shall amount to fifty per centum of the cost of said improvement, and thereafter said abatement shall be disallowed: provided, that in all cases where any street or streets has or have been repaved, said abatement shall immediately cease; and in all cases where streets shall be hereafter repaved all abatements thereon shall thereafter immediately cease.'

"Fifth. That in the summer of 1892 a majority of the owners of real estate fronting on Tenth street, in the city of Erie, between Peach street and Cherry street, petitioned councils of the city of Erie to improve Tenth street between the points aforesaid by grading, curbing, and paving said street with vitrified brick; the defendant in this case being an owner of property fronting on said street between the points aforesaid, and being one of the petitioners for the pavement in question.

"Sixth. That the municipal authorities of the said city of Erie, in pursuance of said petition, by an ordinance duly passed, and approved October 5, 1892, provided for the paving of said street, as requested by said petitioners, and thereafter, to wit, in the year 1893, the city of Erie caused the said street to be paved from curb to curb between the points aforesaid, in pursuance of said petition and ordinance, and assessed the property of said defendant fronting upon said street with the sum of \$5,542.50, the said sum being the proper proportionate amount of the costs of said pavement duly

assessable thereto; and the said assessment was duly paid by the said defendant.

"Seventh. That in pursuance of the provisions of the ordinance of April 1, 1880, the said plaintiff, in levying the taxes for the years 1894 and 1895, deducted from the amount of taxes so levied upon said land by the said city paying, abatements as required by the provisions of said ordinance, and collected from said defendant the amount of the said taxes remaining after allowing the abatement as aforesaid.

"Eighth. That the city of Erie passed an ordinance, duly approved September 16, 1895, which is as follows, to wit:

"An ordinance abolishing abatement of taxes allowed on lots fronting on paved streets.

"Be it ordained and enacted by the select and common councils of the city of Erie, and it is hereby ordained and enacted by the authority of the same:

"Section 1. That from and after the first Monday of January, A. D. 1896, no abatement of city taxes shall be allowed on any lot or lots by reason of the fact that said lot or lots front upon any street which has been or may hereafter be paved at the expense of the owners of property abutting thereon.

"Sec. 2. That any ordinance, or part thereof, conflicting herewith, be, and the same is hereby, repealed."

"Ninth. That for the fiscal year commencing the first Monday of April, 1896, the city of Erie levied a tax upon the property of the said defendant, situate in the Third ward of the city of Erie, amounting to \$1,271.21. That of the property upon which the tax aforesaid was assessed there were lots fronting upon that part of Tenth street paved by the city of Erie in the year 1893, as aforesaid, on which the paving abatement for the year 1896, if the same had been allowed under the provisions of the ordinance of April 1, 1880, would have amounted to the sum of \$236.77, and said amount did not exceed three-fourths of the city tax levied on said property for that year.

"Tenth. That the said defendant, on August 31, 1896, paid all taxes assessed upon lands fronting on Tenth street between the points paved as aforesaid, except the sum of \$236.77, which said sum the said defendant refused to pay.

"Eleventh. It is furthermore agreed that all acts of assembly affecting the city of Erie, and all ordinances relating to paving abatements passed by said city of Erie at any time, and the ordinances relating to the paving of Tenth street, and proceedings of councils thereon, shall be considered as a part of this case stated, and treated with like force and effect as if set forth herein at length.

"If the court shall be of the opinion that the defendant is entitled to a rebate of \$236.77

in his city taxes for the fiscal year beginning on the first Monday of April, 1896, then judgment is to be entered in favor of the defendant; but, if the court shall be of the opinion that the defendant is not entitled to said rebate, then judgment is to be entered for the plaintiff for the sum of \$255.71, which amount includes interest and penalties to the 1st day of March, 1897. Each party reserves the right to sue out writ of error, certiorari or appeal from the judgment of the court in such manner as the law directs."

Ordinance of October 5, 1892.

"An ordinance providing for the grading, curbing, and paving of Tenth street from the west line of Peach street to the east line of Cherry street, providing for the assessment and collection of the costs thereof, and making an appropriation therefor.

"Whereas, a majority of the owners of real estate fronting or Tenth street, in the city of Erie, between Peach street and Cherry street, have petitioned councils for the improvement of said Tenth street between the points aforesaid by grading, curbing, and paving said Tenth street, and the public welfare requiring such improvement: therefore be it ordained and enacted by the select and common councils of the city of Erie, and it is hereby ordained and enacted by the authority of the same:

"Section 1. That Tenth street, from the west line of Peach street to the east line of Cherry street, be improved between the points aforesaid by being graded, curbed, and paved; said street to be paved with vitrified brick, upon a suitable foundation of sand and gravel, from curb to curb; the said curbing to be of stone, of such dimensions as may be directed in the specifications for said work; the work to be done under the superintendence of the city engineer and the street committee of councils.

"Sec. 2. It shall be the duty of the city engineer to advertise in at least two newspapers published in the city of Erie, for one week, for sealed proposals for the construction of said improvements, and the furnishing of all necessary material therefor, and the said city engineer shall draw up, and, simultaneously with said advertisement, exhibit in his office, full specifications of the plans for the manner of constructing said pavement, of the material to be used therefor, and when said work shall be commenced and completed, and all other necessary information. He shall give notice in said specifications that the contractor shall collect the cost of paving said street, except street intersections, public alleys, school and church property, other than that held for parsonage purposes, from the property owners whose land front on part of the street improvement; and that the said city of Erie shall, under no circumstances, be held responsible for the payment of any part of the cost of such improvement, except as to amounts

actually received from such owners for said contractor, and for street intersections, public alleys, school and church property.

"Sec. 3. The contract for said work shall be let to the lowest responsible bidder, who shall furnish satisfactory security for the due performance of the work, and shall be executed on behalf of the city by the mayor thereof. Councils reserve the right to reject all bids.

"Sec. 4. That said work shall be done under the supervision of the city engineer, and, as soon as the work is completed, the city engineer shall proceed to assess the costs thereof, as hereinafter provided, and shall report to councils a statement of assessments, showing the amount each property holder will be liable to pay for the same. After said assessments have been approved by councils, a warrant shall be drawn in favor of the contractor for such amount, if any, as shall have been paid into the city treasury by the property owners to apply on the cost of such improvement, and the cost of street intersections, public alleys, school and church property, other than that held for parsonages; and so much of the assessments in amount shall be assigned by the city solicitor to the contractor as is requisite to pay the contractor the balance due; and the party receiving the contract is hereby authorized to file liens in the name of the city of Erie for the use of such contractor, for the purpose of collecting unpaid assessments.

"Sec. 5. The cost of grading, curbing, and paving said street shall be assessed by the frontage rule upon the real estate on both sides of said street between the points improved, and shall be payable as follows: Within fifteen days after the assessment therefor has been approved by councils.

"Sec. 6. That the sum of thirty-five thousand six hundred and fifty dollars (\$36,650.00) from the moneys derived upon the assessments above provided for be, and is hereby, appropriated to defray the cost of said improvement.

"Sec. 7. All ordinances, or parts thereof, conflicting with the above, are hereby repealed."

Opinion of the Superior Court (Rice, P. J.).

"The proposition that the ordinance of April 1, 1880, was repealed by the paving ordinance of October 5, 1892, cannot be sustained. They are in pari materia, and are to be construed together. The latter ordinance created the condition to which the earlier general ordinance became applicable. Thus viewed there is no conflict between them. Applying the well-settled principles governing the construction of statutes and ordinances which are in pari materia, the paving ordinance is to be construed as if it contained an express provision that the owners of property abutting on the improvement, and paying assessments thereon, should be entitled to an annual abatement of city taxes on said property of five per centum of the cost of the pavement per lineal

foot for the term of ten years. This provision was fairly within the authority conferred by the local act of May 9, 1871 (P. L. 630), and is not in conflict with any provision, that has been called to our attention, of the acts of 1874 or 1880, regulating the making of such improvements in cities of the third class. Pursuing the same line of thought, the learned judge below says: 'The city proceeded, under the authority of the petition, to pass an ordinance for paving the street, and the existing ordinance, applicable to all such cases, must be read into this special provision for the particular case. So read, the enactment substantially is that the pavement shall be paid for, in the first instance, by the owners of lots, and that the owners shall receive back again 50 per centum of the amount so paid, by way of annual abatement of taxes. This amounts to a promise on the part of the city, for which the defendant has given a sufficient consideration by signing the petition, and by paying his assessment of the costs of the improvement.' But it is argued that the act of 1871 was abrogated by the provisions of sections 1 and 2 of article 9 of the constitution. It is undoubtedly true that it confers powers which could not be exercised to the fullest extent by councils without coming in conflict with the constitutional provisions with reference to uniformity of taxation and exemption from taxation, and to that extent it was modified, and its operative force is restrained, by the latter; but it does not necessarily follow that it was wholly repealed, so as to prevent the exercise of powers conferred by it not inconsistent with the provisions of the fundamental law. The question, then, arises whether an act authorizing a city having power to pave streets at the expense of the city or of the abutting property owners, or partly at the expense of the city and partly at the expense of the abutters, to allow the latter an abatement of their general city taxes on the same property equivalent to a portion of the assessment for the improvements is in conflict with the constitutional provisions under consideration. We are justified in saying that this is the main question in the case, for it is very clear that the city of Erie had this power, unless it was taken away by the constitution. We are of opinion that such a law neither offends against the constitutional provision requiring uniformity of taxation nor against that forbidding the enactment of laws exempting property from taxation. When, in the exercise of the discretion of the municipal authorities, a local improvement has been determined upon, and it has also been determined that it would be just to make the city and the abutters bear the expense proportionately, every dollar which one of the latter pays in the first instance beyond his due proportion is in relief of the city, and goes to the benefit of the other taxpayers. A law which, in its practical operation, permits him to apply this overpayment in discharge of the general taxes against the same property,

manifestly tends to produce uniformity and equality of taxation, rather than the contrary. For the same reason it is not an act exempting property from taxation. It simply provides a mode for equalizing the burdens of taxation, and making each citizen bear his due proportion.

"The remaining question is as to the effect of the repealing ordinance of September 16, 1895, upon the rights of persons who paid the paving assessments against their properties. The authorized body of a municipal corporation, acting within the scope of its powers, may bind it by an ordinance which, in favor of private persons interested therein, may, if so intended, operate as a contract. 1 Dill. Mun. Corp. pars. 450, 474, citing *Western Saving Fund Soc. v. City of Philadelphia*, 31 Pa. St. 175, 185. A repeal of a valid ordinance of this nature, and thus intended to operate as a contract, cannot operate retrospectively to impair private rights vested under it. 1 Dill. Mun. Corp. pars. 314, 450. As the learned judge below well says: 'A municipality, although vested with legislative powers, is competent to contract, and amenable to judicial coercion, and it cannot legislate away its agreements.' It is to be observed that the paving ordinance was passed pursuant to a petition of the abutting property owners. This petition enabled the city councils to pass the ordinance by a vote of a majority of all the members elected, whereas, without petition, a two-thirds vote of all the members would have been necessary. Presumably, the property owners had in view the ordinance of 1880, and were influenced by it in petitioning for or refraining from opposing the paving ordinance. It was in the nature of an inducement held out to them by the city, a proposition which was accepted. Furthermore (and this is a consideration which applies to the case of all the abutters, whether petitioners or not), it was just as much a part of the plan or scheme under which the pavement was ordained and laid as if the councils had declared in so many words that one-half the cost of the pavement should ultimately be borne by the city. Is it too much to say that the city assumed an obligation which it could not repudiate by a subsequent repeal of the ordinance? We think not. The question as to the power of a municipality to 'contract away' the taxing power delegated to it is not fairly raised in this case. If, as is conceded by the appellant's counsel, the city had authority to lay the pavement partly at the expense of the city and partly at the expense of the abutters, and if we are correct in holding that the paving ordinance and the ordinance of 1880, taken together, are to be construed as an exercise of that power in a lawful, although perhaps roundabout, mode, it would seem to follow as a self-evident proposition that the abutter who performed all that the ordinance required of him acquired a vested right to have the city bear the portion of the burden imposed upon it, which right could not be impaired by a subsequent repeal of that

portion of the ordinance. The purpose and ultimate effect of the ordinance is not to exempt or partially relieve his property from taxation, but to reimburse him out of the taxes levied upon his property to the extent that he has contributed in the first instance to pay the city's share of the cost of the improvement. The city had the power, if the conditions warranted it, to lay the pavement wholly at the expense of the abutters. It also had the power—and we must presume that this was a proper occasion for its exercise—to apportion the cost between the city and the abutters. This was a matter resting in the discretion of the councils ordaining the improvement, and the mode of exercising it was wholly in the city's favor, since thereby the payment of its share of the expense was distributed over a period of years. But, having exercised its discretion, the pavement having been laid, and the assessment having been paid, its power was exhausted. It could not afterwards shift its share of the burden upon the shoulders of the abutters. We concur with the learned judge below in holding that the repealing ordinance is valid, but it cannot affect the vested rights of abutting property owners under the original ordinance.

"Something was said upon the argument as to the creation of a municipal indebtedness beyond the two per cent. limit, but we cannot find that any question of that nature is raised in the case stated. Nor is it alleged that the allowance of the abatement will diminish the annual revenues from ordinary taxation to a point where it will be impossible for the city to provide for its necessary current expenditures. So far as appears, there is nothing to prevent the city from discharging the obligation it assumed in the defendant's favor according to its spirit and intent. Judgment affirmed."

Henry A. Clark, City Sol., and Jos. P. O'Brien, for appellant. Theo. A. Lamb and C. L. Baker, for appellee.

PER CURIAM. We find nothing in the record to justify either reversal or modification of the well-considered judgment of the superior court. Nothing can be profitably added to what has been so well said by the learned president of that court in his clear and exhaustive opinion sent up with the record. On that opinion the judgment is affirmed.

(70 Conn. 306)

TOWN OF BRISTOL v. NEW ENGLAND R. CO.

(Supreme Court of Errors of Connecticut. Jan. 21, 1898.)

RAILROAD CROSSING—CHANGING GRADE—ORDER OF COMMISSIONERS—DENUKER.

1. The record of proceedings by the railroad commissioners to eliminate a grade crossing of a street and a railroad by ordering the construction of a bridge for the railroad over the street is sufficient to authorize abutments encroaching on the street, though not directly in-

dictating what portion of the land within the true limits of the highway is to be covered by the structure; the portion of the surface of the land which the structure is authorized by the order to occupy being precisely indicated by a map (drawn to a scale) locating the structure in accordance with distances from permanent and known monuments, such as the corners of known buildings and the center line of the railroad's then location, and the intention to appropriate part of the street for the structure sufficiently appearing, and the commissioners not being bound to determine the lines of the street.

2. The authority of the railroad commissioners, under Pub. Acts 1889, c. 220, in abating the nuisance of a grade crossing of a street and a railroad, to order the construction of a bridge, includes the power to occupy therefor land occupied by the highway.

3. A town cannot, otherwise than by appeal from the order, raise the question whether a highway is unnecessarily encroached on by a bridge to carry a railroad over the highway as ordered by the railroad commissioners.

4. The reason specified in a demurrer to the answer in a suit to enjoin a structure, that all the allegations of said defense are insufficient to justify the building thereof, is too general.

5. The provision in an order of railroad commissioners relative to a grade crossing of a railroad and M. street, that it be changed by removal of the railroad tracks to a certain point, and that they be carried over the highway on a bridge, "with stone abutments located on the street lines on each side, and with supporting columns on the gutter lines of the street," with approaches not exceeding 9 feet in 100 on the north side of said crossing; and not exceeding 5 feet in 100 on N. M. street, "said alterations and changes being also delineated and shown on two maps on file in this office," does not contradict or render invalid the part of the order contained in the maps which directs in detail the changes to be made in N. M. street, and locates with exactness, within the lines of that street, an abutment to be there built.

6. Where an order of railroad commissioners, set up as a defense, on its face authorizes the structure which the complaint seeks to enjoin, the point that it is insufficient, because not so intended, cannot be raised by demurrer.

Appeal from superior court, Hartford county; Samuel O. Prentice, Judge.

Action by the town of Bristol against the New England Railroad Company to enjoin the construction of the abutment of a railroad bridge so as to encroach on a highway. Demurrers to the answer were overruled, and judgment rendered for defendant. Plaintiff appeals. Affirmed.

The complaint contains two counts, the first being as follows: "(1) Main street and North Main street are highways of the town of Bristol, over which said town has all the rights and duties which by law are vested in towns, as to their public highways. (2) Said streets are the two principal business streets of said town. The travel on both said streets, near and at their junction, is very great, on foot, and in trucks, wagons, bicycles, and other vehicles; and an electric street railway also passes from one street to the other at that corner, at a grade of about five feet to the hundred. (3) The defendant is planning to build a railway bridge over Main street, and an embankment on its land northerly of North

Main street to support its railway tracks; and it intends and threatens to, and will, unless it is restrained by this court, build a stone abutment to support said embankment within the limits of said North Main street, and so as to encroach upon said street, and occupy a strip thereof about forty feet long, about four and a half feet in width at the corner, and about six feet in width at the widest point, as shown by a map of said proposed encroachment, hereto annexed. (4) Said encroachment will greatly obstruct and inconvenience the travel on said highway, and, in addition thereto, it will, by cutting off the view of each street from travelers approaching the corner upon the other street, make said corner very dangerous, because of the likelihood of collision between wagons and other vehicles, tramway cars, and foot passengers approaching said corner on the two streets. Such danger will be especially great because of the proposed operation of said railway across said bridge over Main street, and nearly parallel to, and very near the line of, North Main street, whereby horses will be liable to be frightened and become uncontrollable at and near said corner, by the sound and sight of passing railway trains. The plaintiff claims an injunction to restrain the defendant from building any abutment or other structure within the lines of North Main street, or in any way encroaching thereon." The second count alleges: "Paragraphs 1 and 2 of the first count are made similarly numbered paragraphs of this count. (3) The defendant is planning to build a railway bridge over Main street, and an embankment, wholly or in part on its land on the north side of North Main street, to support its railway tracks; and it intends and threatens to, and will, unless it is restrained by this court, build a stone abutment, or other structure, to support said embankment, within the limits of said North Main street, and so as to encroach upon said street, and occupy a portion thereof about twenty-one feet long, about eleven feet in width at the corner, and about fourteen feet in width at the widest point. (4) Paragraph 4 of the first count is made paragraph 4 of this count." The defendant's answer to both counts is the same, and contains two defenses. "First Defense. (1) The defendant admits that Main street and North Main street are highways of the town of Bristol, and that the defendant is planning to build a bridge to carry its railway over the highway at the corner of Main and North Main streets, including, as a necessary part of said bridge, a stone wall or abutment to support it. (2) As to the other allegations of the plaintiff's complaint, the defendant has not sufficient knowledge to form a belief, and leaves the plaintiff to its proof thereof. Second Defense. On the 2d day of March, 1891, the railroad commissioners of the state of Connecticut duly made, after full hearing of all parties in interest, including the plaintiff in this action, an order, a copy of which is hereto annexed, as Exhibit 1. A copy of each of

the maps described in said order as delineating the alterations and changes ordered is also filed herewith, one to be marked 'Exhibit 2,' and the other to be marked 'Exhibit 3.' The said order of the railroad commissioners was, upon appeal, affirmed by a decree of this court, July 29, 1892. (3) The defendant, at the time when this action was brought, planned and intended, and has ever since planned and intended, to build the embankment and stone abutment referred to in the complaint, and alleged to be within the limits of North Main street, in exact accordance with the said order of the railroad commissioners affirmed by this court, and with said maps delineating the changes and alterations ordered."

Exhibit 1 is as follows: "State of Connecticut, Office of the Railroad Commissioners. Hartford, March 2d, 1891. Be it remembered that on the 2d day of September, 1890, the following order for hearing and of notice was by us made in regard to the removal of the grade crossing of the New York & New England Railroad, and the highway known as 'Main Street,' in the town of Bristol, viz.: 'State of Connecticut, Office of the Railroad Commissioners. Hartford, September 2d, 1890. Whereas, the directors of the New York & New England Railroad Company failed to remove or apply for the removal during the year ending August 1st, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and whereas, in our opinion, said directors should have applied for the removal of the grade crossing of their road and the highway known as "Main Street," in the town of Bristol: Therefore, be it ordered that a hearing be had at the passenger station of said company in said Bristol on Wednesday, the 24th day of September, 1890, at 9 o'clock a. m., as to what alterations, changes, or removals, if any, shall be made at said crossing, and by whom done, and that notice thereof be given to the selectmen of said town, to said company, and to the owners of the land adjoining said crossing, and adjoining that portion of said highway to be changed in grade, by George T. Utley, by depositing in the post office in Hartford, postage paid, true and attested copies of this order, on or before the 6th day of September, instant, addressed one to each of the following named parties, viz.: The selectmen, Bristol, Conn.; James W. Perkins, secretary N. Y. & N. E. R. R. Co., Boston, Mass.; Henry W. Gridley, the Bristol National Bank, Samantha Churchill, John B. Churchill, Augusta Churchill, the Society of Trinity Church, the Bristol Savings Bank, C. H. Riggs, F. H. Williams, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachael Nott, Charles E. Nott, Julius R. Mitchell, and Drusilla Mitchell, all of Bristol, Conn. Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners.' And on the 24th day of September we met at the time and place named

in said order, when it appeared, and we do find, that said order of notice had been duly complied with, and that reasonable notice of said hearing had been given to said railroad company, to the municipality in which said crossing is situated, and to the owners of the land adjoining such crossing, and adjoining that part of the highway to be changed in grade; and all of said parties appeared, and were heard in part, and the further hearing was by agreement adjourned until the 25th of November, 1891, at the town hall in said Bristol, where said parties again appeared and were heard. And the further hearing on said matter was from time to time adjourned until the 11th day of February, instant, at this office, at 2 o'clock p. m.; and on the 3d day of February, instant, a further order of notice was by us issued as follows, viz.: 'State of Connecticut, Office of the Railroad Commissioners. Hartford, February 3d, 1891. Whereas, the undersigned railroad commissioners of Connecticut on the 2d day of September, 1890, issued their order as follows, viz.: "State of Connecticut, Office of the Railroad Commissioners. Hartford, September 2d, 1890. Whereas, the directors of the New York & New England Railroad Company failed to remove or apply for the removal during the year ending August 1st, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and, whereas, in our opinion, said directors should have applied for the removal of the grade crossing of their road and the highway known as 'Main Street,' in the town of Bristol: Therefore, it is ordered that a hearing be had at the passenger station of said company in said Bristol on Wednesday, the 24th day of September, 1890, at 9 o'clock a. m., as to what alterations, changes, or removals, if any, shall be made at said crossing, and by whom done, and that notice thereof be given to the selectmen of said town, to said company, and to the owners of the land adjoining said crossing, and adjoining that portion of said highway to be changed in grade, by Geo. T. Utley, by depositing in the post office in Hartford, postage paid, true and attested copies of this order, on or before the 6th day of September, instant, addressed one to each of the following named parties, viz.: The selectmen, Bristol, Conn.; James W. Perkins, secretary N. Y. & N. E. R. R. Co., Boston, Mass.; Henry W. Gridley, the Bristol National Bank, Samantha Churchill, John B. Churchill, Augusta Churchill, the Society of Trinity Church, the Bristol Savings Bank, C. H. Riggs, F. H. Williams, Sarah C. Richards, A. H. Frinck, William Linstead, Henry A. Seymour, Rachael Nott, Julius R. Mitchell, and Drusilla Mitchell. Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners.'" And the hearing in said matter having been adjourned from time to time till the 11th day of February, 1891, at 2 o'clock p. m., at our office in Hartford: Therefore,

ordered, that notice of said adjourned hearing be given by Geo. T. Utley, by depositing in the post office at Hartford true and attested copies of said original order and of this order, addressed to each of the parties named in said order of September 2d, 1890, on or before the 5th day of February, instant. Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners.' And pursuant to said adjournment and notice we met at said last-named time and place, when said parties again appeared, and were fully and finally heard. And now, after such notices and hearings, we, being of opinion that the financial condition of the said New York & New England Railroad Company will warrant such order, and that public safety requires the same, do hereby order such crossing removed, and do determine and order that the following alterations, changes, and removals be made and done, to wit.: That the method of crossing be altered so that said highway, instead of crossing said tracks at grade, as at present, be carried under said tracks, and, for that purpose, that the location of the said crossing be changed by the removal of said tracks from their present location to a point about eighty feet southerly therefrom; the same being carried over said highway on a double-track iron bridge, with not less than twelve feet clear head room, with stone abutments located upon the street lines upon each side, and with supporting columns upon the latter lines of the street (said street being excavated so much as may be necessary to give said head room), with approaches not exceeding nine feet in a hundred on the north side of said crossing, and level upon the south side, and not exceeding five feet in a hundred on North Main street, and four feet in a hundred on Prospect street; said alterations and changes being also delineated and shown on two maps on file in this office, one marked: 'N. Y. & N. E. R. R. Proposed Undercrossing of Main Street, Bristol, Conn. Scale, 50 feet to one inch. Chief Engineer's Office. Boston, February 10th, 1891. L. B. Bidwell, Chief Engineer.' And the other marked: 'Proposed Change of Main Street Crossing, Bristol, Conn. Scale, 40 feet to one inch. Boston, February 10th, 1891. L. B. Bidwell, Chief Engineer.' All of said alterations, changes, and removals to be made and done by said railroad company, and the expense thereof, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highways shall sustain by reason of any change in the grade of such highways in consequence of any change, alteration, or removal above ordered, to be paid by said railroad company. Geo. M. Woodruff, W. H. Hayward, Wm. O. Seymour, Railroad Commissioners."

The plaintiff demurred to the second defense in each count. The demurrer to the second defense in the first count is as fol-

lows: "(1) All the allegations of said defense, taken together, are insufficient in law to justify the building of an embankment and abutment within the limits of said North Main street in the manner described in the complaint. (2) The order of the railroad commissioners referred to in paragraph 1 of said defense, and affirmed as alleged in paragraph 2 thereof, and the maps and exhibits 2 and 3, referred to in paragraph 1 as delineating the alterations and changes ordered, do not authorize any encroachment on said North Main street by an embankment to support the railway tracks of the defendant, or by a stone abutment to support said embankment. (3) The plan and intention of the defendant to build the embankment and stone abutment referred to in the complaint, and alleged to be within the limits of said North Main street, in exact accordance with the said order of the railroad commissioners affirmed by this court, and with said maps delineating the changes and alterations ordered as set forth in paragraph 8 of said defense as amended, is not authorized or justified, in so far as said plan or intention of the defendant involves any encroachment on said North Main street by an embankment or abutment. (4) Said order of the railroad commissioners, with the maps therein referred to, do not authorize any encroachment on North Main street for the purpose of locating, building, or maintaining the stone abutments referred to and described in said order." The demurrer to the second defense in the second count is as follows: "(1) All the allegations of said defense, taken together, are insufficient in law to justify the building of an embankment and abutment within the limits of said North Main street in the manner described in said second count. (2) The order of the railroad commissioners referred to in paragraph 1 of said defense, and affirmed as alleged in paragraph 2 thereof, and the maps and exhibits 2 and 3 referred to in paragraph 1 as delineating the alterations and changes ordered, do not authorize an encroachment on said North Main street as described in said second count of the complaint, by an embankment to support the railway tracks of the defendant, or by a stone abutment or other structure to support said embankment. (3) The plan and intention of the defendant to build the embankment and stone abutment referred to in said second count of the complaint, and alleged to be within the limits of said North Main street, in exact accordance with the said order of the railroad commissioners affirmed by this court, and the said maps delineating the changes and alterations ordered as set forth in paragraph 3 in said defense, is not authorized or justified, in so far as said plan or intention of the defendant involves any encroachment on said North Main street by an embankment, abutment, or other structure. (4) Said order of the railroad commissioners, with the maps therein referred to, do not authorize any encroachment on North

Main street for the purpose of locating, building, or maintaining the stone abutment referred to and described in said order."

Frank L. Hungerford and Epaphroditus Peck, for appellant. Edward D. Robbins, for appellee.

HAMERSLEY, J. The complaint alleges that the defendant intends to build a bridge for carrying its railroad tracks over Main street at the corner of that street and North Main street (they being highways within the limits of the town of Bristol), and threatens to build a stone abutment in connection with said bridge, so as to encroach upon North Main street, and occupy a strip thereof, as shown by the annexed map, marked "Exhibit A," and claims an injunction restraining the defendant from building any structure within the limits of North Main street. Exhibit A is a map (drawn to a scale) purporting to be a fac simile of the defendant's plan and profiles for the abolition of the Main street grade crossing at Bristol, prepared and signed by its chief engineer. The right of the plaintiff to ask an injunction arises from the duties imposed upon it by law, as the agent of the state in the maintenance and care of these highways; and the defendant, in its second defense, sets up the paramount authority of the state, exercised through an order of the railroad commissioners, appropriating this portion of the highway as necessary for the abolition of a public nuisance endangering the lives of its citizens who use the highways. The answer contains a first defense, in which each allegation of the complaint is either denied or admitted, and a second defense, which purports to allege extrinsic facts sufficient, if proved, to defeat the plaintiff's action, admitting for the purposes of the defense the facts stated in the complaint. The allegations of the defense are: (1) The existence of an order by the railroad commissioners directing the defendant to remove its present grade crossing of Main street, and for that purpose changing the location of said crossing to a point 80 feet southerly, at the corner of Main and North Main streets, and directing the defendant to there build over Main street, and adjoining North Main street, a bridge, with a wing or supporting abutment, whose location is definitely fixed by the maps which are a part of the order. (2) The structure which the defendant threatens to build, as alleged in the complaint, and shown on the maps contained in the complaint, is in exact accordance with the command of the commissioners contained in the order, and the maps, which are a part thereof. If these allegations of fact are denied and proved, a complete defense to the action is established. Instead of replying, by denial or otherwise, to the defense, the plaintiff has demurred; and the action of the court in overruling that demurrer is the only error assigned in this appeal.

Before dealing directly with the demurrer, we consider what seems to be the plaintiff's conception of the fundamental defect claimed to be apparent in the second defense. It is this: An inspection of the record of the proceedings of the commissioners does not clearly indicate what portion, if any, of the land within the true limits of the highway, is to be covered by the structure authorized. This claim is true, but it must be distinguished from a claim confounded with it,—that the record does not precisely indicate that portion of the surface of the land which the structure authorized is to occupy. The latter claim is not true. A map (drawn to a scale) locating the structure in accordance with distances from permanent and known monuments describes its actual location as precisely as is possible. Such is the character of the map in question. It purports to denote corners of permanent buildings, and the center line of the appellee's present location, fixed by public authority, and made a matter of public record. It is unnecessary that a map of a projected structure, of the nature of that which was the subject of the order of the railroad commissioners, should be so drawn as to describe every possible monument in the vicinity of its site. It is enough if it describes such, and so many, that, when received upon the ground, and in relation to the ground, a competent surveyor can ascertain the points at which to set his stakes. The presumption is that the board of railroad commissioners, one of whose members the law requires to be a civil engineer, has made no order for the construction of a public work which cannot be precisely executed. On demurrer, the answer which set forth such an order was entitled to the support of that presumption. The exact position of the land to be occupied being thus sufficiently shown, any statement in the order of the precise point where the actual line of North Main street crosses this land is immaterial to the sufficiency of the defense. The commissioners are dealing with the abatement of a nuisance. Their authority to order such construction of a bridge as is necessary to most thoroughly abate that nuisance is complete, including the power to occupy land covered by a highway. They have no authority to determine the disputed lines of a highway, and were not bound to do so in making the order. The defense set up is complete, whether the land the defendant is ordered to occupy is covered to the extent of 1 foot or of 20 feet by the easement of a highway. If the plaintiff, as guardian of that highway, thought its limits were unnecessarily encroached upon, it was its duty to appeal from the order. The legal exercise of discretion by the commissioners cannot be challenged in any other way.

But in this connection the plaintiff claims that the record does not clearly show that the commissioners intended that any portion of the highway should be occupied. We think the record does clearly show that the commission-

ers made this location with full understanding that the land occupied might be, and probably was, within the limits of this highway. Assuming that there must be an intention to appropriate the portion of the highway within the limits of the land designated, we think that intention sufficiently appears on the face of the record, which includes the order expressed in writing and in maps. The commissioners apparently decided that the structure described, covering the land defined, is necessary to the abatement of the nuisance, notwithstanding a portion of the land defined may be covered by the adjoining highway, and ordered the defendant to build that structure. This they had the power to do, and were not bound to first adjudicate the legal limits of that highway, and then, in addition to the limitation of the use of the highway necessarily involved in the location of the structure ordered, to formally condemn or discontinue as a highway a precise number of square feet. The decision made, and the structure ordered, were a sufficient appropriation for that purpose of such portion of the highway as actually covered land designated. It follows that when the defendant alleges the existence of this order, and that the structure it threatens to build as alleged in the complaint is in exact accordance with the order, it sets up a complete and valid defense, consistent with the truth of the essential allegations of the complaint; it alleges facts, and not conclusions of law; it assumes the whole burden of proof properly belonging to it (i. e. the burden of proving the existence of the order, and of proving the identity of the structure it has threatened to build, as alleged in the complaint, with the structure it has been ordered to build); and it does not, as claimed by the plaintiff, allege facts that in any event can be held equivalent to a general denial, for it admits the allegation material to the plaintiff's case, that the threatened structure is within the limits of the highway. And if the defendant fails to establish by proof the existence of the order, and the identity of the structures, the admission of this fact entitles the plaintiff to judgment. If, on the other hand, the defendant does prove the facts it has alleged, then the fact admitted, material to the plaintiff's case, becomes immaterial to the case the defendant has established, and whether the fact so admitted is in reality a fact or not cannot affect the defendant's right to a judgment. "All demurrers must distinctly specify the reasons why the pleading demurred to is insufficient." Gen. St. § 873. Reasons for claiming the insufficiency of the second defense, not specified in the demurrer, do not demand discussion. The plaintiff is not entitled to a reversal of the judgment because the trial court did not sustain the demurrer for reasons not specified. The first reason stated in the demurrer is too general to have any force. It is claimed under the fourth reason that the clause in the written portion of the order directing the building of a bridge over Main

street, "with not less than twelve feet clear head room, with stone abutments located upon the street lines upon each side, and with supporting columns upon the gutter lines of the street," controls the subsequent clause, directing changes in North Main street, and contradicts and renders invalid that portion of the order contained in the maps which directs in detail the changes to be made in North Main street, and fixes the exact location upon the surface of the land of the supporting wall or abutment to be there built. We do not so read the order. The description of the bridge over Main street as one with abutments on the street lines, and supporting columns on the gutter lines, of that street, exhausts its force in describing the abutments and supporting columns mentioned, and that description cannot be construed as applicable to the portions of the order dealing with changes in other streets, nor as compelling a wing or supporting abutment on North Main street to be located upon the street line, notwithstanding the portion of the order directing these changes locates with certainty the abutment in a different place. Giving the widest allowable scope to the language of the two other reasons, they present, in addition to the points already considered, only this claim: That the railroad commissioners had no power, in their order for the elimination of the grade crossing at Main street, to direct the abutment in question to be built within the lines of North Main street; and, if they had such power, they have not given such directions. If the commissioners had the power to order the erection of the abutment as described, covering a portion of the highway, it is immaterial to the sufficiency of the second defense, for reasons already stated, whether or not the abutment ordered actually extends within the legal lines of North Main street. That they had the power, under chapter 220 of the Public Acts of 1889, to order any changes or alterations in highways, including their partial discontinuance, necessary to the elimination of a dangerous grade crossing (of which necessity the commissioners are the judges), subject to a review of their proceedings on appeal to the superior court, and that the law conferring this power is constitutional, is too well settled to be now questioned. *Town of Suffield v. New Haven & N. R. Co.*, 53 Conn. 368, 370, 5 Atl. 366; *Fairfield's Appeal*, 57 Conn. 167, 171, 17 Atl. 704; *State v. Branford*, 59 Conn. 402, 407, 22 Atl. 336; *Cullen v. Railroad Co.*, 68 Conn. 211, 222, 33 Atl. 910; *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, 26 Atl. 122. An appeal was taken from the order in question to the superior court, and the order was affirmed by that court, and the judgment of the superior court was affirmed by this court, in the case last cited. To all these proceedings the plaintiff was a party. So far as concerns this plaintiff, the question of public safety, and that of necessity of occupying any portion of North Main street for the elimination of the grade crossing as ordered, is *res judicata*.

State v. Branford, 59 Conn. 411, 22 Atl. 336. The plaintiff suggests in argument that the course of proceedings by the commissioners, as recited in the order, lays no valid foundation for an order directing changes in North Main street. The record of the commissioners' proceedings, on its face, seems sufficient to justify any necessary change in that highway; and, being sufficient on its face, the question of some possible latent defect cannot be raised by this demurrer, even if the plaintiff could raise it in any way other than by appeal.

The brief and argument of the plaintiff suggest that its real grievance is based on the assumption that the second defense in some way cuts off or abridges its right to establish upon trial the claim that, whatever this order may apparently say, the commissioners did not in fact intend to authorize the occupation of any part of North Main street, and therefore did not authorize an abutment extending over the line of that street. We fail to see how this right, if the plaintiff has such a right, is in any way affected by the mode of pleading the second defense, or how the demurrer can be construed as specifying such a reason for the insufficiency of the pleading. If the plaintiff can in this action, or in any other action, attack the validity of the order, or establish a meaning not apparent on its face, because the order was made under a misapprehension of essential conditions, it certainly cannot do so by means of this demurrer. We think the question raised by the demurrers to the first and second counts do not materially differ. No claim was made in argument that the same considerations did not apply to both demurrers.

There may be doubt whether the true theory of the practice act would not, in a case like this, require the defendant to allege the facts set up in the second defense in connection with those set up in the first as a single defense, rather than to make such facts the basis of a separate and distinct defense. The practical results of following either form may be substantially the same, and any error in such a matter is waived, if not specified in a demurrer. As the question is not material to our decision, we merely mention the doubt, in order to avoid any implied approval of the form followed. There is no error in the judgment of the superior court. The other judges concurred.

ALLEN v. MATTISON et al.

(Supreme Court of Rhode Island. Jan. 26, 1898.)

WILLS—ANNUITIES—PAYMENT FROM REAL ESTATE.

Where a will does not charge annuities on the real estate, and the surplus of the personality is sufficient to pay them, the realty cannot be applied to such payment, though the executrix squanders the personality.

Bill by John B. Allen, executor, against Elon G. Mattison and others. Thomas J. Hamilton, as administrator, claims the

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amount of certain annuities against respondent Doran, as administrator of the estate of Horatio N. Mattison, deceased. Disallowed.

Wood & Fitch, for complainant. Wilson & Jenckes, for respondents.

PER CURIAM. The will of Horatio N. Mattison contains no express charge of the annuities on the real estate. In view of the fact that the surplus of the personal estate, had it not been misapplied and wasted by the executrix, was more than sufficient to pay all the annuities, we do not think that such charge can be raised by implication, although the will contains what is in effect a residuary clause which proved inoperative. *Larkin v. Larkin*, 17 R. I. 461, 23 Atl. 19; *McGough v. Hughes*, 18 R. I. 768, 30 Atl. 851. We decide, therefore, that Thomas J. Hamilton, as administrator, has no claim, by reason of the annuities given to Henry and Maria Hamilton, to the proceeds of the real estate in the hands of the respondent Doran, as administrator on the estate of Horatio N. Mattison.

(20 R. I. 376)

FARR v. KENYON.

(Supreme Court of Rhode Island. Jan. 29, 1898.)

LANDLORD AND TENANT—COVENANT AGAINST UNDERLETTING—BREACH.

1. A lease covenanted that the lessee should not underlet without the lessor's consent in writing, and stated that the premises were to be used for the sale of certain articles only, except by the written assent of the lessor. The latter wrote the lessee that he gave him permission to use the premises for the sale of certain other articles. *Held* a consent that the lessee might underlet, so long as the premises were not used for any of the purposes prohibited in the letter.

2. Where a lessor is estopped to claim a forfeiture of the lease because of a particular breach of a covenant against underletting, such estoppel does not extend to a subsequent underletting to another tenant.

Exceptions from court of common pleas, Providence county.

Action by Richard W. Farr against George H. Kenyon. There was a verdict for defendant, and plaintiff excepts. Exceptions sustained.

Clarence A. Aldrich, for plaintiff. Van Slyck & Mumford, for defendant.

MATTESON, C. J. This is an action of trespass and ejectment to recover possession of certain leasehold premises because of the breach of a covenant in the lease. Originally, the city of Providence leased certain premises to one William Band. Band subsequently leased a portion of the premises so leased to him to the defendant. The lease from Band to the defendant contains a covenant that the lessee shall not underlet the demised premises, or any part thereof, without the consent in writing of the lessor, and a condition for a forfeiture of the lease in case of default in the

performance of the covenants on the part of the lessee. The lease also stated that the demised premises were to be used and occupied for the sale of tobacco, cigars, fruit, confectionery, and periodicals only, and for no other purpose, without the written assent of the lessor first obtained. Band sent to the defendant a letter, of which the following is a copy: "Providence, R. I. Oct. 1st, 1891. Doctor George H. Kenyon—Dear Sir: Yours of the 30th at hand. I intend to give up my stationery and confectionery departments. I hereby give you permission to use the store No. 15½ Greenwich St. for the sale of stationery and all other goods you think will sell with the present stock; dry goods, notions, liquors, and all intemperance drinks excepted. Yours, truly, William Band." The plaintiff succeeded to Band's interest under the lease from the city of Providence in June, 1892. At this time the defendant had underlet portions of the premises to two tenants, without the written consent of Band. The defendant subsequently attorned to the plaintiff. In February, 1897, the defendant underlet a portion of the premises to another tenant without the written assent of the plaintiff, who thereupon, in the latter part of the following month, brought this suit. At the trial in the common pleas division the jury returned a verdict for the defendant. A number of exceptions were taken by the plaintiff to the rulings of the court, upon which two of the questions raised were argued at the hearing in this division on the plaintiff's petition for a new trial: (1) Whether the letter, a copy of which is given above, was a consent in writing that the premises might be underlet by the defendant to any person, so long as they were not used for any of the purposes prohibited in the letter, and as such binding on the plaintiff. (2) Whether a waiver of a breach of a covenant against underletting will excuse a subsequent breach of the same covenant.

The letter purports to be merely a license to the defendant to use the premises for other kinds of business than those to which he was restricted by the lease. It contains no express consent to an underletting, or language from which such consent can be raised by implication. We think that the first question, therefore, must be answered in the negative.

If it be assumed, as contended in behalf of the defendant, that Band, by reason of his knowledge that the defendant hired the premises for the express purpose of underletting them to Joslin, would have been estopped to claim a forfeiture for the underletting to Joslin, and that the plaintiff, as his successor to the original lease, would have been equally estopped, such estoppel would not extend to a subsequent underletting to another tenant. It would amount to nothing more than a waiver of a breach of the covenant for that particular letting. The subsequent underletting would be a new breach of the covenant, for which either Band, if the holder of the lease at the time, would have been entitled, or the plain-

tiff, as his successor in title, would be entitled, to insist upon a forfeiture. *Tayl. Landl. & Ten.* §§ 411, 412, 501. Exceptions sustained, and case remitted to the common pleas division, with direction to enter judgment for the plaintiff for possession and costs.

(30 R. I. 378)

PARKER v. PROVIDENCE CARRIAGE CO.

(Supreme Court of Rhode Island. Jan. 31, 1898.)

NEW TRIAL—MISCONDUCT OF COUNSEL.

In an action in which the issue was whether D. was a member of defendant firm, plaintiff's attorney stated, in the presence of the jury, that he expected "at some stage of the game to show by the testimony of witnesses who are perfectly disinterested, and know about these transactions, that it is an old trick of D. to do such work,—to get up a company, get goods for 20 per cent. of what they are worth, and then swipe the whole business, and steal the books," etc. *Held*, that where there was a verdict for plaintiff to the effect that D. was a member of said firm, and the preponderance of the evidence was against the finding, a new trial should be granted.

Exceptions from court of common pleas, Providence county.

Action by Edwin L. Parker against the Providence Carriage Company, a co-partnership. There was a verdict for plaintiff, and defendant excepts. Exceptions sustained.

Franklin P. Owen, for plaintiff. Bassett & Mitchell and Arthur P. Sumner, for defendants.

PER CURIAM. The issue in this case was whether Deslauriers was a member of the defendant firm. The jury returned a verdict for the plaintiff, thereby finding that he was. We are inclined to think that a preponderance of the evidence is against the finding. The record shows that the plaintiff's attorney, while examining one of his witnesses,—counsel for Deslauriers having objected to a question put to the witness,—stated, in the presence of the court and jury: "I expect at some stage of the game to show by the testimony of witnesses who are perfectly disinterested, and know about these transactions, that it is an old trick of Deslauriers' to do such work,—to get up a company, get goods for twenty per cent. of what they are worth, and then swipe the whole business, and steal the books," etc. Such an attack on a party to the cause, which, so far as the case shows, was perfectly groundless, was wholly unjustifiable, and should have received, as it did, the immediate censure of the court. It was calculated to prejudice the minds of the jury against Deslauriers, and to prevent them from weighing the evidence with that discrimination and impartiality to which he was entitled. It may have caused the finding against him. We are of the opinion, therefore, that a new trial should be granted. New trial granted, and case remitted to the common pleas division.

(20 R. I. 370)

CHAMBERS v. CHAMBERS.

(Supreme Court of Rhode Island. Jan. 22, 1898.)

WILLS—ASSESSMENT OF BENEFITS—LIABILITY OF LIFE TENANT AND REMAINDER-MEN—APPORTIONMENT.

1. Assessments for sewers and curbing are not taxes within the meaning of a devise for life requiring the life tenant to "pay all necessary taxes and repairs on the property," and such assessments should be apportioned between the tenant and the remainder-men.

2. Such assessments should be apportioned in the proportion which the value of the life estate bears to the entire estate.

Bill by Letitia Chambers against Jonathan Chambers. Judgment for plaintiff.

Bassett & Mitchell, for complainant. Cooke & Angell, for respondent.

MATTESON, C. J. This is a bill for an apportionment of certain assessments for curbing and a sewer. The case is as follows: William Chambers, late of Providence, died January 24, 1886. By his last will and testament he gave to his wife, the complainant, the income of his real and personal estate for life, and on her decease the remainder in fee to his son, the respondent, Jonathan Chambers, one-third to him individually, and the other two-thirds in trust for his other sons, Israel Chambers and Thomas Chambers. The gift to the complainant was coupled with the requirement that she should pay all necessary taxes and repairs on the property. On March 27, 1894, the city of Providence assessed a portion of the real estate situated on Helme street, in Providence, for a sewer in Grove, Helme, and River streets. This assessment, with the expenses of a levy on the estate for its collection, amounted, on July 3, 1895, when it was paid by the complainant, to \$295.63. On July 1, 1895, the city of Providence also assessed the estate for curbing on Helme street. This latter assessment amounted to \$90, and was paid by the complainant October 14, 1895. The question raised is whether these assessments should be borne by the complainant as life tenant, or should be apportioned between her and the remainder-men, and, if so, in what proportions. It is contended on behalf of the remainder-men that these assessments are to be regarded in the light of taxes, and as such should be borne by the life tenant, not only because it is the general rule that it is the duty of the life tenant to pay taxes, but especially because of the direction in the will that she should pay all necessary taxes and repairs. We do not think, however, that assessments like these in question, though popularly sometimes spoken of as taxes, are to be regarded as taxes within the meaning of the will. They are exceptional and extraordinary in their character, being expenses for improvements of a permanent nature, rather than the usual current expenses which are

provided for by ordinary taxes. *Love v. Howard*, 6 R. I. 116; *Beals v. Rubber Co.*, 11 R. I. 381. We find nothing in the will to indicate that the testator intended to include any other than the usual ordinary taxes in the requirement that his wife should pay all necessary taxes and repairs on the property. Assessments for sewers, if not paid when due, and assessments for curbing, are required to be added to the taxes of the owner of the estate, and collected in the same manner as ordinary taxes. Ordinances of the City of Providence, 37, 361; Pub. Laws R. I., April 15, 1890, c. 815. And see Pub. Laws R. I., May 4, 1893, c. 1239, providing for the recovery by a life tenant who has paid the whole of a sewer assessment of a proportional part of the assessment from the remainder-man. The complainant having paid these assessments to prevent the sale of the estate by the city treasurer therefor, and not being required by the will to pay them, we think that she is entitled to have them apportioned between herself and the respondent in the proportion which the value of her life estate bears to the value of the entire estate.

(20 R. I. 372)

SULLIVAN v. WATERMAN.

(Supreme Court of Rhode Island. Jan. 24, 1898.)

NUISANCE—WHAT CONSTITUTES—PLEADING—DAMAGES.

1. One who wrongfully injures the good name of a boarding or lodging house, by using rooms hired as lodging rooms for purposes of assignation and debauchery, is guilty of an actionable nuisance.

2. A declaration for nuisance need not expressly allege that the acts complained of constitute a nuisance, where such acts amount to a nuisance in fact and in law.

3. In an action for the creation of a private nuisance, it is not necessary to allege that plaintiff suffered special damages from the acts complained of.

Action by Maria Sullivan against Stephen W. Waterman. On demurrer by defendant. Overruled.

C. M. Salisbury, for plaintiff. Wilson & Jenckes, for defendant.

TILLINGHAST, J. The plaintiff complains, in an action of trespass on the case, that the defendant, who hired certain rooms in her house, so misbehaved himself while in the occupancy of said rooms as to injure the plaintiff in her business, and in the good name, credit, and reputation of her house. The declaration sets out, in substance, that the plaintiff is, and for a long time before the grievances complained of was, the owner of a certain dwelling house, in which she lives, in the city of Providence, and where she was engaged in keeping a lodging house for hire and profit; that the defendant hired certain rooms of her in said house for the purpose of using the same in a reasonable and proper manner,

and was at the time when the grievances complained of were committed in the possession thereof; that, contriving and intending to hurt and injure the good name and credit of said house, the defendant grossly misbehaved himself therein, in this: that upon the 10th day of May, 1897, in the nighttime, and upon divers other nights between that time and the date of plaintiff's writ, he brought or caused to come to his said rooms certain dissolute and immoral women, without the knowledge and against the will of the plaintiff, and kept said women there till a late hour in the night, in consequence whereof certain good people who had intended to take rooms in said house for hire did not take them, whereby the plaintiff suffered loss and damage. The declaration also sets out that on the 20th day of May, 1897, in the nighttime, and upon divers other nights, the defendant allowed one John Doe to use said rooms so hired as aforesaid for the purpose of bringing or causing to come into said rooms certain other dissolute and immoral women, without the knowledge and against the will of the plaintiff, and said women to keep in said rooms till a late hour of the night, thereby intending and contriving to injure, and actually injuring, the plaintiff as aforesaid. The declaration further charges the bringing of other dissolute and immoral persons, both male and female, to said rooms, both in the daytime and in the nighttime, there to revel, drink, and carouse, and to commit other immoral acts, whereby plaintiff was injured and damaged as aforesaid. To this declaration the defendant has demurred on the ground that it does not set forth any unlawful or wrongful act of the defendant upon which an action for damages can be founded. In support of this demurrer he contends that there is no allegation that the acts complained of constituted a nuisance, either public or private, and further that, even if the acts complained of did constitute a nuisance, still the declaration does not state a cause of action, because the plaintiff does not allege that she has suffered any "actual specific" damage therefrom.

We think the declaration states a cause of action. It cannot be seriously argued that a man who hires rooms in a dwelling house, to be used as lodging rooms, has any right to apply them to the purposes of assignation, or to create a nuisance therein. And that a wrong which arises from the unreasonable or unlawful use by a person of his own premises, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to the right of another, is a nuisance, is clear, both upon sound principles of reason and judicial authority. See *Wood, Nuis. § 1*, and cases cited. "A nuisance," says Smith in his *Manual of the Common Law*, "is something done which has the effect of prejudicially and unwarrantably affecting the enjoyment of the rights of another person." See also, *Aldrich v. Howard*, 8 R. I. 248. Of course, it must arise from some unlawful act; for

that which is lawful can never be a nuisance. Some legal right must be violated, and some material annoyance, injury, and damage must be sustained, thereby. But, where there is a material injury, damage is implied, when it results from the violation of a legal right. *Wood, Nuis. § 5*, and cases cited. The declaration in the case at bar shows the violation of a legal right. The plaintiff had the right to the good name and fame which her house had acquired in the community, and to the income and profit which such a reputation aided in producing. They are elements of value in the prosecution of her business, and she is as much entitled to be protected in the enjoyment thereof as she is in the enjoyment of any other property. The good name of a boarding house or lodging house, like the good name of an hotel or other place of entertainment, is of vital importance to the success of the proprietor; and any one who wrongfully injures such good name is guilty of a tortious act, which the law will redress in damages. The declaration shows that the defendant by his misconduct has injured the good name of the plaintiff's house, and that by reason thereof she has been damaged by the loss of custom and business. In other words, it shows the commission of a wrong resulting in injury and damage; and, this being so, it states a case for redress,—there being, in contemplation of law, no wrong without a remedy. It is true, as argued by defendant's counsel, that the declaration does not, in terms, allege that the acts complained of constituted a nuisance; but we do not think that this is necessary, so long as said acts, as stated, amount to a nuisance in fact and in law; and to allege in the declaration, therefore, that they constituted a nuisance, would simply be to state a conclusion of law. The ordinary forms for declarations in actions of this sort simply set out the acts complained of, without averring that they constitute a nuisance. See *Chit. Pl. (Ed. 1821) 429 et seq.*; *Oliv. Prec. (3d Ed.) 878*.

We do not think the declaration is demurrable because it does not allege that the plaintiff has suffered special damage from the acts complained of. The nuisance alleged was evidently a private one, and, so far as appears, the plaintiff was the only one who was injured thereby; and we see no reason why, under a general claim for damages, she is not entitled to recover, as a recompense for her injury, such actual damages as are the natural and proximate consequence of the wrong committed. See *Sedg. Dam. (6th Ed.) 732, 733*. If the defendant deems it essential to his defense that he should be more particularly informed of the matters for which he is to be put on trial, the court, on motion, would probably order such information to be furnished. *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9. The cases cited by defendant's counsel relate to public nuisances, and in such cases it is necessary for a person suing for a private injury therefrom to allege and prove special damage.

Benjamin v. Storr, L. R. 9 C. P. 400; Cooley, Torts (2d Ed.) 736, 737, and cases cited. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

(70 VL 46)

THORP v. THORP et al.

(Supreme Court of Vermont. Chittenden. Oct. Term, 1897.)

HOMESTEAD—WHEAT CONSTITUTES — CONVEYANCE BY HUSBAND.

1. A husband may convey a part of his property free from the homestead exemption of his wife by his sole deed, where there is sufficient property left, including the dwellings and land used in connection therewith which the husband has selected as a homestead, to give the widow the full homestead exemption, both at the time of the conveyance and the vesting of the right.

2. To constitute a homestead under the exemption law (V. S. § 2179), there must be a dwelling owned by the head of the family, or in process of erection, and actually occupied or used for an abiding place for the family.

3. So far as use or occupation are determinative of the location of land used in connection with a dwelling as a homestead, the husband's acts and intentions control.

Appeal from chancery court, Chittenden county; Munson, Chancellor.

Action by W. E. Thorp against Thomas W. Thorp, and others. From a pro forma decree in favor of plaintiff, defendants appeal. Reversed.

L. F. Wilbur and Elihu B. Taft, for appellant Lovisa A. Thompson's estate. J. J. Morahan and W. H. Bliss, for appellee.

ROSS, C. J. This is a petition for the foreclosure of a mortgage. The petition is in ordinary form, and claims the right to foreclosure against all the defendants. When the bill was brought, Lovisa A. Thompson was living and answered, claiming that she had a homestead in the premises covered by the mortgage, derived under the law, through her late husband, Homer Thompson, deceased. She has since deceased, and is represented by the executor of her will. The determinative question presented by the pleadings is whether she had a homestead in the premises against the mortgage at the decease of her husband. If she had such a homestead, the court should cause it to be set out by metes and bounds, if it has not already been done in a manner that binds the orator. If she had no such right, then the orator is entitled to foreclose his mortgage against her, and against her estate. Other questions have been argued, but these are the only questions raised under the pleadings, and the only questions which we have considered. The facts, found by the master, relative to whether Lovisa A. Thompson had a homestead in the premises covered by the mortgage sought to be foreclosed, are, mainly, the following: In March, 1886, her husband, Homer Thompson, purchased the French place, upon which there was a dwelling house and barn, for his

father and mother to live upon. He then had a farm, where he resided with his wife, and where their home then was. In March, 1886, he sold his farm, his wife joining in the conveyance. In April, 1887, he purchased the Wheeler place, and in May began building the store covered by the mortgage on the southeasterly end of the lot. This place adjoined the French place on the southeast. Both places are of nearly the same width. There was a dwelling house on the Wheeler place. In September of that year, Thompson and wife moved into the house on the Wheeler place, and continued to reside there until June, 1892. While building the store, and all of the time they resided in the Wheeler house, Thompson used the barn on the French place, to keep his team, a cow, and some other stock. January 3, 1888, he executed the mortgage, sought to be foreclosed, to secure the payment of money which he had borrowed and used to build the store. He then owned the Wheeler place and the French place, free from incumbrance. The mortgaged premises are, in the mortgage, described as bounded "on the west by my homestead." It is found that Thompson had never used the premises conveyed by the mortgage "for any household purposes, or any purpose connected with the home or dwelling," and that, at the time of making the conveyance, "it was the intent of Homer Thompson to have his homestead in the Wheeler house and the adjacent lands of the Wheeler and French purchases, not including the mortgaged premises." The Wheeler house and the lands adjacent of the Wheeler and French purchases, not including the house on the French place occupied by the father and mother of Thompson, nor the lot and store covered by the mortgage, were, and have ever continued, of greater value than the homestead exemption. Since that time other buildings have been erected on these portions of the Wheeler and French purchases. When the mortgage was executed, the upper story of the store was finished to be used, and was used, for a hall. In June, 1892, he changed it into a tenement, moved into it, and made it his home to the time of his death, in March, 1896. His wife, Lovisa A., did not join in the execution of the mortgage of the store and lot. The store stood only 10 feet from the Wheeler house, and the lot covered by the mortgage came practically to the end of the house. These facts, for the first time, in litigation regarding the homestead, bring for consideration: Whether a husband who owns land surrounding the house which he occupies with his family for a home, which, together with the house, is of greater value than the homestead exemption, may select out and convey, free from homestead right, a portion of such surrounding land, by his sole deed; provided the land so conveyed had not been, and was not then, used for any homestead purposes, or any purpose connected with the home or dwelling, although it was so located.

that it might be used for such purposes; and provided he then leaves the house and adjoining lands, then being used in connection with the dwelling for such purposes, then, and at the time when the homestead is to be set out, of ample value to give his widow the full homestead exemption.

V. S. § 2179, defines the homestead exemption. It is created for a housekeeper or head of a family. It consists of a dwelling house, outbuildings, and land used in connection therewith, not exceeding \$500 in value, used or kept by such housekeeper or head of a family as a homestead. It exists in the dwelling house and outbuildings if of the value of \$500, and, if they fall short of that value, the land used in connection with them must be added to make up the deficiency. *Pease v. Shirlock*, 63 Vt. 622, 22 Atl. 661; *Hastie v. Kelley*, 57 Vt. 293. The housekeeper or head of a family need not own the fee of the premises. It exists in his estate therein, either in an equitable estate or an estate in common. *Morgan v. Stearns*, 41 Vt. 398; *McClary v. Bixby*, 36 Vt. 254; *Danforth v. Beattie*, 43 Vt. 138; *Doane v. Doane*, 46 Vt. 485. To constitute a homestead within the protection of the exemption law, there must be a dwelling owned by the housekeeper or head of a family, or one in process of erection, and actually used or set apart and kept for a home and an abiding place for the family. *Rice v. Rudd*, 57 Vt. 6; *Woodbury v. Warren*, 67 Vt. 251, 31 Atl. 295. There must be a present right to use or keep the premises for a home. *Bugbee v. Bemis*, 50 Vt. 216. Ownership and intention unaccompanied by use will not create the exemption. *Goodall v. Boardman*, 53 Vt. 92. Ownership and occupancy or use are the essential conditions of the existence of the right. *Morgan v. Stearns*, 41 Vt. 398. Whether the premises are so occupied, used, or kept as to create a homestead exemption is largely determined by the intention of the housekeeper or head of a family. *Whiteman v. Field*, 53 Vt. 554. The wife's right in such premises is inchoate during the husband's life, and ripens into an absolute right on his decease. When the inchoate right once attaches in favor of the wife, the husband cannot convey it by his sole deed, nor estop her from it by oral declarations. *Canfield v. Hard*, 58 Vt. 217, 2 Atl. 136. Whether the premises are so used or kept as to create the homestead is a fact to be established by the person claiming the right. *Russ v. Henry's Estate*, 58 Vt. 388, 3 Atl. 491.

The exemption is of only \$500 in value, and starts in and from a dwelling house used or kept as a homestead. The statute does not, like the statutes of many states, require the homesteader to reduce to writing, and place upon record, a description of that portion of his estate thus used and kept which he claims for his homestead. It leaves its location and extent to be determined by the language of the statute in granting it. It was not intended to enable him to hold from his creditors

more of his estate than \$500 in value, and this must center in and about the dwelling house. When levied upon by a creditor, the statute provides for its severance from the estate by definite boundaries. It has not provided for a conveyance of the overplus by the sole deed of the husband. We think it does not mean to deprive him from selling or mortgaging the overplus, so long as he leaves the dwelling house, outbuildings, and land used in connection therewith of a sufficient value to answer the demands of the statute, both at the time of the conveyance and at the time the homestead may become vested in his widow. The widow derives it through him, through his ownership and use or keeping. His use and keeping are characterized largely by his intention. All the ends and purposes of the exemption are met if he does convey some part of his estate which might have, but has not, been used as a part of his homestead, so long as he leaves the dwelling house, outbuildings, and land used in connection therewith of sufficient value to give his widow a full homestead. So far as use or keeping is determinative of the location of the land used in connection therewith, the husband's acts and intention, by the terms of the statute, control. The master has found that Homer Thompson's intention and use of the land connected with the Wheeler house, when he gave the mortgage sought to be foreclosed, fixed the homestead in land owned by him other than that covered by the mortgage. This enabled him to convey the store and lot by his sole deed. The orator has the right to foreclose the mortgage against the estate of Lovisa A. Thompson. We do not consider whether she may have a homestead in the husband's equity in these mortgaged premises arising out of their occupancy of the second story of the store; nor whether he had abandoned his homestead in the Wheeler house; nor whether, if the homestead is in his equity in the store, debts contracted prior to the time he moved into the tenement in the store can be satisfied out of the homestead; nor how nor where her homestead should be set out. All these and other questions discussed in the briefs do not fall within the scope of the bill and answer, but are within the jurisdiction of the probate court administering on his estate. Decree reversed, and cause remanded, with a mandate to the court of chancery to enter a general decree of foreclosure of the mortgage against all the defendants, limiting the time of redemption of each defendant as it may judge equitable.

(70 Vt. 13)

TITUS v. GAGE.

(Supreme Court of Vermont. Caledonia. May Term, 1896.)

WILLS—CONTEST—EVIDENCE—WITNESSES—EXAMINATION.

1. On the contest of a will by which testatrix left most of her property to the "Old Ladies'

Home," in St. Johnsbury, it appeared that there was no institution of that name in existence, and proponent failed to show in his opening what institution was intended. *Held*, that it was proper to permit proponent to make good the oversight at the close of his rebuttal.

2. On the contest of a will on the grounds of incapacity, an offer to show that the father of testatrix was, in early life, a man of intemperate habits, without any further offer in connection with it, was properly excluded.

3. The court properly excluded the question: "Something has been said about her stories. What do you say about their improbability or impossibility, on that line?"

4. There was evidence that testatrix had accused her neighbor W., and others, of theft of her property. *Held*, that the court properly excluded the question "whether or not you understood the statements made by [testatrix], relative to these matters of her property and her neighbors, were improbable and impossible."

5. Another question, "What is Mr. W.'s character?" was properly excluded.

6. Where contestant claimed that testatrix was subject to an insane delusion, consisting of a belief that certain neighbors had stolen some of her property, he was entitled to show that such neighbors were reputed to be honest.

7. Where a physician, called as an expert, gave an account of his experience with cases of insanity, it was not error to refuse to permit him to be asked, in cross-examination, as to a case not mentioned by him in his direct testimony.

8. Where a physician in his direct evidence gave no expert testimony, but when recalled testified as an expert, he may be cross-examined as to his competency as an expert.

9. Where it appeared that testatrix was a woman of advanced years, it was error not to permit contestant, on such cross-examination, to ask the witness whether there are certain periods in the life of a woman when she is more subject to derangement of the mind than at others.

10. The fact that testatrix complained that her neighbor on the opposite side of the street had procured a pipe to be laid on her side of the street, instead of his, was not admissible, even if supplemented by evidence that his side was the best location for it.

11. A witness for contestant testified that testatrix at one time released a part of a debt secured by mortgage, and took an unsecured note for the amount released. On cross-examination he stated the note was a good one, and in re-direct contestant undertook to show the contrary, and was met by the statement that the maker had property. *Held*, that it was error not to permit contestant to also inquire what the property was, apparently with a view of showing that it was exempt.

12. It was not available error for the court to attempt to improperly restrict the testimony of a witness, when the witness answers as to the whole matter.

Exceptions from Caledonia county court; Ross, Chief Judge.

Proceeding by I. P. Titus to probate an instrument as the will of Lydia P. Fuller, to which Henry F. Gage objected on the ground of incapacity and undue influence. From a judgment of the probate court admitting the instrument to probate, contestant appealed to the supreme court. There was a verdict and judgment for proponent, and contestant excepted. Reversed and remanded.

The contestant, having introduced evidence that the sister of the testatrix had been insane, propounded a question to an expert witness, upon the supposition that

there was hereditary insanity in the family. The proponent objected, and the court remarked that "there was nothing to show that there was insanity back in the line," adding: "It was not proper to speak of it as 'hereditary'; it was developed in her sister." The contestant inquired if the court so ruled as a matter of law; to which the court replied that it was not making a ruling, but merely stating its understanding of the strict meaning of the term. The questions referred to in the opinion as having been put to the witnesses Dutton and Houston were as follows: To the witness Dutton: "Something has been said about her stories. What do you say about their improbability or impossibility, on that line?" To the witness Houston: "Whether or not you understood the statements made by Miss Fuller, relative to these matters of her property and her neighbors, were improbable and impossible." And further: "What is Mr. Wheatley's character?" Mr. Wheatley was one of the neighbors who was said to have been accused by the testatrix of theft. The questions were excluded.

Taylor & Dutton and B. E. Bullard, for contestant. W. P. Stafford, for proponent.

MUNSON, J. The testatrix left five dollars to the contestant, her sole heir at law, and the remainder of her property to the "Old Ladies' Home," in St. Johnsbury. There was no institution of that name in existence, and the proponent failed to show in his opening what institution was intended. In this situation of the case it was within the discretion of the court, and a wise exercise of its discretion, to permit the proponent to make good the oversight at the close of his rebuttal.

The contestant excepted to what the court said during the introduction of testimony in regard to the use of the term "hereditary insanity"; but the court expressly said that its suggestion was with reference to the exact application of the term, and that no ruling upon the subject was intended. This being the case, it is not important to consider the correctness of the view expressed.

The offer to show that the father of the testatrix was in early life a man of intemperate habits, without any further offer being made in connection with it, was properly excluded. The connection between the intemperance of the parent and the insanity of the child is not so obvious and well recognized as to make evidence of the one admissible in proof of the other, without the support of medical testimony upon the subject.

If it was error to restrict the testimony of McKnight as the court attempted to do, the error cannot avail the contestant, for the witness ignored the restriction, and answered as to the whole matter.

The questions asked of the witnesses Dut-

ton and Houston were properly excluded, but the contestant was entitled to show the fact which the examination was apparently designed to elicit. The contestant claimed that the testatrix was subject to insane delusions, and that among the delusions entertained was a belief that certain neighbors had stolen some of her property. To characterize this belief as an insane delusion, it was necessary to show, not only that the facts involved were not as the testatrix believed, but that the situation was such that a sane person would not have entertained the belief. So the contestant could not be confined to proof that the persons accused by the testatrix had not milked her cows in the pasture nor stolen hay from her barn. They might not have done this, and yet their reputation might have been such that it was perfectly reasonable to suspect them of it. The contestant was entitled to show that the neighbors whom the testatrix believed to have stolen her property were reputed to be honest people.

Dr. Darling, a local physician in general practice, who had known the testatrix and attended her in sickness, was called by the proponent in his opening, and gave testimony as to the mental capacity of the testatrix, based upon what he knew of her personally. In rebuttal, the proponent used this witness as an expert, and in the course of the examination asked him to tell what experience he had had with insane people; whereupon the witness "gave an account of his experience with cases of insanity." In cross-examination the contestant asked the witness if he had been called to see a certain person, and proposed to inquire whether he examined her with reference to insanity, and whether her case was one of monomania. The manner in which the case was referred to by the examiner would indicate that it was not a case mentioned by the witness in his direct testimony, and, if this was the fact, it was not error to exclude the inquiry. It is for the court to determine, in its discretion, how far a party shall be allowed to inquire into collateral matters for the purpose of discrediting the witness.

In the cross-examination of this witness the contestant asked whether there are certain periods in the life of a woman when she is more subject to derangement of the mind than at others, and claimed the right to ask this and like questions, to test the capacity of the witness as an expert. The court refused to allow this, saying that this examination of the witness should have been made when he was upon the stand before. We think this was error. The witness was not used as an expert when first upon the stand. His opinion evidence at that time was only such as might have been given by any one who had had an opportunity of observing the testatrix. When produced as an expert, and inquired of as to his opinion upon the facts testified to by others, he stood

in an entirely different relation to the case. The contestant was then entitled to test the witness' capacity as an expert by a proper cross-examination. He was clearly entitled to do this by any examination which kept within the facts relating to the testatrix, as already disclosed by the evidence. The testatrix was a woman of advanced years, and there was evidence tending to show that women are more than ordinarily liable to mental derangement at the change of life, and that a marked alteration was observed in the testatrix's manner and conduct about that time. The proposed cross-examination did not extend to collateral matters, and its exclusion was the denial of a legal right.

It was not error to exclude the inquiry in regard to the street in which the pipe complained of by the testatrix was located. The fact that she said her neighbor opposite had procured the pipe to be laid on her side of the street, instead of his, even if supplemented by evidence that his side of the street was the best location for it, would not have been evidence tending to show insanity.

The contestant introduced one Crandall, who testified that the testatrix at one time released a part of a debt secured by mortgage, and took an unsecured note for the amount released. The proponent then drew from the witness the statement that the note taken was a good note, and in redirect the contestant undertook to show the contrary, and was met by the statement that the maker had property. The contestant then proposed to inquire what the property was, apparently with a view of showing that it was exempt; but he was interrupted by the court in making his statement, and the evidence was excluded. The size of the note may have made this a matter of little weight, but in strictness, the contestant was entitled to pursue the inquiry.

Considerable discussion was had in regard to the introduction of evidence concerning the disposition of the property left by the testatrix's father, and a ruling was made limiting the contestant's offer in that behalf. This offer was apparently so inconsistent with facts elsewhere presented in the exceptions that we are in doubt as to just what the contestant expected to show, and so do not deem it advisable to pass upon the exception taken. Judgment reversed, and cause remanded.

(70 Vt. 52)

DRAKE v. WILD et al.

(Supreme Court of Vermont, Windsor. Dec. 20, 1897.)

EQUITY—LACHES—TRUSTS—ACQUIESCENCE IN RE-
FUDIATION BY TRUSTEE—ELECTION
TO TAKE BY WILL.

1. The mother of oratrix inherited a certain estate from her father, which she permitted her husband to manage without accounting there-

for. After her death, intestate, leaving oratrix as her sole heir, the father of oratrix retained such fund, and disposed thereof, with his own property, by will; devising his homestead and household furniture to oratrix, and directing payment of the income from a certain sum of money to her annually, during life, for her support. The daughter knew that by such will he intended to dispose of his wife's property as his own. *Held*, that where for 13 years the daughter accepted the income provided by the will, and for 10 years gave the executors no information on the subject, she had elected to take under such will.

2. Where a daughter, knowing that her father has by will disposed of property belonging to her as heir of her mother, for 13 years acquiesces therein, she is barred by laches from filing a bill praying that the executor be ordered to pay over to her such property, with the income and increase thereof.

Thompson, J., dissenting.

Appeal in chancery, Windsor county; Tyler, Chancellor.

Bill by Louisa B. Drake against John Wild, executor of the will of Cyrus B. Drake, deceased, and others. Heard on the pleadings and master's report. From a pro forma decree dismissing the bill with costs, oratrix appeals. Affirmed.

D. C. & J. D. Denison, for appellant. Stewart & Wilds, for appellee Middlebury College. Gilbert A. Davis and A. M. Albee, for other appellees.

TYLER, J. This case was before the court upon a demurrer to the bill, and is reported in 65 Vt. 611, 27 Atl. 427. The following are the material facts since reported by the master: Cyrus B. Drake and Louisa Smith were married in the year 1839, and the oratrix, their only child, was born in 1843, and always lived with her parents. Louisa died in the year 1870, and Cyrus B. in 1878. Mrs. Drake's father died in 1867, and her share of his estate was \$4,457.08, which the administrator in December, 1868, paid to Mr. Drake, by her instructions. Mr. Drake retained possession and control of the fund to the time of his death, and managed it as he thought best, without accounting to any one. As he collected it, he mingled it with his own property, and out of it the family was supported; and, in case of any surplus, it was invested by him. His wife and daughter had great regard and respect for him, and perfect confidence in his integrity and ability. He received the fund to hold in trust for his wife, and did not intend to make any claim thereto, and there is no evidence of any change in his intention until he included the fund in his will. Mrs. Drake died intestate, and no administration has been taken on her estate. Mr. Drake made his will the day before he died, the second clause of which is as follows: "I give and bequeath to my daughter, Louisa B. Drake, my homestead, consisting of about one-fourth of an acre of land, and house, barn, and out-buildings thereon, to be hers absolutely; also all the household furniture, clothing, books, keepsakes, and pictures now in said house, or as much thereof as she may desire and select.

I also direct that my homestead shall be appraised at its fair cash value, and a sum which, added to said appraisal, will make in the whole the sum of eight thousand dollars, shall be invested to the best advantage, and the earnings or interest thereof shall be paid to my said daughter, Louisa B., annually, for her support, during her natural life; and at her decease said amount so invested shall be paid Middlebury College, at Middlebury, Vermont." Nothing in the third and fourth clauses is in issue here. By the fifth, sixth, seventh, and eighth clauses, he gave to the American Board of Commissioners for Foreign Missions, to the Home Missionary Society, and to the American Missionary Association, \$2,000 each, and to the American Tract Society, \$500, which four bequests he directed to be paid, respectively, as soon as the amount could be realized from his estate. He gave the residue of his estate to the American Education Society. The will was duly probated and allowed, and the executors named therein were appointed by the probate court. Appraisers and commissioners were also appointed, who respectively performed their duties, and returned their reports to that court. In August, 1878, an inventory of the estate was returned, showing real estate amounting to \$750, and personal property to the amount of \$14,058.25, which included all of Mr. Drake's and his wife's property. The debts proved were \$1,065.63. The oratrix knew the contents of the will the day after its execution, and understood that her father must have intended thereby to dispose of his own and his wife's estate. She subsequently presented an account of \$54 against the estate, which was allowed and paid. She presented no other claim. She continued to reside upon the homestead (which was all the real estate her father owned at his decease) until February, 1891, when she sold it and received the money for it; and she took possession of the household furniture and other personal property given her by the will, appraised at \$541.25, and has ever since retained it. The executors also set apart a trust fund for her use as hereafter stated. The oratrix knew that the inventory of her father's estate included the property of her mother as well as of her father. The executors supposed that it was all the property of her father, and managed and controlled it in that belief. The oratrix gave them no information on the subject until the year 1888, when she claimed to Mr. Wild, the executor, that she ought to have certain gas stock, because it came from her mother's estate. In November, 1885, the executors settled an account in the probate court, in which they credited themselves with the real estate and the household furniture, and other personal property specifically bequeathed to the oratrix, and which they had passed over to her, leaving in their hands a remainder of \$11,131.10. This settlement was made upon due notice by publication under an order of the probate court, and, upon the settlement being made, the executors resigned; and their res-

ignation was acted upon and accepted on June 2, 1886, and John Wild was appointed administrator de bonis non. No other account was settled in the probate court, except one on May 27, 1896, by which it appeared that the administrator had in his hands \$12,555.63. Quite a portion of the property of the estate included in the inventory, and managed by the executors, consisted of Western mortgages, drawing 8 and 10 per cent. interest. The executors and the oratrix thought that the fund provided for in the will for the benefit of the oratrix was first to be provided for and kept good, without reference to whether or not there were sufficient assets to pay all of the specific legacies. Acting upon this belief, the executors selected what they considered the best securities, sufficient to make up the amount of said trust fund, and set them apart for the purposes of the fund. This was approved of by the oratrix, and for a time the income from these securities was paid to her by the executors. Included in these securities were mortgages upon which the interest was subsequently defaulted, and then the executors decided to, and did, pay the oratrix 6 per cent. interest on the trust fund, which was satisfactory to her. Payments were thereafter made until 1888 or 1890, when the judge of probate informed the administrator that the trust fund did not stand prior to the other legacies in the will, that the oratrix had received more than she was entitled to, and that, as the estate had diminished by losses, the trust fund should be proportionately lessened. Upon learning this, the oratrix suggested that a portion of the estate came from the estate of her mother. No interest has been paid to her since July, 1889, and nothing has been paid to the defendants. The oratrix now prays that the executor "be ordered to pay over to her the trust property so belonging to her mother, with all the income and increase thereof."

The general rule in equity, in such cases may be stated as follows: Where a will assumes to give one of its beneficiaries property of another person, for whom provision is likewise made in the will, the latter cannot take the provision made for him in the will, and also hold the property, but must elect which he will take; that, by taking a beneficial interest under the will, he is held thereby to confirm and ratify every other part of the will; that, if an heir prefers to take by descent, then a court of equity will compel him so to elect, and, if he prefers to take as heir, it will not allow him also to have any other property or benefit under the will. *Huston v. Cone*, 24 Ohio St. 11; *Hyde v. Baldwin*, 17 Pick. 308; 1 Chit. Prac. 363; *Pom. Eq. Jur.* §§ 464-471; *Story, Eq. Jur.* §§ 1075, 1076; 10 Eng. Ruling Cas. 351, and notes. The rule is well stated in 1 *White & T. Lead. Cas. Eq.*, as follows: "Equitable election usually arises where a testator gives to A. certain property, real or personal, and in the same will gives a third party certain property belonging to A. In this case, A. must elect between the two. If he

accepts the legacy or devise to himself, he must confirm and carry out the gift of his own property to the third party." But the rule must be stated with the condition that, in order to make such an election binding upon the party, it must be made understandingly; that is, with a knowledge of the facts, and of the party's rights under the will. Judge Story, in *Eq. Jur.* § 1097, says that before a presumption of an election can arise from long acquiescence, or from other circumstances, it is necessary to show that the party acting or acquiescing was cognizant of his rights; also, whether the party intended an election, and whether he can restore the other persons affected by his claim to the same situation as if the acts had not been performed, or acquiescence existed. Other jurists say, "An election made with a knowledge of the party's rights."

The oratrix and the executors were in error in supposing that her trust fund was to be "kept good" out of the remaining portion of the estate, and it is contended that, through ignorance of her rights, the oratrix failed to claim her estate. A mistake may be of law, as when a person knows the state of the facts, but is ignorant of the legal consequence,—forms a wrong opinion or draws a wrong inference from those facts,—or it may be a mistake of fact, where some fact that really exists is unknown, or some fact is supposed to exist which really does not exist. It is a rule, to which there are but few exceptions, that a mistake of law, pure and simple, is not adequate ground of relief; that where a party, with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under ignorance or error with respect to the rules of law controlling the case, courts will not, in general, relieve him from the consequences of his mistake. All persons of sound and mature mind are presumed to know the law; and what is meant is general law, the law of the country, and not private legal rights. *Pom. Eq. Jur.* §§ 841, 842. It is stated in section 849 that mistakes of a person with respect to his own private legal rights and liabilities may be properly regarded and dealt with as mistakes of fact. While the author admits that the decision of each case must depend upon its own facts, he ventures to formulate the following as a rule of general application: "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relations, either of property or contract or personal status, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative; treating the mistake as analogous to, if not identical with, a mistake of fact." In his discussion of these rules, Mr. Pomeroy says that negligence

on the part of the person seeking relief must not enter into the case, but defines negligence as culpable negligence, upon which an action is maintainable. In this state legal negligence is held to be the failure to exercise the degree of care that a prudent and careful man would exercise in like circumstances. In the elaborate notes to *Railway Co. v. Jones* (Miss.) 55 Am. St. Rep. 488 (s. c. 19 South, 105), this subject is considered, and the following general rules are stated as the result of numerous authorities: That ignorance or mistake of law alone, and hence of one's rights, does not, as a rule, excuse, and it is no ground for either defensive or affirmative relief in equity; and such ignorance or mistake includes misconception of the law, erroneous deductions, and misapprehensions of legal rights. That ignorance of the law does not excuse a wrong done or a right withheld. That relief from liabilities under the law, arising from a known state of facts, will be denied. But to these general rules there are exceptions, as where there is a mistake of law caused by fraud, imposition, or misrepresentation. We think it will be found that in most of the cases cited in these notes, and in *Pomeroy*, the party seeking relief was led into error by the action of the other party to a transaction, as in contracts and releases. When the oratrix saw the will, she knew that it included both estates, and she may have known how much of her mother's estate remained. She must be presumed to have known that she was her mother's sole heir, that her father had held her estate for her since her mother's death, and that he could not convey it without her consent; yet, with this knowledge, she did not take administration upon her mother's estate, presented no claim for it to the commissioners, and made no objection that it was inventoried as if it were all her father's. She was negligent in not informing the executors that her mother left an estate, and that it was included in the will, and in allowing them to proceed as if it were all her father's. If they had known the facts, they doubtless would have required her either to take her mother's estate, or waive her claim to it. She accepted and used the homestead and the personal property in the house, and approved of the selection and setting apart of the best securities. These acts, in the light of the knowledge she is shown to have had, must be considered as constituting an election. The facts brought in by the master's report make a case within the rule in *Pom. Eq. Jur.* § 507: "Wherever a case involves a necessity for election, it is an elementary rule that any person who is *sui juris*—not under disabilities—is both bound and entitled to elect." In this case the situation of the estates required an election to be made. Can the oratrix now be permitted to elect over? We think not, in view of the circumstances in which her election was made, and of her subsequent action. She is chargeable with knowledge of the executors' settlement in the probate court in 1885, and that the court ordered the amount

in their hands to be paid to the administrator *de bonis non*. To this settlement and order she made no objection. She made no complaint of the manner in which the estate had been settled until the year 1888, down to which time she had received her interest. When that partially failed, she claimed a part of her mother's estate. As the oratrix could not take both by the will and as heir, she acquired no title to the homestead, except by the will. Therefore her occupancy and sale of that property confirmed her election to take by the will. They were acts sufficient of themselves to constitute an election. The master says that, without including Mrs. Drake's property, Mr. Drake did not have an estate sufficient to make the amount specifically disposed of by his will; leaving the inference that there was a sufficient amount by including it. According to the inventory, after deducting the debts and reasonable expenses of administration the entire property does not seem to have been quite sufficient. But whatever sum the estate amounted to, if the oratrix had elected to take by descent (for anything that appears) the estate might have been settled and distributed within a year from the testator's decease; and in that event, if the oratrix and the defendants had taken the securities upon their legacies, they might have disposed of them, or held them, and each legatee suffered his own loss thereon. By the course pursued the estate has been kept open at expense to the defendants, and losses have been sustained upon their securities, which probably would have been avoided had the estate been settled; for the securities seem to have been good in 1878, and to have depreciated in value after they were set apart. It was on account of these losses that the oratrix brought her bill, that she might be exempt from them, and take her mother's entire estate. The defendants have been prejudiced by her action, and will be further prejudiced if the prayer of her bill is granted. Whether the oratrix considered it for her advantage to take the bequest, or acted from a desire to carry out her father's wishes, does not appear. Whatever her motive, the legal effect of her action in respect to an election was the same. It cannot be held that the executors acted for the defendants, as well as for the oratrix, in keeping the estate open, and keeping up her annuity in consequence of losses; for it was to their prejudice, and without their consent. Previous to making his will, Mr. Drake had held his wife's estate in trust, and made no claim to it. By the will he repudiated the trust, and claimed her estate adversely. The oratrix was *sui juris*, emancipated from all influence of her father, and, as the cestui que trust, she learned from the will of the repudiation. She brings her bill 13 years afterwards. The facts reported bring the case within the rule stated in the former opinion. By analogy to the statute of limitations, and her long acquiescence in the bequest, the oratrix is barred from maintaining her claim. *King v. White*, 63 Vt. 158, 21 Atl. 535

The pro forma decree is affirmed, and cause remanded.

THOMPSON, J., dissents.

(70 Vt. 19)

WALSTON et al. v. SMITH et al.

(Supreme Court of Vermont. Addison. Dec. 8, 1897.)

RESULTING TRUSTS—WHAT CONSTITUTES—PAROL EVIDENCE.

1. Whether a conveyance to a wife, with the consent of the husband, by a trustee, who had held the property in trust for him, was an advancement, is a question of intention, though presumed in the first instance to be a provision and settlement; and hence any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption.

2. The agreement of the grantee with the person paying the consideration, at the time of receiving the conveyance, to hold the property for the use of such person, does not make an express trust.

3. Property conveyed to the wife by her husband, to be held by her for their common living, and as a source of payment of his debts, on many of which she had become liable, with the understanding that on the death of either, the property should be disposed of according to law, is held for the husband's benefit.

Taft, J., dissenting.

Appeal in chancery, Addison county; Taft, Chancellor.

Bill by Harry M. Walston and others against Elizabeth Smith and others to have a trust declared. The cause came on for hearing upon the pleadings, the original and supplemental reports of the master, and exceptions of both parties thereto. The exceptions were overruled pro forma, and the bill dismissed, with costs. The orators appealed. Reversed.

L. F. Wilbur and Stewart & Wilds, for appellants. Daniel Roberts and Elihu B. Taft, for appellees.

ROSS, O. J. The solicitor for the defendants concedes that when this case was before this court, as found in 67 Vt. 542, 32 Atl. 486, the court properly held, on the findings of the master, that by the conveyance from the intestate to Norton the latter took simply the title to the premises, as a passive trustee, for the beneficial use of the intestate; and that, except to a bona fide purchaser for value without notice, Norton, without the consent and direction of the intestate, could convey no greater title than he (Norton) held. But he contends that, it now being found by the master that the conveyance to Elizabeth, the wife of the intestate, was made with the consent and by the direction of the intestate, the deed concludes the intestate and those interested through him, so that against the plea of the statute of frauds, relied upon in the answer, no parol testimony could be received and considered by the master to determine whether Elizabeth took the same in trust for the intestate. He reasons: "Starting with the proposition that Norton was but a passive trustee

of the title for Smith, without interest, he was at all times subject to the direction of Smith as to its disposition." That "Norton was trustee for Smith, not for Smith's wife, nor for his creditors, nor for such as might be his heirs at his death." That "the trust under which Norton held the title did not necessarily or naturally follow to his grantee. If the conveyance was made by consent and direction of Smith, it went according to the terms of conveyance, unless otherwise restricted in the mode provided by law." That "the conveyance of lands by a husband to his wife is universally through a trustee." Hence he concludes: "This was, in legal effect, a direct conveyance from Smith to his wife, and the only recognized mode in which he could convey to her." If the conveyance to Norton had been made for the purpose of having him convey to the wife, Norton would have taken the title in trust for the wife. He would have taken and held it for the sole purpose of transferring it to her, and have held the title in trust for her sole use and benefit. In such case the conveyance of the title to the wife through Norton would have been a direct conveyance of it from the husband to the wife. No right or interest, legal or equitable, after such conveyance to Norton, would have remained in the husband. No trust in behalf of the husband could result from such conveyance. Unquestionably, the cases cited by the solicitor for the defendants, holding that, if the husband conveys real estate to a third person for the sole purpose of having such third person convey it to his wife, and such third person makes the conveyance, no trust of any kind arises out of such conveyance in favor of the husband, are properly decided. Such cases are clearly distinguishable from the case under consideration. Here, on the facts found by the master, Norton, by the conveyance from the intestate, took the title as a passive trustee for the sole benefit of the intestate. The intestate was to remain in possession, and manage the property. As held, when this case was before this court, in 67 Vt., and 32 Atl., Norton could convey, when the conveyance alone is considered, no greater rights or title to the estate than he held. It is immaterial in this respect whether Norton held the property impressed with an express or an implied trust in favor of the intestate. "Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing or carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary." 2 Pom.

Eq. Jur. § 1048. This, in substance, this court held when it previously had the case under consideration. The solicitor for the defendants concedes that that decision was correct. No new facts have been brought into the case bearing upon the operation of the conveyance by Norton, considered by itself. It follows, therefore, that by that conveyance, when the conveyance alone is considered, Mrs. Smith took the title to the property subject to the same trust which was impressed upon it when Norton held the title, to hold for the beneficial use of the intestate. It is found that she had full notice of the trust, and paid nothing for the conveyance. She does not stand as a bona fide purchaser without notice. The trust impressed upon the property when Norton held the title, by his conveyance, considered by itself, remained when the title came to L. S. Smith. Whether that conveyance created strictly a resulting trust need not be determined. To consider it a resulting trust is to regard it in the light most favorable to Mrs. Smith.

By the concession of the parties, the intestate, while Norton held the legal title, was the equitable owner of the property. The property conveyed by the intestate to Norton, by the concession of the parties, became a trust estate. In kind, it was such a trust as arises by implication and operation of law. As said in the American notes to *Dyer v. Dyer*, 1 White & T. Lead. Cas. Eq. 339: "The trust which results by implication and operation of law from the payment of the purchase money, or part of it, and without any agreement, is a pure and simple trust of the ownership of the land. It is not an interest in the proceeds of the land, nor a lien upon it for the advance, nor an equity or right to a sum of money to be raised out of it, or upon the security of it." However created, such was the trust in regard to this property existing between the intestate and Norton when Norton held the title. By Norton's deed of this property, when considered by itself, to Mrs. Smith, the same trust continued, or a trust in every essential a resulting trust. If the conveyance by Norton had been to a stranger, under the circumstances in which it is found to have been made to Mrs. Smith,—with notice, and without consideration,—the same identical trust would follow. To render the conveyance valid and freed from the trust under which Norton held the title, the burden was on Mrs. Smith to establish that she took the title from Norton without notice of the trust, and for a valuable consideration, or under such circumstances that the law would presume the property conveyed to be a gift. The master has found that she had notice of the trust, and paid nothing for the conveyance. Hence from the conveyance, considered by itself, with these circumstances added, the same trust under which Norton held the property would continue or be implied if no other facts were shown. A new fact, or "circumstance of evidence," has been brought into the case,—the fact that the intestate

consented to and directed the conveyance by Norton to his wife. This is frequently spoken of as "a circumstance of evidence." 1 Lewin, Trusts, *171; 1 Perry, Trusts, § 143. When this "circumstance of evidence" is shown where, under the facts, otherwise a trust would continue, or be implied to follow the conveyance of the property, then, because of the obligation of the person who furnishes the consideration for the conveyance to support the grantee, if nothing more is shown, a presumption or implication arises that he intended the conveyance as an advancement or gift. But this presumption or implication may be rebutted by circumstances or parol testimony. It is so held universally. It then becomes a question of what was the intention of the real parties to the transaction, or of the person furnishing the consideration for the conveyance and of the grantee therein. 2 Pom. Eq. Jur. §§ 1040, 1041; 1 Lewin, Trusts, *176; 1 Perry, Trusts, § 147; American notes to *Dyer v. Dyer*, 1 White & T. Lead. Cas. Eq. 345-347. Perry uses this language: "Whether a purchase in the name of wife or child is an advancement or not is a question of pure intention, though presumed, in the first instance, to be a provision and settlement. Therefore any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption." He says (section 134): "A trust results from the acts, and not from the agreements, of the parties, or rather from the acts accompanied by the agreements; but no trust can be set up by mere parol agreements, or, as has been said, no trust results from the breach of a mere parol contract." In the American notes to *Dyer v. Dyer*, after considering the doctrine as applied at different times and by various courts, on page 347 the writer concludes: "When the doctrine is once taken up that the intention of the parties is not to be found in the legal construction of an instrument, and that you are to infer it from extrinsic circumstances nothing short of a general admission of all parol evidence that throws light on the intention, and is in its nature competent can be adopted." Hence all the evidence and circumstances received and considered in regard to the intention of the intestate and of Mrs. Smith were properly received and considered by the master, and their intention found established thereby controls. If their intention then was that she should hold the property, freed from the trust, as a gift or advancement, she would so hold it. But, if it were their intention that she should hold the property in trust for him, that intention must prevail. Being the equitable owner of the property when the title stood in Norton, and having directed Norton to convey to his wife, the intestate furnished the consideration or paid the purchase money of that conveyance. It is immaterial what the consideration for the conveyance is, provided it is a good and valuable one; but it must belong to the cestui que trust, and move from him. He may borrow it from the grantee in the deed. Page v. Page,

8 N. H. 187. Such a trust, arising or resulting by implication of law, may be proved, rebutted, or discharged by parol evidence. *Page v. Page*, supra; *Botsford v. Burr*, 1 N. Y. Ch. (Lawy. Ed.) 426, and note, and cases there cited. That the grantee agreed with the person paying the consideration, at the time of receiving the conveyance, to hold the property for the use of such person does not convert it into an express trust. As said by Mr. Perry, a resulting trust arises from the acts of the parties accompanied by their agreements. As said by the supreme court of Iowa in *Cotton v. Wood*, 25 Iowa, 43, when the husband had paid the purchase money, and had the property conveyed to his wife under an agreement between them that she would convey to him, or to any one to whom he might assign his interest, upon his request so to do, and it was urged the agreement converted it into an express trust: "But the trust is based upon the fact of the payment of the purchase money of the property by the husband. This of itself created it. It cannot be that the consent of the trustee to hold the title for the benefit of the cestui que trust, or an agreement so to do, in the case of a resulting trust, will change its character. By the agreement the trustee simply assents to an obligation imposed by the law. The trust would exist, without the agreement, by operation of law. The agreement cannot destroy the effect of the conditions under which the law presumes the estate is held. *Livingston v. Livingston*, 2 Johns. Ch. 540; *Page v. Page*, 8 N. H. 187; *Runnels v. Jackson*, 1 How. (Miss.) 358; *M'Culloch v. Cowher*, 5 Watts & S. 427; *Harder v. Harder*, 2 Sandf. Ch. 17. In another view, the agreement between the husband and wife can be properly shown in evidence in order to rebut the presumption that the property was conveyed to the wife as an advancement." Any legitimate evidence that will rebut such presumption may be received and considered. *Bickford v. Bickford's Estate*, 68 Vt. 525, 35 Atl. 471. It would be anomalous if she could by parol show that she was the wife of the intestate, and that he, being the equitable owner of the property, but not having the title, directed Norton, who held the title for him, to convey it to his wife, to raise the presumption of an advancement, and that he should be deprived of showing by the same kind of proof what his direction was, to rebut the presumption. Such cannot be the law.

This case, in all its essential features, is not unlike *Clark v. Clark*, 43 Vt. 685. The father, in that case, had paid for a piece of real estate, for which he held a bond for a deed, and so had become the equitable owner of it. He directed the party who held the title to convey it to his son, to hold in trust, in order to have a permanent place of abode for himself and family, and to prevent its being squandered and wasted. Afterwards he consented that this place should be exchanged by the son for another of greater value, towards which he claimed to have made some further

payments. This, in substance, he set forth and claimed in his bill. The son, in his answer, claimed that he consented to take a deed of the first place, on condition the place was to be absolutely his, but that he was to keep the place as a home for the father and mother so long as they, or either of them, lived; and that he exchanged the first place for the better one with his father's consent, and at his request, to hold as his own, as he did the first. The answer was traversed, and testimony taken. This court, by Judge Peck, said, among other things, in regard to the first place: "It being admitted by the answer, as well as proved, that the intestate paid the whole consideration, and that the defendant neither paid nor agreed to pay anything, it is a case of implied trust in favor of the party who advanced the consideration, and hence parol evidence as to the understanding and intention of the parties is not excluded by the statute of frauds." It further held that the trust thus created followed the exchange into the second place to the extent of the value of the first place. It also considered parol evidence to determine whether the intestate contributed, at the time of the exchange, anything further towards the purchase of the second place, and held that, if so, the trust in the second place would be increased to the extent the intestate so contributed. In the case at bar the master has found, from parol evidence, that the trust impressed upon the property when the title was in Norton continued when Norton conveyed to Mrs. Smith; that the presumption that it was intended by the intestate to be an advancement to his wife was rebutted by such evidence, and that the defendant took the property charged with a trust for the intestate; that such was the intention of the defendant and of the intestate. In *Pinney v. Fellows*, 15 Vt. 525, and in *Page v. Page*, 8 N. H. 187, the original grantees took the title to the premises charged with a resulting trust in favor of another, and had them conveyed with the consent of that other, and in each case parol testimony was received and considered to establish that the trust continued. In *Pinney v. Fellows* the conveyance was, with the consent of the mother, the cestui que trust, from one son to another son. See, also, *Nell v. Keese*, 51 Am. Dec. 743, and note; *Bickford v. Bickford's Estate*, 68 Vt. 525, 35 Atl. 471; *Bennett v. Camp*, 54 Vt. 36; *Bent v. Bent*, 44 Vt. 555; *Barron v. Barron*, 24 Vt. 375; *Wallace v. Bowens*, 28 Vt. 638; *Clark v. Clark*, 43 Vt. 685; *Reynolds v. Sumner* (Ill. Sup.) 9 Am. St. Rep. 523, and note (s. c. 18 N. E. 334); *Brison v. Brison* (Cal.) 7 Am. St. Rep. 189, and note (s. c. 17 Pac. 689); *Bork v. Martin* (N. Y. App.) 28 Am. St. Rep. 570, and note (s. c. 30 N. E. 584); *Farmers' & Traders' Bank v. Kimball Milling Co.* (S. D.) 36 Am. St. Rep. 739, and note (s. c. 47 N. W. 402).

2. The defendant further contends that the trust found by the master is complicated, other and different from such as results by impli-

cation of law. In substance, he urged this contention when this case was before this court as found in 67 Vt. 542, 32 Atl. 486, but it was denied. It was a question then in the case on the same facts as now, and necessarily considered to uphold that decision; because— notwithstanding Norton held the property for the benefit of the intestate, as found by the master—if, when the property was conveyed by Norton to defendant Elizabeth, a new and different trust, or an express trust, was created between herself and husband, then the case could not have been disposed of as it was. Besides, it is found by the master that the trust found by him is, in legal effect, different from the one existing when the title to the property was in Norton, was created without being reduced to writing, and was proved by oral testimony, to which the orators excepted, and which exception they insist upon. This exception would preclude the defendants from setting up any trust, in legal effect different from that resting upon the property when the title was in Norton. The conveyance by him, on the facts found, carried the property into defendant Elizabeth's hands impressed with the same trust under which Norton held it. The decision in 67 Vt., 32 Atl., is conclusive upon the defendant on this point. This is not a rehearing of the case upon any point then before the court and decided. All the facts of the case on this point remain unchanged. But, were this point now open, we should find no occasion to disturb the decision then announced. All the findings of the master in regard to the details of the trust under which Elizabeth held the property, are, in effect, that she held it for the benefit of the intestate. He finds that she was to hold it "first, for their own living." She being his wife, he was legally bound to support her. That she held it in part for her living or support was a holding it for his benefit. Such, in substance, is one of the purposes of the conveyances established by oral testimony in *Pinney v. Fellows* and in *Clark v. Clark*, supra. Then the master further finds that she held it, "secondly, as a source of payment of his debts, on many of which she had become liable by signing his notes." This was clearly a holding for his benefit, within the meaning of the law. In *Page v. Page*, supra, the original grantee loaned the purchase money to the beneficiary, by the payment of which the resulting trust arose, and held the title for the payment of the loan. See, also, *Boyd v. McLean*, 1 N. Y. Ch. (Lawy. Ed.) 254, and note, in which it is said, "If one should, by way of loan, and wholly upon the credit and account of another, advance the purchase money, and take the title to himself as security for its repayment, he would hold the estate upon a resulting trust for the other, and on repayment would be compelled to convey." A number of cases are there cited in support of this doctrine. So, too, a deed absolute may, by parol, be shown to have been intended for security only. *Marks v. Pell*, Id. 258, and

note. These are the only purposes found by the master for which she was to hold it while both were alive. Under the master's findings, thus far, of the purposes for which she held the property, the intestate was the sole beneficiary. Upon payment of the notes which she had signed for him, the intestate could, in equity, have compelled her to convey the property to him. To the same legal effect are the master's findings in regard to what the intestate and Elizabeth understood should be done with the property in the case of the death of either. He finds, "if she should survive him," she was "to reserve her own homestead and dower rights, and to pay up said debts, and, if any property remained, to distribute it to the heirs at law of said Alfred, in the same shares as they would have taken had he died owner thereof. She was the younger of the two, and expected to outlive him; but it was their common and mutual intent, in case it became apparent that she would probably die first, that she should deed the property back to him or give him some writing whereby he might hold the same." On this finding, in case of the death of either, they mutually understood the property was to be disposed of just as the law would dispose of it if it were his property. All the findings of the master leave the property belonging to the intestate when she held the title the same as it did when Norton held it, except she had the added right to first have his notes, which she had signed paid out of it. This change could be made by parol. These views render a decision of the other questions discussed in argument unnecessary. The pro forma decree is reversed, and cause remanded to be proceeded with in accordance with the mandate covering the views herein expressed.

TAFT, J., dissents.

(68 N. H. 377).

STATE v. LAGER BEER.

(Supreme Court of New Hampshire. Rockingham. March 13, 1896.)

INTOXICATING LIQUORS—SEIZURE.

Malt liquor admitted to be intoxicating is liable to seizure and forfeiture under Pub. St. c. 112, § 80, providing that "any spirituous liquors" kept for sale in violation of law may be seized and forfeited, since the act relating to construction of statutes (chapter 2, § 83) provides that by the words "spirituous liquors" shall be intended "intoxicating liquors."

Exceptions from Buckingham county court.

Libel by the town of Exeter for the seizure and forfeiture of lager beer. Motion to dismiss the libel overruled, and claimant excepts. Exceptions overruled.

The libel alleged that "the following particularly described spirituous and intoxicating liquors, * * * to wit, twenty-six cases of lager beer, of two dozen bottles each, of the value of sixty-four and $\frac{22}{100}$ dollars, * * * were kept for sale in violation of law in a certain building in said Exeter, occupied by E.

ra Fisher as a bottling establishment; that, upon a lawful and proper warrant, search of said premises was lawfully made, and the goods and chattels above described there found, then and there kept for sale in violation of law as aforesaid, were duly seized, whereby said intoxicating liquor * * * became forfeited." Ezra Fisher appeared as claimant, and moved to dismiss the libel on the ground that there is no law authorizing the seizure and forfeiture of malt liquors. The motion was denied, and the claimant accepted.

Eastman, Young & O'Neill, for the State.
A. O. Fuller, for the claimant.

BLODGETT, J. The contention that there is no law authorizing the seizure and forfeiture of malt liquors cannot be sustained. The libel in this case alleged, and the claimant does not deny, that the liquors in question are intoxicating. If this be so, they are clearly within the intent and meaning of the statute (Pub. St. c. 112, § 30) providing that "any spirituous liquor kept for sale in violation of law may be seized * * * and upon due proceedings may be adjudged forfeited," because it is enacted by the chapter relating to the construction of statutes that "by the word 'spirit,' 'spirituous liquor,' or 'intoxicating liquor,' shall be intended all spirituous or intoxicating liquor, and all mixed liquor any part of which is spirituous or intoxicating, unless otherwise expressly declared." Id. c. 2, § 33. There being no such statutory declaration as to fermented intoxicating liquor, the construction of section 30, c. 112, is controlled by the legislative definition in section 33, c. 2. "The construction of statutes is governed by legislative definitions; that of indictments, by the ordinary use of language." *Jones v. Surprise*, 64 N. H. 243, 245, 9 Atl. 384, 385, and authorities cited. It is hardly necessary to go further, but the claimant's contention is also no less clearly refuted by the historical evidence. In its original form, and with certain exceptions which it is unnecessary at this time to consider, the prohibitory law made it unlawful and criminal "to sell or keep for sale any spirituous or intoxicating liquor, or any mixed liquor any part of which is spirituous or intoxicating," and subjected "any intoxicating liquor" illegally kept for sale to seizure and forfeiture. Laws 1855, c. 1658, §§ 1, 10-15. In the revision of this law in 1867, "spirituous liquor" was substituted for the longer and more specific description of intoxicating liquor in section 1; and, in the chapter of definitions, section 33, c. 2, of the present statutes was enacted. Gen. St. c. 1, § 31; Id. c. 99. This definition was copied in the revisions of 1878 and 1891 (Gen. Laws, c. 1, § 31; Pub. St. c. 2, § 33), and its meaning has not been changed in the 40 years that have elapsed since the enactment of the prohibitory law. During that time there has been a statutory variation in relation to the legality and penal consequen-

ces of selling fermented intoxicating liquor, and keeping it for sale; but now, as in 1855, such liquor is not an exception to the rule that intoxicating liquor illegally kept for sale is liable to seizure and forfeiture. Exception overruled.

PARSONS, J., did not sit. The others concurred.

(97 N. H. 210)

KING et al. v. CITY OF ROCHESTER.
(Supreme Court of New Hampshire. Strafford.
March 17, 1893.)

SALES—PERFORMANCE BY SELLER.

One who bargains for a specific chattel is not bound to accept another similar chattel, of equal value and usefulness.

Exceptions from Strafford county court.

Assumpsit by King and Goddard against the city of Rochester for nonacceptance of water valves. In August, 1891, the defendant agreed to buy of the plaintiffs a certain number of valves or water gates, of the Peet pattern, for an agreed sum. September 2d the plaintiffs delivered six of the valves, and September 19th six more, manufactured by the Peet Company at their works in Boston. September 22d they delivered five more, manufactured by a firm in Pittsburg, which differed in some respects from those already delivered, though the agents of the town did not discover the difference until September 26th, when they learned that the plaintiffs had ordered the valves from Pittsburg. Subsequently the town telegraphed the plaintiffs countermanding their order for the valves, on account of the plaintiffs' delay in delivering them. The evidence was conflicting whether any definite time for the delivery was agreed upon. In October the plaintiffs offered to deliver the balance of the valves which were manufactured at Pittsburg, but the defendant refused to receive them. There was evidence that the contract called for the Boston valves, and that they were more serviceable than the others. There was no evidence that the defendant at any time claimed the right to rescind the contract upon the ground that the plaintiffs were not furnishing the goods contracted for. The jury were instructed that the defendant was not obliged, under the contract, to accept valves of a different pattern from those agreed upon, unless they were equally good in all respects. To this instruction the defendant excepted. Verdict for the plaintiffs. Verdict set aside.

James A. Edgerly and Joseph H. Worcester, for plaintiffs. George E. Cochrane, for defendant.

PER CURIAM.¹ The verdict establishes the fact that there was no rescission of the contract, and the only question raised by the

¹ See footnote 36 Atl. 607.

case is whether the plaintiffs were entitled to recover the agreed price by tendering to the defendant valves as good as those they agreed to furnish. There was evidence that the defendant agreed to purchase valves of a certain pattern manufactured in Boston, while some of the valves tendered were different in some respects, and were manufactured in Pittsburg. If the valves tendered were not such as the agents of the town had a right to understand, and did understand, the plaintiffs had agreed to deliver, the defendant was not bound to accept them. If they were as good as the Boston valves, for the purposes for which they were designed, it would not follow, as a matter of law, that the defendant agreed to purchase them. Many other considerations might have an important bearing in the determination of the fact of the parties' intention in this respect. An agreement to sell a black horse would not ordinarily be fulfilled by the tender of a white one of equal or greater value. *Iron Foundry v. Harvey*, 23 N. H. 395, 409. And the plaintiffs' offer to deliver Pittsburg water valves in the place of Boston valves, though of the same value, might not be a performance of their contract. Verdict set aside.

SMITH, J., did not sit. The others concurred.

(68 N. H. 406)

TOWN OF BROOKFIELD v. SAWYER et al.
(Supreme Court of New Hampshire. Carroll.
March 13, 1896.)

HOMESTEAD—FRAUDULENT CONVEYANCES.

The fraudulent grantee of a homestead cannot maintain trespass *quare clausum* against a creditor of the grantor who has subsequently taken it on execution, since the homestead right is personal.

Trespass *quare clausum* by the town of Brookfield against William A. Sawyer and another. There was a verdict for defendants. Verdict set aside, and judgment entered for plaintiff.

September 5, 1894, Joseph Pike conveyed his homestead premises to the defendant Sawyer by a warranty deed, in which his wife did not join. The conveyance was fraudulent and void as against the plaintiff. The premises were in two parcels,—one containing about 4 acres, having a dwelling house, barn, and other buildings upon it, situate on one side of a highway, and the other containing about 20 acres of pasturage and tillage land, situate on the other side of the highway. Pike's family resided upon the premises, and consisted of himself, wife, and a female servant. June 6, 1895, the plaintiff levied an execution, issued upon a judgment recovered by it against Pike, upon the 20-acre parcel; the same being set off at \$36.21. The 4-acre parcel, with the buildings upon it, was then of the value of \$385. Pike or his wife did not request the

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officer who made the levy to set off a homestead for them, and the officer did not set off one, nor make the levy subject to their homestead right. No allusion to the homestead right was made in the return of the levy. If the levy was valid, the verdict should be set aside, and judgment should be rendered in favor of the plaintiff for damages in the sum of \$15, and interest from October 22, 1895; otherwise there should be judgment on the verdict.

Worcester, Gafney & Snow and J. A. Edgerly, for plaintiff. F. B. Osgood and A. L. Foote, for defendants.

BLODGETT, J. Limited to its facts, the case presents but the simple inquiry whether the fraudulent grantee of a homestead can maintain trespass *quare clausum* against a creditor of the grantor who has subsequently taken a part of it on execution. This inquiry is decisively answered by *Currier v. Sutherland*, 54 N. H. 475 (approved more or less directly in *Tilton v. Sanborn*, 59 N. H. 291, and *Hall v. Johnson*, 64 N. H. 481, 14 Atl. 24), in which it was held that a conveyance of property which is exempt from attachment or levy may be fraudulent and void as to creditors; that the right of homestead, being personal to the parties in whom it exists, is not assignable, and cannot be set up as a defense by a fraudulent grantee; and that such grantee cannot recover possession against a creditor of the grantor who has taken the homestead on execution. While the decision in *Currier v. Sutherland* is doubtless not in accord with the majority of decisions in other jurisdictions (*Thomp. Homest. & Ex.* §§ 408-413; *Bump, Fraud. Conv.* [2d Ed.] 242), it is nevertheless supported by a strong minority of them, as well as by its own "forcible reasoning" (*Thomp. Homest. & Ex.* § 417), against which, in our opinion, no satisfactory objection has as yet been urged. Verdict set aside. Judgment for the plaintiff for \$15 and interest.

CHASE, J., did not sit. The others concurred.

(68 N. H. 369)

BENTON v. MERRILL.

(Supreme Court of New Hampshire. Coos.
July 26, 1895.)

TAXATION—SALES—COLLECTOR'S WARRANT—LIST OF REDEMPTIONS—ACCOUNT—KNOWLEDGE OF OWNERSHIP—ASSESSMENTS—IRREGULARITIES—WAIVER—OFFICERS—PERFORMANCE OF DUTY—PRESUMPTIONS.

1. The validity of a general warrant for the collection of all taxes, as required by Gen. Laws, c. 57, § 8, is not impaired by the issuance of an additional warrant, signed by only one selectman, for the collection of nonresident taxes.

2. A collector of taxes, filing true copies of his account of sales with the town clerk, thereby complies with Gen. Laws, c. 59, § 7, requiring him to file "an account of the sales," though the copies are not attested.

3. Gen. Laws, c. 59, § 13, requiring the tax

collector to leave a list of redemptions with the town clerk, is complied with where the clerk enters the redemptions on his books, upon information from the collector, though no statement thereof is filed by the collector.

4. The fact that lands were not assessed in the names of grantees in a deed recorded prior to the assessment is immaterial where the selectmen are not shown to have had actual knowledge that such grantees were the owners thereof.

5. An owner of land paying taxes assessed in the name of another without objection is estopped to object that taxes subsequently assessed were assessed in such other's name.

6. The fact that plaintiffs, for a series of years, paid taxes on certain lands, is not sufficient to charge the collector with knowledge of their ownership of the lands within Gen. Laws, c. 59, § 2, requiring him to send bills of taxes when the owners are known.

7. Where tax bills have not been sent to the owners of land, as required by Gen. Laws, c. 59, § 2, when the owners are known, it will be presumed that the collector did not know the owners, in the absence of evidence to the contrary.

8. Where owners of land make no reply to a letter of a tax collector inquiring whether they had lands in his town on which they desired to pay taxes, he need not send them tax bills, under Gen. Laws, c. 59, § 2, providing for such sending when the owners are known.

Action by Jacob Benton against Ezra F. Merrill. Case discharged.

Trespass qu. cl., with an additional count in trover. Pleas: (1) To both counts, the general issue; (2) to the first count, soil and freehold in the defendant; (3) to the first count, not the soil and freehold of the plaintiff. Facts found by a referee:

The plaintiff introduced a deed of the premises in question from two grantors, Weeks and Hutchins, as tenants in common, to himself, and an earlier deed from one Dewey to said Weeks and the plaintiff, as tenants in common. It did not appear what Hutchins' interest was. Both deeds were duly recorded. The plaintiff offered evidence of certain acts of possession on the part of his grantor Weeks, and the question of their sufficiency was in dispute, but becomes immaterial, in the view taken by the court. The defendant claims title by virtue of a purchase under a tax sale of the premises as nonresident lands, in 1884 and 1885, by the collector of Stratford, and conveyances by him to the defendant's grantor, and by the latter to the defendant. The tax deed having been lost or destroyed by fire, the defendant was permitted, subject to exception, to prove it by secondary evidence. The referee finds that there was a deed of the premises by the collector to the defendant's grantor, given upon a sale made in 1884 for the taxes assessed in 1883, and that said deed has been lost or destroyed. The warrant to the collector for the collection of nonresident taxes for 1883 was signed by only one of the selectmen. It was under seal, and required the collector "to collect the taxes in the annexed list," etc., which annexed list was signed by a majority of the selectmen, and was sworn to. Neither the list nor the warrant was dated. The collector testified, subject to the plaintiff's exception, that the lands had

not been redeemed. A copy of his return of sales was seasonably recorded. Within the time limited by statute, the collector informed the town clerk of such lands as were redeemed, and of the dates, and amounts paid in redemption, but did not file any statement thereof. The clerk entered the lands redeemed, and date, and sums paid, upon the record under the return of sales, having left a blank space, apparently at the time of the record of the sales, in said record, for that purpose, which he filled in upon information obtained from the collector, when any lands were redeemed. The plaintiff contended that there was no such return of lands redeemed as is required by law, that the sale was void for that reason, and that there was no sufficient evidence that the lands had not been redeemed. The collector made a return of sales, and signed and swore to it. He retained the return, and filed with the town clerk copies of the return and of the jurat thereon. The copies were, in fact, true copies of the original, but were not attested as such. The town clerk's record was made from the copies. The lands had been for some years before 1883, and were in 1883, taxed to Ebenezer Wooster, who was long since dead. The collector who made the sale for the taxes of 1883 had acted for several preceding years, and the taxes for some of the preceding years had been paid him either by the plaintiff or by his co-tenant, Weeks. It did not appear that the collector gave any formal notice of the tax of 1883 either to the plaintiff or to Weeks, but he thinks, and the referee finds, that it is more probable than otherwise that he wrote one of them inquiring upon what lands in his town they desired to pay taxes in that year, but they made no reply. The deed to the plaintiff and Weeks was on record before the assessment of the tax, but the collector had no knowledge of the ownership of these lands, excepting from the payment of the taxes assessed upon them prior years by the plaintiff or his co-tenant. The defendant proved acts of possession under his tax deed. Such acts, and the deed itself, were subsequent to the deeds and acts of possession introduced in evidence by the plaintiff, and relied on by him.

Drew, Jordan & Buckley and Henry Heywood, for plaintiff. Ladd & Fletcher, for defendant.

BLODGETT, J. Assuming that an amendment of the case will be granted to the effect that, in addition to the invalid warrant to the collector for the collection of the nonresident taxes for 1883, there was another general warrant for the collection of both the resident and nonresident taxes for that year, "complete and formal in every particular," the defendant shows a superior title under the collector's deed of the premises to his grantor, given upon a sale made in 1884 for the taxes assessed in 1883, whether the title set up by the plaintiff is or is not sufficient to sustain his action. But

one general warrant is provided for by the statute for the collection of all taxes, both resident and nonresident (Gen. Laws, c. 57, § 8), and its validity cannot be destroyed or impaired by any additional and unnecessary warrant like that which appears in this case to have been made. It is surplusage merely.

The objection that the account of sales filed by the collector with the town clerk, under section 7, c. 59, Gen. Laws, was not the original, but an attested copy, with a copy of the jurat on the original, and that the town clerk's record was made from such copy, is not well taken, in view of the finding that "the copies were in fact true copies of the original, but were not attested as such." The account being a true one, and having been seasonably recorded, the legislative object, namely, to enable the landowner to obtain at the town clerk's office correct information as to the extent and amount of the sale, was fairly secured. *Cahoon v. Coe*, 52 N. H. 526, 527. But the statute does not require an attested copy. Its language is: "The collector shall, within ten days after any sale, deliver to the town clerk an account of the sales, with the charges of sale, under oath, copies of the newspapers in which the advertisement was published, and the advertisement posted, with an affidavit that it was so posted, which shall be kept on file; and the said account, advertisement, and affidavit shall be recorded by the town clerk, and a certified copy of such record shall be competent evidence." Gen. Laws, c. 59, § 7. And, furthermore, it might well be held that these provisions are directory merely, and that even a total failure to comply with them would not invalidate the sale. *Wells v. Manufacturing Co.*, 47 N. H. 258, and authorities cited; *Cahoon v. Coe*, supra, 526; *Odiorne v. Rand*, 59 N. H. 504, 506.

The objection that there was no list of redemptions left with the town clerk by the collector, as required by section 13, c. 59, Gen. Laws, is disposed of by the application of principles already stated to the finding of the referee that: "Within the time limited by statute the collector informed the town clerk of such lands as were redeemed, and of the dates, and amounts paid in redemption, but did not file any statement thereof. The clerk entered the lands redeemed, and dates, and sums paid, upon the record under the return of sales, having left a blank space, apparently at the time of the record of the sales, in said record, for that purpose, which he filled in upon information obtained from the collector, when any lands were redeemed."

The objection that the land should have been assessed to the plaintiff and Weeks as the known owners is likewise not well taken. The fact that the deed to them was on record before the assessment of these taxes is of no importance upon the question of the selectmen's knowledge as to the ownership of the lands (*Thompson v. Gerrish*, 57 N. H. 87); and,

as it is not found, and does not appear, that the selectmen knew the plaintiff and Weeks to be the owners, the presumption is they were not so known to them. *Jaquith v. Putney*, 43 N. H. 139, and authorities cited. But this is not all, for it is found that the lands were taxed by the same description the year in question that they had been in preceding years, for some of which, at least, the taxes had been paid by the plaintiff or by Weeks without any objection, so far as appears. This of itself was sufficient to authorize the selectmen to continue the same description, and to estop the plaintiff from now objecting to it. *Sawyer v. Gleason*, 59 N. H. 140, 141.

The remaining objection—that no bill of taxes was sent either to the plaintiff or to Weeks—has no validity. The statute requires it to be done only when the owners are known. Gen. Laws, c. 59, § 2. The finding of the referee is that "the collector had no knowledge of the ownership of these lands, excepting from the payment of the taxes assessed upon them prior years by the plaintiff or his co-tenant." But, while this may have been sufficient to authorize an inference on the part of the collector that they had an interest in the lands, and might be the owners, it cannot be regarded as a necessary consequence, nor, when standing alone, can it be fairly held to have afforded such evidence of the ownership as required him to know it within the statutory intentment. He was entitled to have knowledge of the ownership derived from evidence such as would satisfy persons in general in the like situation, and it was not his duty to examine the registry for the purpose of obtaining such knowledge. *Thompson v. Gerrish*, supra. Giving to the inference all the weight to which it can be entitled as evidence against him, it sufficiently appears he did not know that the plaintiff and Weeks were the owners of the lands from his letter to them inquiring whether they had any lands in his town on which they desired to pay the taxes; and, in addition to this, the presumption is he did not know they were the owners, because officers acting under oath, or in whom the government reposes a trust, are presumed to have done their duty till the contrary is clearly and explicitly proved. *Cross v. Brown*, 41 N. H. 288; *Proctor v. Andover*, 42 N. H. 348. Nor is this all; for, if it were even held that the payment of the taxes by the plaintiff and Weeks to him in some of the prior years was such knowledge on his part of their ownership of the lands as to make it his duty to send them a bill of the taxes on them for the year in question, it is difficult to see, in view of his letter of inquiry to them as to such ownership, and their failure to make any reply, why he would not be justified in understanding, as he evidently did, that they had abandoned whatever claim to the ownership of these lands could arise from their payment of the taxes on them in some of the preceding years. Case discharged. All concur.

(89 N. H. 1)

STATE v. GRIFFIN.

(Supreme Court of New Hampshire. Rockingham. March 12, 1897.)

MUNICIPAL CORPORATIONS—POWERS—CRIMINAL LAW—CONSTITUTIONAL LAW—EMINENT DOMAIN—JUDICIAL FUNCTIONS—EQUALITY—UNIFORMITY.

1. The city of Manchester can exempt no one from the operation of Laws 1891, c. 28, § 1, making it a penal offense to deposit sawdust in the source of said city's water supply.

2. Laws 1891, c. 28, § 1, prohibiting the deposit of sawdust in Lake Massabesic and its tributaries, which are the source of water supply for the city of Manchester, is not unconstitutional as depriving persons of property without compensation, though prior to its enactment owners of sawmills had exercised the privilege of depositing sawdust in such waters.

3. The section is not unconstitutional as being an exercise of judicial power.

4. The section is not unconstitutional as being a local act.

Appeal from justice court, Rockingham county.

Willard H. Griffin was convicted of depositing sawdust in the source of a city water supply, and he appeals. Dismissed.

Defendant was convicted upon a complaint for depositing sawdust in Sucker brook, a tributary of Lake Massabesic. Facts agreed:

Lake Massabesic is the source of the water supply of the city of Manchester. There are several sawmills on or near the shore of the lake, all of which deposit sawdust in the water of the lake or of its tributaries. The effect of sawdust on the water is to give it a taste of wood, and to discolor it. As the process of decay goes on, the effect is to render the water unwholesome for drinking. But the water used in Manchester is taken from the lower end of the lake, and does not now show the effect of the sawdust which has been put into the lake and its tributaries to any extent that can be detected, except by chemical analysis. In 1881 the city of Manchester became the owner of a sawmill on Sucker brook, which had existed and been operated for more than 100 years. During all that period the sawdust created by it was deposited in the brook. The city, immediately after acquiring the title, leased the sawmill for 20 years to G. In the lease the city agreed that the lessee might "occupy said premises during said term, peaceably and free from the lawful claims of any persons claiming by, from, or under said lessor," and G. covenanted, among other things, that he would "not carry on, or suffer to be carried on, upon said premises, any trade, business, or occupation whereby or by reason of which the waters of the aforesaid brook shall be polluted or affected in any other or different ways from what they now are or heretofore have been." G. assigned the lease to the defendant, who has ever since operated the sawmill, and deposited the sawdust in the brook.

O. E. Branch, for appellant. Drury & Peaslee and E. F. Jones, for the State.

CARPENTER, C. J. "If any person shall throw, place, leave, or cause to be thrown, placed, or left, any sawdust in Lake Massabesic, situated in Auburn and Manchester, or in any stream tributary thereto, he shall be punished for the first offense by a fine not exceeding \$20, or by imprisonment not exceeding thirty days, or both; and for any subsequent offense by a fine of not exceeding \$100, or by imprisonment not exceeding six months, or both." Laws 1891, c. 28, § 1. The complaint is founded upon this statute. The circumstance that the defendant holds the mill under a lease from the city of Manchester and the stipulations of the lease are immaterial. The city cannot exempt the defendant from the operation of the statute. The only defense is that the act is unconstitutional. The defendant claims that it is in conflict with the constitution for three distinct reasons, namely: Because (1) it deprives him of his property without compensation; (2) it is an exercise, not of legislative, but of judicial, power; and (3) it is not an equal and uniform law, applicable equally to all persons similarly situated, but operates only against those engaged in a particular business in a particular part of the state.

"It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth * * * is derived, directly or indirectly, from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property to public use whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power,—the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to

perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for contagious diseases, or for carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life. Nor does the prohibition of the noxious use of property,—a prohibition imposed because such use would be injurious to the public,—although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick with a slated roof. If the owner of a warehouse, in a cluster of other buildings, could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a smallpox hospital or a slaughter house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim, *"Sic utere tuo ut alienum non lædas."* It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is, therefore, not within the principle of property taken under the right of eminent domain." *Com. v. Alger*, 7 Cush. 53, 84-86. The universal doctrine on the subject is nowhere more clearly stated than in the foregoing language of Chief Justice Shaw. It has been often applied, and never questioned, in this state.

In *State v. Clark*, 28 N. H. 176 (decided in 1854, when the keeping for sale of intoxicating liquor was not unlawful), it was held that a city ordinance adopted under legislative authority, prohibiting the keeping of liquors in "any refreshment room or restaurant for any purpose whatever," was constitutional. In *State v. Noyes*, 30 N. H. 279, it was held that the statute declaring a "bowling alley situate within twenty-five rods of any dwelling house, store, shop, school house, or place of public worship" to be a public nuisance (*Laws 1845*,

c. 245), was constitutional, although it deprived the defendant of the use of a bowling alley lawfully built, if not put in operation, before the statute took effect. It was not suggested by the defendant's counsel that the act was invalid for the reason that the defendant was deprived of that use of his property without compensation. In *State v. Freeman*, 38 N. H. 426, a city ordinance prohibiting restaurants to be kept open after 10 o'clock at night was held valid. Bell, J., says (page 423): "It is an unavoidable consequence of city ordinances that they, in some degree, interfere with the unlimited exercise of private rights which were previously enjoyed. It is one thing to deprive a party of his rights, and quite another to regulate and restrain their exercise in such a manner as the common convenience and safety may require. If it is permissible to interfere in any way with the private right to carry on and manage his lawful business at such time and place and in such manner as suits himself, we are unable to see anything unreasonable in requiring places of public entertainment to be closed at seasonable hours. The guaranty of the constitution is just as effective to secure the citizen against the interference of the legislature as of the city council, and it has never been questioned that the legislature may constitutionally pass laws materially interfering with the business of individuals." In *Morey v. Brown*, 42 N. H. 378, an act providing that no one should be liable for killing a dog found without a collar, etc., was held constitutional. Bartlett, J., says (page 375): "The plaintiff claims that the act is in conflict with our constitution, but we do not think so. It is not, as he argues, an act to take private property for public uses, or to deprive parties of their property in dogs, but merely to regulate the use and keeping of such property in a manner that seemed to the legislature reasonable and expedient. It is a mere police regulation, such as we think the legislature might constitutionally establish." A statute prohibiting the sale of goods by any person outside his usual place of business within two miles of a public assembly convened for religious worship (*Gen. St. c. 255, § 9*) is constitutional. *State v. Oate*, 58 N. H. 240. "Vice, pauperism, and crime may be suppressed and prevented by a variety of measures. In behalf of property, health, life, and morals the social contract may be performed by destroying buildings, burglars' tools, gambling, and counterfeiting implements, and intoxicating liquors. The spread of fire and physical, mental, and moral disease may be stopped by vigorous action. Destruction may be protection. For the common security, by the judgment of his peers and the law of the land, an offender may be deprived of his estate, liberty, and life. Wrong may be obstructed and repressed by methods less severe than capital punishment. The protective power may seek by mild courses to lessen an evil, or check its increase. Instead of destroying the life, liberty, or property of wrongdoers, it

may discourage their noxious business, and restrain it within certain bounds." *State v. United States & C. Express Co.*, 60 N. H. 219, 257. "The police power of the state extends to the protection of the lives, health, comfort, and quiet of all persons, and the protection of all property, within the state; and persons and property are subjected to such restraints and burdens as are reasonably necessary to secure the general comfort, health, and prosperity. * * * The state has authority to make regulations as to the time, mode, and circumstances under which parties shall assert, enjoy, or exercise their rights without coming in conflict with any of those constitutional principles which are established for the protection of private rights and private property." *State v. White*, 64 N. H. 48, 50, 5 Atl. 828, 830. In *State v. Campbell*, 64 N. H. 402, 13 Atl. 585, a statute prohibiting the sale of milk containing less than a specified per cent. of milk solids, though perfectly pure and wholesome, was held valid. The court say (page 403, 64 N. H., and page 586, 13 Atl.): "Under what is generally called the police power of the state, * * * the sale of bread, the inspection of flour, beef, pork, and other provisions, the practice of medicine, surgery, and dentistry, the licensing of druggists, and the sales of drugs and medicines, are regulated, and the sale of spirituous or intoxicating liquor prohibited by statute. Such legislation is not open to the objection that it transcends the limits of legislative authority, the purpose and object of such legislation being the protection of the lives, health, comfort, and safety of all persons; and for securing this purpose persons and property are subjected to many restraints and burdens. They are presumed to be rewarded by the common benefits secured." *Bancroft v. Cambridge*, 126 Mass. 438, 441. In *Mugler v. State*, 123 U. S. 623, 664, 670, 8 Sup. Ct. 273, it was held that the owners of breweries that were made worthless by a statute forbidding the manufacture of malt liquors were entitled to no compensation for the practical destruction of their property. Any conceivable statute enacted under the police power, and regulating the use of property, must necessarily affect injuriously individual rights, but in no instance, so far as known, has it been declared by a court of last resort that persons whose interests are so affected are entitled to compensation. Under the law of eminent domain no one is entitled to compensation for injuries, however serious they may be, caused by public improvements, if no part of his lands or property is taken therefor. *Kennett's Petition*, 24 N. H. 139, 143; *Petition of Mt. Washington Road Co.*, 35 N. H. 134, 146, 147.

The objection that the act is judicial in its character—that in enacting it the legislature exercised judicial power—has no better foundation. *Merrill v. Sherburne*, 1 N. H. 199, 203, 204. The precise question was considered and decided in *State v. Noyes*, 30 N. H. 272, where it was held that the statute declar-

ing bowling alleys situated within 25 rods of a dwelling are public nuisances, was not, for this reason, unconstitutional. *Bell, J.*, says (pages 294, 295): "It is objected to this law that, if otherwise constitutional, it is forbidden by the constitution, because it undertakes to determine questions of fact and law, and is judicial in its character. What is or is not a nuisance, is a judicial question, it is said, to be determined by courts; and this is clearly so. Nothing is a nuisance unless it is made such by the law, and to determine what is by the law a nuisance is an exercise of judicial power. But the legislature do not exceed their legitimate authority when they make a change of the law, and constitute that an offense which was not such before, nor when they make certain acts an offense of a particular kind within which they were not previously included. There may be an apparent unfitness sometimes in such legislation, but its validity has never been questioned. * * * It may be said that a bowling alley is not of itself a nuisance, since it may either remain unused, or it may be used only as a place of innocent amusement; that its injurious character depends upon the improper use alone. But the legislature may well determine that an instrument which tends to facilitate vicious practices is of itself an evil which ought to be prohibited. There seems to us, then, to be no sound foundation for this exception." *Farnum's Petition*, 51 N. H. 876, 880, 381.

The instances are numerous in which acts and things not nuisances at common law, and in themselves harmless and inoffensive, or even beneficial, and only liable to become offensive to the public health or comfort by improper use, have been, by statute, declared nuisances. Such legislation, whenever brought in question, has been sustained by the courts. *Pub. St. c. 108; §§ 8, 10, 12, 16; State v. Wilson*, 43 N. H. 415, 420. The following are a few out of many early examples of such legislation, viz.: The act of April 6, 1781, against permitting swine to go at large in Portsmouth (*Laws, Ed. 1789, p. 174*); of February 23, 1786, forbidding gunpowder in excess of 10 pounds to be kept in private houses in Portsmouth (*Laws, p. 184*); of January 3, 1792, forbidding the erection or occupation of slaughter houses or a house for currying leather or trying tallow in the compact part of any town (*Laws, Ed. 1797, p. 194*); of January 14, 1795, against permitting horses, etc., to go at large without fetters (*Laws, p. 340*); of February 18, 1794, forbidding gunpowder in excess of 10 pounds to be kept in private houses or in vessels at the wharves in Portsmouth (*Laws, pp. 369, 380*); of June 18, 1791, against permitting swine to go at large in any town without being yoked and ringed, or at all in Portsmouth (*Laws, p. 370*); of June 16, 1792, prohibiting the casting of gravel, stones, ashes, etc., into Portsmouth Harbor (*Laws, p. 391*); of June 22, 1796, prohibiting the setting of gill nets in Ammonoosuc river (*Laws, p.*

402); of January 9, 1795, prohibiting seines, nets, and pots in Connecticut river (Laws, p. 404). The act of October 19, 1887, declaring any building used for the illegal sale of spirituous or malt liquors, wine, or cider to be a common nuisance, has been sustained by many decisions. Whether a statute restricting individual rights, that is enacted for the purpose of protecting the public health, may be declared unconstitutional and void, because, in the opinion of the court, it has no such effect, is a question not raised. It is found that the tendency of sawdust in the water is to render it unwholesome. It is needless to pursue the subject. It is enough to say that this objection cannot be sustained without overruling *State v. Noyes*.

The principal ground relied upon is that the act is local in its operation. It is not, it is said, equal and uniform, and does not apply to all persons similarly situated. It operates, it is urged, against a class only and those engaged in a particular occupation in a part only of the state. It is said that: "If the water supply of Manchester needs a sawdust law, the water supplies of other towns in the same situation need the same law. If an infusion of sawdust is unwholesome for the people of Manchester, it is unwholesome for other people. * * * If Maasabesic can be selected by a state law for protection unknown elsewhere, the well of a Massabesic farmer can be protected by a penal enactment applicable to no other well. * * * All wells, springs, and brooks from which the owners and their families take their supply of water for domestic purposes are equally entitled to protection. A statute making it a felony or misdemeanor to put sawdust or other substance in the well of A. B. in Haverhill, and leaving all other wells in the state protected by the common law alone, would be valid if the act of 1891 is valid in giving Manchester a protection against sawdust that is not given to anybody else in the same situation. Under a state law equality is a right, or the construction repeatedly put upon the constitution from 1827 to the present time is a false pretense." In other words, it is claimed that a general law applicable to a particular place, or not applicable throughout the entire state, is unconstitutional. The legislature cannot make an act a penal offense in one locality,—as a city, town, or other place,—where, for the public welfare, the legislation is necessary, without also making it penal in all other parts of the state, though in none of them is the protection necessary or desirable. It cannot forbid the killing of the few deer found in the small and scattered forests of Cheshire county, without also forbidding it in the vast wilderness of Coos, though there they become so numerous as to be a pest. It cannot protect the wells of Haverhill, where the state of society makes protection necessary, without extending it to all other wells, though they need no protection. It cannot confer an authority upon one town which it does not give

to all. Legislation required for the public good in Strafford county must be made applicable to Grafton, though there it is injurious. The acts for the protection of the Duston monument (Laws 1874, c. 44) and of Corbin Park (Laws 1895, c. 258) are unconstitutional and void. If, however, the words, "or any other like monument in the state," "or any other like park in the state," were added, though no other such monument or park exists, the statutes would be valid; that is to say, the constitutionality of a statute may depend upon the presence or absence of words that in practical effect are immaterial. If this is sound constitutional law, more than a thousand invalid statutes have been enacted since the adoption of the constitution. In numerous instances rights under them have been enforced, and punishment for their violation has been inflicted by judicial action. Not one in a hundred of such cases appears in the reports, and in two only of the reported cases (*Scott v. Willson*, 3 N. H. 321 and *In re Charter of Manchester*, 47 N. H. 277) was this objection taken, in both of which it was overruled. In all this class of cases for more than a hundred years our courts have administered to the people gross injustice, instead of constitutional justice. No clause in the constitution condemning such legislation is pointed out. No judgment of the court declaring it invalid is cited. No such decision can be found. The sole argument of the defendant in support of his position is that the act is inconsistent with "the equality of right which the constitution secures to all; that it discriminates in favor of some citizens to the detriment of others." The argument is without foundation in fact. The statute makes no discrimination. It does not permit some persons and forbid others to put sawdust in the lake. Everybody is prohibited. "Any person," says the statute, who puts sawdust in the lake, shall be punished. True it is that the prohibition affects the owners of sawmills on the lake shore more seriously than the farmers, and it affects the farmers there dwelling more seriously than the farmers of Coos. Such is necessarily the effect of all restrictive laws. They affect some persons more than others. A similar objection might be made against the larceny law. It has no effect upon the great body of the people, but upon a small class only, namely, the thieves. In the sense of the defendant's argument, it is as unequal as the sawdust law.

The act confers upon Manchester or its citizens no individual or exclusive right or benefit, within the meaning of the constitution. Every inhabitant of the state is entitled to enjoy the benefits conferred by the statute on complying with the necessary conditions, as he may, if he choose, enjoy the benefit of the aqueduct itself or of any other property taken for the public use. If this act violates the law of equality prescribed by the constitution because only the 50,000 inhabitants of Manchester are directly benefited by it, because to

reap its benefit a person must go to Manchester, all acts authorizing the condemnation of private property for aqueducts, cemeteries, or other public uses, which, from their nature, can be enjoyed only in the towns and cities where they are located, are equally invalid. It is impossible to hold that the legislation in the latter case is for the public good, and that it is not in the former. The equality of the constitution is the equality of persons, and not of places; the equality of right, and not of enjoyment. A law that confers equal rights on all citizens of the state, or subjects them to equal burdens, and inflicts equal penalties on every person who violates it, is an equal law, though no one can enjoy the right, be subjected to the burden, or infringe its provisions, without going to or being in a particular part of the state. It does not discriminate in favor of some at the expense of others. There are places regarding which any protective legislation must necessarily be special; as for example, Corbin Park and the state house yard. Laws 1883, c. 12; Pub. St. c. 7, § 5. If general in form, it would be special in substance. There are few, if any, towns, cities, or other subdivisions of the state, whose situation and circumstances are so nearly alike that legislation may not be required for one that is not necessary or desirable for any other. Many may be so differently situated that legislation essential for one would be injurious to the others. No two cities in the state are governed by exactly the same ordinances. Acts made penal offenses in some cities are innocent in others. No two charters are alike. Some cities have over them a police commission, while others select and control their police officers. Their authority and their ordinances differ in many particulars. So it is, in perhaps a less degree, with towns. Many have been given authority which others do not possess. Their by-laws (Pub. St. c. 40, §§ 7, 8) are not uniform. Acts forbidden in some towns are permitted in others. It is said that this lack of uniformity results "from the exercise of limited powers of local government granted to towns and cities," and therefore has no bearing on the present question. In the first place, it is not, as a matter of fact, altogether a result of local ordinances or by-laws. Much of it is created by the direct action of the legislature; as, for example, in the creation of police commissioners, and in conferring special powers upon particular towns. In the next place, acts under a delegated power are the acts of the principal. The principal cannot confer upon his agent a power which he does not himself possess. Whatever by-laws and ordinances the legislature can lawfully authorize towns and cities to adopt, it has the constitutional power to enact directly. *Wooster v. Plymouth*, 62 N. H. 193, 208-210; *State v. Noyes*, 30 N. H. 279, 293. The legislature may at any time resume the delegated powers. *School Dist. v. Smart*, 18 N. H. 268, 273; *Lisbon v. Clark*, Id. 234; *Stevens v. Dimond*, 6 N. H. 330, 331; *State v.*

Hayes, 61 N. H. 335; *Berlin v. Gorham*, 34 N. H. 266, 275. If the legislature is by the constitution forbidden to enact such laws, it cannot authorize towns and cities to enact them. It cannot confer a power it does not itself possess. It is not for the court to inquire into the wisdom or unwisdom of such legislation. Whether the act "be wise, reasonable, or expedient is a legislative, and not a judicial, question. The legislature is as capable of determining the question of the wisdom, reasonableness, and expediency of a statute, and of the necessity for its enactment, as the courts. The only inquiry is whether the statute conflicts with the constitution." *State v. Marshall*, 64 N. H. 549, 550, 15 Atl. 210; *Farquhar's Petition*, 51 N. H. 376, 378. The question is one of constitutional power.

It is not easy to see how a requirement that all general statutes shall be made applicable equally to all similarly situated portions of the state could be given practical effect unless the legislature were made the final and exclusive judge of what places, towns, or cities are so situated. *Cooley Const. Lim.* (4th Ed.) 156, note. It is a question of fact. Is it to be determined by a jury, and the validity or invalidity of the statute made to depend upon their verdict? *State v. Campbell*, 64 N. H. 402, 404, 13 Atl. 585. The question is concluded by our decisions. In *Scott v. Willson*, 3 N. H. 321, decided in 1825, it was held that an act regulating the mode of putting pine timber into Connecticut river was not repugnant to the constitution, for the reason that it "does not embrace all rivers, but is confined to Connecticut river." *Richardson, C. J.*, says (page 328): "It has been decided in Massachusetts that an act attempting to suspend the operation of a general law in relation to a particular person was unconstitutional. *Holden v. James*, 11 Mass. 396. But that decision has no bearing upon the question to be decided in this case. Here the objection is not that the law does not extend to all persons, but that it does not extend to all places. The objection in truth is that the statute is a general law in relation to a particular place. But we have been referred to no clause in our constitution which restrains the legislature from passing such a law; nor have our researches enabled us to find any such clause." *Richardson, C. J.*, and his associates thought the proposition so obviously sound as to require no elaboration. It is needless to say that nothing is to be found in Opinion of the Justices (the same judges) 4 N. H. 572, inconsistent with this doctrine. In *Re Charter of Manchester*, 47 N. H. 277, decided in 1867, it was held that an act requiring the check list in the city of Manchester to be regulated in a different manner from that prescribed by the general law in all other places, towns, or cities was not, for that reason, unconstitutional. *Sargent, J.*, says (page 279): "But

it may be said that the rule should be uniform, and administered alike in all places. There might be more weight in this objection if all the other attendant circumstances were the same. We by no means intimate an opinion that the legislature might not constitutionally impose these duties relative to the check list upon one set of officers in some towns and counties and upon a different board in other towns and counties. The legislature may constitutionally pass a general law in relation to a particular place. *Scott v. Willson*, 8 N. H. 321, 328; *State v. Noyes*, 30 N. H. 279. So general statutes have been passed in regard to schools in Portsmouth and in Somersworth, differing widely from the general law relating to schools in other parts of the state. Comp. St. cc. 80, 81. But when we consider the differences between the wards of a city and towns not connected with any city, we see at once that there is such a difference in circumstances as may well justify a difference in the board selected to perform these duties, if such a justification were necessary." The question was directly involved in *State v. Franklin Falls Co.* (1870) 49 N. H. 240. It was there held that the statute (Gen. St. c. 251, § 20) prohibiting the maintenance of dams on the Winnipiseogee river (and five others) was constitutional. The objection that the statute was local in its application was not alluded to either by counsel or the court, and for the reason, undoubtedly, that they understood that it was not tenable; that the question was not an open one. The same is true of *State v. Roberts* (1879) 59 N. H. 266, 484, where the defendant was indicted, convicted, and presumably punished for taking trout from his own pond, under a statute prohibiting the taking of trout in certain months from any waters of the state except certain lakes and a certain pond. So, also, of *Purinton v. Ladd*, 58 N. H. 596, which was debt for the penalty under the same statute. Laws 1872, c. 55.

The latest judicial declaration bearing upon the question is found in Opinion of the Justices, 66 N. H. 629, 665, 33 Atl. 1076, 1096, where it is said that "a special act is not to be declared void because it is opposed to a spirit supposed to pervade the constitution, but not made an operative part of it by express words, or necessary implication; that is, by fair construction." Until 1864, deposits in savings banks were taxed to the depositors like other property. Rev. St. c. 39, § 3; Comp. St. c. 41, § 4; Laws 1864, c. 4028. By the act of 1864 the banks were required to pay a tax of three-fourths of 1 per cent. on the deposits, to be in full of all taxes on the depositors or account of the deposits. In 1869 the tax was increased to 1 per cent. (Laws 1869, c. 4, § 3), and so it remained until 1895, when it was reduced to three-fourths of 1 per cent. (Laws 1895, c.

108). This was a heavy discrimination in favor of the depositors. *Bank v. Concord*, 59 N. H. 75, 78. They were required to pay in many towns less than one-half the tax assessed on other property. Yet, notwithstanding the express provisions of the constitution that the general court may "impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and residents within the said state, and upon all estates within the same" (article 5), and "in order that such assessments may be made with equality" require that a valuation of the estates be taken anew once in every five years (article 6), and declare that "every member of the community * * * is bound to contribute his share" of the public expense (Bill of Rights, art. 12, and the numerous judicial decisions thereon,—*State v. Pennoyer*, 65 N. H. 113, 114, 18 Atl. 678), this court, in 1863 (less than 20 years after the enactment creating the discrimination), declared that "the savings bank tax is an anomaly, resting on peculiar grounds of public policy, and is universally understood to have acquired the position of an exception to the constitutional rule of equality." *Boston, C. & M. R. R. v. State*, 62 N. H. 648, 649. How did it become an exception? Solely by virtue of the statute creating it and less than 20 years' of public acquiescence. In *Morrison v. Manchester*, 58 N. H. 538, 551, 552 (decided in 1879), the court said: "In this state the taxability of money at interest is not an open judicial question. Whether the assessment of money at interest is a process of ascertaining the lender's or the borrower's just share of the public expense, or an exceptional, double, or otherwise wrongful taxation of the borrower, * * * permitted, not required, by an erroneous constitutional construction established by legislative usage and judicial recognition, we need not inquire. If the assessment of a creditor for his interest-bearing loan of money is, in effect, either a double taxation of his debtor, or a taxation of the debtor for property which, by conveyance or destruction, has ceased to be his, * * * such taxation is sustained by the authority of precedent. * * * The precedent is too firmly established to be overthrown by any other authority than that of making laws." In other words, a legislative usage for something less than 100 years, accompanied by judicial recognition, is sufficient to establish a rule of taxation forbidden by the constitution. "Local self-government, * * * in uninterrupted operation more than two hundred and forty years; has been constitutionally established by recognition and usage." *Doe, J. C. J., State v. Hayes*, 61 N. H. 264, 323. "When a question arises as to the contemporaneous meaning of the terms used in an ancient instrument, early and long-continued usage has a controlling weight." *The Dublin Case*,

38 N. H. 459, 512; *Pierce v. State*, 13 N. H. 536, 573; *Company v. Fernald*, 47 N. H. 444, 459; *Copp v. Henniker*, 56 N. H. 179, 209; *King v. Hopkins*, 57 N. H. 334, 356; *Keniston v. State*, 63 N. H. 37, 38.

Immediately upon the adoption of the constitution in 1784, the legislature (many members of which, and of succeeding legislatures, were members of the convention, and participated in framing the constitution) began to enact general laws applicable to particular places. They have continued to do so from that time to this,—more than a hundred years. There have been few, if any, legislative sessions during which one or more statutes of this character have not been enacted. Their number is very great. They have been sanctioned by judicial decisions. Not a dictum or intimation against their validity is to be found in our reports, nor, it is believed, in those of any other state, in the absence of express constitutional prohibition. They have been acquiesced in by the public. Under them rights have accrued, and have been enforced. Many persons have been punished for violating them. It is not claimed that such legislation is expressly forbidden. Conceding (for sake of the argument) that it is unwise, and opposed to the general spirit of the constitution, this long-continued usage, recognition, and acquiescence must (even if there were no judicial decision on the subject), under our established doctrine of constitutional construction, be held decisive upon the question of legislative power. "Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one; and they may extend to all citizens or be confined to particular classes,—as minors, married women, bankers, or traders, and the like. The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state, or a single class of its citizens, only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may, therefore, prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the state constitution does not forbid. These discriminations are made constantly, and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The business of common carriers, for instance, or of bankers, may

require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same by persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." *Cooley, Const. Lim.* (4th Ed.) 488, 489.

Appeal dismissed. All concur.

(87 N. H. 330)

EMERY et al. v. HILL et al.

(Supreme Court of New Hampshire. Merri-mack. March 17, 1893.)

LEASE—PROVISION AGAINST ASSIGNMENT—NOTICE OF RENEWAL—RECEIPT FOR RENT.

1. A stipulation, in a lease to partners, against leasing or underletting any part of the premises, or assigning the lease or any interest therein, is violated by the partners and others forming a corporation, and transferring to it all the assets of the partnership, including real estate, and all rights and privileges theretofore possessed and enjoyed by it, and the occupation of the premises by the corporation.

2. Notice to the lessor that the lessees elect to renew, signed by a third person, is not notice by the lessees, required by the lease for a renewal.

3. An assignee of a lease is not recognized as tenant, though rent is paid with its check, the receipt being to the lessee.

Bill in equity by Edson J. Hill and others against George H. Emery and another. Case discharged.

January 15, 1885, the defendants leased to the plaintiffs, as partners under the firm name of James R. Hill & Co., a certain building in Concord, for the term of six years, "and if the said lessees shall so elect, and notify the lessors, in writing, of such election, three months, at least, before the expiration of said six years, for the further term of six years; making twelve years, in all, if such election is made as aforesaid." The lessees covenanted that they would "not lease or underlet said premises, or any portion thereof, or assign this lease, or any interests therein, without the written consent of the lessors." The plaintiffs, as partners, occupied the leased premises for the manufacture and sale of harnesses until May 15, 1888, when, with three others, they formed a stock corporation, under the statute, styled the James R. Hill Harness Company, and transferred to it all the assets of the firm, including all its real estate, and all the rights and privileges before possessed and enjoyed by it; the corporation assuming all the liabilities of the firm. By mutual consent the partnership was then dissolved. Thereupon the corporation, by its officers and agents, took possession of the premises, and still occupies the same; carrying on the same business as the

partnership had been engaged in. The object of changing to the corporate method of doing the business was principally that of convenience. The nature and character of the business were in no way changed or affected; the plaintiffs sustaining the same relation to it as before, so far as its management was concerned. The defendants had general information that the plaintiffs and others had formed a corporation in 1888, which was apparently carrying on the business in which the firm had been engaged; but they did not know how the change affected the old firm, or that the corporation had succeeded to all its assets and liabilities, or that it had been dissolved, and its affairs closed up. The rent of the premises was regularly paid according to the terms of the lease, by checks signed by the firm name of James R. Hill & Co., until the formation of the corporation, since which time they have been signed, "The James R. Hill Harness Co.," by the treasurer, or the president. For these payments, as well after as before the formation of the corporation, the defendants gave receipts to "J. R. Hill & Co." September 5, 1890, a written notice addressed to the defendants was served upon them, which stated that "James R. Hill & Co., the lessees under a lease from Sophia L. Hill and others, dated January 15, 1885, of number 67 and 69 N. Main street, in Concord, hereby give notice that they elect to have the said lease extended for the additional term of six years from January 15, 1891, as provided in said lease. The James R. Hill Harness Co., Geo. H. Emery, Pres." December 12, 1890, the defendants wrote the plaintiffs that, as no notice had been given by them of a renewal, the lease would terminate January 15, 1891, but that they would be willing to lease the property to responsible parties at an increased rental. December 15, 1890, the plaintiffs addressed a notice to the defendants, electing to extend the lease for six years, and signed it by the firm name, and by their individual names. The prayer of the bill is for specific performance of the defendants' covenant to renew the lease, but by agreement of the parties the only question submitted on the foregoing facts is whether the corporation is rightfully in possession of the leased premises.

Samuel C. Eastman and William L. Foster, for plaintiffs. Streeter, Walker & Chase, for defendants.

PER CURIAM.¹ In the defendants' lease to James R. Hill & Co., it was stipulated that the lessees should "not lease or underlet said premises, or any portion thereof, or assign this lease, or any interest therein, without the written consent of the lessors." This is a valid stipulation, inserted for the benefit of the lessors. The lessees' ability and willingness to pay the rent promptly, and their careful use of the premises, including the reasonable pres-

ervation of the building from reckless or careless injury, and from destruction from fire, furnish some of the apparent reasons for this provision in the contract. *Roe v. Sales*, 1 Maule & S. 297. While the lessors were willing to make Hill & Co. their tenants, they were not willing to allow Hill & Co. to substitute others as their tenants by an assignment of the lease, made without their approval. The practical dissolution of the partnership, the substitution of the corporation in its place, and the occupancy of the leased premises by the corporation as the successor of the partnership, amounted to an assignment of the lease. The form of the assignment is unimportant. *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 65 N. H. 393, 451-457, 23 Atl. 529. If, instead of adopting a corporate form of doing business, they had admitted new members into the firm, and transferred to the new partnership their interest in the lease, the transaction would have been an assignment of "the lease," or an "interest therein." *Varley v. Coppard*, L. R. 7 C. P. 505. The retention by the plaintiffs of a nominal interest in the firm would not enable them to violate the contract with impunity, or to deprive the defendants of their right to enforce it. "A lessee of one hundred acres, on condition that he shall not assign, can no more convey one acre, without breaking the condition, than he can ninety-nine or one hundred acres. His grant of ninety-nine and ninety-nine one-hundredths acres is no more a breach than his grant of one-hundredth of an acre." *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 65 N. H. 452, 23 Atl. 529. If the plaintiffs could assign a hundredth part of their interest as lessees, they could assign ninety-nine one-hundredths of it. It is one of those cases in which no line can be drawn between a great and a small violation of the contract. If the case of *Roosevelt v. Hopkins*, 33 N. Y. 81, holds that, although it is stipulated in the lease that the lessees shall not sublet or assign the premises, they may assign anything less than the whole premises, it is not in accordance with the settled law of this state.

The formation of the corporation by the members of the old firm, and others who were allowed to become stockholders, presents additional objections to those already mentioned in the case of the admission of new members to the firm. If the assignment of the lease to the corporation were valid, the lessors' rights in respect to payment of, and security for, the rent, might be materially impaired. The personal liability of the plaintiffs, as partners, for the rent, and their liability as stockholders, under Gen. Laws, c. 149, would not be the same. That difference is often one of the reasons for forming corporations instead of unincorporated partnerships. So far as it is favorable to the stockholders, so far it is unfavorable to the corporate creditors. As new stockholders may acquire control of the corporation, and as the original incorporators may cease to have an

¹ See footnote 36 Atl. 607.

interest in the corporate affairs, it is plain that the personal integrity and carefulness which the lessees sought to secure by the provision in the lease against the lessees' assignment of it would also cease, and the recklessness of others might be substituted; and the lessors would be deprived of the security against careless injury to the property, for which they stipulated, if it is held that the corporation's possession of the defendants' real estate is rightful. The change from a partnership to a corporation was a substantial change, and not a mere matter of form.

Whether this result amounts to a forfeiture of the lease, so that an occupancy by the original members of the dissolved firm would be wrongful, need not be considered. If the legal right of the firm to the possession of the premises was not terminated by its voluntary dissolution, and its unlawful assignment of the lease to the corporation, the term of six years for which the lease was given has expired, and there has been no valid renewal of it. The attempt to extend the lease for an additional term of six years was ineffectual, so far as the corporation is concerned. It was provided in the lease that the lessees might extend it for a further period of six years by notifying the lessors, in writing, of their election so to do, three months before the expiration of the original lease. Whether the paper given to the defendants on September 5, 1890, was a notice given by anybody, is an interesting question. It states that "James R. Hill & Co., the lessees, * * * hereby give notice that they elect to have the said lease extended," and is signed, "The James R. Hill Harness Co., Geo. H. Emery, Pres." If this was a notice by the partnership, it did not make the possession of the corporation legal; if it was a notice by the corporation it could have no effect, for legal notice could only be given by the partnership; and, if it was a notice by neither, the same result follows. The corporation's wrongful possession could only be made legal by legal methods, and the service of this paper upon the defendants was not a legal method of extending the corporation's illegal possession for a series of years. Nor was the service of the notice of December 15th sufficient, because the time had then expired within which the partnership could elect to have an extension of the lease.

It is claimed that the defendants have so recognized the corporation as its tenant under the lease that they have waived their right to a notice of extension from the partnership. If the receipt of rent from the corporation by the defendants, recognizing them as tenants, would be a waiver, there has been no such recognition. After the formation of the corporation, the rent was paid by checks signed by the corporation; but the defendants took special care not to recognize the corporation as their tenant, and plainly repudiated the relation of landlord and tenant, as to the corporation, by giving receipts for the rent to the unincorporated

partnership. There was no waiver, and the lease has not been extended. Case discharged.

ALLEN and CHASE, JJ., did not sit. The others concurred.

(37 Md. 10)

SPIES v. ROSENSTOCK.

SAME v. STARGARDTNER.

(Court of Appeals of Maryland. Jan. 4, 1898.)

NOTE.—CONSIDERATION—PARTNERSHIP FOR ILLEGAL PURPOSE—GAMBLING CONTRACT.

1. The question of the consideration of a note is always open as between the maker and original payee thereof.

2. Where the business for which a co-partnership is formed is illegal, the contract of co-partnership is equally illegal.

3. The making of books on horse races is gambling, and contrary to public policy, within the meaning of Act 1894, c. 232, making it a misdemeanor to "make books" on the results of races.

4. A note given in the state in consideration of money loaned for "making books" on races run in another state, where the laws authorize "bookmaking," is given for money loaned for gambling purposes, in violation of Act 1894, c. 232, and is therefore void.

Appeals from superior court of Baltimore city.

Assumpsit by Charles A. Spies against Hesse Rosenstock and assumpsit by Charles A. Spies against S. J. Stargardtner. From a judgment in favor of defendant in both cases, plaintiff prosecuted two appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BOYD, PAGE, ROBERTS, and FOWLER, JJ.

Edward Isreal and R. W. Mobray, for appellant. Frederick C. Cook, for appellee.

FOWLER, J. The plaintiff sued the defendant to recover on a promissory note for the sum of \$750. The defendant pleaded nonassumpsit. It appears from the testimony of the plaintiff that he and the defendant "were co-partners as bookmakers for the races to be run at the tracks in Virginia in the year 1895, and that, the defendant not having the money to put into the business, the plaintiff agreed to furnish the capital of the same to the amount of \$1,500, and the defendant gave him the note sued on for his one-half of the capital of said business; that the said business had been unsuccessful, and said sum of \$1,500 was lost therein." The defendant was asked to state the circumstances under which the note sued on was given, but the plaintiff objected. This objection was overruled, and the defendant was allowed to answer the question. He testified that the note was his genuine note, and that the indorsement "S. J. Stargardtner," was also genuine; that the plaintiff and defendant had entered into an agreement in Baltimore city to engage in the business of bookmaking on certain races to be

run in 1896, on courses in Virginia, and that at the time said partnership was formed it was agreed that the sum of \$1,500 was to be furnished by the plaintiff, and that the note sued on was to be and was given by the defendant for his share of the capital." It further appears from the testimony that "the business of bookmaking on horse races is a business in which the bookmakers offer bets at certain odds on particular horses in the races, and take all such bets as persons may choose to make with them at the odds offered, and upon the receipt of the money from the person willing to bet with them the bookmakers issue tickets to them showing the terms of the bet, and, if the horses backed by the bookmakers lose, they pay the winners, and, if the horses win, they keep the money received from the customer, and pay out nothing; * * * that the business of bookmaking is betting on horse races, and is called bookmaking because the bets are booked, or a record kept of them in a book." The plaintiff also offered testimony tending to prove that the races in question were authorized by the laws of Virginia, and at the close of the case asked the court to instruct the jury that, if they believed from the evidence that the defendant executed the note sued on, and had not paid any part thereof, the plaintiff was entitled to recover the amount of the note, with interest. But the learned judge below refused this prayer, and instructed the jury that upon the uncontradicted testimony the note was given in part execution of a contract which was contrary to public policy, and therefore void, and that the plaintiff was not entitled to recover. The verdict and judgment being against him, the plaintiff has appealed.

The defendant was permitted to state the circumstances under which the note was given. This constitutes the first exception. It is clear, however, that there was no error in this ruling; for it is settled that, as between two immediate parties, as here between the maker and the payee, "while the note itself is prima facie evidence of the consideration, the question of consideration is always open." *Ingersoll v. Martin*, 58 Md. 73.

Nor do we think there was any error in the instruction given the jury upon which is based the second exception. As we have seen, the jury were instructed by the learned judge below that the note sued on was, by the uncontradicted evidence in the case, given in part execution of a contract which was void, because contrary to public policy. Both the plaintiff and defendant testified that the note was given for the defendant's contribution to the capital of the partnership formed between them to carry on the so-called business of betting on horse races in Virginia. It requires neither argument nor authority to show that, if the thing to be done is illegal, the contract of co-partnership for the purpose of doing that thing is equally

illegal, for otherwise it would only be necessary to form a co-partnership or a corporation in order, with impunity, either to violate the law, or prosecute a business contrary to the public policy of the state. The only question we need consider, then, is whether the business of betting on horse races is contrary to the public policy of this state.

The statute of 16 Car. II. c. 7, and that of 9 Anne, c. 14, are both in force in Maryland. *Hook v. Boteter*, 3 Har. & McH. 348; *Gough v. Pratt*, 9 Md. 533; *Emerson v. Townsend*, 73 Md. 224, 20 Atl. 984; *Alexander*, Brit. St. 475, 689. By the first, which is entitled "An act against deceitful, disorderly, and excessive gaming," it is provided, among other things, that those who win bets on horse races and other games by any fraudulent means or device shall forfeit treble the sum so won; and by the third section, that notes given for money lost at games, including therein horse races, if such note exceed 100 pounds, shall be void, and the payee shall forfeit treble the sum thereof. And by the second statute, passed nearly 50 years after the one just cited, which is entitled "An act for the better preventing of excessive and deceitful gaming," it is provided that all notes, bills, etc., where the whole or any part of the consideration shall be for money won by gaming, shall be void. As the word "gaming," as used in the statute of Charles, included betting on horse races, and as the statute of Anne was passed for the purpose of better preventing the evils of gaming, such betting, and the giving of notes for money thereby lost, would seem to be within the latter statute, although not expressly prohibited thereby. And it was so held in *Blaxton v. Pye*, 2 Wils. 309; *Goodburn v. Marley*, 2 Strange, 1159; *Grace v. McElroy*, 1 Allen, 563; *People v. Weithoff*, 51 Mich. 203, 16 N. W. 442. But we are not left in any doubt as to what the policy of this state is now in regard to betting on horse races, whatever it may have been heretofore, for by the act of 1894 (chapter 232) it was enacted that "it shall be unlawful for any person or persons or association of persons to gamble or make books and pools on the result" of any horse race or race of any kind, except for the space of 30 days, as therein provided. The violation of this act is declared to be a misdemeanor punishable by fine not exceeding \$500. In the recent case of *State v. Dycer*, 85 Md. 250, 36 Atl. 763, we said, in commenting upon this act, *Bryan, J.*, delivering the opinion of the court: "The comprehensive, absolute, and unqualified expressions used by the legislature show that they regarded this species of gambling as a serious evil, and desired to suppress it. But for reasons which they considered satisfactory they saw fit to permit it, under certain circumstances, for the space of thirty days in any one year." The contention of the appellant, therefore, that the making of books on horse races is not gambling, within the

meaning of the law, will not avail him in the face of this act and our construction of it. In support of his view he cites a number of decisions of other states, and also the case of *James v. State*, 63 Md. 257. This latter, however, has no application to the question now before us. It was there held that the selling of pools on horse races, and the keeping of rooms for that purpose, did not constitute a criminal offense, within the meaning of the statute against gambling as there existing. But, as we have seen, pool-selling and bookmaking is now a misdemeanor,—a criminal offense,—under the act of 1894, unless such as is permitted by the express terms of that act, or expressly excluded from its absolute and unqualified prohibitions. The facts that the races on which the bets were made were run on grounds owned and controlled by associations or driving clubs incorporated under the laws of Virginia, and that such races were authorized by the laws of that state, do not legalize here the bets thereon, made there or here, unless such bets be within and are clearly permitted by the act of 1894. And that such is the case no proof has been offered. Nor would it be possible to offer any such proof, unless we admit—which we are not inclined to do—that our act, under any circumstances, was intended to make legal such bets made here or elsewhere on races run in other states. Its object was, undoubtedly, to allow, on certain conditions, betting on races run in this state, as therein provided. All other such betting is declared illegal. But, in addition to what we have said, it seems to be clear that, the note in question having been given for money advanced or loaned for the purpose of gambling is clearly within the decision in *Emerson v. Townsend*, where we said, *Briscoe, J.*, delivering the opinion of the court, that a note is utterly void where even a part of the consideration was for money loaned and advanced for gambling purposes. It follows that the judgment appealed from will be affirmed. Judgment affirmed.

(36 Md. 562)

**SUSQUEHANNA FERTILIZER CO. v.
SPANGLER et ux.**

(Court of Appeals of Maryland. Jan. 4, 1896.)

**NUISANCE—FACTORY—NOXIOUS GASES—DEFENSES
—SKILL IN OPERATING—INSTRUCTIONS—
SUFFICIENCY OF EVIDENCE.**

1. If a factory be so conducted as to render it a nuisance, the fact that it used care and skill and employed the best appliances in the management of its works will not defeat a recovery by one whose property is injured thereby.

2. In an action against a factory for maintaining a nuisance, it is not error to refuse to instruct that, where expensive works have been constructed, which are useful to the public, persons must submit to the reasonable consequences of the carrying on of its trade in the immediate neighborhood.

3. In an action against a factory for maintaining a nuisance, where the gases arising from the factory had affected the paint on plaintiff's

house, had eaten the nails holding the shingles on the roof, had rendered the occupancy thereof uncomfortable and unhealthy, and had caused customers to cease trading at plaintiff's store, a verdict for plaintiff for substantial damages will be sustained.

Appeal from court of common pleas.

Action by Andrew Spangler and wife against the Susquehanna Fertilizer Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, ROBERTS, BOYD, and BRISCOE, JJ.

Charles Marshall, E. H. Gans, and B. Howard Haman, for appellant. R. R. Boorman and Robert R. Brown, for appellees.

BRYAN, J. Andrew Spangler and his wife brought an action against the Susquehanna Fertilizer Company to recover damages caused by an alleged nuisance. Judgment having been rendered in their favor, the defendant appealed.

The declaration averred that the plaintiffs were owners of two lots of ground on each of which there was a dwelling house; that the plaintiffs and their family lived in one of the dwelling houses, and kept a store in it, and that the other was rented to tenants from time to time; and that the defendant conducted and maintained a factory for the manufacture of fertilizers, phosphates, manures, and compounds; and that from said factory, from time to time, there arose noxious, noisome, offensive, and unwholesome vapors, smoke, and foul and disagreeable odors and noxious gases, and were spread and diffused over and upon the lots of the plaintiffs, and upon and into the dwelling houses erected on said lots, and caused great discomfort and annoyance and sickness to the plaintiffs and their family, and destroyed their furniture, bedclothes, and wearing apparel, and greatly corrupted and polluted the air, and rendered it deleterious to the health of the plaintiffs and their family, and took away from them the reasonable and comfortable enjoyment of the houses as places of abode, and greatly impaired and diminished the value of the dwelling houses, and the value of the stores as a place of business. The defendant pleaded that it did not commit the wrong alleged. The houses alleged to belong to the plaintiffs and the factory of the defendant are situated in Canton, a large and populous village adjoining the city of Baltimore. The evidence showed that one of the lots was owned by the plaintiffs. This lot is at the corner of First street and Eighth avenue. There is no testimony in the record as to the other lot, which adjoins the first one. The evidence for the plaintiffs tended to prove the other facts averred in the declaration. The evidence for the defendant contradicted them, and also tended to show that, with the exception of a few houses, the entire locality where the nuisance is alleged to exist is given up to fertilizer factories, wharves, elevators, and a

railroad, and that the Spangler property is in close proximity to large hog pens and manure pits. The court granted two prayers in behalf of the plaintiffs. The first prayer is restricted to the premises at the corner of First street and Eighth avenue, and it substantially leaves it to the jury to find the truth of the evidence offered on the part of the plaintiffs, and it maintains that upon the finding of these facts the plaintiffs are entitled to recover. It does not, however, state the measure of damages. With the exception of the description of the property affected, it is a literal copy of the first prayer in *Malone's Case*, 73 Md. 268, 20 Atl. 900, which this court adjudged to be correct. The second prayer of the plaintiffs maintained, in substance, that, if the nuisance was found by the jury as stated in the first prayer, the recovery would not be defeated, even if the defendant used care and skill, and employed the best and most approved appliances, in the management of its works. The doctrine of this prayer was laid down in *Malone's Case*. At page 276, 73 Md., and page 900, 20 Atl., the court said: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie; and this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business." The defendant offered three prayers. The court rejected the first prayer, and granted the other two. The rejected prayer is in these words: "The jury are instructed that, before the plaintiffs can recover under the pleadings in this case, they must believe that the fumes and gas from the factory of the defendant have occasioned substantial injury to the house owned by the plaintiffs jointly, and in determining this question the jury are instructed that they should take into consideration the locality and all the surrounding circumstances; and that, when expensive works have been constructed, which are needful and useful to the public, if they so find, that persons must not stand on extreme rights, and bring actions with respect to every trifling annoyance, but must submit to the reasonable consequences of the carrying on of trades in this immediate neighborhood, which are actually necessary to trade and commerce; and in considering the question of damage to the property of the plaintiffs the jury are instructed that the plaintiffs cannot recover for any injury they might have prevented by ordinary effort and care." There was evidence that the gases from the defendant's factory not only injured the physical structure of the plaintiffs' house, but made it extremely uncomfortable, disagreeable, and unwhole-

some as a place of abode, and also seriously injured the business of the store.

This court has several times had occasion to consider the rights of a party under such circumstances. An action for a nuisance rests on the same principles as those which support every other action of tort. If the defendant has committed an injury to the rights of property of the plaintiffs, he must respond in damages. In *Dittman v. Repp*, 50 Md. 518, there was an application for an injunction to restrain the defendants from carrying on a brewery on Bond street, in the city of Baltimore. It was alleged that they were using steam machinery, which produced a loud and deafening noise, which was so disagreeable and offensive to the complainant and his family, who occupied adjoining premises, that, with a due regard to their health and comfort, it would be impossible for them to remain in the house. The court, quoting from *Lord Chancellor Westbury in St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 650, said: "If a man lives in a town, of necessity he must submit himself to the consequences of the obligations of trades which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop." It also said: "But still, as we have said, there is a limit to the discomforts and annoyances to which a party may be required to subject himself without remedy by living in a city or a manufacturing district; and the authorities are numerous which hold that noise alone, if it be of such character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, may create a nuisance, and be the subject of an action at law, or an injunction from a court of equity, though such noise may result from the carrying on of a trade or business in a town or city." *Chappell v. Funk*, 57 Md. 465, was a bill in equity for an injunction to restrain and prohibit the operation of a factory for the manufacture of vitriol, sulphuric acid and other products. The facts are not stated in the report of the case. But a reference to the record on file in this court will show that Funk owned and possessed a lot of ground in the city of Baltimore on which there were several dwelling houses; that he occupied one of them as a place of abode, and that the greater portion of the lot was used by him as a garden in which he raised large quantities of produce, such as plants, vines, fruits, and vegetables of excellent quality, and that he had been in the habit of selling them at high prices, and had realized great pecuniary profit in this way; and that im-

mediately in the rear of his lot there was the factory in question, which was conducted, controlled, and operated by the defendants; and that in the course of the business conducted by them large quantities of smoke, and of noxious, noisome, offensive, and unwholesome vapors and gases were produced and emitted from the said factory; and that the smoke came over and upon Funk's garden and dwelling house, and that offensive smells from the factory pervaded the dwelling house and garden, and that noxious and unwholesome gases were diffused over and upon the garden and throughout the dwelling house; and that these causes killed and destroyed his plants, flowers, and vegetables, and prevented Funk from cultivating his garden successfully and profitably, and inflicted great pecuniary loss and injury upon him; and that the noxious vapors and gases corrupted and polluted the air, and were greatly deleterious to the health of his family, and greatly incommoded and annoyed them, and took away from them all reasonable comfort in the occupation of their home. This court held that it was very clear that the averments in the bill of complaint were quite sufficient to warrant the granting of relief by injunction. If there could be any doubt of the reason for the decision in this last-mentioned case and in Dittman's Case, it will be entirely cleared up by what was said in *Adams v. Michael*, 38 Md. 123, referred to in Dittman's Case, and made the basis of its decision. In *Adams v. Michael* the court quote with approval the words of Lord Romilly in *Crump v. Lambert*, L. R. 3 Eq. 413. His lordship says: "The law on this subject is, I apprehend, the same whether it be enforced by action at law or bill in equity. * * * There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapors, or water, or any gas or fluid. The owner of one tenement cannot cause or permit to pass over or flow into his neighbor's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighboring tenement, or so as to injure his property." He also says: "The real question in all the cases is the question of fact, viz. whether the annoyance is such as materially to interfere with the ordinary comfort of human existence. This is what is established in *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642." Let us now refer to the *St. Helen's Case*, which has always been considered a high authority by this court. In that case the defendant was sued for damage alleged to have been caused by smelting works used on land near to the dwelling house and lands of the plaintiff. It was in evidence that the whole neighborhood was studded with manufactories and tall chimneys; that there were some alkali works close by the defendant's works; that the smoke from one was quite as injurious as the smoke from the other; that the smoke of both

sometimes united, and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendant's works existed before the plaintiff bought the property was also relied on. In the house of lords, the lord chancellor said that "the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to circumstances the immediate result of which is sensible injury to the value of the property." And speaking of an argument made in behalf of the defendant that the whole neighborhood where the smelting works were carried on was more or less devoted to manufacturing purposes of a similar kind, and that it was consequently a fit place for such a business, he said: "That is not the meaning of the word 'suitable,' or the meaning of the word 'convenient,' which has been used as applicable to the subject. The word 'suitable' unquestionably cannot carry with it this consequence: that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property." Lord Cranworth said: "It is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property."

We have considered at a length which is perhaps unnecessary the reasons and authorities on which the opinion of this court is founded on questions of the character presented in this case. We have done so because we perceived from the argument that the principle was very important to the appellant in this case. We have not meant, however, to imply any dissatisfaction with the decision in *Malone's Case*, 73 Md. 268, 20 Atl. 900, in which this same fertilizer company was appellant. That decision was approved in *Euler v. Sullivan*, 75 Md. 616, 23 Atl. 845, and we have no doubt of its correctness. In the opinion it was said: "So we take the law to be well settled that in actions of this kind the question whether the place where the trade or business is carried on is a proper and convenient place for the purpose, or whether the use by the defendant of his own land is, under the circumstances, a reasonable use, are questions which ought not to be submitted to the finding of the jury." In the rejected prayer on the part of the defendant it was proposed to instruct the jury, in determining the question of substantial injury to the plaintiffs' house, that they should take into consideration the locality and surrounding circumstances, and other matters which appear in the prayer, which we have already quoted in full, and which need not be repeated here. The jury are not told what exculpa-

tory inference they would be at liberty to draw from these matters after they had taken them into consideration. But they were to consider them in determining whether the injury was substantial or not. Manifestly, none of them could have any tendency to show whether the injury to the house was great or small. One of the plaintiffs testified that the house had entirely "gone to rack"; that the gases had affected the paint on the house, and made the shingles on the roof loose by eating the nails; and that the tin roof on the stable had been eaten up. Both of the plaintiffs testified that the gases from the factory made living in the house extremely uncomfortable and unhealthy. The wife testified that customers had ceased coming to the store on account of the gas and fumes, and that they had nearly broken it up. This evidence, if believed by the jury, would justify them in finding substantial injury to the rights of the plaintiffs without any regard whatever to the locality. It is not in any manner countervailed or weakened by any of the matters suggested for the consideration of the jury in the rejected prayer. The proper question for the jury was whether the operation of the factory interfered with the reasonable and comfortable enjoyment by the plaintiffs of their property, or occasioned material injury to the property itself. The finding of these facts depended on the evidence applicable to them, and not on locality or any other matter embraced in the rejected prayer. Judgment affirmed.

(36 Md. 675)

BARROLL et al. v. FOREMAN.

(Court of Appeals of Maryland. Jan. 4, 1898.)

NOTES—BONA FIDE HOLDER—TRUSTS—INTERPLEADER—SUFFICIENCY OF BILL.

1. Where a purchaser of real estate at a trustee's sale passed, to one of the two trustees, a negotiable note of another, payable to the purchaser's order, and indorsed by him in blank, and afterwards said trustee, without the consent or knowledge of his co-trustee, sold said note, before its maturity, to one who took it in good faith, for full value, and without notice that it belonged to a trust estate, such purchaser acquired a valid title to the note.

2. A bill of interpleader is defective where plaintiff neither brings the money into court nor offers to do so.

Appeal from circuit court, Queen Anne county.

Bill by Pere T. Foreman against Hope H. Barroll, trustee, and others, to require defendants to interplead, and to enjoin the prosecution of suits on a note. From a decree adjudging the ownership of the note, certain defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and PAGE, BRISCOE, and FOWLER, JJ.

Hope H. Barroll and Jas. P. Gorter, for appellants. J. H. C. Legg, Byron Reynolds, and Geo. R. Wilts, for appellee.

FOWLER, J. Hope H. Barroll and A. Randolph Weedon were appointed trustees, under

a decree of the circuit court for Queen Anne county, to sell the real estate of the late Joseph A. Raisen. The plaintiff in this case purchased several parcels of said real estate, and the sale so made to him was duly ratified. In part settlement of his purchase the plaintiff passed to Weedon, one of the trustees, the promissory note of John B. Brown for the sum of \$1,230.53, dated 29th September, 1891, payable to the plaintiff's order, 36 months after date. It must be noted that this note was indorsed in blank by the plaintiff, Pere T. Foreman, there being nothing upon the face of it to show that it was intended to be in payment of the land purchased by the plaintiff from the trustees. Some time in October, 1892, Weedon advised Gov. Reynolds to invest \$1,000, which Weedon had collected for him, in the note we have just described. This was done, and the difference between the note and the amount Weedon had collected, amounting to \$74.54, was remitted to him by Gov. Reynolds. The note was duly indorsed, and delivered by Weedon to Reynolds, who held it until its maturity, October 2, 1894, when he sued Brown as maker, and Foreman as indorser. The latter then filed in the circuit court for Queen Anne county his bill of interpleader against Gov. Reynolds, Hope H. Barroll, trustee, and John B. Brown, praying that Reynolds, and Barroll, trustee, might be required to interplead and set forth their respective claims to said note, and the sum represented thereby, and that Reynolds might be enjoined from prosecuting said suits against the plaintiff and said Brown until it could be determined who is legally entitled to the ownership of said note. All the defendants answered. Gov. Reynolds alleges that he is a bona fide holder for value, without notice of any kind, either actual or constructive, of any infirmity in the title of his indorser, and that the note was transferred to him before maturity, in the usual course of business. Mr. Barroll, now sole trustee, his co-trustee, Weedon, having been removed, alleges that the settlement made by the plaintiff with said Weedon was without his (Barroll's) authority, and that the trust estate cannot be bound by it. The remaining defendant, J. B. Brown, admits his indebtedness on the note; that it has not been paid by him, because he was notified by the trustee, Barroll, not to pay it, and afterwards was enjoined from so doing; and that he is willing that the court shall direct the disposition thereof. A good deal of testimony was taken relating to the question of the ultimate rights of the trust estate on the one side, and the liability of the plaintiff on the other. Even assuming the validity of Gov. Reynolds' title to the note,—and whether he has such a title is the only question now properly before us, because that is the sole question finally settled by the decree appealed from,—it may have been the opinion of the court below that in point of fact the note was intended to be a part of the trust estate, because the plaintiff intended it to be a payment on account of the land purchased

from the trustees; but the decree is silent as to the right of the remaining trustee, notwithstanding such payment, to compel the plaintiff to pay again. By the decree it is declared that Gov. Reynolds is the lawful owner of the note; that, as such owner, he is entitled to judgment against John B. Brown, and also entitled to proceed with the suit against the plaintiff as indorser, unless the plaintiff pay to said Reynolds the amount of said note, with interest, etc., on or before 1st June, 1897. It is also decreed that the plaintiff pay to Reynolds the amount of the note, with interest and costs. We have thus recited the whole of the operative part of the decree, and it appearing that the court below has not passed upon the questions relating to the claim of the trust estate against the plaintiff, nor upon the defense set up by the latter that he made the settlement with Weedon, one of the trustees, in the manner already referred to, with the consent of the other trustee, Mr. Barroll, we cannot consider this branch of the case, although there was testimony taken relating to it, and the question involved therein was somewhat discussed at the hearing. However, we are informed by counsel that this question is directly presented in certain cases now pending in the circuit court for Queen Anne county, and we were requested by both sides not to pass upon it now. In fact, suits at law on the note are now pending, and may be prosecuted to judgment, if the money here involved should not be paid, as required by the decree in this cause; and the controversy between the appellant trustee and the appellee, Foreman, may also be settled by appropriate proceedings, if not already in process of settlement in pending suits.

We have examined the evidence before us, and have been unable to find any proof whatever which, upon any view, establishes the contention that Gov. Reynolds was guilty either of negligence or bad faith in the transaction with Weedon. The case of *Swift v. Williams*, 68 Md. 236, 11 Atl. 835, so much relied on by the appellants, is not like the one before us. There the funds of one trust estate were used to pay the creditors of another trust estate, and the bank, and the creditor who was held liable, were dealing with one who, not only was a trustee, but one who was acting in the capacity of trustee. But here it must be conceded that Gov. Reynolds had neither notice, nor was there anything to put him on inquiry, so that he could discover that the note ever had any connection with the trust estate of Ralsen, or that Weedon was disposing of trust property. And there, too, the trust estate here in question has not been, as yet, damaged or lessened by the improper transfer of the note, for the very land in payment for which the plaintiff passed it to the trustee has never been conveyed, and may therefore be sold again at the purchaser's risk, if it should ultimately be determined that he has not complied with the terms of sale.

In conclusion, it may be proper to say that, although no demurrer was filed to the bill of

interpleader in this case, the bill is defective because there is an omission either to bring the money into court or to offer to do so. We have recently, during this term, passed upon this question. In the case of *Insurance Co. v. Caulk* (not yet officially reported) 38 Atl. 901, *Boyd, J.*, delivering the opinion of the court, said: "The bill was also defective because the plaintiff neither brought the money into court nor offered to do so. It does state that the plaintiff was willing to pay it to the parties entitled thereto, but it nowhere offered to bring it into court for that purpose. This offer is required to prevent an abuse of this proceeding, just as the affidavit that there is no collusion; and although a bill is not demurrable, because the money is not actually brought in, yet, when that is not done, the offer to do so must, at least, be made. * * * And a bill should not be deemed sufficient unless it embraces such an offer." If the bill in this case had been properly drawn, and the money had been paid into court, the decree below could have awarded it to the defendant Gov. Reynolds, who, as we have already said, is the legal owner thereof; and thus there would have been, so far as he is concerned, an end of the litigation when the decree in this case was passed. But, as the matter now stands, if the money should not be paid as directed by the decree, further proceedings at law must be had in conformity with the provisions of the decree itself. Decree affirmed, with costs.

(37 Md. 59)

**BALTIMORE BUILDING & LOAN ASS'N
OF BALTIMORE CITY v. POWHATAN
IMP. CO. OF BALTIMORE CITY et al.**

(Court of Appeals of Maryland. Jan. 5, 1896.)

**BUILDING AND LOAN ASSOCIATIONS — RIGHTS OF
WITHDRAWING MEMBERS — BY-LAWS.**

1. A building and loan association based on the mutual plan is bound to treat its members equally, and any by-law or contract made by it in contravention of such mutuality would be ultra vires and void.

2. A building and loan association, whose fees were \$1 for admission per share, and a monthly assessment of 60 cents, had by-laws relative to withdrawal of members and disposition of the receipts, providing that members withdrawing were entitled to the amount paid on their shares, less the admission fee, and interest; that 50 cents of the monthly assessment should be paid into the loan fund, and 10 cents thereof into the expense fund; and that the receipts should be divided into two classes,—the expense fund, into which should go all admissions and transfer fees, together with 10 cents per share per month from the monthly assessments, and the loan fund, to consist of all receipts which did not go into the expense fund. *Held*, that a member withdrawing was entitled to repayment of the whole monthly payments of 60 cents, and interest thereon.

3. In ascertaining the meaning of by-laws of a building and loan association, the design of the framer, when it can be ascertained, must prevail.

Appeal from circuit court of Baltimore city.

Bill by the Powhatan Improvement Company of Baltimore City and others against the Baltimore Building & Loan Association of Baltimore City. From a pro forma decree for

plaintiffs, defendant appeals. Reversed, and bill dismissed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

F. C. Slingluff, John S. Wirt, and James A. Pearce, for appellant. Fred. W. Feldner, N. M. Edwards, and Wm. T. Donaldson, for appellees.

ROBERTS, J. The appeal in this case is taken from a decree of the circuit court No. 2 of Baltimore city, perpetually enjoining the appellant, its officers and agents, from paying, in the future, to the withdrawing members of the appellant association, the 10 cents per share per month, which it is contended is provided in the by-laws of the appellant shall be devoted to the operating expenses of the appellant, and that the surplus, if any, of the expense fund of said appellant, shall be treated as profits, and as such shall remain in the appellant for the benefit of the members thereof, who shall continue therein until the maturity of their stock. The question presented by this appeal is whether the decree from which the appeal is taken correctly interprets the by-laws of the appellant relating to the rights of those who are denominated the withdrawing members. The appellant was incorporated on the 26th of March, 1891, under the provisions of the general incorporation law of this state. By an amendment of its charter, dated the 31st of January, 1893, its aggregate capital stock is declared to be "represented by such number of shares of stock, not exceeding 250,000 shares, as the members of the appellant may, from time to time, subscribe for, and that the par value of said shares of stock shall be \$100 per share." The appellant is engaged in a very extensive business enterprise, involving large sums of money. It is claimed that it has \$60,000 shares in force, and holds about 3,000 mortgages, given to it as security for advances made on shares of the value of \$2,000,000. The question arising on this appeal is one of importance, the disposition of which may seriously affect a large number of shareholders. The appellant, from the beginning of its operation down to the filing of this bill in the court below,—a period of more than six years,—has been in the habit of paying to its withdrawing members, under the advice of its counsel, the whole 60 cents per month paid in by them, and this, it is contended by the appellant, is the construction proper to be placed on the by-laws as to their just meaning and fair legal intentment, and this, the appellant claims, constitutes in good faith the contract existing between the appellant and its members. The converse of this proposition is the contention of the appellees, as stated in the decree of the court from which this appeal is taken.

Before proceeding to announce our views as to the meaning and effect of the by-laws of the appellant which have been adopted for its management and government, it is important

that we should ascertain the principles which lie at the foundation of an enterprise of this character; not so much its declared purposes as its actual meaning, demonstrated in the conduct of its affairs. From a careful examination of its charter and by-laws found in the record, it is quite apparent that it is an association incorporated under the provisions of Code, art. 23, §§ 95-104, incl., tit. "Corporations," subtit. "Building or Homestead Associations," and is thereby entitled to exercise all the powers and attributes which properly pertain to, or flow from, the various provisions of the Code referred to. Its primary object is the investment of money for profit and gain, while its secondary effort should be its division and distribution in such manner as to secure to each shareholder his just and fair proportion of its profits. As a mutual association, based on the mutual plan, it is bound to treat its members equally, and any by-law or contract made by it in contravention of such mutuality would be ultra vires and void. While we are of opinion that an examination of all the by-laws must be made to ascertain their meaning and effect, we must not allow too much weight to attach to any one alone, so that it shall unduly preponderate as against the other. The appellees, in their brief, assert that: "The whole contention of the withdrawing members is based upon these words in section 2 of article 6: 'And the holder thereof will be entitled to receive the amount paid on such shares, less the admission fee, together with interest thereon at the rate of six per cent. per annum;' and, while they admit that these words must be interpreted in connection with other provisions of the by-laws, they maintain that there are no other provisions which qualify or restrain what they insist is their natural and primary meaning." As illustrative of the effect of the appellees' contention, we submit the following calculation, based upon the theory advanced by the learned counsel who presented the appellees' case to this court in a most ingenious and forcible argument. Take for consideration 10 shares of stock in the appellant association, which had been withdrawn at the end of the first year, as follows:

Admission fee, \$1 per share.....	\$10 00
Amount paid on 10 shares for 12 months	72 00

Total amount paid in.....	\$82 00
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In withdrawing, the admission fee is retained	\$10 00
Appellees claim that on a proper construction of by-laws 10 cents per share per month on monthly payments on stock should be retained.....	12 00
	\$22 00

Amount of principal due withdrawing member	\$60 00
Interest at 6 per cent. for average time..	1 80

Total receipt	\$61 80
Without taking into consideration interest not allowed on amount paid in, the loss is	20 20
	\$82 00

Hence it follows, as shown by this statement, that the withdrawing member loses on each 10 shares of his stock the sum of \$22. It may be as well for us at this point to revert to the fact heretofore mentioned that from its inception, and so far as the record discloses, down to the present period, the appellant has not, in a single instance, retained "ten cents per share per month from the monthly payments on stock," but has always paid the holder of stock that which, by the express terms of article 6, § 2, of the by-laws, "the amount paid on such shares, less the admission fee, together with interest thereon at the rate of six per cent. per annum," and this the by-laws say in terms "he will be entitled to receive." But it is contended by the appellees that, as against this construction, stands section 3, art. 8, which reads: "The payments on each share shall be sixty cents per month for each and every month until maturity, or withdrawal of stock, commencing the month following that in which the certificate is dated. Fifty cents per month per share shall be paid into the loan fund, and ten cents per month shall be devoted to operating expenses;" and sections 1, 2, 3, art. 10, which read: "The receipts of this association shall be divided into two classes, which shall be known respectively as the 'Loan Fund' and 'Expense Fund.' The expense fund shall consist of all admission, transfer fees, together with ten cents per share per month from the monthly payments on stock, five dollars per share on paid-up stock during the first year, and two dollars per share each thereafter, and this fund so constituted shall be devoted to the payment of operating expenses. The loan fund shall consist of all receipts which do not go to the expense fund as hereinbefore provided." In contrasting these several sections of the by-laws with section 2 of article 6, which reads as follows: "Shares upon which six monthly payments shall have been made may be withdrawn by giving thirty days' notice, and the holder thereof will be entitled to receive the amount paid on such shares, less the admission fee, together with interest thereon at the rate of six per cent. per annum for average time,"—there is to be found manifest inconsistency. Determining the rule of construction proper to be applied here is a question by no means free of difficulty, yet when you compare the language of section 2, art. 6, which is clear and explicit, without qualification or condition, with the phraseology of section 3, art. 8, and of sections 1, 2, 3, art. 10, the first-named expressly declares what the withdrawing member is entitled to receive. The other sections provide only for the various funds and the uses to which they are to be applied. It is an admitted fact that it has been the usage of the appellant, in paying to a withdrawing member the amount "which he was entitled to receive," to pay him the whole 60 cents per

month paid in by him. The by-laws were framed by those who were the promoters and original members of the appellant, among whom it is alleged were the appellees, and now, after the expiration of six years, the by-laws having received but one construction, and undergone no change in their phraseology, it is proposed to give to them an entirely different meaning. We apprehend that there can be but small doubt as to the object which is now sought to be attained. The "agreed statement of facts" says: "The amount of the ten-cents expense fund repaid to the withdrawing members since the organization of the company is \$98,482.31. Had this amount been retained, it would be an asset of the association, and would have been devoted to the maturing stock." It appears to be a conceded fact that the appellant is a solvent, prosperous, and money-making concern, which notwithstanding it has paid out to withdrawing members since its incorporation nearly \$100,000, without impairing the success of the enterprise, we are forced to the conclusion that its organizers were well informed as to the proper methods to be adopted and followed to protect it from financial disaster, and secure for it successful operation. It is a canon of construction, often applied in the ascertainment of the meaning of statutes, which is equally applicable here, "that the design and intent of the framer, when it can be ascertained, must prevail." When you contrast the two theories,—that of the appellant with that of the appellees,—you cannot fail to recognize the fact that this controversy finds apt illustration in the statement which we have made, and is found on folio 5 of this opinion, and demonstrates clearly the more equal and fairer distribution of the funds which have been accumulating for the benefit of all its members. If the appellant can be managed in the future as it has been during the past six years, under the construction of its by-laws, as contended for by the appellant, there can be no reasonable expectation that the nonwithdrawing members will be called upon to assume more than their just share of responsibility. For the reasons assigned, we think there was error in the passage of the pro forma decree appealed from, and it is hereby reversed, and the bill of complaint dismissed. Decree reversed and bill dismissed.

(39 Md. 638)

WILSON v. WILSON.

(Court of Appeals of Maryland. Jan. 5, 1898.)

HUSBAND AND WIFE—CONVEYANCES—TRUSTS—ESTOPPEL—EVIDENCE.

1. A court of equity will not allow a married woman to hold property conveyed to her by her husband subject to an agreement to allow him to collect the rents during his life, and at the same time allow her to repudiate her agreement as void.

2. In an action by a husband against his wife to have property worth \$6,000 conveyed by him

to her declared a trust, it appeared that the deed was made out in May, 1888, and recorded in October, 1889. The husband testified that the deed was drawn upon the wife's agreement to loan him \$2,000; that she afterwards refused to do so, and the deed lay in his safe nearly a year, when she told him to record it, and she would give him a life interest in the property, which was all he had; that he accepted the proposition, and had the deed recorded, but before doing so, and on the same day, he prepared a memorandum dated on that day, for a lease of the property to him for life, which she signed. Defendant testified that the deed was made to prevent trouble arising out of suits against plaintiff; that at first she refused to accept it, as she thought he intended to defraud his creditors, but finally consented, in consideration of a \$1,000 bond she had given him shortly after their marriage, 12 or 15 years before, and in further consideration that he had lived in her home, and enjoyed for many years the rents of her property; that this was in May, 1888, at which time he agreed to have the deed recorded; that about a year afterwards he procured her signature to the lease by deceit or duress. On cross-examination she admitted that plaintiff had never been threatened with suit, so far as she had heard, and that she had no knowledge that he intended to defraud his creditors. The only other witness testified that he had called on defendant after her separation from plaintiff, in January, 1896, and tried to effect a reconciliation; that he suggested to defendant that she deed back the property to plaintiff; that defendant said she was afraid plaintiff might marry again, and have children who would get the property, but that he could have the rents as long as he lived; that in a subsequent conversation with her, on expressing surprise at her claiming the rents, she said that she had changed her mind. *Held*, that the agreement of defendant to allow plaintiff to enjoy during life the rents of the property was the real consideration of the deed, and hence there was a trust.

Appeal from circuit court, Allegany county.

Bill in equity by Lawson B. Wilson against Mary R. Wilson. From a decree for defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and PAGE, BRISCOE, BRYAN, and FOWLER, JJ.

Geo. A. Pearre and Ferd. Williams, for appellant. Rob. R. Henderson, for appellee.

FOWLER, J. The appellant, who was plaintiff below, filed his bill of complaint in the circuit court for Allegany county for the purpose of establishing a trust to receive during his life the rents and profits of the property which is the subject of this controversy. He executed an absolute deed to his wife, dated the 28th May, 1888, for the purpose, as he alleges, of securing a loan of \$2,000, which, however, she refused to make, and he did not then deliver the deed, or have the same recorded. However, being desirous of settling the property upon his wife, she agreed with him, he alleges, that, if he would deliver the deed in question to her without any money consideration whatever, she would allow him to collect for his own use the rents and profits during his life. Relying, he says, upon this agreement, he filed the deed for record on the 26th October, 1889, but, before so doing, his wife entered into a written agreement with him, dated the same day the deed was re-

corded, to lease the premises to him during his life for the nominal consideration of \$100. The property in dispute was purchased by the plaintiff for the sum of \$6,000 on the 5th September, 1885, and is located on the southeast corner of Center and Henry streets, in Cumberland. Its rental value is placed by the plaintiff at \$700 per annum. The defendant, in her answer, gives an account of this transaction which differs radically from that given by her husband. She alleges that his purpose in conveying this valuable property to her was to prevent trouble to himself arising out of some alleged infringements of patent rights in some dental materials which he had been using in the practice of his profession of dentistry. She feared, she says, that he intended by this conveyance to her to defraud his creditors. She finally, however, consented to take an absolute deed for the property, worth \$6,000, in consideration of a \$1,000 bond she had given him soon after their marriage, some 12 or 15 years before this transaction; and in further consideration that he had lived in her house, and had enjoyed for many years the rents of other property owned by her. She further alleges that this understanding between herself and her husband was fully consummated in May, 1888, and that, if the deed was not then recorded, it was a fraud upon her rights. She also alleges in her answer that the written agreement signed by her, and which, her husband alleges, was executed in pursuance of her agreement to allow him during his life to enjoy the rents, was procured through his fraud and deceit, or, if not by fraud and deceit, then by duress. She alleges that the agreement to lease was signed under duress, and in the same breath she says that she signed it because he told her that the paper was only a power of attorney to collect the rent for her.

There was a demurrer filed to the bill on the ground that any such agreement as is alleged to have been made by the defendant is void, because she is a married woman; but the learned judge below held (and we entirely agree with him, and adopt his opinion upon the demurrer) that the defendant could not take the property conveyed to her subject to the alleged agreement to allow her husband to collect the rents during his life, and then repudiate her agreement as void, and hold on to the property. A court of equity will not allow such a fraud to be perpetrated. The learned judge below, quoting from *Crampton v. Prince*, 83 Ala. 246, 3 South. 520, said, "It is as unconscionable for a married woman to get the land of another without paying the purchase money, as for one *sui juris* to do the same thing." The same principle, he said, is applicable to this case, and that "it would be as inequitable to permit a married woman to get property for nothing, with the understanding that the grantor should enjoy it for life, and then refuse to carry that out, as it would be for one who is *sui juris*." But, as we have said, we adopt

the opinion on the demurrer filed in the court below, fortified as it is by sound reasoning and abundant authority. The controlling question, therefore, that we have to consider, is one of fact; and it is whether the agreement between the plaintiff and defendant was made at the time, and for the considerations, alleged by the former. If, as he alleges, the deed was delivered to her upon the clear and express understanding that he was to enjoy the rents during his life, she will not be allowed to set up her title under the absolute deed to defeat her husband's claims. This question must be solved mainly upon the testimony of two witnesses,—the plaintiff and defendant.

The contention of the plaintiff would seem, under the circumstances of this case, to be certainly the more reasonable. The defendant had, as she terms them, certain "invested investments" in real estate in Cumberland, and she also had some investments in bonds. In answer to the question as to the amount of income, outside of the property here in dispute, she said it amounted to about \$700, subject to deductions for taxes, etc. The plaintiff owned little, except the Henry street property here involved, having previously given his wife almost everything else he had. He says that, wishing to settle this property, also, upon her, and having confidence in her, he made to her an absolute deed, or, rather, delivered, by recording, the one he had prepared for the purpose of securing a loan from her of \$2,000, which loan, as we have seen, she finally refused to make. It would seem very remarkable that he should not, under these circumstances, have had the prudence and foresight to secure for himself, during life, the enjoyment of the income from this property; being all that he had. And this is exactly what he says he intended to do, and did, by means of the alleged agreement. His statement is clear, consistent, and convincing. We will let him speak for himself. He says: "On or about the 28th October, 1888, I wanted money to manufacture and advertise dental specialties, some of which I invented myself. I told my wife, if she would loan me \$2,000, I would make her a deed, as security, to my Center-Henry street property. She said, 'If you do that, I will loan you the \$2,000.' Then I made the deed. I took it to her, and she said: 'I won't let you have this \$2,000. I do not want your property.'" The defendant having refused to loan the money, the plaintiff, of course, did not deliver to her the deed which he had prepared. He says: "I declined to deliver the deed, or have it recorded. I placed it in my safe, and it laid there nearly a year, when my wife said to me: 'If you will have that deed recorded without the payment of the \$2,000, I will sign any paper you bring me, giving you a life interest; you to collect the rents during your life.' I accepted this proposition, and had the deed recorded. On the same day I prepared a memorandum for a lease. This memorandum," he says, "was signed the same day (October 26th), before the

deed was recorded." It is a brief and imperfectly drawn agreement for a lease, by which the defendant agrees to lease to the plaintiff for life this valuable property, producing \$700 per annum, for the nominal sum of \$100. Subsequent to this transaction the plaintiff improved the property to the extent of \$1,200, and continued to collect and enjoy the rents from October, 1889, until July, 1895, when the plaintiff and defendant separated, and the latter notified the tenants that they should pay the rents to her. She has been collecting them ever since. It also appears from the plaintiff's testimony that he had expended \$2,600 in improvements placed on certain vacant lots. The defendant contradicts flatly this account of the transaction. She says that, while sitting in her room one day, the plaintiff came in with a deed for the Henry street property; that he was afraid of being sued for crown and bridge work infringement or vulcanite rubber; that he did not care to have any property in his name, but that he wished to be agent. She called his attention to the consideration of \$2,000, and told him she could not possibly pay it, and would not if she could. To which he replied, "You have already given me \$1,000, which bore me \$70 for many years," which, with other sums she had advanced, would make the amount named in the deed. She then told him that she was afraid he was about to defraud his creditors, but he denied it. After making other objections, and requiring him to destroy a power of attorney she had given him to collect the rents of her property in Cumberland, she says that she finally agreed to accept her husband's deed. He said that he would have the deed recorded, and, although he never brought the deed to her, she thought that it was all right, as she knew that it made no great difference, as it had been recorded, and would be quite sufficient, at any time, to prove her ownership. In regard to the execution of the agreement to lease, she says: "Some months after (I think, probably, a year after his having given me the deed for the corner), he came to me, and represented that he was having a great deal of trouble with different tenants, to distrain them when they were delinquent in their rents, etc. He said that he had no power to properly look after these things, unless he had a properly drawn up paper for agency. I said: 'Are you sure that is all you want?' He said: 'Why, certainly. Haven't you already previously given me such papers, to manage your affairs; and why not this, as I am looking after your and the children's interests, and you are away from home a good deal, and when away I can do nothing with them?' I at that time thought very little about business, or the proper purport of any kind of business papers. He had one in his hand,—the one shown, I think,—and said that he had taken it out of a book that he had in his office, and that it only constituted him a manager for me for this property. He wished me to sign it. I had my little daughter on my lap at the time, away from any

light; so, asked him to read it for me, not thinking but what he would do it in a proper manner. He suppressed, to the best of my knowledge and remembrance, the beginning of it, the lease, or adding it on afterwards, because I knew nothing about it purporting to be a lease, and supposed it to be similar to the paper I formerly burned, on the Center street property. Even then, believing as I did, objected to tie myself up in any way; but as things at our house were extremely unhappy at that time, and wishing, at almost any price, for peace and harmony, I finally reluctantly signed my name. My small son James being in the room with me, his father told him to write his name, also." She was then asked by her counsel if any other inducements or motives influenced her in signing this paper. Her reply was that she had answered that question in the affirmative. She was then asked if the plaintiff had ever tried to compel her to sign such a paper, and, if so, how. She replied: "I think I have answered that question, also." And finally she was asked whether the plaintiff had ever threatened her in any way with reference to the property in question, and she said: "About the time I refer to, he began repeatedly to solicit me, in the most urgent manner, to sign such a paper. I, fearing to make him angry, from time to time put it off, without definitely saying that I would never give it to him; but always thinking, of course, that he simply referred to my making him my agent, as I had previously done. At last I was so unhappy that I determined to try what obliging him in this, as in many other ways, would do for me." On cross-examination she admitted that the plaintiff had never been threatened with suits for infringements, so far as she had heard, and denied that she had any knowledge that he intended to defraud his creditors. She suspected it. But there is no proof whatever before us that the plaintiff was guilty of any such conduct. The charge, or, more properly speaking, the suggestion (for she denies having made the charge), rests upon the unsupported suspicions of his wife. There is one other witness (Dr. J. Jones Wilson) whose testimony rather tends to confirm that of the plaintiff. He called to see the defendant just after the separation, in January, 1895, and tried to effect a reconciliation. But he soon found that to be impossible, and suggested an equitable division of the property of the plaintiff and defendant. He suggested that the plaintiff ought to relinquish any right he might have to the buildings he had erected and paid for on her lots, and that she ought to deed the property on Henry street back to him. She replied that this suggestion would be all right, but for the fact that the plaintiff might get a divorce from her, and marry another woman, and have children, who would get the Henry street property if she deeded it back to him, and that she intended to keep it for her children. She said that she would never molest him in any way about the property during his life, and that he could have the rents as long as he lived. This

witness subsequently had a conversation with the defendant, in which he expressed surprise that she claimed the rents. Her reply was, "I have changed my mind." Of course, most of this testimony was contradicted by the defendant. We have thus, at considerable length, given the testimony of the only witnesses who have said anything relating in any way to the transactions which have resulted in this unfortunate controversy. We would gladly avoid, if we could, the necessity of commenting upon the case thus presented. But it is our duty not only to determine, on the evidence, on which side lie right and justice and truth, but also to give our reasons for our conclusions, which we will proceed to do as briefly as possible:

In the first place, it is, of course, conceded that the deed in question was recorded on the 26th October, 1889; although dated May 28, 1888. Now, it is a most significant fact that the informal agreement by which the defendant agreed to lease the property to her husband for life, for \$100, bears the same date the deed was recorded. And that it was executed on that day there appears to be no doubt. The plaintiff so swears, and he is not contradicted, except by the defendant, who says that she never knowingly at any time signed any such paper. But there is nothing in her testimony to disprove the fact that a paper was signed by her about that time. It follows that if the deed was not recorded until 26th October, 1889, the plaintiff had up to that time a clear, fee-simple title to the property; his deed to her being in his own possession, and never having been delivered to the grantee. If this be so, does it not seem very improbable that the plaintiff would have resorted to fraud and duress, or either, to induce the defendant to sign the agreement, which only gave him a leasehold interest for life? He was the owner of the property in fee, and no amount of fraud or duress could enlarge his interest. The plaintiff swears that the agreement was signed before the deed was recorded (that is, while the title was still in him), and the body of the agreement would seem to confirm this statement; for if the deed which was dated May, 1888, had been delivered, and was complete, that deed would have been referred to in the agreement, but it is not mentioned, either by way of recital or otherwise, but the property is therein described as the property corner Center and Henry streets, being the same which was conveyed to the plaintiff by Wilson and wife by deed dated and duly recorded, etc. It was the plaintiff's property, and was so described. But it was suggested that the fact that the deed was recorded so early as 9:20 a. m. throws some doubt upon his statement that he prepared the agreement the same day, and before the deed was recorded. But, as we have already said, the paper is imperfect and short, and could have been prepared in a few minutes, even by a layman, and doubtless was intended only for temporary use; the intention being to prepare, later, a more formal one.

That this was the purpose of the plaintiff appears from his testimony. He says: "It was only intended to be for a short while, and I desired to have something to show I had a life interest in the property, in case of accident or death." And he also said that he never thought the agreement was worthless, but that he thought it was genuine, and she was afterwards to give him a lease that would be legal. This testimony explains what would otherwise be, to say the least, difficult to understand,—why the plaintiff would have accepted an unacknowledged and unrecorded agreement to lease the property to him for life, if it was the consideration upon which the deed was delivered. Experience teaches us, however, that much greater risks are taken in much larger transactions, even between strangers. But, after all, the defendant had in his hands, when the agreement was executed and delivered, what he called "evidence" which will afford him ample protection in a court of equity, unless he was, as charged by his wife, guilty of fraud and duress in procuring it. While it may be difficult to explain some of the transactions between the plaintiff and defendant, yet we cannot be expected to hold, without proof of any sufficient motive on his part, that he would perpetrate a fraud on his wife, to deprive himself of a fee-simple interest in his property, in order to vest it in her, and get for himself only a life interest. She, and she alone, has suggested—without any evidence to justify it, so far as we have been able to ascertain—that he wanted to convey the property to her to defraud his creditors. If there are any creditors, none appear to have been found. It is true, the defendant says that the plaintiff had been sued before a magistrate by some one; but it is incredible that he would convey away property worth \$8,000 to evade the payment of a possible claim less than \$100. Nor do we think it probable that a woman of such intelligence and knowledge of business (especially when, as she says, she suspected that her husband was trying to get something more than a mere power of attorney) would have signed that paper without reading it carefully. Forbearing to further comment upon the testimony, we are forced to the conclusion, upon all the evidence in the cause, that the agreement of the defendant to allow the plaintiff to enjoy during life the rents of his property was the real consideration of his deed conveying the property to her, and that he is entitled to the relief prayed. None of the exceptions to testimony have been relied upon in this court; and we will not, therefore, discuss them. Decree reversed and cause remanded. Each side to pay its own costs.

(91 Me. 59).

COTE v. BATES MFG. CO.

(Supreme Judicial Court of Maine. Dec. 10, 1897.)

MASTER AND SERVANT—WAGES—FORFEITURE.

1. It is provided by the statute of this state that employers engaged in manufacturing or

mechanical business may contract with their employees that a week's notice of intention to quit work shall be given. In such case the employer is required to give notice of intention to discharge the employee, and, on failure, shall pay to such employee a sum equal to one week's wages.

2. In this case the defendant claimed that the plaintiff quit work without giving and working the week's notice, and retained one week's wages. The plaintiff claimed that he was discharged without notice, and that he was entitled to recover the week's wages due, and another sum equivalent to a week's wages as a forfeiture of defendant.

Held, that the facts of the case do not support the claim of forfeiture by either party, and that the plaintiff is entitled to recover the amount due him when he quit work, for labor before then performed.

(Official.)

Report from supreme judicial court, Androscoggin county.

This was an action brought by Pierre Cote against the Bates Manufacturing Company under St. 1887, c. 139, § 4, as follows:

"It shall be lawful for any person, firm or corporation engaged in any manufacturing or mechanical business, to contract with adult or minor employees to give one week's notice of intention on such employee's part, to quit such employment under a penalty of forfeiture of one week's wages. In such case, the employer shall be required to give a like notice of intention to discharge the employee; and on failure, shall pay to such employee a sum equal to one week's wages. No such forfeiture shall be enforced when the leaving or discharge of the employee is for a reasonable cause. Provided, however, the enforcement of the penalty aforesaid shall not prevent either party from recovering damages for a breach of the contract of hire."

The action was to recover \$7.14, wages due the plaintiff from the defendant, and a like amount, \$7.14, equivalent to one week's wages, as a forfeiture under the above statute.

Judgment on report for plaintiff.

M. L. Lizotte, for plaintiff. W. H. White and S. M. Carter, for defendant.

STROUT, J. Plaintiff was a weaver in defendant's mill, receiving 50 cents per cut. His contract, which was in writing, provided that he should give one week's notice of his intention to quit, and work that week, and that, if he quit without giving and working such notice, he should forfeit one week's wages. The statute imposes a like forfeiture by a corporation for the discharge of its laborer, without one week's notice of its intention. On Saturday, May 16, 1896, defendant owed plaintiff for two weeks' work, amounting to \$14.28. On May 11th defendant gave notice of a reduction in pay of weavers to 48 cents per cut, to take effect on Monday, May 18th. Plaintiff says he first knew of this on May 16th. On Monday, May 18th, plaintiff went into the mill, but did not start his loom, and he, with others, refused to work at the reduced rate, and left. He says he was willing to work his notice at the old price, but under-

stood that, if he worked longer, he would only be paid at the reduced rate. He was not told that if he gave notice, and worked the week, he would receive the old price. He went back on the following Wednesday, and worked one week, for which he was paid at the rate of 48 cents per cut, and was also paid \$7.14, for one week's work previously done, the company retaining an equal amount as forfeited, on the ground that he left without giving the required notice.

This action is brought to recover the amount withheld, and also a like amount as forfeiture under the statute, for discharging him without notice. The case fails to show legal ground for recovery of forfeiture, as defendant did not attempt to discharge plaintiff.

As to the week's unpaid wages, whatever might have been the legal right of plaintiff to recover at the old rate, if he had given notice on the 18th and worked his week, the plaintiff had good reason to suppose that he would not be so paid, and was therefore justified in leaving. If defendant intended to pay 50 cents per cut, for the time of the week's notice, it could very easily have so informed the plaintiff. But failing in this, and the reply of the superintendent to a remonstrance of the weavers, that the old price would not be restored, fairly gave the weavers to understand that only 48 cents per cut would be paid after May 18th. Acting upon this inference, warranted by all the circumstances, the plaintiff was justified in leaving, and incurred no forfeiture thereby.

He is entitled to recover the week's wages withheld.

Judgment for plaintiff for \$7.14, and interest from date of writ.

(91 Me. 62)

INHABITANTS OF WOODSTOCK v. INHABITANTS OF CANTON.

(Supreme Judicial Court of Maine. Dec. 11, 1897.)

DIRECTING VERDICT—SETTLEMENT OF PAUPER.

1. Where, in the trial of a cause, after the plaintiff has introduced his testimony the defendant does not contradict it in any material point, and the evidence will not authorize a verdict for the defendant, *held*, in such case, the presiding justice may order a verdict.

2. In this case it clearly appears from the testimony introduced by the plaintiff, which was not contradicted in any material point, that the pauper had gained a settlement in the defendant town by five years' continuous residence therein. *Held*, that the evidence would not authorize a verdict for the defendant, and exceptions will not lie to the order of the court in directing a verdict to be returned in favor of the plaintiff.

(Official.)

Exceptions from supreme judicial court, Oxford county.

Action by the inhabitants of Woodstock against the inhabitants of Canton. Defendant excepts to the direction of a verdict for plaintiff. Exceptions overruled,

H. C. Davis and J. S. Wright, for plaintiff.
J. P. Swasey, for defendant.

STROUT, J. Exceptions to a direction by the presiding judge to the jury to return a verdict for the plaintiff.

The only question in controversy was whether the pauper, George W. Howe, had acquired a settlement in Canton by five years' continuous residence therein without receiving pauper supplies. It was admitted that Howe, prior to March, 1883, had his settlement in plaintiff town. He was married on September 30, 1882, while living at Mechanic Falls, and resided there with his wife for about four months after the marriage. Differences arose between them, and she left him and went to her father's, in West Minot, taking with her all her goods. Both Howe and his wife testify that the separation was believed by each to be final. Howe says that, within two or three days after his wife left him, he gave up his house, disposed of what little furniture he had, except a chamber set and a few chairs, which he stored in Woodstock, but not in the house he had occupied, gave up his job, and left Mechanic Falls "for good," and went to Canton about March 1, 1883, in response to a request from Mr. Hayford to work upon the railroad as a brakeman, and occasionally as fireman. He immediately obtained employment on the railroad, and retained that employment continuously till the middle of May, 1888; actually living and making his home in Canton. He says that when he went to Canton he intended to remain, if he got work. He had no intention of returning to Woodstock. He intended to remain an indefinite period of time, if he had employment. Obtaining employment in Canton, and in fact remaining there for more than five consecutive years, with no intention of removing therefrom, constituted a residence, within the meaning of the statute, and conferred a pauper settlement in that town. *Warren v. Thomaston*, 43 Me. 421.

For nearly two years after George W. Howe went to Canton, his wife was living in another town. Then she returned to him, in Canton, and lived with him there till they removed, in May, 1888. While the wife was living apart, her husband contributed nothing to her support, and made no provision for her. She had deserted him, as both believed, permanently. He made his home in Canton. He had the right to determine his place of residence. His wife could not change it, against his will, by living apart from him in another town. *City of Bangor v. Inhabitants of Frankfort*, 85 Me. 128, 26 Atl. 1088; *Richmond v. Vassalboro*, 5 Me. 398.

The residence of the wife is evidence of the domicile of the husband, but, if she has abandoned him, he may establish his domicile elsewhere. *Burlington v. Swanville*, 34 Me. 86.

Upon the testimony introduced by the

plaintiff, which was not contradicted in any material point, it clearly appeared that the pauper had gained a settlement in defendant town by continuous residence therein from March, 1883, to May, 1886, making that his home. The evidence would not authorize a verdict for defendant. In such case the presiding judge may order a verdict. This court said in *Heath v. Jaquith*, 68 Me. 438, "It would be but an idle ceremony to submit the case to the jury by instructions authorizing them to find for a party, when he has introduced no evidence which would authorize it, and when, if they find a verdict in his favor, it would be the duty of the court to set it aside because there was no evidence sufficient to support it."

Exceptions overruled.

(91 Me. 70)

STEVENS v. THATCHER et al.

(Supreme Judicial Court of Maine. Dec. 13, 1897.)

INDIANS—TREATIES—RIPARIAN RIGHTS—ATTACHMENT.

1. The incorporation of territory within the boundaries of the state into a town, county, or other political division is a purely political act; and such power of incorporation by the state is unaffected by any stipulations in the Indian treaties between Massachusetts and the Penobscot Indians of June 29, 1818, and between Maine and the same Indians, August 17, 1820.

2. White Squaw Island, in the Penobscot river, above Old Town, lies west of the center line of the river at ordinary pitch of water. It is therefore within the territorial limits of the riparian town of Argyle, on the west side of the river.

3. *Held*, that a certificate of attachment of bulky personal property attached upon White Squaw Island should be filed in Argyle, and not in Greenbush, the oldest adjoining town.

(Official.)

Agreed statement from supreme judicial court, Penobscot county.

Action by Joseph A. Stevens against Benjamin B. Thatcher and another on an agreed statement of facts. Plaintiff nonsuited.

This action was trover for a certain lot of peeled hemlock logs. Plaintiff, as a deputy sheriff of Penobscot county, on the 6th day of July, 1896, attached the logs upon a writ, Augustus B. Clifford against Joseph E. Clifford, requiring him to make the attachment to secure and enforce the labor lien of said Augustus B. Clifford. All of the logs, when attached, were in two rafts on the east shore of White Squaw Island, and between said island and the center line of Penobscot river at ordinary pitch of water, at or near the place as shown on a plan.

Within five days after the attachment, the officer duly filed a copy of his return thereof in the office of the town clerk of the town of Greenbush, where it was duly recorded.

No copy of his return was filed or recorded in the town of Argyle, and no keeper was put on the logs.

The writ was in due form to enforce a log-

lien claim, and was duly entered at the return term thereof in the Bangor municipal court, where said writ was returnable. While the action was pending in said court, and after 10 days from the date of said attachment, and before rendition of judgment against the logs, they were purchased of one I. W. Bussell, who claimed to be the owner of them, by the defendants, who had no knowledge of the attachment, and were taken into possession by the defendants.

The Penobscot river flows on both sides of said White Squaw Island.

The locality where said logs were when attached, and the distances from the Greenbush shore to the center line of said river, thence to and across said island and from said island to Argyle shore, are shown by a plan in the case.

Said White Squaw Island is one of the islands in Penobscot river above Old Town, belonging to the Penobscot tribe of Indians, and the shore is leased by the agent of said tribe to the Penobscot Lumbering Association, and was so leased at date of said attachment.

It was agreed that in determining the question of the validity of filing and recording the attachment in Greenbush the acts incorporating said Greenbush and Argyle, and all the treaties with said Indians, the state plan of said island, recorded in Penobscot registry of deeds, may be used as evidence for the consideration of the court.

If the court should find the attachment as made and recorded in said Greenbush is valid, the defendants were to be defaulted, otherwise plaintiff to be nonsuited.

W. C. Clark, for plaintiff. J. F. Gould, for defendants.

EMERY, J. White Squaw Island in the Penobscot river above Old Town is said, in the statement of facts, to lie west of the center line of the river at ordinary pitch of water. It is therefore admitted by the plaintiff to be within the territorial limits of the riparian town of Argyle on the west side of the river, unless it has been reserved or excluded from the act of incorporation of the town of Argyle by virtue of some prior Indian treaty.

The only Indian treaties cited by the plaintiff are that between Massachusetts and the Penobscot Indians, June 29, 1818, and that between Maine and the same Indians, August 17, 1820, both of which are printed in Acts & Resolves 1843, p. 253 et seq. In these treaties it was stipulated that the Penobscot tribe of Indians "should have, enjoy and improve * * * all the islands in the Penobscot river above Old Town." The plaintiff contends that this stipulation barred the legislature from afterwards including any of these islands (including White Squaw Island) within any incorporated town. This contention cannot be sustained.

The treaties cited cannot be held to have exempted the Penobscot Indians or their lands from the political jurisdiction and power of the state. Notwithstanding any treaties with Indians upon the territory of Maine, the political jurisdiction of the state includes every person and every acre of land within its boundaries. *State v. Newell*, 84 Me. 465, 24 Atl. 943. The incorporation of any territory within those boundaries into a town, county, or other political division is a purely political act, and such power of incorporation is unaffected by any stipulations in the treaties cited.

Those treaties secured property rights in White Squaw Island to the Penobscot Indians, but the incorporation of the territory of the island with other territory into a town does not deprive the Indians, or any other owners of lands within those limits, of any property rights. The Indians can "have, enjoy and improve" their island, notwithstanding its inclusion within the limits of Argyle.

It follows that the certificate of attachment of bulky personal property attached upon White Squaw Island should have been filed in Argyle, instead of Greenbush, the oldest adjoining town. This not having been done, the plaintiff acquired no title or right against the defendants, the purchasers of the logs.

Plaintiff nonsuit.

(91 Me. 24)

ROGERS v. HAYDEN.

(Supreme Judicial Court of Maine. Nov. 5, 1897.)

CONTRACT—USAGE—REASONABLENESS—CONSTRUCTION.

1. The meaning of a contract cannot be varied by local usage, unless it be uniform, reasonable, and known to the parties, so that they may be presumed to have contracted with reference to it.

2. A usage that might nearly double the quantity of goods sold is unreasonable.

3. The plaintiff contracted to deliver, on or near the premises where defendant was building a cellar wall, certain stone, at an agreed price per cubic yard. He claimed, among other things, that, by reason of a local usage, the stone were to be measured as solid wall after they had been laid. The defendant claimed that the contract price was by the cubic yard of the stone, measured when delivered. *Held*, that the contract fixed the price per cubic yard delivered, and not as solid wall after the stone had been laid.

(Official.)

Action by Samuel H. Rogers against William H. Hayden. Verdict for plaintiff. Motion by defendant to set it aside. Sustained.

This was an action on the case to recover payment for building stone sold by the plaintiff to the defendant under a verbal contract.

The plaintiff claimed payment for 102 cubic yards, 17 cubic feet, two-faced stone, at \$3.75 per cubic yard, and 10 cubic yards, 12 cubic feet, one-faced stone, at \$2.35, amounting to \$409.42. The defendant contended that he owed the plaintiff for 58 cubic yards, 12 cubic feet, 724 cubic inches, two-faced stone,

at \$3.50 per cubic yard, and 8 cubic yards, 26 cubic feet, 1,162 cubic inches, at \$2.35 per cubic yard, amounting to \$225.72.

Plaintiff recovered a verdict of \$407.58.

S. L. Fogg, for plaintiff. G. E. Hughes, for defendant.

HASKELL, J. Assumpsit for the contract price of stone sold and delivered. The contract was to deliver, on or near the premises where defendant was building a cellar wall, certain stone, at an agreed price per cubic yard. The plaintiff claimed that the contract included certain two-faced stone, at \$3.75 per cubic yard, and that, by reason of a local usage, the stone were to be measured as solid wall after they had been laid. The defendant claimed that the contract price was \$3.50 per cubic yard, measured when delivered. The verdict was for plaintiff, manifestly including the quantity measured as masonry. Defendant asks to have it set aside as against evidence, and because it is excessive.

The contract fixed the price per cubic yard, delivered. That meant cubic yards of stone, not of masonry. That meaning cannot be varied by local usage, unless it be uniform, reasonable, and known to the parties, so they may be presumed to have contracted with reference to it. *Marshall v. Perry*, 67 Me. 78; *The Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657. The measure in the wall was over 102 cubic yards; on the dump, about 58. Certainly a usage that might nearly double the quantity of goods sold must be unreasonable. Better have honest measure and fair price.

Motion sustained.

(91 Me. 64)

LEWISTON CO-OP. SOC., NO. 1, v. THORPE.

(Supreme Court of Maine. Dec. 11, 1897.)

ARREST IN CIVIL ACTION—OATH OF OFFICER OF CORPORATION—SET-OFF.

1. A debtor about to leave the state may be arrested in certain cases, as provided in Rev. St. c. 113, § 2; and, where a corporation is the creditor in such proceeding, the oath required by the statute must be that of some officer, or some other agent or attorney. *Held*, that the president of the corporation is competent, as representing the corporation, to take such oath, and that his oath so taken is to be regarded as the oath of the creditor corporation, within the meaning of the statute.

2. The defendant was a stockholder in the plaintiff corporation. Its by-laws provided that, "on and after six months from the date of organization of the society, shares may be withdrawn at their par value, on demand, or, if the board of directors shall require, after thirty days' notice has been given: provided, that no share shall be withdrawn at the expense, or to the detriment, of the remaining shareholders." The corporation was organized for the purpose of buying and selling "food, fuel, clothing, and other necessities of life, and to carry on the business of general dealers in merchandise." The defendant bought at the plaintiff's store goods amounting to \$41.34, which was sued for in this action. He claimed to set off the amount of shares held by him, being \$40. He had ask-

ed to withdraw his shares about March, 1896. Suit was brought June 18, 1896. On April 18, 1896, the directors voted "to allow no more withdrawals for the present, or until further action of the board." Under this vote, plaintiff refused to allow defendant to withdraw his shares. *Held*, that the set-off cannot be maintained; also, that the action of the directors was in line of their authority, and appears to have been warranted by the condition of the corporation.

3. The defendant, as a stockholder, was interested in the venture, and the plaintiff was in no sense indebted to defendant. His capital, represented by his shares, must take the chances of the business. He could not withdraw it, if, in the judgment of the directors, it could not be done with safety to the business. He must pay his indebtedness in aid of the business.

(Official.)

Report from supreme judicial court, Andros-coggin county.

Action by the Lewiston Co-operative Society, No. 1, against George Thorpe. Judgment for plaintiff on record.

This was an action on account annexed to the writ, to recover the sum of \$41.84, for groceries and provisions.

Date of writ, June 18, 1896. Plea, general issue, with brief statement as follows, to wit:

That he claims to set off against the plaintiff's claim the sum of \$41 due him from said plaintiff according to the following account:

Lewiston Co-operative Society, No. 1, to George Thorpe, Dr.

1896.	
Jan. 18.	To amt. due in shares held by George Thorpe in the Lewiston Co-operative Society, No. 1, as per account stated
	\$40
To interest on same to June, 1896, 5 mos.	1
	<hr/> \$41

The defendant was arrested on a *capias* writ by the plaintiff; the writ being returnable to the Lewiston municipal court.

In that court the defendant filed the following motion to dismiss the action:

"State of Maine. Andros-coggin—ss.: Lewiston Municipal Court. Lewiston Co-operative Society, No. 1, vs. George Thorpe. And now comes the said defendant, and moves that the plaintiff's writ be quashed, and that said action be dismissed, because he says that, the service of said writ being by arrest, there was no sufficient affidavit indorsed upon said writ prior to said service to justify said service, or to give this court jurisdiction. And defendant further prays for his costs. By Savage & Oakes, his Attorneys."

Affidavit on writ: "I, William Widdall, president of the Lewiston Co-operative Society, No. 1 (a corporation duly established by law), the within-named creditor, make oath and say that I have reason to believe and do believe that George Thorpe, the within-named debtor, is about to depart and reside beyond the limits of the state, and to take with him property or means of his own exceeding the amount required for his immediate support, and that the demand named in the within process, or the principal part thereof, amounting to at least

ten dollars, is due to the within-named creditor. William Widdall, President.

"Andros-coggin—ss.: June 18, 1896. Subscribed and sworn to by the above-named William Widdall, who also made oath that he is president of the within corporation. Before me, Frank A. Morey, Justice of the Peace."

The foregoing motion was overruled by the court, and, judgment having been rendered in favor of the plaintiff for the amount sued for, the defendant thereupon appealed to this court, sitting at nisi prius.

After the evidence was drawn out before the jury in the court below, the case was reported to the law court. The parties stipulated that the law court should determine first the question arising above, on account of lack of jurisdiction by reason of the defective affidavit, etc., and, if the motion should be sustained, then judgment was to be rendered for the defendant. If the motion should not be sustained by the law court, then that court was to render such judgment as the legal rights of the parties might require, upon so much of the evidence as the court should find to be legally admissible.

D. J. McGillicuddy and F. A. Morey, for plaintiff. H. W. Oakes, for defendant.

STROUT, J. To justify arrest upon meane process, on contract, the statute requires "the creditor, his agent or attorney," to make oath to a belief in the facts enumerated in the statute. The oath in this case was made by the president of the plaintiff corporation. It is objected that this was not a compliance with the statute. A corporation can only act by its officers. If the creditor is a corporation, the oath must be that of some officer, or some other agent or attorney. The act of the president, in the business of the corporation, and within the scope of his authority, is the act of the corporation. For the purpose of the creditor's oath to authorize arrest, we regard the president, in taking the oath, as representing the corporation; and the oath so taken is to be regarded as the oath of the creditor corporation, within the meaning of the statute. The motion to dismiss is overruled.

Defendant was a stockholder in plaintiff corporation. Its by-laws provided that, "on and after six months from the date of organization of this society, shares may be withdrawn at their par value, on demand, or, if the board of directors shall require, after thirty days' notice has been given: provided, that no share shall be withdrawn at the expense or to the detriment of the remaining shareholders." The corporation was organized in 1883 for the purpose of buying and selling "food, fuel, clothing, and other necessities of life, and to carry on the business of general dealers in merchandise."

Defendant bought at plaintiff's store goods to the amount of \$41.34, which is sued for in this action. He claims to set off the amount of shares held by him, being \$40.

Therpe asked to withdraw his shares about March, 1896. Writ was dated June 18, 1896. On April 13, 1896, the directors voted "to allow no more withdrawals for the present, or until further action by the board." In accordance with this vote, plaintiff refused to allow defendant to withdraw his shares.

The action of the directors was in line of their authority under the by-laws, and appears to have been warranted by the condition of the corporation. The defendant had stock in the corporation, an interest in the venture. The success or even continuance of the business might be endangered or ruined if shareholders, at pleasure, could withdraw the capital by them contributed to the enterprise. Plaintiffs were in no sense indebted to defendant. They had a right to require payment from defendant for goods purchased by him. His capital, represented by his shares, must take the chances of the business. If the corporation, in the honest judgment of the directors, could safely allow him to withdraw his capital, it could be done; but until then he was one of the principals in the enterprise, to stand or fall with them. He must pay his indebtedness in aid of the business.

Judgment for plaintiff.

(21 Me. 22)

McNALLY v. BURLEIGH et al.

(Supreme Judicial Court of Maine. Oct. 16, 1897.)

LIBEL—PRIVILEGED COMMUNICATION—DAMAGES.

1. Where the words published by the defendants in their newspaper concerning the plaintiff, both personally and in his official capacity, are clearly libelous, a verdict for the plaintiff will be sustained, if the words are untrue and unprivileged.

2. To be privileged, the words must be published without actual malice, in an honest belief of their truth, and with such belief based upon reasonable or probable cause, after a reasonably careful inquiry.

3. In this case it appeared that the publication complained of was the work of a reporter of the defendants' newspaper, and that his motives and conduct were really in question. There was some evidence tending to show that the reporter was hasty, and somewhat unfriendly to the plaintiff; that his belief was influenced by his feelings rather than by his judgment; and that his investigation of the affair, as published, was rather superficial, and more for the purpose of making a sensation than to ascertain the truth. The jury believed this testimony, and the court consider that the finding was not unquestionable error.

4. The plaintiff was a public officer, and was severely libeled in that capacity by the defendants' newspaper, an influential and leading newspaper in the state, having a wide circulation. Upon a motion for a new trial upon the ground that the damages, (\$896.37) were excessive, held, that the plaintiff was entitled to the opinion of the jury on the question of the damages caused him by the libel, and the court declined to set the verdict aside.

(Official.)

Action by George R. McNally against Edwin C. Burleigh and others.

This was an action on the case for libel, and in which the plaintiff, who was a deputy

sheriff, claimed that the defendants, who were proprietors and publishers of the newspaper called the "Kennebec Journal," had falsely and maliciously accused the plaintiff with being guilty of and committing two crimes, viz.: The crime of voluntarily suffering Foster Nelson, a prisoner in his custody, as a deputy sheriff, to escape; and the crime of bribery, in receiving money, as a deputy sheriff, from said Nelson, as an inducement for omitting to perform his official duty, by allowing said Nelson to escape from plaintiff's custody.

The case was tried to a jury, who returned a verdict for the plaintiff of \$896.37. Defendants move for new trial. Denied.

W. H. McLellan and John McCarty, for plaintiff. H. M. Heath, C. L. Andrews, Forrest Goodwin, Jos. Williamson, Jr., and L. A. Burleigh, for defendants.

PER CURIAM. The words published by the defendants in their newspaper concerning the plaintiff, both personally and in his official capacity, were clearly libelous, if untrue, and unprivileged. The jury found they were untrue, and in this finding the defendants, though denying its correctness, frankly concede they should acquiesce.

To be privileged, the words must have been published without actual malice, in an honest belief of their truth, and with that belief based upon reasonable or probable cause, after a reasonably careful inquiry. The jury found against the defendants on this issue, but this finding the defendants vigorously and confidently attack, as being so much against the evidence as to show the jury to have been unmistakably wrong.

The publication was really the work of a reporter for the defendants' newspaper. His motives and conduct were really in question. We find some evidence tending to show that the reporter was hasty, and somewhat unfriendly to the plaintiff; that his belief was influenced by his feelings, rather than by his judgment; and that his investigation of the affair was rather superficial, and more for the purpose of making a sensation than to ascertain the truth. The jury believed this testimony, and we do not feel warranted in saying that the finding was unquestionable error.

The defendants also strenuously contend that the damages (\$896.37) are excessive. They claim that the prior standing and character of the plaintiff were so low, he could not have suffered more than nominal damages. The plaintiff's standing and character were in issue on this question of damages, and the jury found he had enough to be injured to the extent named. The plaintiff was a public officer, and was severely libeled in that capacity by an influential newspaper of wide circulation, one of the leading newspapers of the state. The plaintiff was entitled to the opinion of the jury on the question of the damages caused him by the libel. We do not feel justified in this case in setting that opinion aside.

Motion overruled.

(91 Me. 77)

STATE v. SIMPSON.

(Supreme Judicial Court of Maine. Dec. 16, 1897.)

CRIMINAL LAW—FORMER CONVICTION—EVIDENCE—DOCKET ENTRIES—JURISDICTION.

1. It is a settled rule in this state that, when the record in a case has not been fully extended, the docket entries may be read to the jury in support of the allegation of a former conviction; but, as there is no presumption in favor of the jurisdiction of an inferior court of limited statutory jurisdiction, the docket entries from the records of such a court cannot be accepted as sufficient proof of a former conviction of larceny, without further evidence that the court had jurisdiction of the particular offense of which the respondent was convicted.

2. The respondent was indicted in the superior court for Kennebec county as a common thief. To prove a former conviction of larceny in the municipal court of Waterville, the docket entries of that court were introduced, it appearing that no extended record had been made in that case. Neither the original complaint, nor a duly-certified copy of it, upon which the conviction was based in the municipal court of Waterville, was offered in evidence. *Held* that, in the absence of prima facie evidence that the court had jurisdiction of the offense charged, the docket entries alone are not sufficient to establish the former conviction alleged in the indictment.

(Official.)

Exceptions from supreme judicial court, Kennebec county.

Wallace Simpson was indicted for larceny by night in a dwelling house, under Rev. St. c. 120, § 2, with an allegation of a previous conviction of larceny as principal, so that the sentence might be given for a common thief, under section 5 of said chapter, if the respondent were convicted.

Verdict of guilty, and defendant excepta. Sustained.

To prove the alleged former conviction of the defendant in the municipal court of Waterville, the following testimony was given by Frank K. Shaw:

"Q. You are the judge of the municipal court of the city of Waterville?

"A. Yes, sir.

"Q. Have you the records of your court with you?

"A. I have.

"Q. Will you turn to the record of No. 3,626? Have you that record with you?

"A. I have.

"Q. Is it a record of conviction?

"A. Yes, sir.

"Q. Will you read it?

"A. '3,626. State vs. Wallace Simpson. Larceny. Complainant, A. L. McFadden. Date, Dec. 30, 1895. Same day, prisoner arraigned. Plea, guilty. Sentenced to be imprisoned fifteen days in jail at hard labor, and to pay the costs of prosecution, \$6.69. In default of payment of costs, fifteen days additional imprisonment. Committed.'"

Neither the original complaint, nor any copy of the same, was put into this case. The defendant's counsel, at the close of the charge of the presiding justice, insisted that to establish a former conviction, as alleged in this

indictment, it was incumbent on the government to show what was the complaint in the municipal court upon which the conviction was based, and asked the court to instruct the jury that there was not sufficient evidence in the case to support the allegation of prior conviction. This instruction the presiding judge refused to give. The jury returned a general verdict of guilty. To the foregoing refusal to give the requested instruction, the defendant excepted.

G. W. Heselton, Co. Atty., for the State. S. S. Brown, for defendant.

WHITEHOUSE, J. This was an indictment against the respondent for the crime of larceny, committed on the 28th day of January, 1897, with an allegation of a prior conviction in the municipal court of Waterville, and an averment of the legal conclusion, based upon section 5, c. 120, Rev. St., that the respondent was a common thief.

In support of the allegation of a former conviction of larceny, the state introduced without objection the following docket entries from the records of the municipal court of Waterville, it appearing that no more extended record had been made in the case, to wit: "State v. Wallace Simpson. Larceny. Complainant, A. L. McFadden. Date, Dec. 30, 1895. Same day, prisoner arraigned. Plea, guilty. Sentenced to be imprisoned fifteen days in jail at hard labor, and to pay the costs of prosecution, \$6.69. In default of payment of costs, fifteen days additional imprisonment. Committed." Aside from proof of the respondent's identity, no other evidence was introduced to substantiate the averment of a prior conviction.

But, at the close of the charge of the presiding judge, the defendant's counsel requested an instruction that it was incumbent on the government to show what the complaint was in the municipal court upon which the conviction was based, and that there was not sufficient evidence in the case to support the allegation of a prior conviction. The presiding judge refused to give this instruction, and the jury returned a verdict of guilty. The case comes to this court on exceptions to this refusal to give the requested instruction.

It is settled law in this state that, when the record in a case has not been fully extended, the docket entries may be read to the jury in support of the allegation of a former conviction. The docket is deemed to be the record until a more extended record is made, and the same rules of imported verity apply to the docket entries as to the completed record. *State v. Neagle*, 65 Me. 469, and cases cited; *State v. Hines*, 68 Me. 202.

But this rule of evidence is not decisive of the question here presented. Such docket entries from the records of a superior court of general jurisdiction are undoubtedly accepted as sufficient proof of a legal conviction, without further evidence that the court had jurisdiction of the particular offense of which the

respondent was convicted. Such a court is presumed to have jurisdiction to give the judgment it renders until the contrary appears. All intendments of law in such cases are in favor of its acts. But a different rule prevails in regard to inferior courts of special and limited authority. "As to them, there is no presumption of law in favor of their jurisdiction. That must affirmatively appear by sufficient evidence or proper averment in the record, or their judgment will be deemed void on their face." *Galvin v. Page*, 18 Wall. 364. "The acts of these two classes of courts," says Mr. Freeman, "have been properly likened to the acts of general agents and the acts of special agents. The former are to be regarded as valid in all cases to the extent that all persons relying upon them need show nothing beyond the general grant of authority, while the latter, to be binding, must first be shown to fall within the limits of a special or restricted grant." *Freem. Judgm.* § 517. See, also, sections 123, 124; *Lawson, Pres. Ev.* p. 27. With respect to "courts of special and limited jurisdiction, whatever may be their grade, the facts necessary to jurisdiction must be shown." 2 *Whart. Ev.* § 1308. See, also, an interesting discussion of this subject in 2 *Smith, Lead. Cas.* (9th Ed.) 1008; *State v. Hartwell*, 35 Me. 159; *State v. Hall*, 49 Me. 412; *Treat v. Maxwell*, 82 Me. 79, 19 Atl. 98.

The municipal court of Waterville is an inferior court of limited statutory jurisdiction. It appears from the act establishing that court (chapter 220, Sp. Laws 1880) that the judge has "jurisdiction in all cases of simple larceny where the property alleged to have been stolen shall not exceed in value the sum of twenty dollars, and power to award sentence upon conviction by fine not exceeding twenty dollars, or imprisonment in the county jail, with or without labor, for a term not exceeding ninety days." But in 1891 it was extended to cases where the value of the property shall not exceed \$50. The act declares, it is true, that it "shall be a court of record and have a seal"; but it is not thereby elevated to the grade of those superior courts that are entitled to the benefit of the presumption *omnia rite acta* respecting jurisdiction. It must be admitted that there is no clearly defined test by which to determine in all cases whether a court belongs to the one class or the other; but as stated in *Smith's Leading Cases*, supra: "If the court is one possessing common law or equity powers, even though conferred by statute, the court will be one of general and superior jurisdiction, and its judgment will be supported by the presumption attending the judgments of superior courts. * * * If, on the other hand, the court is one of limited or limited statutory jurisdiction, the court will be regarded as an inferior one, and the effect of its judgments will be limited in certain respects. * * * The tendency of modern decisions seems to be towards doing away with the distinctions pointed out; but, for the present, the distinctions seem to be too well

grounded in the cases to be successfully attacked."

It appears from the docket entries in the present case that the sentence actually imposed by the judge was within the scope of his power to award sentence for simple larceny when the property alleged to have been stolen shall not exceed in value the sum of \$50. But in the absence of the original complaint, or of any copy of it, there is no *prima facie* evidence even to show that the property alleged to have been stolen was found or alleged not to exceed in value the sum of \$50. The respondent's plea of guilty to a complaint for the larceny of property alleged to be of greater value than \$50 would confer no power upon the court to award sentence as upon conviction, but only to require him to recognize for his appearance at the superior court. The respondent's plea would be no waiver of the objection to the jurisdiction of the court over the offense charged. "Neither in this way, nor in any other, can the court be given a jurisdiction which, on other principles, it would not be competent to exercise." 1 *Bish. Cr. Proc.* § 123.

In the absence of *prima facie* evidence that the court had jurisdiction of the offense charged, the docket entries are not sufficient to establish the former conviction alleged in the indictment.

Exceptions sustained.

(91 Me. 83)

STATE v. SIMPSON.

(Supreme Judicial Court of Maine. Dec. 16, 1897.)

CRIMINAL LAW—INDICTMENT—DESCRIPTION OF PLACE—FORMER CONVICTION.

1. It is a familiar principle that courts of law are bound to take judicial cognizance of the territorial divisions of the state into counties and towns, and the relative situation of the towns with respect to counties.

2. In criminal pleading it is sufficient to state an offense to have been committed in a given town without adding the county in which the same is situated, there being no other town of the same name in the state.

3. *Held*, in this case, that the original complaint upon which the former conviction was based in the municipal court of Waterville contains a proper allegation that the alleged crime was committed in Kennebec county, and hence fulfilled all of the requirements of law in regard to the allegation of place; and such complaint is adequate to give that court jurisdiction of the offense therein charged.

See *State v. Simpson*, 39 Atl. 286, 91 Me. 77. (Official.)

Wallace Simpson was indicted under Rev. St. c. 120, § 5, as a common thief. To a ruling on evidence, defendant excepted. Exceptions overruled.

The indictment sets forth a larceny specifically described therein, and alleges a former conviction of the defendant for the crime of larceny in the municipal court of Waterville. The object of setting forth this former conviction was to obtain on this indictment a conviction of the defendant for be-

ing a common thief, as provided in Rev. St. c. 120, § 5.

A general verdict of guilty was returned by the jury. The docket entries of the municipal court were introduced, and, when the original complaint from the municipal court was offered, the defendant's counsel objected to its introduction as the basis of the proceedings in the municipal court, which resulted in the conviction of the defendant there, because that complaint contained no allegation that the defendant committed the alleged crime of larceny in Kennebec county; and hence there was nothing in the complaint to show that the municipal court had any jurisdiction of the alleged offense for which it was alleged, in this indictment, that this defendant had been previously convicted.

The original complaint introduced in evidence by the government is of the following tenor:

"State of Maine.

"Kennebec, ss.: To Frank K. Shaw, Clerk of Our Municipal Court of Waterville, in the County of Kennebec:

"Lynn W. Rollins, of Waterville, in the county of Kennebec and state of Maine, on the twenty-sixth day of March, A. D. 1895, in behalf of said state, on oath complains that on the twenty-fifth day of March, A. D. 1895, with force and arms, at Waterville, Wallace Simpson, of Winslow, in the county of Kennebec aforesaid, one carriage robe of the value of five dollars, of the goods and chattels, property and moneys, of Lynn W. Rollins, then and there in the possession of the said Lynn W. Rollins being found, feloniously did steal, take and carry away, against the peace of said state, and contrary to the form of the statute in such case made and provided."

To the ruling of the presiding judge, admitting said complaint in evidence, the defendant took exceptions.

G. W. Heselton, Co. Atty., for the State.
S. S. & F. B. Brown, for defendant.

WHITEHOUSE, J. In this case, as in *State v. Simpson*, 91 Me. 77, 39 Atl. 286, the indictment was for larceny, with an allegation of a prior conviction in the municipal court of Waterville, and an averment of the legal conclusion, resting upon section 5, c. 120, Rev. St., that the respondent was a common thief.

But in this case, to substantiate the averment of a prior conviction, the government introduced the docket entries from the records of the municipal court of Waterville, showing a prior conviction of the respondent for larceny, and also the original complaint upon which such conviction was based.

The defendant's counsel contended that this complaint contained no allegation that the larceny charged was committed in the county of Kennebec, and hence afforded no

evidence that the municipal court of Waterville had jurisdiction of the offense. The presiding judge ruled otherwise, and, a verdict of guilty being returned, the defendant took exceptions.

The complaint is somewhat inartificial in its structure, but it may properly be held to fulfill all the requirements of the law in regard to the allegation of place.

It appears from an inspection of the original complaint, as well as of the copy before the court, that the pleader was careful to place a comma after the word "Winslow" in the phrase "Wallace Simpson, of Winslow," and also after the word "Waterville" in the phrase "at Waterville," indicating an intention on his part to make the clause "in the county of Kennebec aforesaid" qualify the antecedent phrase "at Waterville," as well as that "of Winslow"; and if the two phrases had been transposed so as to read "Wallace Simpson, of Winslow, at Waterville, in the county of Kennebec, aforesaid," such an analysis would have been clearly in harmony with the rules of syntax, and all doubt and uncertainty in regard to the meaning would have been removed.

But it is unnecessary to rely upon this grammatical construction of the language of the complaint. "In most of our states," says Mr. Bishop, "the names of the minor localities, such as townships, cities, and the like, and the counties in which they are located, are parts of the public law; and, where they are, the allegation of the place, omitting the name of the county, carries with it that of the county." 1 Bish. Cr. Proc. § 378. And such is the law in this state. In *Martin v. Martin*, 51 Me. 366, the court says: "Courts of law are bound to recognize the territorial divisions of the state into counties and towns. In criminal cases it is sufficient to state an offense to have been committed in the town of S., without adding the county in which the same is situate, to give the court jurisdiction. The courts take judicial cognizance of the towns created by law. *Vanderwerker v. People*, 5 Wend. 530; *Goodwin v. Appleton*, 22 Me. 453; *Ham v. Ham*, 39 Me. 263; *State v. Jackson*, Id. 291." See, also, *State v. Powers*, 25 Conn. 48. "It is customary," says Mr. Bishop, "to write the name of the state in the margin, in connection with the name of the county. But the name of the state need not appear either in the margin or in any other part of the indictment." 1 Bish. Cr. Proc. § 383. See, also, *Com. v. Quin*, 5 Gray, 478; *State v. Wentworth*, 37 N. H. 198.

In the case at bar, however, the words "State of Maine" appear in the caption of the complaint, and "Kennebec, ss.," on the left-hand margin. The court could take judicial notice that the city of Waterville is situated in the county of Kennebec, there being but one town of that name in the state of Maine.

It is the opinion of the court that the com-

plaint should be deemed adequate to give that court jurisdiction of the offense therein charged.

Exceptions overruled.

(184 Pa. St. 482)

NEALE et al. v. DEMPSTER.

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

QUESTION FOR COURT—CONSTRUCTION OF CONTRACT.

Where it is not contended that the rights of the parties depend on anything but the construction of a contract, the question at issue is for the court.

Appeal from court of common pleas, Allegheny county.

Action by James B. Neale and others against Alexander Dempster. Judgment for defendant. Plaintiffs appeal. Affirmed.

Richard C. Dale and Hunter & Beatty, for appellants. D. T. Watson and W. W. Thomson, for appellee.

MCCOLLUM, J. The first judgment entered in this case was in conformity with the claim of the plaintiff that the land released from the lien of the mortgage was subject to the lien of, and liable to seizure and sale upon, a judgment obtained on the bond. It was founded upon the construction of the agreement, and the mortgage, bond, and release provided for therein. The plaintiffs, in their reply to the affidavit of defense and the rule to restrict execution on the judgment to the land bound by the mortgage, distinctly affirmed that these instruments fully and correctly expressed the intention, understanding, and agreements of the parties, and positively denied that there was any agreement or understanding between the said parties different from that contained in them. The defendant's averments in his affidavit of defense respecting the release and the effect of it, as understood and intended by the parties, were properly considered by the court as of no avail against the written instruments. It was undoubtedly the province of the court to construe these instruments, and to enter judgment in accordance with its construction of them. This, as we have seen, the learned court below did, and, on an appeal from its judgment to this court, it was determined that the lien of the judgment obtained on the bond should be restricted to the land bound by the mortgage. This determination was based upon a construction of the writings opposed to the construction put upon them by the court below. The judgment was accordingly reversed, and the record remitted, with instructions to enter a judgment in accordance with the opinion of this court. *Neale v. Dempster*, 179 Pa. St. 569, 36 Atl. 338. The court below promptly complied with the instructions, and entered a judgment in accordance with them, and from the judgment so entered the appeal now before us was taken.

We have carefully considered the argument

made and the cases cited in support of the plaintiffs' contention on this appeal, and we are satisfied that there are no substantial grounds for it. We need not repeat or qualify any part of the opinion filed in the first appeal. The controlling question then was whether the release freed the land included in it from further liability for the purchase money. The solution of it depended upon the construction of the writings we have referred to. Our construction of them was in accord with the defendant's contention, and our reasons for it were plainly stated. To these we may add another fact or circumstance not heretofore specifically mentioned. There was no warrant of attorney contained in or attached to the bond authorizing a confession of judgment upon it, and no suit could be maintained thereon until the defendant defaulted in the payment of the purchase money. When the release was executed the defendant was not in default, and it was two years and eight months after that before any suit was brought on the bond. The only lien upon the land for purchase money prior to May 13, 1896, was created by the mortgage. If before that time, and after the release was made, the defendant had conveyed the land included in the release to a bona fide purchaser of it, the latter would have taken it freed from any claim of the plaintiffs for purchase money. The tendency of these facts is to confirm the defendant's contention that the release was intended by the parties to free the land included in it from liability for any part of the debt secured by the mortgage. The plaintiffs evidently misapprehend the grounds of the decision of this court when the case was here on the defendant's appeal. It was not made on the ground that there were averments in the affidavit of defense which created an issue of fact to be determined by a jury. It was distinctly based on the construction of the agreement, mortgage, bond, and release, and this, it is conceded, was a matter exclusively for the court. The suggestion, therefore, that the plaintiffs, by the entry of the judgment now appealed from, are deprived of the "constitutional right to trial by jury," has nothing whatever to rest upon. If the court below had in the first place entered judgment in conformity with the defendant's contention, and the plaintiffs had appealed from it, there would have been no irregularity in an affirmance of it. A judicial ascertainment of their right cannot be considered as in derogation of it. The plaintiffs have not alleged heretofore, and they do not allege now, the existence of any oral agreement or understanding between them and the defendant in conflict with or in any degree qualifying the writings on which they rely for a judgment in accordance with their contention. On the contrary, they have positively denied the existence of any such agreement or understanding, and that the affidavit of defense raised any issue of fact. Why, then, should the judgment entered in the court below be reversed or modified? We confess our in-

ability to discover any valid reason for such action. It was clearly competent for this court to direct the court below to enter the judgment it should have entered when the case was first before it, and as it appears on the plaintiffs' own showing that the judgment must depend on the construction of the writings, and they have not convinced us that we erred in our construction of them in defendant's appeal, we overrule the assignments. Judgment affirmed.

(184 Pa. St. 488)

GILLESPIE et al. v. ROGERS.

(Supreme Court of Pennsylvania. Feb. 1, 1898.)

OPENING JUDGMENT—DEFENSE TO NOTE.

1. Refusal to open judgment on a note in favor of the assignee against the maker, is proper, application therefor being 15 months after confession of the judgment by defendant, which was after withdrawal of affidavit of defense setting up that the note was merely for plaintiff's accommodation, the ground alleged for the application being forgery by the payee, and defendant's knowledge of the transactions being substantially the same when he confessed judgment as when he made the application.

2. As against a bona fide purchaser of a note without notice of the course of dealing between the maker and payee, it does not avail the maker that, having signed and delivered it in blank to the payee, with permission to write into it anything under a certain amount, the payee wrote in a greater amount.

Appeal from court of common pleas, Allegheny county.

Action by D. L. Gillespie & Co. against William Rogers. From an order denying application to open judgment for plaintiffs, defendant appeals. Affirmed.

R. P. Lewis, for appellant. J. S. & E. G. Ferguson, for appellees.

McCOLLUM, J. This was an action of assumpsit on a promissory note for \$1,800. It was brought, and a statement of claim, accompanied by a copy of the note, was filed, on the 13th of April, 1896. On the 29th of the same month the defendant filed an affidavit of defense, in which he averred that there was no consideration whatever for the note either to him, or to Doherty Bros., "or in the execution or indorsement and delivery of it to the plaintiffs," for whose accommodation he alleged it was made. On the 21st of May, 1896, the defendant withdrew his affidavit of defense, and confessed judgment for \$1,814.10, that being the amount of the note with interest. Fifteen months and 14 days after judgment was entered in the suit as above stated, he presented a petition to the court, in which he claimed that the note was a forgery, and on which a rule was granted to show cause why the judgment should not be opened. The court, upon due consideration of the petition and the affidavit filed in aid of it, discharged the rule, and from the order discharging it this appeal was taken.

The petition was manifestly based on the af-

fidavit of Henderson that the defendant was accustomed, on the solicitation of Doherty Bros., to sign notes in blank for their accommodation, leaving it to them to fill in the amounts as they might have occasion to use the notes. It was further stated in his affidavit that it was understood between the defendant and Doherty Bros. that the amounts so filled in should not exceed \$300 in any case, and that they were accustomed to disregard this understanding, and to write into the notes such amounts as best accommodated them. From this course of dealing the affiant appears to have inferred that the defendant never made and delivered the note in suit to Doherty Bros. He does not allege that he has ever seen the note, or state other grounds than those above mentioned for his "best knowledge and belief." There is no denial in the defendant's petition, or in Henderson's affidavit of the genuineness of the defendant's signature to the note in question, nor is there an avowal in the defendant's petition of an agreement between him and Doherty Bros., such as is alleged in Henderson's affidavit. It could hardly be expected that the defendant would make such an avowal in the face of the fact that he practically admitted in his affidavit of April 29th that he made the note for the accommodation of the plaintiffs, and of the further fact that he set up want of consideration as a defense to it. It is very clear that, if it was agreed between the defendant and Doherty Bros. that they should not write into any note he signed in blank for their accommodation an amount to exceed \$300, he knew, when he appeared to take defense to the note in suit, that they had violated the agreement. If, however, no agreement defining or limiting the amount to be filled in was made, it was for them to determine it. Assuming that Doherty Bros. wrote into the note in question a larger amount than they were authorized by the defendant to write into it, it does not follow that a purchaser of the note for value, before maturity, and without notice of the course of dealing between the maker and the payees, would be prejudiced by their action. It is not denied in the defendant's petition, or in the Henderson affidavit, that the plaintiffs were such purchasers.

The petition and the affidavit on which it was founded were vague and unsatisfactory. They were made on the same day, and the former was suggested by the latter. This sufficiently appears in the defendant's affidavit of the 8th of September, in which he states that the information on which he acted was received on the day they were written. No evidence was offered to sustain them, and they were not sufficient upon their face to warrant the opening of the judgment. Aside from their own insufficiency, there were other matters in the way of the application to open it, to wit, the defendant's affidavit of defense filed on the 29th of April, and withdrawn by him on the 21st of May, his confession of judgment on the day he

withdrew the affidavit, and his acquiescence in the judgment for 15 months. To these obstacles in the way of his application may be added the further and obvious one that when he filed his affidavit of defense his knowledge of his transactions with Doherty Bros. was substantially the same as now. The assignment is overruled, and the order discharging the rule to open the judgment is affirmed.

(184 Pa. St. 541)

**GERMAN-AMERICAN TITLE & TRUST CO.
v. CAMPBELL.**

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

JUDGMENT ON BOND OF SURETY—ENTRY BEFORE BREACH.

Judgment can be entered before breach on bond given, with power of attorney to confess judgment, to surety on building contract, conditioned to be void if the obligor indemnify and save harmless the surety from all damages which it may sustain by reason of its suretyship.

Appeal from court of common pleas, Philadelphia county.

Judgment was entered by the German-American Title & Trust Company against Sanford P. Campbell on a bond. Rule to open the judgment was discharged, and defendant appeals. Affirmed.

The bond given by defendant to plaintiff was as follows: "Know all men by these presents that I, Sanford P. Campbell, am held and firmly bound unto the German-American Title & Trust Company of Philadelphia in the sum of \$10,000, lawful money of the United States of America, to be paid to the said German-American Title & Trust Company, its certain attorney, successors, or assigns, to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with my seal dated the seventeenth day of June, in the year of our Lord one thousand eight hundred and ninety-two (1892). Whereas, the said German-American Title & Trust Company is about to become surety for Frederick J. Amweg, at his request, upon a certain bond in the sum of \$50,000, required by the commonwealth of Pennsylvania to accept and perform a contract to erect an asylum for chronic insane at Wernersville, Pennsylvania, in the event of the said Frederick J. Amweg being the lowest and best bidder for the said contract; and whereas, the obligor herein named, in consideration thereof, has agreed to save harmless and indemnified the said the German-American Title & Trust Company, its successors and assigns, of and from all loss by reason thereof: Now, the condition of this obligation is such that if the above-bounden obligor, his heirs, executors, administrators, or any of them, shall and do well and sufficiently indemnify and save harmless the said the German-American Title & Trust

Company, its successors and assigns, of and from all actions, suits, loss, costs, and damages and expenses whatsoever which the said the German-American Title & Trust Company, its successors or assigns, shall be put to or sustain by reason of becoming surety as aforesaid, by said Frederick J. Amweg, then this obligation to be void, or else to be and remain in full force and virtue. And the said obligor hereby authorizes any attorney of any court of record in Pennsylvania or any other state to confess judgment against him for the above sum, with release of errors, etc., and hereby, for himself and his legal representatives, waive and relinquish unto the said obligee and its assigns all benefits that may accrue to him by virtue of any and every law exempting his property from levy and sale under execution."

J. Campbell Lancaster, for appellant. William H. Staake, for appellee.

PER CURIAM. We see no reason to interfere with the discretion of the learned court below in refusing to open the judgment in this case. There is no dispute whatever as to the fact of the breach of Amweg's contract, and the loss of the plaintiff in its undertaking to complete the performance of his contract for the erection of the buildings in question. It is perfectly clear, upon the testimony, that the work done by the plaintiff was done solely as surety for Amweg, and that it was done with the full knowledge and consent of the defendant in the present judgment, who was surety for Amweg to the plaintiff, against loss by it as such surety. The plaintiff had an undoubted right to enter the judgment before breach, for its own protection, and also to complete the performance of Amweg's contract as surety for him. We are very clear that the rule to open the judgment was properly discharged. Judgment affirmed.

(184 Pa. St. 554)

GILBERT v. ERIE BLDG. ASS'N.

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

BONA FIDE PLEDGEE—CERTIFICATE OF STOCK.

A power of attorney on the back of a certificate of stock containing a full power of sale, authorizing sale by any attorney having it in his lawful possession, being executed by a pledge of the certificate, gives the innocent pledgee a good claim thereto against the owner.

Appeal from court of common pleas, Philadelphia county.

Action by Clara A. Gilbert, formerly Clara A. Lukens, against the Erie Building Association, to determine rights to certificate of stock which, with power of attorney on the back, plaintiff, the owner thereof, loaned to Joseph McDonald, to use as security for a loan of \$700 from Laughlin and McManus, and which Laughlin and McManus then pledged to defendant for a loan of \$5,000. Judgment for defendant. Plaintiff appeals. Affirmed.

The power of attorney is as follows:

"Know all men by these presents, that I, Clara A. Lukens, for value received, have bargained, sold, assigned, and transferred, and by these presents do grant, bargain, sell, assign, and transfer, unto —, fifty (50) shares of the capital stock of the Catawissa R. R. Co., standing in my name on the books of the company, and do hereby constitute and appoint — my true and lawful attorney, irrevocable for me and in my name and stead, but to — use to sell, transfer, and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that — said attorney or substitute or substitutes shall lawfully do by virtue hereof. In witness whereof, I have hereunto set my hand and seal, the 23rd day of July, 1891.

"Clara A. Lukens, [Seal.]

"Now Clara A. Gilbert.

"Signature guaranteed: Laughlin & McManus.

"Sealed and delivered in the presence of E. D. Gilbert."

Samuel S. Craig and Elias P. Smithers, for appellant. O. T. Quin and Hanson, for appellee.

PER CURIAM. The power of attorney on the back of the certificate signed by the plaintiff was in the usual general terms of such instruments, and contained no restrictions, qualifications, or conditions. It contained a full power of sale, and certainly authorized a sale of the certificate by any attorney who had it in his lawful custody. The defendant was an innocent pledgee of the certificate, and was perfectly at liberty to advance money upon it, and take it as collateral, divested of all claims on the part of the owner. Under all the authorities, a transfer executed in such circumstances confers a good title upon the person buying it or advancing money upon it. Judgment affirmed.

(184 Pa. St. 519)

STEARNS v. ONTARIO SPINNING CO.

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

NEGLIGENCE—EVIDENCE.

Any presumption of negligence arising from the fact that the ax head which struck plaintiff's husband fell from an open door in the building occupied by defendant is rebutted by testimony of defendant's employé, introduced by plaintiff, that at the time of the accident he was using the ax in cutting the iron bands on a bale of cotton; that he had used it for two years, and never had trouble with it; that he had frequently examined it, to see whether it was in good condition; that, while he had not made any particular examination, "it seemed to be in first-class shape"; that he had noticed nothing wrong about it; that immediately before the accident he had been using it for about two minutes, and had

cut ten bands from a bale, and, when he raised it to strike again, the head flew off and out the doorway.

Appeal from court of common pleas, Philadelphia county.

Action by Sarah Stearns against the Ontario Spinning Company. Judgment of nonsuit. Plaintiff appeals. Affirmed.

William F. Harrity, James M. Beck, and Alfred R. Haig, for appellant. John G. Johnson, for appellee.

FELL, J. The plaintiff's testimony showed that her husband, while lawfully in an area way in the building in which he was employed, was struck on the leg by an ax head, and thereby received a wound, from the effects of which he died; and that the ax head fell from an open doorway in the fifth story of the building which was occupied by the Ontario Spinning Company, the corporation defendant. The plaintiff then called Clement, an employé of the defendant, who testified that at the time of the accident he was using the ax in question in cutting or breaking the iron bands on a bale of cotton; that he had used the same ax for about two years; that he had never had any trouble with it; that he had frequently examined it, to see whether it was in good condition; that on this occasion, while he had not made any particular examination, "it seemed to be in first-class condition"; that he had noticed nothing wrong with it; that immediately before the accident he had been using it for about two minutes, and had cut ten bands from a bale of cotton; and that, when he raised it to strike again, the head flew off the handle, and out of the open doorway behind him. The doctrine of *res ipsa loquitur* applies where, under the circumstances shown, the accident presumably would not have happened if due care had been exercised. Excepting where contractual relations exist between the parties, as in the case of carriers of passengers and some others, negligence will not be presumed from the mere happening of the accident and a consequent injury, but the plaintiff must show either actual negligence, or conditions which are so obviously dangerous as to admit of no inference other than that of negligence. The burden which is thus thrown upon the defendant is not that of satisfactorily accounting for the accident, but merely that of showing that he used due care. It is therefore unnecessary in this case to consider whether proof of the accident and its attendant circumstances was sufficient to put the defendant to its defense, for, if any presumption of negligence had been raised by the previous testimony, it was a presumption of fact only, and was entirely rebutted by the testimony of Clement, the defendant's employé, who was the last witness called by the plaintiff. His evidence showed that he was a competent man, and that he had used due care, and it was at the same time entirely consistent with the happening of the accident as described by the other witnesses. For to those

who are familiar with the construction of the ordinary ax, such as the one in this case was shown to have been, it is readily conceivable that the head and handle may part although apparently securely joined; and to those who are familiar with their use it is known that they sometimes do so without previous warning. What, then, was there to submit to the jury? The defendant, as we have said, was not bound to account for the happening of the accident. He had been relieved by the plaintiff of the burden, if any there was, of showing the exercise of due care. The plaintiff's whole testimony not only failed to show negligence on the part of the defendant, but rebutted any presumption of negligence which may have arisen, and affirmatively proved its absence. We are of the opinion that the nonsuit was properly entered, and the judgment is affirmed.

(184 Pa. St. 572)

FIFTH MUT. BUILDING SOC. OF MANAYUNK v. HOLT.

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

RES JUDICATA—PARTIES—EVIDENCE—OPINION.

1. A judgment, in an action by F. against an association, determining that F. was the owner of certain shares therein, is not conclusive between the association and H., though H. was notified of the action, and testified therein for the association; he not having been allowed to defend therein, and the right to appeal having been stipulated away by the association.

2. A party to a disputed contract cannot, independent of anything else, give as evidence of the contract that he entered a charge against himself, in his own book, for the consideration.

3. One in an action with an association, endeavoring to show ownership of shares in it, cannot ask its secretary whether he had not always been recognized by it as the owner of the stock after an alleged transfer to him; this being an attempt to elicit an opinion formed from entries in the society's books and the declarations in a mortgage which such person gave the association for a loan.

Appeal from court of common pleas, Philadelphia county.

Action by the Fifth Mutual Building Society of Manayunk against John P. Holt to enforce a mortgage. Judgment for plaintiff. Defendant appeals. Reversed.

S. Morris Wain and John G. Johnson, for appellant. Francis S. Cantrell, for appellee.

DEAN, J. John A. Fitzpatrick, in May, 1887, subscribed for 15 shares of stock in the plaintiff society; he to pay therefor \$15 per month dues, according to the usual stipulations of such contracts of membership. About one year afterwards, Fitzpatrick, by a verbal contract, agreed to transfer the 15 shares to Holt, defendant; and a credit of \$210, the consideration, was entered in Fitzpatrick's favor on Holt's books,—Fitzpatrick being at the time an employé of Holt. Fitzpatrick then took his society pass book to the secretary, and had him erase his name in it, and write that of

Holt. The same change was made in the society's books. But the certificate of stock itself was never delivered or assigned to Holt. It remained in Fitzpatrick's possession until the 9th day of February, 1894, when he assigned it to his mother, Emma Fitzpatrick. From June, 1888, Holt's name appeared on the books of the association as a member and owner of the stock, and the society received from him the monthly dues. On October 4th of that year, he borrowed from the society, under its rules, \$3,000, on the 15 shares of stock, and secured the loan by mortgage upon his cotton and woolen mill property in Manayunk. The mortgage recites, as part of the consideration for the loan, that Holt is to pay \$15 monthly, as the owner of 15 shares of the capital stock. Holt paid the monthly contribution, and other demands of the society, until May, 1895,—a period of 84 months,—which contributions repaid the loan. He then requested the association to satisfy the mortgage, which it declined to do, for these reasons: As already noticed, the certificate of stock itself had not been transferred or delivered by Fitzpatrick to Holt, but, instead, had been retained by Fitzpatrick, and was by him, in 1894 (more than six years afterwards), transferred and delivered to Emma Fitzpatrick, who brought suit on it against the society, and after a trial in court there was judgment for the plaintiff. The contention of the plaintiff in that case was that no actual transfer of the stock was intended; that all the payments made by Holt had been out of money furnished him for that purpose by Fitzpatrick. This was flatly denied by the society, and it called Holt as a witness, who supported the denial under oath. After the adverse judgment, the society paid the amount of it to Emma Fitzpatrick, and claimed that its liability on the 15 shares of stock then ended. It then issued scire facias against Holt, who contended that he had paid the mortgage by the monthly contributions. On the trial in the court below, plaintiff, for the purpose of showing that Holt had no title to the stock, offered in evidence the record and judgment in the suit of Fitzpatrick against the society. Against the objection of defendant, the record was admitted, and the jury instructed that the judgment was conclusive against Holt, and to render a verdict for plaintiff. Hence this appeal.

The main question here is what is the legal effect of that judgment, as between the parties to this suit? Undoubtedly, a former judgment binds the parties to the record, and their privies. Holt, however, was not a party of record to that suit; but this is not conclusive in his favor. "The law includes all who were directly interested in the subject-matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment. The right also involves the right to adduce testimony, and to cross-examine the witnesses on the other side." Greenl. Ev. § 524; Giltinan v. Strong, 64 Pa. St. 242. There can be no doubt that Holt was directly interested in the

subject-matter of that suit, and he was a privy, as regards the society, for it succeeded to his right to the contract with John Fitzpatrick. But he could not defend the right of his successor, against its objection. He must be brought upon the record by the assent of the latter, or, with its assent, he must, personally or by counsel, take active part in the defense. Holt testified that the society gave him notice of the suit, but that when his attorney appeared he was not permitted to take part in the trial, or examine witnesses, or argue the case to the jury; that the society's counsel took control, and practically excluded him from any part in the defense. It further appeared that his attorney requested counsel for the society to have him intervene as a defendant of record, and this request was refused. Still further it was shown that after judgment the counsel for the society agreed with Holt that it would take an appeal to the supreme court,—Holt to employ counsel, and take charge of the appeal; but when his appeal was lodged in this court he was met by a written stipulation of the same counsel with Fitzpatrick that no appeal should be taken, whereupon the appeal was quashed. Clearly, as between him and the society, not being a party to the record, and there being evidence offered that he and his counsel were excluded from any control of the defense; were not permitted to adduce evidence, examine or cross-examine witnesses; that his appeal failed because of the disingenuous conduct of the society's counsel,—he is not bound by the judgment, which he had no opportunity to defend against. The appearance as a witness, in a suit between other parties, by one having an interest in the subject-matter of contention, does not make the witness a party to, or bind him by the event of, the litigation. As is said by our Brother Williams in *Re Miller's Estate*, 159 Pa. St. 562, 28 Atl. 441: "There are some cases in which actual knowledge of the pendency of an action at law, or the existence of an incumbrance, or the like, may take the place of legal notice; but I know of no case where one who has been examined as a witness is, by reason of that fact alone, concluded by the judgment or decree rendered in the case." On this question the jury should have been instructed that if they believed from the evidence that Holt, as a party, was not allowed to, in fact, defend in the former suit, he was not bound by the judgment.

This disposes of all the errors assigned, except the first and second. As to the first, the defendant offered in evidence his book of original entry, containing the account between him and Fitzpatrick, to show that, at the time he alleged that the purchase of the stock was made, a credit had been entered in favor of Fitzpatrick for \$210; the consideration to be paid for the transfer. On objection by plaintiff, this was excluded. In view of the offer, we think that this was right. The learned judge properly held that one party to a disputed contract cannot prove it by showing that he entered a charge against himself in his own

book for the consideration. That was the offer in this case, and the whole of it. If it had been to prove that such an entry was regularly made by defendant long anterior to any dispute as to the ownership, to be followed by proof that plaintiff contemporaneously had changed, in its books, the name of the owner from Fitzpatrick to Holt, and that the latter had thereafter, for years, paid the monthly dues, this to be further followed by the testimony of Holt that Fitzpatrick, in the business transactions between them, had in fact received the very consideration entered to his credit on the book, it would have been admissible; for then it would not have been an independent act of plaintiff, tending to establish his side of the case, but would have been a link in the chain of circumstances, and entirely consistent with them, warranting the inference of the alleged contract. By itself, it was of no value; but as part of a whole, pointing to the same conclusion, it would have been admissible.

As to the second assignment, the secretary of the society was asked if Holt had not always been recognized by the society as the owner of the stock after the alleged transfer. This question, on objection by plaintiff, was overruled. The ruling was correct. The object was to elicit an opinion formed from the entries in the society's books and the declarations in the mortgage. The court and jury were just as capable of forming an opinion from these facts as the witness, and that is what they were there for. The judgment is reversed, and a v. f. d. n. awarded.

(134 Pa. St. 524)

BLANEY v. ELECTRIC TRACTION CO.

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

STREET RAILWAYS—ACCIDENT ON TRACKS—CONTRIBUTORY NEGLIGENCE.

There is contributory negligence where one starting to cross a street, just after a street car has passed, does not stop till he is struck by a car going in the opposite direction from the first, on tracks six feet beyond those on which was the first car.

Appeal from court of common pleas, Philadelphia county.

Action by Catharine Blaney against the Electric Traction Company. Judgment for plaintiff. Defendant appeals. Reversed.

Thaddeus L. Vanderslice and Thomas Leaming, for appellant. A. S. Ashbridge, Jr., for appellee.

DEAN, J. John Blaney, husband of plaintiff, while attempting to cross defendant's tracks at Leamey street crossing of Lehigh avenue, on 21st of September, 1895, was struck by a car and killed. The car tracks are on Lehigh avenue, an unusually broad street. There are double tracks in the center for cars running east and west, with a space between of six feet. The deceased attempted to cross from the north to the south side of the avenue. Just as he left the curb, a car approached on

the north track, the one next him, running westward. He stopped about four feet from the track, and, as soon as the car passed, attempted to cross, and was struck by a car running eastward on the south track. There was evidence for the jury, such as rapid running at that point, failure to sound the gong, and inattention of motorman, tending to show negligence of defendant. The plaintiff brought suit for damages. At the trial the learned judge of the court below submitted two questions to the jury: (1) Was defendant negligent? (2) Was deceased negligent? The jury found for plaintiff on both, and defendant appeals, assigning for error the refusal of the court to peremptorily instruct the jury that deceased was guilty of contributory negligence, and therefore plaintiff could not recover. The defendant called no witnesses. Consequently the only question is whether plaintiff's evidence disclosed a case of contributory negligence. The deceased was a weaver by trade, and was 54 years of age, in full possession of the senses of sight and hearing, and had been a resident of the city for several years. He must be assumed to have possessed ordinary intelligence, and therefore was bound to know the double tracks were for the passage of cars in opposite directions. He stopped until the west-bound car passed in front of and away from him; then immediately started to cross both tracks, and did not stop before being struck. This is testified to by all of plaintiff's witnesses who saw the accident, five in number. Two of them state he seemed to "cut cater-cornered" across, as if to avoid the car. One says he ran into the car. But, if any fact can be established by unvarying, concurrent testimony, it is that, immediately after the car passed west, he started to cross the intervening 16 feet to the other side of the tracks, and did not stop for an instant. As before noticed, he was bound to know a car might be coming east on the far track. That car could be seen, was actually seen, approaching by the witnesses. He could have stopped for a second on the track of the car which had just left him westward, or for half that time on the six-foot space between the tracks. If he had done either, he would have been safe,—that is, if the coming car had been running, as is argued by appellee, 30 miles an hour (but this is very doubtful); for, if he had lost but a second of time on his way to reach the east-bound track, the car would have passed him. To bring about the disaster, both had to occupy that particular spot in that particular instant of time. What is the unavoidable inference? Clearly, one of two: Either he did not look for a coming car, where ordinary intelligence and care dictated there might be one; or, seeing one perilously near, he recklessly ran the risk of passing in front of it. The argument of appellee, that the westward car obstructed his view of the east-bound one, is without weight. If he had stopped for a moment on that track to look, the car on the other would have passed him, whether he saw it or not; if he had stopped but a moment on

the space between the tracks, he would have seen it coming, and safely passing him. From the testimony of the two witnesses, who say that, without stopping, he "cut cater-cornered" across the tracks, it is not improbable the second inference is correct; that is, he attempted a not unusual experiment, to match his speed against that of a car. Every day on the streets of this city we see agile persons bound from one side of the street to the other, rather than wait a second or two, until an approaching car which they see passes. Probably, 999 get across safely. The one-thousandth one miscalculates his own speed, or that of the car, by half a second, and is injured or killed. But whichever of the two inferences, in the case before us, be correct, each points, unerringly, to contributory negligence. There was no room, on the evidence, for the jury to draw a third one, that of ordinary care on part of deceased; for ordinary care suggested that he stop and look for a coming car running east as well as for one running west. The judgment is reversed, and judgment is entered for defendant.

(184 Pa. St. 500)

LAWRENCE v. KORN.

(Supreme Court of Pennsylvania. Feb. 7. 1898.)

MORTGAGES—FORECLOSURE—DEFENSES.

1. In an action by an administrator c. t. a. to foreclose a mortgage, it is not a good defense that defendant is prosecuting with diligence proceedings in partition in the orphans' court, under which the mortgage, being against his undivided interest, will be discharged, and payment made from the fund raised by the sale, the administrator not being a party to such proceedings.

2. It is not a good defense that the right of plaintiff as administrator c. t. a. to foreclose does not appear on the face of the scire facias, in that it is not alleged therein that letters of administration to plaintiff were granted in the state.

Appeal from court of common pleas, Philadelphia county.

Action by Frank A. Lawrence, administrator de bonis non with the will annexed of the estate of Achilus Lawrence, deceased, against Henry Korn. From an order making absolute a rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

F. Carroll Brewster, for appellant. William Henry Fox and David Wallerstein, for appellee.

FELL, J. The action was to recover the principal of an overdue mortgage debt. The assignments of error relate to the order of court in making absolute a rule for judgment for want of a sufficient affidavit of defense. The grounds of defense presented by the affidavit are (1) that the defendant has begun and is prosecuting with due diligence proceedings in partition in the orphans' court, under which the mortgage, being against his undivided interest, will be discharged, and payment made

from the fund raised by sale; (2) that the right of the plaintiff to sue does not appear on the face of the scire facias, as it is not alleged therein that letters testamentary to the executors to whom the mortgage was given, or letters of administration de bonis non cum testamento annexo to the plaintiff, were granted in this state. We see nothing in either of these reasons to prevent judgment. It would not follow that the mortgage would be devested by the proceedings in partition. The primary purpose of such a proceeding is to secure a division of the lands, and, where a part is allotted to a mortgagor of an undivided interest, the lien of the mortgage may be restricted to the part set out to him in severalty. *Bavington v. Clarke*, 2 Pen. & W. 115; *Long's Appeal*, 77 Pa. St. 151; *Stewart v. Bank*, 101 Pa. St. 342; *Robisson v. Miller*, 158 Pa. St. 177, 27 Atl. 887. The plaintiff was not a party to the proceeding, and his right to proceed on the mortgage could in no manner be affected by it.

The record shows no defect of power in the plaintiff to maintain the action, and the affidavit of defense does not aver a want of power. It suggests only that his right to sue does not affirmatively appear from the statement in the scire facias that letters of administration were issued to him. No issue was raised upon the subject. There is no presumption against the right, and, if the defendant had reason to believe that the plaintiff was a foreign administrator, he should have so stated. The judgment is affirmed.

(184 Pa. St. 565)

COCHRAN et al. v. PHILADELPHIA & R. T. R. CO.

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

NEGLIGENCE—PLEADING—SUFFICIENCY OF PETITION.

In an action against a railroad company, the statement averred that plaintiffs owned a mill in a city occupied by tenants; that defendant procured the passage of an ordinance to change the grade of the street in front of the mill, provided defendant should be liable for damages therefrom; that the work was done by defendant in March and April, 1892, in the course of which it covered the stopcock to the gas main with some six feet of earth; that on December 1, 1893, a fire occurred in the cellar of the mill, which was just about under control, when the heat melted the gas pipe at the meter, and permitted the gas to flow in; that an effort was immediately made to turn it off, but it was then first discovered that the stopcock had been covered, and could not be located; and that the flames fed by the gas became uncontrollable, and the mill and contents were totally destroyed. *Held* not to state a cause of action.

Appeal from court of common pleas, Philadelphia county.

Action by John S. Cochran and another, trading as John S. Cochran & Bro., against the Philadelphia and Reading Terminal Railroad Company. From a judgment for defendant, after a demurrer to plaintiff's amended

statement was sustained, plaintiffs appeal. Affirmed.

The statement is as follows:

"On the 1st day of December, A. D. 1893, and for several years prior thereto, plaintiffs were the owners of a mill property at the southeast corner of Tenth and Columbia avenue, and extending east to Hutchinson street, in the city of Philadelphia. In this mill property plaintiffs had a large quantity of stock, goods, machinery, boiler, engine, shafting, and fixtures, and were engaged in the manufacture of yarns. In operating said mill plaintiffs made use of the gas furnished by the city of Philadelphia, supplied by pipes leading from the gas main in Columbia avenue into said mill. In front of said mill property, on Columbia avenue, there was provided and existed a mode of access to said gas pipe leading from the main into said mill, whereby the flow of gas into said mill could be turned on or off by means of a key inserted into the stopoff of the gas pipe, and this key was used from the surface of the street, and reached the gas pipe through a wooden pipe leading from the surface of the street down to the gas pipe. The defendant, the Philadelphia & Reading Terminal Railroad Company, desired to make said Columbia avenue cross its railroad between Ninth and Tenth streets over a bridge instead of at the surface grade, and in furtherance of that object the city of Philadelphia passed an ordinance dated the 26th day of December, A. D. 1890, to change the grade of said Columbia avenue (Ordinances 1890, p. 423), a copy of which is as follows:

"Sec. 8. The department of public works is hereby directed and authorized to revise the grade of Columbia avenue at or near the point where the same crosses the line of the Philadelphia, Germantown and Norristown Railroad, and to revise the grades of Broad street and Lehigh avenue, at or near the place where the said streets cross the line of the Philadelphia, Germantown and Norristown Railroad, so that said streets shall be carried over the line of said railroad, and to revise the grade at Broad street, at or near Pennsylvania avenue, where Broad street crosses the line of the Philadelphia and Reading Railroad Company, so that Broad street can be carried over the said railroad. Said changes of grade, after said revisions, shall be made by said department: provided, that all expenses and damages incident thereto shall be paid by said railroad company, which shall hold the city of Philadelphia indemnified against the same. The said Philadelphia and Reading Terminal Railroad Company shall be obliged to construct, or cause to be constructed, without expense to the city, that portion of the structures, with the approaches thereto, necessary to carry Broad street and Columbia avenue and Lehigh avenue, at the elevation and in accordance with the plans herewith submitted, over the Philadelphia, Germantown and Norristown Railroad, and to construct, or cause to be constructed, without expense to the city, so much

of the structure, with the approaches thereto, as shall be necessary to carry Broad street, at Pennsylvania avenue, at the elevation and in accordance with the plans submitted herewith, over the tracks of the Philadelphia and Reading Railroad Company.

"Sec. 9. Before any work shall be commenced by the said railroad company it shall enter into a bond, in a form to be approved by the city solicitor, with the Philadelphia and Reading Railroad Company, as surety, in the penal sum of one million (\$1,000,000) dollars, conditioned for the faithful performance of all the conditions, terms and provisions of this ordinance, and the said company shall pay into the city treasury the sum of fifty dollars for printing this ordinance. Before the commencement of any work under this ordinance the said Philadelphia and Reading Railroad Company shall join with the said Terminal Railroad Company in the execution of a contract with the city of Philadelphia, to do all the things directed by this ordinance to be done by said Terminal Company."

"After the passage of said ordinance the defendant undertook to make the said change of grade, and did by its servants and employees change the said grade of Columbia avenue, in front of said plaintiffs' property, by making a gradual rise in said grade from said Tenth street to said Hutchinson street eastward. This change of grade was made by the servants and employees of the defendant, filling up the bed of said Columbia avenue with dirt, soil, and refuse, gradually elevating it, from Tenth street eastward, until at said Hutchinson street it was elevated about twelve and a half feet above its prior grade. The said servants and employees of the defendant in doing said work, during the months of March and April, 1892, so improperly, carelessly, and negligently filled in the said bed of Columbia avenue that they utterly failed and neglected to keep said access to said gas pipe in the street free, open, and unobstructed, but, on the contrary, recklessly and carelessly filled up, obstructed, closed, and covered up the same with the said dirt, soil, and refuse to the depth of several feet, so that no access to said gas pipe could be had, nor the location of said stopoff be discovered. The said work of changing the grade of Columbia avenue in front of the plaintiffs' property, and the filling in of the bed of said street by the defendant, was carried on continuously during the greater part of the months of March and April, 1892. On the 1st day of December, 1893, about 8 o'clock p. m., a fire broke out in the cellar of the plaintiffs' mill, and which cellar was then occupied by a tenant. In a few minutes the heat from the fire melted the gas pipe off at the meter in the cellar, which permitted the gas to flow from the main pipe in the street into the building, and which flow of gas fed the flames. An effort was then almost immediately made by the plaintiffs to stop the flow of gas by turning it off at the stopcock in the sidewalk, but the plaintiffs then for the

first time discovered that it had been covered up by the defendant while doing the work of filling in the bed of Columbia avenue. In consequence of said covering up it was impossible to discover where the said stopcock had been originally located. And the plaintiffs aver that the said fire could have been and would have been extinguished before said mill property and its contents were totally destroyed but for the fact that said fire was fed and increased, and shortly became beyond control, by reason of the flow of gas through the said pipe leading from the main on Columbia avenue into the said mill, and which flow of gas it was impossible to stop on account of the access to said pipe from the surface of the street having been destroyed, buried, and obliterated by the said negligence of the defendant's servants. In consequence whereof and by reason whereof the said mill property of plaintiffs, with the stock and machinery therein, were entirely and totally destroyed. Plaintiffs' loss by fire on said building, stock, and machinery amounted to the sum of \$193,696.28, while the amount of insurance obtained by the plaintiffs on the same was \$153,591.50, and plaintiffs lost by said fire the sum of \$40,104.78 for which they received no insurance. But for the said carelessness and negligence of defendant's servants and employees the said flow of gas could have been and would have been turned off from said mill, and the fire extinguished, before the loss by said fire had reached the amount of insurance. Plaintiffs aver that they are injured by the said carelessness and negligence of defendant's servants and employees to the amount of \$40,104.78; therefore they bring suit, etc."

Francis S. Laws, for appellants. Thomas Hart, Jr., for appellee.

PER CURIAM. If it was negligence on the part of the defendant to cover up the plaintiffs' stopcock in the gas pipe on the sidewalk, so as to cut off access to it, it was certainly negligence in the plaintiffs to permit it to remain in that condition for a year and a half. As the plaintiffs' statement contains this averment, it is to be taken to be true, and defeats their action. It is also true that the covering of the stopcock had nothing to do with the cause of the fire, on the facts set forth in the statement, and in any other aspect of that fact it was entirely too remote and speculative as the basis of a cause of action. It could only be a matter of conjecture whether the building would not have been destroyed by the fire, in any event, whether the gas was escaping or not, and the jury could not be permitted to guess upon such a subject. The proximate cause of the loss of the building was the fire, and the question whether the fire could have been put out if the gas had not escaped could not possibly be determined. The mere emission of gas from a broken pipe would not have produced fire, and it required the intervention of another agency.

to wit, fire, to cause the destruction of the building. There are other reasons equally fatal to the cause of action apparent in the statement, but it is not necessary to consider them. The assignments of error are not sustained. Judgment affirmed, and appeal dismissed, at the costs of the appellants.

(184 Pa. St. 537)

**PHILIPS v. PHILADELPHIA & R. T.
R. CO.**

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

**ELEVATED RAILROADS — DAMAGES — CAUSED BY
CONSTRUCTION OF ROAD.**

Smoke, noise, ashes, and vibration are not elements of damage caused by the construction and operation of an elevated railroad, for which there may be a recovery by one whose realty is damaged by such construction and operation.

Appeal from court of common pleas, Philadelphia county.

Action by Felix L. Phillips against the Philadelphia & Reading Terminal Railroad Company to recover damages caused by the construction and operation of defendant's road on an alley on which a lot owned by plaintiff abuts. From a judgment in favor of plaintiff for \$700 only, he appeals. Affirmed.

W. Horace Hepburn, for appellant. John C. Lamb and Thomas Hart, Jr., for appellee.

PER CURIAM. Under the charge of the learned court below, the plaintiff was allowed to recover the full amount of the difference in value of his property before and after the taking of his alley way leading to Division street. This easement is what was taken, and the extent to which his property was injured in consequence of the taking he was permitted to recover. The other elements for which an attempt was made to recover damages, such as smoke, noise, ashes, and vibration, we have frequently ruled, are not elements for which damages can be recovered in such cases as these. The case was fairly and correctly tried, without error in any of the rulings, and the jury has found the actual amount of damages sustained. The assignments of error are all dismissed. Judgment affirmed.

(184 Pa. St. 545)

BAUERLE v. CITY OF PHILADELPHIA.
(Supreme Court of Pennsylvania. Feb. 7, 1898.)

**MUNICIPAL CORPORATIONS — INJURIES CAUSED BY
DEFECTIVE STREETS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.**

In an action by plaintiff to recover for injuries caused by defects in a sidewalk along a street, where the grade had been raised, and sidewalks made to correspond to the grade, where plaintiff knew of the change of grade, but did not know of the condition of the sidewalk at the place in which he was injured when using it, on a dark night, the question of negligence was for the jury.

Appeal from court of common pleas, Philadelphia county.

Action by Christian Bauerle against the city of Philadelphia for personal injuries caused by a defective street and sidewalk. From a judgment refusing to take off a compulsory nonsuit, plaintiff appeals. Reversed.

James O. Sellers, for appellant. John L. Kinsey, City Sol., and Howard A. Davis, Asst. City Sol., for appellee.

DEAN, J. Welkel street is a public street of the city, running north, and connecting Clearfield street and Allegheny avenue. The grade of these two last-named streets had been raised some time prior to 1893, which involved a corresponding raising of the grade of Welkel street about seven feet. From Clearfield street to the avenue, the bed of the street had been raised by filling to the proper height, but it had not been paved. Until halfway from Clearfield street, there were no buildings on either side, and the sidewalks for that distance had not been raised to conform to the grade of the roadbed. At this distance, halfway from Clearfield street, there were two dwellings on the west side, one owned by Mrs. Kress, and the other by Mrs. Murray, both of which had been raised to a level with the new grade, and sidewalks made to correspond. Next to them, towards the avenue, was another house, belonging to one McGonigle, which had not been raised; and the sidewalk remained at the old level,—about seven feet below the grade of the street. The slope of the embankment, caused by the height of the street above the sidewalk, was not very abrupt, and the ascent to the street was not difficult; but there was no slope from Mrs. Kress' raised sidewalk to McGonigle's depressed one, next to it. The bank of the raised sidewalk was at that point held up by boards across it, leaving a vertical descent of six to seven feet. There were no railings, guards, or lights, to save from, or to indicate, danger. This condition had existed for about a year prior to 1893. The plaintiff, a butcher by trade, accompanied by his 10 year old son, started about half past 7 on the evening of 9th of February, 1893, to call upon Kress, to purchase calves. His place of business was four squares distant. Snow was falling, and the night was dark. He had not traveled on Welkel street after the change of grade. He had, however, been along Clearfield street in daylight, and knew grading had been done on Welkel, but had no knowledge of the condition of the sidewalk in front of McGonigle's house. He turned up Welkel street from Clearfield, and, keeping the middle of the street, walked up to, and turned into, Kress' house. After concluding his business with Kress, he left to return home, not by way of Clearfield street, as he had come, but by way of Allegheny avenue. About 12 feet from Kress' door, he stepped over the abrupt termination of the raised sidewalk at McGonigle's lot, and was seriously injured. He brought suit against the city for damages, alleging his injuries resulted from

the negligence of the city in permitting an obviously dangerous sidewalk to remain in that condition long after the change of grade. The learned judge of the court below, after hearing plaintiff's evidence, establishing the facts as we have narrated them, nonsuited him. The court in banc having refused to take off the nonsuit, we have this appeal by plaintiff, assigning for error this refusal. In entering the nonsuit, the trial judge gave his reasons therefor, as follows: "It appears that this man, who knew the condition of affairs there, and knowing the condition of the street, and all that was going on there, and that it was a very dangerous place,—every man going along there would know it, and he certainly knew it; and therefore he did it at the risk of his life and limb. By going home a different way from that which he had taken when going there,—a way which he knew was perfectly safe,—he came to grief; and, in my opinion, that was negligence, and therefore I grant a nonsuit in this case."

Was this error? The negligence of defendant cannot be questioned. Welkel street was an opened, declared highway of the city. There had been a change of grade, which necessitated filling it up seven to eight feet above its original level. This had been done months before, and it was then open for travel between Clearfield street and Allegheny avenue. It was not poled off at either end, and thus there was a constant invitation to the public to use it,—not alone to traverse it between the two streets with which it connected, but for communication, on business or pleasure, with those who dwelt along it. Perhaps a citizen (although we do not so decide) was bound to take notice that a recently graded street might not have a safe connection with the sidewalk where no houses were built, but he was not bound to assume there was an impassable, perilous ditch between a dwelling house and the street. The plaintiff, on entering the street, kept the middle of it until he reached the Kress house, which he entered in safety, because there the sidewalk had been raised to the level of the street. When he came out of the house, had he not a right to assume that the condition of the sidewalk in front of McGonigle's (the next house to it) was the same? Was he bound to assume that the sidewalk between that house and the street was vertically seven feet below that of Kress? That is, was he bound to assume that the city would be so grossly negligent as to leave such a mantrap in front of a dwelling built on the house line? The plaintiff knew there had been a change of grade in the street, by seeing the work going on months before, when passing along the side streets; but this was the first time he had traveled on Welkel street, and he swears positively he had no knowledge of the condition of the sidewalk in front of McGonigle's house. He was not bound to return the way he came, unless he knew the way was more dangerous between the Kress house and Allegheny avenue than between that house and Clearfield

street. So far as concerns any personal knowledge on his part, or any notice to the public by the city, the one end of the street was as safe as the other. We will not say the case was clear of contributory negligence by plaintiff. Neither can we say, as matter of law, contributory negligence was manifest. Therefore the jury must pass on the evidence, and determine the fact. As is said in *Erie City v. Schwingle*, 22 Pa. St. 384: "They invited him into that street by not closing it up, by allowing it to be used without objection, and by putting certain repairs upon it, which made it not safe, but passable with skillful driving and good luck. Culpable negligence or want of ordinary care on part of plaintiff would have been a defense. But the burden of proof was rightly held to lie on defendant. No proof of that kind was offered, except what may be inferred from the plaintiff's not going around some other way. We are very clear in the opinion that that amounts to nothing, under the circumstances of this case." The judgment is reversed, and procedendo is awarded.

(184 Pa. St. 498)

COMMONWEALTH v. KAISER.

(Supreme Court of Pennsylvania. Feb. 7, 1898.)

MURDER—VERDICT—EVIDENCE—INSTRUCTIONS.

1. A verdict of guilty includes a finding that the murder was at the place charged in the indictment.

2. The court, on motion in arrest of judgment in a criminal case, and on appeal from denial thereof, is entitled to take judicial notice that a certain township is within a certain county of the state.

3. It is not necessary that the court specifically call the jury's attention to the issue of the place of the murder, there being evidence that it was as alleged in the indictment, and none to the contrary.

4. Where defendant alleges the murder was committed by a highwayman, a stranger, the state may introduce evidence to identify the other man seen near the place and time of the murder, and claimed by the state to be an accomplice of defendant.

5. It is enough for the court, in its charge, to give the jury a general review of the evidence, which fairly and adequately presents the respective contentions of the state and of defendant, with only enough reference to the items of evidence to assist the jury in recalling it as a substantial whole, and to appreciate its bearing.

Appeal from court of oyer and terminer, Montgomery county.

Charles O. Kaiser, Jr., was convicted of murder, and appeals. Affirmed.

N. H. Larzelere, Geo. Bradford Carr, Henry M. Brownback, and Muscoe M. Gibson, for appellant. J. A. Strassburger, Dist. Atty., and James B. Holland, for the Commonwealth.

MITCHELL, J. The record in this case presents 29 assignments of error, occupying 36 printed pages, but they may be considered in 3 groups, and without being rehears-

ed in detail. All of them are without merit, technical or substantial, in law or in fact.

The first five are to the alleged failure of the commonwealth to prove the commission of the murder in the county of Montgomery, and the refusal of the court to arrest judgment on that ground. It is not worth while to discuss the effect of a failure of the record to show a finding by the jury on the locality of the murder, for their verdict includes such finding. The indictment charges murder in the county of Montgomery, and the verdict of guilty necessarily means guilty in manner and form as indicted. It is not usual or necessary to write out or enter on the record the form in full, but it is always understood and implied in the verdict of guilty. It is as much a part of the verdict in murder as in other crimes, and the fact that the jury in such case have the additional duty, under the statute, of fixing the degree, does not change the effect of the verdict, but merely leaves it incomplete until the degree is added.

Passing now to the evidence, there was competent proof that the place of the murder was in Montgomery county, and within the jurisdiction of the court, which is the essential feature of the requirement. The witness Kuhlman, in replying to a question as to his recollection, assented to the locality as Montgomery county, and two others, Joseph Deterline and Joseph Beaumont, testified to the place as in Upper Merion township, while others, though not so explicitly mentioning Upper Merion, described the locality so that there could be no doubt of its identity with that testified to by Deterline and Beaumont. This was ample. The court on the motion in arrest of judgment, and this court now, are entitled to take judicial notice of the fact that Upper Merion township is in Montgomery county. For all technical purposes this was sufficient, and the locality was only in issue technically. As part of the commonwealth's case, it was requisite that some evidence of it should be given in the case, but it was never really disputed, and very slight evidence was enough. For the same reason, it was not material that the court should specifically call the attention of the jury to the point. To load the jury's minds with reference to undisputed matters, which, though technically material, have no practical bearing on the jurors' duties, would only tend to distract their attention from the matters really essential for them to consider and determine. This court recognizes, and always will fully recognize, the importance of preserving the technical rules of evidence and of legal procedure. They are the safeguards which the law has placed around the innocent, and the court will not be indulgent to disregard of them, or even to loose practice, where it imperils substantial rights. But, on the other hand, such safeguards will not be allowed to be perverted into devices to defeat jus-

tice; and this court has set its face resolutely against trifling objections, that raise no point of any real bearing on the fact of guilt or innocence. As said by the present chief justice in *Com. v. Jongrass*, 181 Pa. St. 172, 37 Atl. 207: "Subtle distinctions that mark no substantial differences, and that do not affect the merits of a controversy, unless it may be to obscure or defeat them, should not be allowed to thwart justice in the interests of disorder and crime."

The next five assignments of error are to the admission of evidence tending to identify Clemmer, under another name, as the man charged with participation in the murder. The commonwealth alleged a conspiracy between the prisoner and Clemmer to commit the murder. The prisoner alleged murder by a highwayman, a stranger. The learned judge, at the trial, held the proof of conspiracy insufficient, but admitted evidence tending to identify the other man seen by witnesses near the place and time of the murder. The evidence objected to was all competent for that purpose, and was carefully confined to it.

The next eight assignments are to the charge and answers to points on the same subject. As already said, both sides asserted the presence of one, if not two, other men, besides the prisoner, at the commission of the crime. The commonwealth claimed a conspiracy, but the court held the evidence insufficient to sustain that contention, but admitted evidence of the presence and identification of accomplices. The question of accomplices, and what they did, is a different one from conspiracy; but the two issues run closely together in the mode of proof and the evidence to establish them. Of course, there cannot be conspiracy carried into execution without participation of several, either as principals or accomplices, but there may be accomplices without previous conspiracy. The learned judge admitted evidence on the presence and identification of accomplices, and presented it to the jury on that view only, keeping the distinction as to conspiracy clearly marked, and excluding all evidence of acts or declarations of the other parties not relevant to their identification. His charge and answers to the points now complained of were a fair presentation of the evidence and its bearing on the issue, and we find no error in them.

The remaining points relate to the charge in connection with the prisoner's own testimony. This was fairly presented to the jury with a strong charge that unless the commonwealth had overcome it,—had "shown that it cannot be credited,"—there could be no conviction. The evidence sustaining or opposing the prisoner's statement was then reviewed correctly and fairly, though in general terms. It is complained that here and there items that bore in favor of the prisoner were not specially mentioned. It is probable that the commonwealth

might make the same complaint. It is not possible, nor even desirable, that the judge should refer to and emphasize every item of evidence on both sides in a way that the counsel would consider adequate. In doing so, he would run much risk of coming to speak as an advocate, rather than a judge. Nor is he required to go over all the evidence on any particular point every time he refers to the point in the course of his charge. It is enough if he gives to the jury a general review of the evidence on the one side and the other, which fairly and adequately presents the respective contentions of the parties, with enough reference to the items of evidence to assist the jury in recalling it as a substantial whole, and to appreciate its bearing. The charge of the learned judge in this case comes fully up to this standard. The case was tried with great patience, care, and impartiality, and none of the alleged errors can be sustained. Judgment affirmed, and record remitted for purpose of execution.

DANVILLE, H. & W. R. CO. v. KASE.

(Supreme Court of Pennsylvania. Jan. 5, 1898.)

ESTOPPEL—CORPORATIONS—CONTRACTS WITH OFFICERS—GOOD FAITH—SALARIES OF OFFICERS.

1. The composition of the auditing committee of a railroad company cannot be objected to, for the first time, 11 years after the accounts in question have been audited, on the ground that two of its members were relatives of the president of the company, whose accounts were under consideration.

2. A contract of an officer of a railway corporation, with the company, to furnish material, is not per se immoral, and is only void where statutes and decisions declare it against public policy; and the subsequent ratification of such a contract by a special act of the legislature makes it valid.

3. Before the constitution of 1874, the legislature might, by special act, validate a particular contract by a corporation with one of its officers, which, under general legislation, was void as against public policy.

4. In a suit for an accounting of stock and bonds of a railway corporation received by defendant, president thereof, brought by purchasers at foreclosure, he cannot be charged with the par value of stock, when it was shown never to have had a marketable value, and, because of the foreclosure, can have no future value.

5. Where the president of a corporation was the actual owner of land standing in the name of another, who purchased said land from the corporation, without disclosing its ownership, for an excessive price, he must account to the company for the amount received in excess of such value.

6. Money paid an official of a railway corporation on a resolution to recompense him for past services, for which no compensation has been provided, is without consideration, and may be recovered back.

7. Where transactions between the president and a corporation arose out of mutual charges and credits, and did not cease until his official connection with the company ended, limitations will not begin to run until such time.

Appeal from court of common pleas, Philadelphia county.

Bill in equity by the Danville, Hazleton & Wilkesbarre Railroad Company against Simon P. Kase, its former president, for an accounting of transactions had between them, and for certain bonds and stock received by him. From a decree for plaintiff entered on a master's report, defendant appeals. Modified.

O. Oscar Beasley and Carrie B. Kilgore, for appellant. Crawford, Loughlin & Dallas and Samuel Gustine Thompson, for appellee.

DEAN, J. On April 15, 1859, a special act authorizing the incorporation of the Wilkesbarre & Pittston Railroad was passed, with power to construct a railroad from the Lackawanna & Bloomsburg Railroad, near Pittston, in Luzerne county, and thence along the Susquehanna river to Danville or Sunbury. An issue of capital stock, of 2,000 shares, at \$50 per share, was authorized. The company was further authorized to issue \$1,500,000 in bonds secured by mortgage upon the road and its franchises. The company was further to have their rights and privileges, and be subject to the restrictions, of the general railroad act of 1849. Afterwards, by a supplement of April 10, 1867, the company was authorized to commence construction at any point on its projected line, and connect with any other railroad. The name was also changed to that of Danville, Hazleton & Wilkesbarre Railroad, and it was enacted that seven directors should manage its business. April 11, 1867, by another supplement, it was authorized to purchase not exceeding 5,000 acres of land, to build lateral railroads, and mine coal; further, to issue \$600,000 additional stock, if a majority of the stockholders should so determine. On April 13, 1867, pursuant to a public notice, a majority of the commissioners named in the act to take subscriptions met at Danville, and opened a subscription stock book. On that and subsequent days, 600 shares were subscribed for.—S. P. Wolverton, 300; S. P. Kase, 194; H. W. McReynolds, 100; William Greenough and George Hill, each, 3 shares; the minutes noted that \$5 per share had been paid by each subscriber, as required by the act of incorporation. On so certifying to the governor, a charter was issued by him to the subscribers, and those who should afterwards become such, creating them a body corporate, as provided in the act authorizing the incorporation. Afterwards more than 1,000 more shares were subscribed for, by different persons; among them, S. P. Kase took 110 shares. No certificates were actually, at that time, issued for these last shares. S. P. Kase was president of the first board of directors. In the negotiation and sale of the bonds authorized, and to further that part of the project, there were issued to parties who purchased bonds, or were connected therewith, 3,207 shares, and to S. P. Kase himself, or to his order, 2,443 shares; to consummate a lease to the Pennsylvania Railroad, there were issued to that company 2,000 shares; and to H. W. McReynolds, on a purchase of coal and

timber lands, 5,500 shares; making the total outstanding stock, if the certificates had all been delivered, about 14,240 shares, of the par value of \$50. So far as appears, no call was made on the subscribers or holders of the stock for payment, except the first \$5 per share on that subscribed when the books were first opened. On May 6, 1867, the board of directors met at Sunbury, and appointed S. P. Wolverton treasurer, A. F. Russell secretary, and adopted by-laws. An engineer was also appointed, and an official seal adopted. The by-laws provided the president should appoint all committees, attend to the executive business of the company, and, by virtue of his office, should be a member of all committees. On June 19, 1867, by resolution of the board, the capital stock was increased to \$500,000. On July 19, 1867, the board called a meeting of the stockholders, to be held July 22d, following, to consider the advisability of purchasing four tracts of land in Columbia county, containing about 1,500 acres, and paying for same in stock and bonds of the company. The stockholders met on the day appointed, and by vote authorized the purchase of the land, to be paid for by \$125,000 bonds of the company, and \$275,000 of the capital stock. The board authorized S. P. Kase, the president, to make the purchase on the terms authorized by the stockholders. On the same day, McReynolds and Greenough, two of the directors, resigned, and the remaining members of the board authorized President Kase to execute a mortgage on all the property and franchises of the company to secure the payment of \$1,400,000 coupon bonds; the mortgage to be executed to Former Director Greenough and Sheppard Knapp, as trustees. The mortgage and bonds were duly executed by the president, and approved by the board. A deed from Former Director McReynolds for the lands authorized to be purchased was also approved by the board, and the treasurer was directed to deliver to him the bonds and stock representing the purchase money, as previously authorized. The mortgage embraced these lands. At a meeting of the board May 13, 1868, the president was authorized to negotiate sales of the bonds of the company for the purpose of raising money to prosecute the work upon the road, and to enter into any contract necessary for that purpose in the name of the company, and affix the seal of the company to the contract. On July 10th and 13th following, the president entered into contracts with Pine, Sterling, Wildman, and Woods for the sale of bonds, which contracts were afterwards ratified by the board of directors. At a meeting on July 27, 1868, a resolution was adopted, that for purpose of speeding construction, purchasing right of way, etc., a superintendent should be appointed, who should have the sole authority to draw all orders on the treasurer for payments due contractors, or for material and machinery furnished from time to time; he should also have general oversight of all the work, and the decision of any question concerning the

location of the road, and do all manner of things necessary to speed construction; should have all the powers conferred by the charter and by-laws upon the president relative to the construction, sale of stock and lands, and should make report at the meetings of the board. Kase then resigned as president. The resignation was accepted, to take effect August 10th following, and Thomas Woods was elected to the vacancy. Kase was then appointed superintendent. He was also appointed to fill a vacancy in the board occasioned by the resignation of Director Grove. At the annual meeting of the stockholders, January 11, 1869, 5,009 shares of stock were voted for the election of the board of directors,—Woods, Sterling, Hendricks, McReynolds, Wolverton, Kase, Hill, and Russell. At the same meeting the office of vice president was created, and Kase was elected to the office. At a meeting of the board February 5, 1869, this resolution was adopted on motion of Director McReynolds: "Whereas, the Danville, Hazleton & Wilkesbarre Railroad Company are about to acquire the iron, rails, chairs, and spikes for their road; and whereas, the cash required for the purchase of the same will involve the necessity of giving the obligations of the company, and hypothecating the bonds as collateral, which may result to the great disadvantage of the company; and whereas, S. P. Kase, vice president of the company, proposes to take of the first mortgage bonds \$700,000, and of the stock of said company \$100,000, for which he agrees to purchase all the iron, rails, chairs, and spikes necessary to complete the fifty-one miles of railroad of said company: therefore, resolved, that the proposition of S. P. Kase be accepted, and that he be furnished with \$700,000 of the bonds of said company, and \$100,000 of the stock of said company, for the purpose of purchasing the iron, rails, chairs, and spikes of railroad of this company."

At a meeting of the directors held December 21, 1869, a motion for ratification of the terms of a loan made for the company with Sterling & Wildman for \$100,000 was adopted, and the delivery of stock and bonds as a bonus was authorized. A contract for the loan of \$100,000 from S. P. Kase was also ratified, and payment to him of a bonus of \$287,000 in bonds and \$50,000 in stock approved, so far as the money borrowed had been used in the construction of the road. In the interval between this date and March 28, 1871, there were both meetings of the stockholders and directors, but nothing occurred at any of them having material bearing on the issue. But at this last meeting a resolution was adopted that all moneys received from loans, sales of stock, and bonds, receipts on passenger and freight traffic, be paid into the treasury, only to be paid out on orders approved by the finance committee, signed by the treasurer, and countersigned by the president, and that thereafter no bonds or stocks should be sold

or loans negotiated without the approval of the finance committee, who should report monthly to the board. At the same meeting a committee (Kase, Sterling, Wolverton, and Porter) were appointed to confer with the Pennsylvania Railroad Company, with a view to leasing the road to that company. On April 13, 1871, a committee was appointed to ascertain and report the amount of stock and bonds used in the construction and equipment of the road. It was also resolved that any individual bonds furnished by Kase, or thereafter furnished by him, should be refunded or paid for at the rate of 85 cents on the dollar. On April 14, 1871, the board ratified the delivery to Kase of the stocks and bonds for furnishing of rails, chairs, etc., for 51 miles of road, as authorized by resolution of February 5, 1869; the same having been furnished as contracted for. At the same meeting the committee on accounts reported that they had examined the accounts of S. P. Kase, and found a balance due him of \$60,530.77 for money advanced up to June 1, 1871. At a meeting of the directors on September 14, 1871, the committee on accounts reported that they had audited the accounts of S. P. Kase up to and including July 31, 1871, and there was a balance due him of \$16,181.31, money advanced by him. At a meeting November 9, 1871, at which the superintendent, S. P. Kase, reported that the road was completed and in good running order to the Central Works, Luzerne county, he then resigned as superintendent, and was again elected president. At this meeting the following resolution was adopted: "Whereas, S. P. Kase has rendered his unremitting services as president, vice president, and superintendent, and without a fixed salary heretofore, therefore, be it resolved that he be paid at the rate of fifteen thousand dollars (\$15,000) per annum, to take date from the 21st day of March, 1867, until the next annual election, in January, 1872." At the same time the salary of S. P. Wolverton as treasurer during the same period was fixed at \$5,000 per annum.

At a meeting held January 29, 1872, the president was authorized to execute a lease of the road to the Pennsylvania Railroad Company for a period of 33 years. The lease, having been executed, was submitted to the board at a meeting held April 1, 1872, and by it approved. This lease was of the railroad and all its equipment for a term of 33 years from 1st day of March, 1872, and stipulated that the Pennsylvania Company, after paying all the costs of operating the road, and all claims for construction, and further improvements necessary to the completion of the road, would apply the surplus earnings, if any, to the interest of the first mortgage bonds, amounting to \$1,400,000, and, if no surplus sufficient to pay the same, would not permit a foreclosure for default, but would purchase the

coupons, and hold them as a lien during the term of the lease. At a meeting of the board February 14, 1872, the treasurer was authorized to deliver to Kase the notes of the company, at three, six, and nine months, for any money found to be due him by the auditing committee, and, as security for the notes, to deliver to him second mortgage bonds of the company, at 50 cents on the dollar. Nothing was further done under this resolution. By a supplement to the act of incorporation, dated March 29, 1872, the company was authorized to borrow not exceeding \$1,000,000, at 8 per cent. interest, and secure the same by a second mortgage, and also to issue 4,000 shares of additional stock. On April 20, 1872, another resolution was adopted, ratifying and confirming that of February 5, 1869, authorizing Kase to furnish rails, chairs, spikes, etc., for \$700,000 bonds and \$100,000 stock; further, that he having already furnished the same, and the bonds and stock having been delivered to him, the action of the treasurer in delivering the same was approved and ratified. On 14th September, 1872, this resolution was adopted: "S. P. Wolverton, treasurer of the said company, is hereby authorized and directed to give the said S. P. Kase a note or notes for the full amount of his bills as audited by the auditing committee this 14th day of September, 1872, which amount, as shown by balances and audited by said committee up to September 1, 1872, is one hundred and eighty-nine thousand and fifty-nine dollars and thirteen cents." At a meeting July 12, 1873, Kase was authorized to sell \$300,000 bonds of the company upon the most favorable terms obtainable, and pay indebtedness of the company. On December 13th following, he was authorized by resolution to appropriate, in payment of any indebtedness due him, bonds at a price not less than 75 cents on the dollar.

The road was now in the possession of the Pennsylvania Railroad Company under the lease, but judgments for right of way and other debts were pressed for payment; and the bondholders feared a seizure of the road or its equipment, and the cancellation of the lease. So, on December 9, 1874, the directors, who stated they held a majority of the stock, resolved and pledged themselves to the bondholders, if they (the bondholders) would pay the judgments and claims pressing, they (the directors) would not part with their holdings of stock, and thereby permit the control to pass into other hands. At an annual meeting of the stockholders on January 11, 1875, the auditing committee (McReynolds, J. H. Kase, and Monroe) presented a written report, signed by all of them, stating they had audited the treasurer's account, and found a balance of \$5,298.76 due him; that all the first mortgage bonds had been issued (\$1,400,000), and put into the hands of Kase for negotiation, and specifying that \$5,000 had been given to the mortgage trustees; \$125,000 paid for land;

\$700,000, under the contract of February 5, 1869, for rails, spikes, etc.; \$570,000, expense of negotiation; that \$200,000 of second mortgage bonds had been delivered to Kase for negotiation, and \$100,000 still remained in his possession. The report of the committee was accepted, and a resolution was adopted authorizing the obligation of the company for the balance to be delivered to Treasurer Wolverton. The coupons on the mortgage bonds due October 1, 1874, were paid; but there were outstanding debts, to a large amount, owing by the company, which it was unable to meet. In the spring of 1875 the Pennsylvania Railroad Company filed a bill for cancellation of the lease. The company defaulted on coupons due April 1, 1875. The bondholders becoming alarmed, a majority joined in proceedings to foreclose the mortgage by suit in Columbia county, which resulted in a decree of sale, and the property was sold for \$400,000. A reorganization was had under the name of the Sunbury, Hazleton & Wilkesbarre Railroad Company. On 26th July, 1875, before the suit to compel a sale was brought, Kase resigned as president, and his official connection with the road from that time was at an end. At the same time, by agreement of Kase with J. R. Casselberry as trustee, the control of the road was relinquished to the latter, so far as Kase controlled it. The trusteeship was to continue for a period of five years, J. C. Rhodes guarantying the performance of the contract by Casselberry. After the judicial sale, and eight days before the expiration of the five years, the company filed this bill against Kase for an account, averring, in substance: (1) The creation of the first mortgage, and the delivery of \$1,335,000 of the bonds to Kase; the creation of the second mortgage, and the delivery of \$47,000 of these bonds to him; the issue and delivery of a large amount of stock to him, which he converted to his own use. (2) The delivery to him of 5,500 shares of stock and \$125,000 of bonds for the purchase of the lands already noticed in statement of facts from McReynolds, when in truth the lands belonged to Kase, by which transaction he largely profited, at the expense of the company. (3) That between July, 1867, and June, 1870, he received from the company's treasurer \$20,000, which he converted to his own use. (4) That he received from the traffic of the road about \$15,000, and from the Pennsylvania Railroad \$11,100, which he converted to his own use; and from George K. Tryon \$5,000, and Charles O. Rhodes \$8,500, which he also converted to his own use. The bill prayed for an accounting and discovery, and that Kase be decreed to pay to plaintiff whatever shall be found due. To this, Kase answered, denying every material averment, warranting an account from him, and averring that he had paid out and expended for the use and advantage of the company every dollar received, and that a large amount was due him from the company for money of his own laid out and ex-

pended for its benefit. The issue thus raised was referred to George Junkin, Esq., as examiner and master, on January 5, 1882, who sat many days hearing the parties, and taking over 1,000 pages of printed testimony and exhibits, now before us. He has made a very able and full report of the facts, with his inferences of fact therefrom, and his conclusions of law. Our statement of the facts is in large part taken from his very clear, but more elaborate and chronological, narration. The decree being for a very large sum against defendant, for fear of possible injustice we have perused every word of the evidence and exhibits tending to establish or negative the facts found, and have examined nearly all the authorities cited to vindicate the legal conclusions; so that, while our discussion of the assignments of error will be brief, the brevity is not for want of thorough examination, and the most careful consideration of the whole case, but because, except as to those points noticed, we find no error in the conclusions of the master. He, in his statement of account, finds a balance due from Kase to the company of \$510,785.86, and suggests a decree against him for that amount; with interest, and that he pay the costs. To the findings and conclusions of law many exceptions were filed, which were overruled by the court below, and the report approved. In its decree the court simply adopted the master's report, stating that, after a thorough investigation of the whole case, it found nothing to sustain the exceptions. They were therefore overruled, and a decree entered against defendant for the balance found by the master, \$510,785.86; add interest from May 28, 1872, \$384,781.96; making entire sum of decree, \$895,567.82. From this decree, defendant appeals, assigning 54 errors. The burden of appellant's complaint in these assignments, so far as it has any merit, involves but four questions: (1) What is Kase's liability for the bonds and stock which went into his possession? (2) Is he, under the facts established, answerable to the company for the profits made on the land purchased, ostensibly, from McReynolds? (3) Can the transaction with him, relative to the purchase of the iron, chairs, frogs, etc., for the road, be sustained as a lawful contract, in view of his official relations with the company? (4) Can he legally be awarded the compensation for past services which the directors, by resolution, fixed and allowed him?

In considering the connection of appellant with this enterprise, we must keep in mind the difference in methods of railroad building in the period covered by the years from 1859, the date of its inception, until 1871, the date of its practical completion. During that period it was the rule, rather than the exception, to adopt a route for a projected road, secure the passage of a special act authorizing an incorporation of a company, the issue of a certain amount of stock and bonds, specifying loosely the organization, and then directing the issue of letters patent. There was seldom any

strict requirement, except the small sum of \$5 per share, as to the payment for stock, in cash or otherwise, before its issue, and very loose stipulations as to the steps preliminary to the issue of bonds. Up until the adoption of the constitution of 1874, the limitations on the power of the corporate officers to issue stock and bonds were meager, and these often equivocal. The special acts generally subjected the corporation to the provisions of the general railroad act of 1849, which went to the verge of liberality in conferring extensive powers on the corporate officers. The ease with which even the vague restrictions of the general act and its supplements could be evaded, and the gross abuse of corporate power under them prompted efforts to cure the evil. So we find the constitution of 1874 prohibits any issue of stock or bonds except for money or property actually received or labor done, as conditions precedent, and all increase of indebtedness by fictitious increase of securities was declared void. This was followed by several acts which by elaborate provisions sought to enforce this mandate of the constitution. Especially stringent was the act of May 7, 1887. After this went into effect, unless there was the grossest perjury and violation of official duty, no railroad could be constructed, the stock and bonds of which did not fairly represent the actual cost of the road and its equipment. But all this curative legislation postdates Kase's enterprise. Under the loose legislation then existing, and some of which he procured, he did just what, generally, others of that period did,—projected and built a road on almost wholly a paper capital. That is, when the larger part of the stock and bonds were issued, they were based on nothing of intrinsic value. Whatever of value the thing pledged had was wholly in the future, and therefore wholly speculative. Nor is it true that those who took the stock and bonds, and paid money for them, were cheated by Kase, in any real sense of the word. Is any man of ordinary judgment cheated when he pays 75 or 80 cents on the dollar for a 7 or 8 per cent. railroad bond, receiving with the bond a gift of the stock in many cases almost equaling the face value of the bond? Such a purchaser knew, just as Kase knew, that the value of the paper was speculative. If Kase lived, if he expended the money in construction, if he completed the road, if the event then proved it to be a meritorious enterprise (that is, if it received and developed traffic sufficient to pay operating expenses, fixed charges, and reasonable dividends), the speculative buyer would probably more than double his money. If any one of the contingencies did not happen, the buyer lost; but he was not cheated, except in the sense, that all who bet on the happening of an uncertain event, and lose, are cheated. Kase bet all he had, and years of most indefatigable labor, on the complete success of the enterprise. The brokers and money lenders who took the bonds and stock at such ruinous rates bet the money they actually paid on

the same event. The last got back part of their money. Kase seems to have got nothing. Yet, as a railroad enterprise, it must have possessed real merit; for does any one believe the Pennsylvania Railroad Company, managed by the most experienced corporate officers, would have taken a 33-year lease of the road, after it had been more than 2 years in operation, on an agreement, practically, to pay the fixed charges, and any surplus to the stockholders, if it had not been a valuable property? For, let it be noted, the fixed charges were the interest on \$1,400,000 7 per cent. first mortgage bonds, while the actual money expended in construction was but little over half that. But either by Kase's incapable management when just on the eve of success, or perhaps by too implicit confidence, as he alleges, in others, to whom he transferred control, foreclosure was suffered; and, while the valuable property sold for much less than it was worth, it did not sell for a great deal less than the actual money cost of it. Then the dissatisfied bond and stock holders, who, in effect, now represent the corporation, instead of Kase, commenced this bill against him to compel an account, as if the securities disposed of by him to them represented their face value in cash, instead of just what money he got on them. We agree entirely with the learned master that, as a corporate officer, Kase was impliedly a trustee for the corporate interests. But under the facts here developed the stringent rules relating to the technical and real trustee are not to be enforced on behalf of the real plaintiffs here with the same rigor against him. A guardian or administrator who receives the money of his ward or intestate is bound, not only to observe the utmost good faith in all his dealings with the trust property, but he is also bound to keep accurate accounts, and be ready to exhibit them when properly called upon, and to show clean hands in the management of the trust estate. But that is because he actually takes into his hands the money, or ought to have so taken it. Even he is not bound to answer for money which by due diligence he could not have acquired, nor for money lost, which by due diligence he could not have saved. But Kase's position was wholly different. In substance, by reason of the many resolutions of the board, there was put into his possession a package of bonds, \$1,400,000, and certificates of stock, half as much more, which at the time of delivery, as the master finds, had no market value. The direction to him, in effect, was: "Take this worthless paper. Build and equip a railroad more than 40 miles long, with 6 miles of sidings. As the work approaches completion, the paper will represent an actual value. As it now stands, it represents nothing." Kase took upon himself this burden, and proceeded with the work. He is now called to account, years after his connection with the enterprise ended, for what? Plaintiffs say he must be charged with the face value of the securities,

or show now that he received all he could reasonably have received, and that he applied every dollar received in payment for construction, equipment, and debts of the company, and that, in so far as he fails to show by proper and accurate accounts just how much he received, he must be charged with the highest price any of the securities sold for; and, further, he must now show, by accurate accounts, every dollar appropriated, and in so far as he fails he must be charged for such amount, as if he had appropriated the sum to his own use.

If Kase had been a mere disburser of the company's cash, we think, if called on within a reasonable time after his duties ceased, it would have been but just to demand of him, as trustee, a strict account, and to hold that it was his bounden duty to produce, in some shape, reliable accounts. But no money was delivered to him by the company. He received stocks and bonds during the time the road was in process of construction. These he was directed to sell and otherwise dispose of at the best price obtainable, to promote the work of construction. A large part of the proceeds was paid to the company's treasurer, and he paid the same, on orders of Kase and the board of directors, for construction purposes. It may be noticed, neither party questions the integrity or business conduct of the treasurer. Kase, in his answer under oath, as already noticed, denied the misappropriation of a single dollar, and averred that he had honestly disposed of the securities that came into his hands, for the benefit of the company. He was called before the master to testify, when he again averred under oath that he had completely accounted. His explanations as to some of the items were not clear. Some of his answers were apparently contradictory. He alleged that his accounts had been audited, as the work progressed, by the auditing committee of the company (in this, the exhibits in evidence corroborate him); that such of his accounts and vouchers as had not been lost had been surrendered to Casselberry and Rhodes, who were now acting with plaintiffs, and hostile to him. That he did surrender many of his accounts and papers to Casselberry and Rhodes was true, for the latter produced many of them. But the most significant fact tending to prejudice Kase in the mind of the master was his inability, in his testimony before him, to render an accurate account of all the bonds and stock. It will be observed, however, that Kase was then over 70 years old. More than 11 years had passed since his official connection with the company had ceased. He, clearly, had parted with many of his papers to the hostile suitor. His statement that he had lost many of them, and that his memory had failed as to many transactions, was certainly not improbable. The master, however, finds as a fact that Kase's accounts were frequently audited by the com-

pany's committee on accounts during the progress of the work covering the period from February 27, 1867, to July 21, 1875. All these papers were delivered to Casselberry, and remained in his possession, or that of Rhodes and the company, from the summer of 1877 to the date of the hearing, when many of them were produced before the master. They covered payments made by Kase on account of construction, damages for right of way, and equipment, and a charge of over \$25,000 on S. K. Ashton loan, resulting in a balance in Kase's favor at last audit of \$199,471.94. True, Kase's accounts were not kept in an orderly manner; but he took, as evidence of payments, hundreds of vouchers, and very many of them he preserved, and produced before the master. From these and other memoranda the audits were made. It is too plain for argument that these audits of the company's committee, had while the expenditures were being made and the work done, are more reliable, as truth, than any oral evidence, or any inference from oral evidence, or any vague, contradictory statements of an aged man 11 years afterwards. The master discredits the committee's certificates because two of Kase's relatives were on the committee. If any objection had been raised by any stock or bond holder at the time of the audits, or within a reasonable time afterwards, to the composition of the committee, when all the evidence going to the substantiation of the accounts could have been produced, it should have weight,—not sufficient of itself to set aside the certificates of the auditing committee, but to have imposed the burden on Kase of explanation and corroboration. The certificates would not have been conclusive in his favor. After this lapse of time, and many of the certificates being practically in possession of the plaintiffs, through Casselberry, for a period of five years before the commencement of this suit, plaintiffs, by their silence, are estopped from raising the objection at the hearing. The committee on accounts was not a judicial tribunal, which, from the very fact of relationship of members to one of the parties, was incompetent. When all at the time interested, and for years afterwards, treated the committee as impartial and competent, it is too late to raise objection more than a decade afterwards. We therefore assume as a fact that in the transactions not involving the bonds and stock, but made up of traffic receipts, money borrowed on notes, and received from the Pennsylvania Railroad Company, etc., Kase paid out, more than he received, \$199,471.94. Starting with this credit in his favor, what money did he receive from the bonds and stock for which he has not accounted?

\$460,000 of the first mortgage bonds were delivered to Sterling & Wildman by Kase (he receiving them from Treasurer Wolverton), and the proceeds, \$379,379.91, were paid to the

treasurer, who paid out the same on the orders of the company. Mr. Wolverton so testified. \$700,000, by resolution of 5th February, 1869, were delivered to Kase in consideration of his purchasing the iron, chairs, rails, and spikes for the road. This was a direct contract between Kase and the company. The bonds were delivered to him. He made the purchase. Then they were his absolutely, unless the contract was void as against public policy. But on May 22, 1871, the legislature passed a supplement to the act of incorporation, the fifth section of which is as follows: "It shall be lawful for the president or any other officer of said company, to contract to furnish any iron or other material for said road, and to receive in compensation therefor, stock or bonds in the said road. Provided, the board of directors shall agree to such contract by resolution at a formal meeting of the board; any act or acts inconsistent herewith are hereby repealed." The master holds that the contract was, at the time it was made, in direct violation of the acts of 1855 and 1860, which made it a misdemeanor for any officer of a corporation to become a party to such contract; that although the board of directors subsequently, under the supplement, ratified the contract, still they could not give the enabling act such a retroactive effect, and therefore the contract to deliver the bonds for the iron was void. We think the master was bound to give full effect to the act authorizing the transaction, for that was the manifest intent of it. A contract by an officer of a company, with the company, to furnish material, is not per se immoral or wrong. It is void, because the statute and decisions declare that such a contract is opposed to public policy. The legislature may declare what acts are opposed to public policy, and before the constitution of 1874 might, by special act, authorize that, in a particular case, which under general legislation was declared void. And, although this contract antedated the special act, the subsequent ratification of the contract made it a valid one. However vicious such legislation is, there was a time, before the adoption of the new constitution, when it was very common, and excited but little indignation. On December 28, 1867, the treasurer was authorized to issue to McReynolds \$275,000 of stock and \$125,000 of bonds in payment of certain alleged coal lands, in quantity about 1,500 acres, and contiguous to the road. The object of this transaction was to give the road title to the lands, and add to its value as a security for the mortgage. The land was conveyed to the company by deed, and the stock and bonds delivered to McReynolds, who redelivered the larger part to Kase. This leaves of the whole issue of first mortgage bonds, \$115,000. Kase loaned to Thomas Woods \$16,000. The borrower became bankrupt, and the bonds were lost. He also claimed to have delivered to B. F. Pine \$5,000 of the bonds. If he did so, the transaction was his own, and the company received no benefit.

He settled an individual debt with his brother's estate for \$8,000 of bonds, and in other transactions with other persons, so far as appears, for his own benefit, disposed of the remainder. There was ample evidence to warrant the auditor in finding that the company had received no benefit from the \$115,000, and that Kase got the bonds. He claimed the right to them on account of salary. As to the stock, the whole number of shares actually issued was about 13,000. Of these, 2,000 were received by Kase on the iron contract. As we have already noticed in regard to the bonds in that transaction, these shares were his, and the company had no interest in them. 5,500 shares were issued to McReynolds on the land purchase. Of these we will speak further in discussing that subject. Besides these, he subscribed originally for 194 shares, on which, from the minutes, he paid into the treasury \$5 per share. He afterwards subscribed for 100 shares, on which he paid nothing. Our only inquiry is concerning these 7,794 shares. They constituted a majority of the stock, and were either owned or controlled by Kase down to July, 1875. As to the 2,000 on the iron contract, they belong to him. As to the 294 shares actually subscribed for and issued, and partly paid for, the company has no claim to them in equity. Their issue to him was by virtue of a statutory contract, for the enforcement of which the statute affords ample remedy, which the plaintiffs must resort to. Of the 7,500 shares of stock received by Kase, excluding the 294, he turned over to Casselberry, who is in full accord with plaintiffs, a large number of certificates, specified in Casselberry's and Rhodes' receipt as 5,890 shares. More than 2,000 shares were absolutely his own. The whole of it, the master finds, was not worth a dollar; but he charges Kase with the stock at its par value, \$354,700. We do not think the facts, or any possible equity, warrants this, because—First, he should not be charged, in any event, with those which were his own; and, second, he should not be charged over \$300,000 for that which was worth nothing, and which is practically in possession of the company. The stock has no possible future value, for the effect of the judicial sale is to deprive it of any future. Of the second mortgage bonds, Kase, the master finds, took for his own use, on account of salary or other services, \$47,000, and sold them at 80 cents on the dollar, and with this amount he is charged. He loaned to an insurance company, for some reason, \$78,500 of these bonds, but they were redelivered to him; and he turned them over, with other second mortgage bonds, the whole amounting to \$103,000, to Casselberry, who had possession of them at date of hearing. The master charges Kase with the value of these bonds loaned to the insurance company, \$58,875. The agreement between Kase and Casselberry and the latter and C. C. Rhodes, by which the stock and bonds held by Kase were transferred to them, shows that the control of the corporation,

theretofore held by Kase, practically passed to these men. Their subsequent conduct, and the corporate action of the company with reference to this suit, put that fact beyond reasonable doubt. It is not necessary to inquire into the propriety of their action, or whether they acted in good faith towards Kase. It is enough to know that they thereafter controlled the corporation as completely as their assignor did before the agreement. They got, and at the hearing had, possession of these bonds. They refused to surrender them to Kase because they belonged to the company. They were the active parties in the suit against Kase, and it is but just to assume the \$163,000 second mortgage bonds were in possession of the company, and Kase ought not to be charged with any part of them. \$37,600 is all he should be charged with in this particular.

The second question is, are the findings of the master and his conclusions correct, with reference to the land contract in name of McReynolds? There was evidence showing that Kase was the actual owner of the land, although it stood in the name of McReynolds; and further that, when the sale was made, Kase, being an officer of the company, did not disclose his ownership. The land was not nearly worth what was paid for it in bonds, \$125,000, even counting the stock of no value, which last the master has found was worthless. It is wholly immaterial what the lands might turn out in the future to be worth. There was some evidence tending to show they were in part underlaid with coal, but this was quite problematical. Although the title was in name of McReynolds, he was only a trustee of it for Kase, who owed him about \$8,000. To discharge this indebtedness and secure a conveyance to the company, he gave to McReynolds \$14,000 in bonds and \$30,000 in stock; and this, according to the testimony, was the full market value of the lands, estimating the bonds at 75 cents on the dollar. The remainder of the bonds, \$111,000, Kase kept, and should account for to the company at what they were worth,—80 cents on the dollar. It is asked, why could not Kase sell land to the company, which it needed, and which, when conveyed, would add largely to the intrinsic value of the property pledged to secure the bonds? We answer, although an official of the company, he could so sell, and the company could buy, but in such a transaction everything must be open and fair. He was bound to retire from the board as a buyer,—to take no part in that attitude. He was bound to make a full disclosure of his connection with the property to the buyer. But Kase did not disclose his ownership; was active in the negotiations, as both buyer and seller, and made a large profit. This he must now, on every principle of fair dealing, and every dictate of public policy, surrender. But, as heretofore intimated, we do not concur with the master in his conclusion that Kase should refund to

the company a large sum of money in excess of the profit, because of the stock received by him in the transaction. He finds as a fact that the stock was then, and is now, worthless. A court of equity does not perform the duties of a court of quarter sessions; does not order restitution of that which is valuable, and also impose a heavy fine on the guilty. The company has the land, Kase has a profit of \$111,000 bonds, and no profit in the worthless stock. He should account for the bonds alone.

As to the third question,—the iron contract,—we have said all that is necessary on that subject in considering Kase's right to the bonds received.

The next question is, can he be given a credit for the compensation allowed him by the directors? No one who reads the testimony can doubt that Kase for years, from the inception of the enterprise to its close, performed most arduous duties, and rendered the most drudging service to the company. He was, in one sense, the company, and without him there would have been no railroad. Some of his acts were reckless, and perhaps improvident. He was strong, energetic, and domineering. The only one who seemed to exercise any restraint upon him was Mr. Wolverton, the treasurer, and he often failed in holding him to anything like business methods. But immense work, whether good or ill, Kase performed; and, if this work had been preceded by a contract for reasonable compensation, he would be entitled to a credit for the contract price. But up to November 9, 1871, there was no semblance of contract. Then the board undertook, by a retroactive resolution, to compensate him at the rate of \$15,000 per year from 21st March, 1867, until the next annual election, in January, 1872. The law is settled (*Loan Ass'n v. Stonemetz*, 29 Pa. St. 534, and cases following it) that no officer of a corporation can receive any compensation for the performance of official duty, except by express contract preceding the rendering of the services. Therefore, because of no contract, up to November 9, 1871, Kase cannot recover for the years preceding; nor for the years following, except the time covered by the resolution. From November 9, 1871, until 9th of January, 1872, two months, he had an express contract at the rate of \$15,000 per year. This would amount to \$2,500, and with that sum he ought to be credited. The learned master refuses to allow him any part of this salary, mainly on the ground that he had proven a faithless officer. We think this judgment, in view of the circumstances, too harsh. Reckless, bold, and in his financial transactions unwise, he probably was, but that he was faithless does not follow. The project itself was a reckless one, just as the Northern and Southern Pacifics, and many other roads of that period were. To commence a railroad, involving an actual expenditure of \$800,000 to

\$1,000,000, without a dollar, trusting to something very like luck, to raise money on suspicious securities as the work progressed, was a project that none but bold and reckless men would attempt, and one that could not be accomplished by other than bold and reckless methods. Conservative business methods have no place in such projects. And these very plaintiffs had knowledge of these methods when they became the owners of the securities. In purchasing them at unusually heavy discounts, it is evident they trusted for returns, recklessly, to the same luck on which Kase relied. They have but little ground on which to rest complaints of faithlessness against Kase. There is no evidence of bad faith, except in the land contract, and that he must atone for in the transaction itself. That his relatives and friends (so far as the evidence shows, reputable men) were directors and officers, who earnestly aided him in his schemes for carrying on the work and completing the road, does not prove, nor even tend to prove, that he was faithless to those who bought the bonds at 25 per cent. discount, and got their stock for nothing. The business was perilous. During the whole period it was on the brink of financial disaster. Under the circumstances, it is probable Kase did the best he could; got his relatives and close friends to aid him, because no others would. Cautious, experienced business men do not assume such risks. Therefore, in accordance with our opinion as heretofore expressed, we restate the account of the learned master, and modify the decree of the court below, thus:

Kase is charged with \$115,000 first mortgage bonds, not applied to railroad purposes, at 80 cents on the dollar	\$ 92,000 00	
He is charged with \$111,000 first mortgage land bonds at 80 cents on the dollar	88,800 00	
He is charged with \$47,000 second mortgage bonds, the price of which the auditing committee fixed, with consent of Kase, at 80 cents on the dollar	37,800 00	
		\$218,400 00
We credit him with balance on last auditors' report, \$199,374.44, to which is added \$97.50, making	\$199,471 94	
We credit him with two months' salary..	2,500 00	
		201,971 94
		\$16,428 06

—Leaving a balance in favor of plaintiff of \$16,428.06, to which interest should be added from 26th July, 1875, the date of Mr. Kase's resignation as president. We have computed no interest on the charges or cred-

its. None should be computed. They ran against each other contemporaneously, up until the date of Kase's resignation. The price of the bonds has been fixed by the master at 80 cents. Many of them were sold at that price, and some higher. A considerable amount was sold as low as 75 cents on the dollar. We adopt the master's finding, that 80 cents is a fair average price.

As to defendant's plea of the statute of limitations, the master very properly refused to sustain it. The transactions between Kase and the company, out of which arose mutual charges and credits, did not cease until Kase's official connection with the company ended, in July, 1875, and this bill was filed July 7, 1880. Up until his resignation, all the books and accounts were in his physical custody, and he was until that time conducting the company's business, resulting in charges against and credits for him, even in some of the bond transactions of previous years.

All the findings of fact by the master are concurred in. We dissent from his inferences as to the effect, in view of the evidence, to be given to the settlements of the auditing committee; to the legal effect to be given the contract for purchase of iron; to the effect to be given the treasurer's account; to the effect, in part, as to the contract for compensation; and under the evidence, and the master's own finding of fact, what, in equity, should be charged against Kase for the valueless stock received by him. It is therefore directed that defendant pay to plaintiff the sum of \$16,428.06, with interest from 26th July, 1875. When the evidence and the result arrived at are considered (that is, by the appeal), defendant has reduced a decree of over \$500,000 to one of \$16,428.06. It would be inequitable to impose upon him all the costs. It is therefore ordered that each party pay one-half the costs.

(70 Vt. 31)

DESANY v. THORP.

WILBUR v. SAME.

(Supreme Court of Vermont. Chittenden.
Dec. 30, 1897.)

CHattel Mortgages—SUFFICIENCY OF DESCRIPTION—LIEN RESERVED FOR PURCHASE MONEY—PROPERTY COVERED—INCREASE OF ANIMALS—SALES BY OFFICER—AMENDMENT OF RETURN—RIGHTS OF CREDITORS.

1. Where an attachment levied on personalty was dissolved by insolvency proceedings commenced by the debtor, neither the attachment nor the pendency of the suit debarred the creditor from pursuing his remedies under prior liens on the same property, since under V. S. § 2071, such suit could proceed to judgment only by leave of the insolvency court, to determine the amount due.

2. Where personalty was sold by an officer at a sale duly advertised to take place, both under a chattel mortgage and under a lien, and without any statement confining the disposal of a given article to either security, in conversion by the debtor or his assignee against mortgagee

and lienee the officer could amend his return on the mortgage by including a cow inadvertently omitted, and two cows returned as sold under the lien, nothing affecting the insolvency proceedings having been done or omitted by reason of said errors, and no rights of other parties having intervened.

3. One who held a chattel mortgage on personalty and a lien on certain other personalty took peaceable possession of all of it 10 days after the debtor filed a petition in insolvency, but before adjudication. *Held* that, as to so much of such property as required possession to perfect such mortgagee's right as against third persons, the assignee in insolvency was entitled to possession.

4. A deed of land also conveyed certain personal property on which the grantor reserved a lien. At the same time the grantee gave a mortgage on the land. *Held*, that the fact that in the foreclosure of the real-estate mortgage plaintiff also petitioned for a foreclosure of all personal property claimed under the lien did not defeat his right to proceed at law as to such personalty.

5. A deed reserved, as security for purchase money, "all the crops produced and products raised or grown hereafter on said premises." *Held* not to cover the increase of stock kept on the premises.

6. A deed of land also transferred to the grantee certain personal property conditionally, the grantor reserving the ownership until the price was paid. *Held*, that such reservation was of no effect as to attaching creditors without notice.

7. The lien reserved by the grantor covered the increase of stock on which it was reserved.

8. The description in a chattel mortgage of "eighteen cows, three yearling heifers, and five heifer calves," is sufficient, where the mortgagor owns no other animals of such description.

9. Where a chattel mortgage on animals gives the mortgagee a title to the increase thereof that is good against the mortgagor, the former cannot hold such increase, as against third persons, after the period of nurture has passed, without taking it into possession.

Exceptions from Chittenden county court; Tyler, Judge.

Two actions tried together, one by Samuel Desany against Thomas W. Thorp, and the other by L. F. Wilbur, assignee in insolvency of Samuel Desany, against Thomas W. Thorp. The first action was trover, with a count in trespass; and the second, trover in two counts. The plea in each case was the general issue. There was a judgment for plaintiff in each case, and both parties except. Reversed and rendered.

The court found the following facts:

The defendant was appointed guardian unto George H. Thorp in June, 1894. April 21, 1894, George H. Thorp had conveyed to the plaintiff Desany a farm of 100 acres by a deed which contained the following clause: "Also thirteen cows, all sugar tools, farming tools, and dairy tools, conditionally. The said Thorp reserves the ownership and control of all said personal property, and all of the crops, produce, and products raised or grown hereafter on said premises, until \$2,000 of said notes, given for the purchase money secured by mortgage on said premises, is paid." On the same day Desany mortgaged to said George H. Thorp the same real estate to secure 20 notes, amounting to \$4,578. On the same day Desany placed on

the farm five other cows, which he owned, and gave said George H. a chattel mortgage thereon to secure a part of said notes. February 1, 1899, Desany gave to said George H. Thorp a chattel mortgage upon "eighteen cows, three yearling heifers, five heifer calves," and some other personal property, to secure some of said notes. The interest upon said mortgage debt was paid to April 21, 1896, but a portion of the principal secured by each of said mortgages was overdue and unpaid at the time of the proceedings in question. The \$2,000 mentioned in the reservation of the lien had not been paid. April 6, 1896, the guardian brought a suit in assumpsit against Desany on the mortgage debt, and caused all his attachable property, including what was afterwards taken under the lien and chattel mortgage, to be attached by a copy in the town clerk's office, but without moving any part thereof. Service of said writ was completed, and the suit is now pending. Desany filed his voluntary petition in insolvency, April 13, 1896, before 11 o'clock in the forenoon. The defendant had no notice of the filing of said petition. On the same day, in the afternoon, the guardian caused notices to be posted by a deputy sheriff advertising the property described in the chattel mortgage of February 1, 1899, for sale thereunder, and caused written notice thereof to be given to said Desany. April 23, 1896, the guardian took possession of said mortgaged farm, and all the personal property thereon, that is described in the officer's return of sale, and of such forage and grain as was necessary to keep the live stock on said farm from that date to June 8th. April 28, 1896, Desany was adjudged insolvent, and the plaintiff Wilbur became his assignee, and received the conveyance of the insolvent's real and personal estate. On the same day the guardian brought his petition of foreclosure against Desany and Wilbur, which was served on them May 2, 1896, to foreclose the real-estate mortgage. Said petition also sought the foreclosure of the defendant's interest in the personal property reserved in the original deed, including the products of the farm, the increase of the original 13 cows, and other live stock grown on the farm. May 25, 1896, he caused notices of a sale under the lien in the deed to be posted by the same deputy sheriff who had advertised the sale under the chattel mortgage. Said deputy made a return showing that the sale took place pursuant to the above-mentioned notices, without distinguishing between the notice under the chattel mortgage and that under the lien. He had adjourned from time to time the sale under the chattel mortgage, so that the sale on the mortgage and the sale on the lien were duly advertised to occur at the same time and place. At the sale the officer did not state to the bidders that he was selling under any particular lien, mortgage, or right, but sold it without comment in that regard. The sale occurred June 8, 1896. All the cows and other cattle thus sold at auction were descendants in female line of the original 13 cows reserved in

the deed from Thorp to Desany, and of the 5 cows covered by the mortgage of the same date, except 3 cows and 1 calf, which had been afterwards brought to the farm by Desany.

When Desany gave the chattel mortgage of 1889 he had but 18 cows, 3 yearling helpers, and 5 heifer calves, the numbers therein named. None of the property taken was the actual property reserved in the original lien, except what was covered by the chattel mortgage of 1889. Five of the cows sold were in the chattel mortgage of 1889, to wit, the two cows returned as sold under the chattel mortgage, the cow omitted which was sold to Cahill, the cow returned under the lien as the Jersey cow sold to Shiner, and the cow returned as sold under the lien to Atchinson. The bay mare was bred by Desany on the farm, from a mare which he bought elsewhere, and, with another horse, constituted his team, which was of less value than \$200, and claimed by him as exempt. The four shoats were purchased by Desany in the fall of 1895, and afterwards kept on the farm. The timber, stovewood, oats, corn, potatoes, sugar, butter, and pork, taken and sold, were all produced on the farm. The stovewood was cut and prepared to support the fires in the house on the farm, and the lumber was cut for the purpose of repairs. The original mowing machine, which was among the farming tools reserved in the deed from Thorp to Desany, and also included in the mortgage of February 1, 1889, was exchanged by Desany in June, 1890, for the machine sold at auction; the old one being valued in exchange at \$5, and the new one at \$45. George H. Thorp consented to this arrangement, and signed a note with Desany for the difference, and the new machine was kept and used on the farm. The note was paid by Desany. The bay mare, one of said cows subsequently purchased and brought to said farm by Desany, and one of said shoats, together with other articles for which Desany claimed to recover, were selected by him, with the consent of the assignee, as exempt.

The manner of taking possession was as follows: The guardian went to the house in Desany's absence, and was admitted, alone and without force, by a boy 18 years old, who was at work for Desany. The guardian was blind, and, at his request, was led into the house by the boy, who was not aware of his purpose. The guardian's son, Ira, a deputy sheriff, who had driven his father to the premises, was sitting in his wagon in the highway in front of the house. The guardian notified the boy that he had taken possession, and sent him away, after permitting him to pack and remove his effects. He then caused the household effects of Desany to be removed to the woodshed by two men besides Ira, whom he had employed for that purpose, but who were not present when he took possession, though they were stationed within calling distance. The bay mare, harness, and wagon which had been left by the boy at a neighbor's, about half a mile away,

was also taken into the guardian's possession. It appeared that at the sale the officer sold a cow to Cahill for \$20.25, which was by mistake left out of the return, although the price was reckoned into the proceeds, and that the officer intended to return the cow as sold under the chattel mortgage. The court allowed him to amend his return accordingly. It was the intent of the officer to return as sold under the chattel mortgage the cows sold to Shiner and Atchinson, but by mistake they were returned as sold under the lien, the officer failing to identify them as cows covered by the mortgage. The court permitted the officer to amend his return to conform with his intention in this respect.

Upon the foregoing facts, the court held that the defendant, at the time of the auction sale, had no title to, nor lien upon, any of the property sold, by virtue of the reservation in the deed, nor by his taking possession on April 23, 1896; and that he had no title to, nor lien upon, any of the products of the farm, nor to the increase of the live stock, as against the plaintiff assignee; but that he could hold the personal property described in the mortgage of February 1, 1889, in existence and sold at the time of the auction, but not property substituted therefor, like the mowing machine. The other facts and rulings are sufficiently stated in the opinion.

L. F. Wilbur and Charles T. Barney, for plaintiffs. J. J. Monahan and W. H. Bliss, for defendant.

MUNSON, J. These cases were heard together. Thorp, the defendant in both suits, held against Desany, the plaintiff in the first suit, a real-estate mortgage, two chattel mortgages, and a lien reserved upon the transfer of certain personal property in a real-estate conveyance; and, after conditions broken, he brought suits of foreclosure and attachment, and took possession of both the real and personal property, and had certain personal property sold under the lien and the second chattel mortgage. Wilbur, the plaintiff in the second suit, is Desany's assignee in insolvency. The cases will be considered together.

The attachment placed upon the personal property covered that afterwards taken on the reserved lien and the second chattel mortgage. This attachment was dissolved by the proceedings in insolvency, but the suit was entered in court, and is still pending. The attachment did not debar the creditor from pursuing his remedies under the lien and the chattel mortgage. *Reed v. Starkey*, 69 Vt. 200, 38 Atl. 297. See *Tilton v. Miller*, 34 Vt. 578; *Brigham v. Avery*, 48 Vt. 602. Nor does the pendency of the suit. It can proceed to judgment only by leave of the court of insolvency, and for the purpose of determining the amount due. V. S. § 2071.

The property was disposed of at a sale duly advertised to take place under both the lien and the mortgage, and without any statement confining the disposal of a given article to either security. The court could properly permit the

officer to amend his return on the mortgage by including the cow inadvertently omitted and the two cows returned as sold under the lien. Nothing affecting the insolvent estate unfavorably has been done or omitted by reason of these errors, and no rights of other parties have intervened.

The fact that the defendant, in his foreclosure of the real-estate mortgage, petitioned also for a foreclosure of all the personal property claimed by virtue of the reserved lien, did not defeat his right to proceed at law. His different proceedings did not stand upon inconsistent grounds, and any remedy available in the foreclosure suit is waived on argument herein. It is held in this state that a grantor may reserve the crops to be thereafter grown upon the land conveyed, as security for the purchase money. *Batchelder v. Jenness*, 59 Vt. 104, 7 Atl. 279; *Darling v. Robbins*, 60 Vt. 347, 15 Atl. 177. The reservation in this case is of "all the crops, produce, and products raised or grown hereafter on said premises," and the defendant claims that this covers the increase of all stock placed upon the farm. But we think the increase of stock cannot be held as the produce or product of the realty. A reservation of crops is sustained on the ground that they are potentially in the land, but animals are not the direct product of the soil. If the defendant has any title to the animals raised on the farm, it must be as the increase of stock of which he remained the owner.

In the deed which the plaintiff received of the farm was also a conveyance of 13 cows and other personal property conditionally, the grantor reserving the ownership and control of the property. The words here employed are such as create a conditional vendor's lien. This reservation of chattels, while good as between the parties, was of no effect as against attaching creditors without notice, because not evidenced by a writing signed by the purchaser, and not affording such record notice as the law contemplates. So the defendant's rights to the articles reserved and returned as sold under the lien depends upon the question of possession.

The defendant also claims to hold the increase of the stock upon which this lien was reserved. The defendant remained the general owner of the property (*French v. Osmer*, 87 Vt. 427, 32 Atl. 254); and, as long as the conditional vendee's title remained unperfected, he had the same right to the increase that he had to the original animals, for the progeny of animals belongs to the owner of the female. But, as the lien was good only as between the parties, the vendor's right to the increase, as well as to the original animals, depended upon a seasonable taking of possession. The mortgage of 1889 covers 18 cows, 3 yearling heifers, and 5 heifer calves. The case shows that at the time this mortgage was given the mortgagor had but 18 cows, 3 yearling heifers, and 5 heifer calves. In *Huse v. Estabrooks*, 67 Vt. 223, 31 Atl. 293, a description of animals by sex and age only was held insufficient, where there was no finding that the mortgagor did not own oth-

er animals of the same description. But we think such a description, and even a designation of so many cows, ought not to be held insufficient, when it appears that the mortgagor owned no others of the description given. The plaintiffs make no question as to the sufficiency of the remainder of the description, so we give the matter no examination.

Assuming that the chattel mortgage gave the defendant a title to the increase of the mortgaged animals that was good as against the debtor, the defendant could not hold such increase as against third persons, after the period of nurture had passed, without taking it into possession. *Enright v. Dodge*, 64 Vt. 502, 24 Atl. 768. It appears then that, as far as the increase is concerned, the defendant's right under the mortgages, as well as his right under the lien, depends upon the question of possession.

There was nothing in the manner in which the defendant took possession of the property to deprive him of the rights which ordinarily follow possession. The entry was peaceable and lawful. *Fuller v. Eddy*, 49 Vt. 11.

The attachment of the property prior to the filing of the insolvency petition, by leaving a copy in the town clerk's office, afforded no support to the defendant's title. The property was taken into actual possession on the 23d of April, which was after the petition was filed, but before the adjudication of insolvency. The title of the assignee relates back to the time of the filing of the petition. *Platt v. Insurance Co.*, 62 Vt. 166, 19 Atl. 637. At that time the debtor was in possession of all the property of which the defendant required possession to perfect his right. If a creditor without notice had then levied an execution upon it, he would have held it against the defendant's lien and mortgage. It follows that the assignee will hold it under his deed of assignment. The assignee takes all the property which could have been taken on an execution against the debtor at the time the petition was filed. *V. S. § 2098*; *Gollender Co. v. Marshall*, 57 Vt. 232; *Rice's Assignees v. Hulett*, 63 Vt. 321, 22 Atl. 75.

The horse, cow, and hog, claimed by the debtor under the exemption, were not a part of the incumbered stock, and were properly included in the Desany judgment. The oats, potatoes, corn, beans, and sugar were held by the lien, and none of them should have been included in either judgment. The butter was not so held, and, not being exempt, it should have been excluded from the Desany judgment, and included in that of the assignee. The lumber cut for the repair of buildings and fences should not have been included in the assignee's judgment. The implied license under which it was cut devoted it to a specific purpose, and it could not be diverted from that purpose either by the mortgagor or his creditors. Nor should the stovewood have been included in the Desany judgment. The debtor's right to it was confined to its use on the place. Subject to that right, it was the property of

the mortgagee. The defendant concedes that the hay rack is properly included in the Desany judgment. It is not necessary to inquire whether articles were improperly omitted from that judgment, for the plaintiff's exceptions were waived on the argument.

There seems to be some uncertainty in the designation of one or more of the cows, but, as the court ruled that the defendant could hold the property covered by the mortgage of 1889, we assume that no cows covered by that mortgage are included in the assignee's judgment. The live stock not specified in that mortgage, and the item of pork, were properly included in the judgment, for the reasons before stated. The mowing machine was properly included. It was one taken in exchange for the one mortgaged, with the consent of the mortgagee, but the findings are not sufficient to subject it to the lien. *Kelsey v. Kendall*, 48 Vt. 24. No claim is made but that the syrup barrel is properly included, and we leave the item without consideration. The buggy, wagon, and driving harness were covered by the mortgage of 1884. No question is made as to the sufficiency of their description. The officer advertised the property under both mortgages, but he sold only under the mortgage of 1889. It is not necessary to consider whether the officer could justify the sale. There might be a wrongful sale by the officer without the mortgagee being liable in trover. *Hyde v. Cooper*, 26 Vt. 552. It appears that the mortgagee placed the papers in the hands of the officer without giving him any specific instructions. So there was no direction to do anything that the mortgages did not authorize. Nor can the mortgagee be held to have become a wrongdoer by ratification. If the case is one where an acceptance of the avails might amount to a ratification, it could only be upon an acceptance with full knowledge of the facts. There is no finding that the mortgagee had this knowledge, and he cannot be presumed to have ascertained it from the return upon his mortgage, for the officer was required to file that in the town clerk's office. So these articles were improperly included in the judgment. Judgment reversed, and judgment in *Desany v. Thorp* for \$92.50, and judgment in *Wilbur v. Thorp* for \$304.60.

(37 Md. 124)

SHAFFER v. STATE.

(Court of Appeals of Maryland. Jan. 5, 1898.)

PERJURY—INDICTMENT—MATERIALITY OF TESTIMONY—DISORDERLY HOUSES—REPUTATION.

1. An indictment for perjury alleged that, on the trial of P. for keeping a disorderly house, it became a material, competent, and proper matter of inquiry whether the reputation of said house was bad, and whether the reputation of P. for chastity was bad, and that defendant swore falsely that he did not know the general reputation of said house, and did not know the general reputation of P. for chastity. *Held*, that the indictment sufficiently alleged the materiality of the testimony, which, under some circumstances, would be material and competent.

2. The general reputation of those who fre-

quent a disorderly house is admissible for the purpose of characterizing the house and showing the object of their visits.

Appeal from circuit court, Allegany county.

Elmer E. Shaffer was convicted of perjury, and he appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, BRYAN, and ROBERTS, JJ.

B. A. Richmond and Jas. A. McHenry, for appellant. Atty. Gen. Clabaugh and Geo. A. Pearre, for appellee.

BRISCOE, J. The appellant was indicted, tried, and convicted of the crime of perjury, in the circuit court of Allegany county. The questions presented on the appeal arise upon a demurrer to the indictment, which was overruled by the court. The assignments of error, as set forth in the indictment, are: First, that the allegation in the indictment that, in the trial of Martha Poole, it became material to inquire as to her general reputation for chastity, she being an inmate of said alleged bawdy house, was not a material allegation, because, she being the defendant in said case, and on trial in a criminal prosecution, it was not competent to submit evidence to the jury of her bad reputation until she undertook to offer evidence of her good character, and that the state's case could offer no evidence of her bad character in that trial, notwithstanding she was an inmate of said bawdy house, unless she first offered evidence of her good character; second, that the allegation in the indictment that, in the trial of the said Martha Poole, it became material to inquire into the reputation of the house alleged to be a bawdy house, was a defective allegation, because it was not competent, under the statutes of Maryland admitting evidence of reputation of the house in such cases, for the state to show the reputation of the house, unless the state undertook to show the general reputation of the house.

Now, it appears from an examination of the indictment that it distinctly alleges that then, upon the trial of said issue, to wit, the charge of keeping and maintaining a certain common and ill-governed and disorderly house by the said Martha Poole, it became and was a material, competent, and proper matter of inquiry in the same whether the reputation of the said house, located on Frederick street, in the city of Cumberland, Allegany county, aforesaid, kept and maintained by the said Martha Poole, was good or bad at the time alleged in the indictment aforesaid, to wit, on or before the 3d day of October, in the year of our Lord 1896, and whether on or before the said 3d day of October, in the year of our Lord 1896, the reputation of said Martha Poole, defendant, inmate of said house, for chastity, was good or bad, and that he, the said Elmer E. Shaffer, did not know the general reputation of the said house on Frederick street, in the city of Cumberland, Allegany county, aforesaid, kept and maintained by the said Martha Poole, and that he did not know whether the reputation of

the said house was good or bad, and that he did not know the general reputation of the said Martha Poole for chastity, and he did not know whether their reputation for chastity was good or bad; whereas, in truth and in fact, he, the said Elmer E. Shaffer, did know the general reputation of the said house in the community, and knew that the same was bad; and whereas he, the said Elmer E. Shaffer, did know the general reputation of the said Martha Poole in the community for chastity, and did know that said reputation was bad. This indictment sufficiently alleges the materiality of the testimony, as under some circumstances it would be material and competent. We have carefully examined the indictment, and find it contains all the averments of a good and sufficient indictment for the perjury assigned.

The assignments of error speak of the house as a bawdy house, but the indictment clearly shows that Martha Poole was tried on the charge of keeping and maintaining a certain common, ill-governed, and disorderly house. There are no bills of exception in the case; so we have no means of ascertaining what the evidence was in the court below, but must confine ourselves to the averments of the indictment itself. The law, however, is settled in this state, that, upon the trial of a person for keeping a disorderly house, evidence of the general reputation of the house is inadmissible, but the general reputation of those who frequented it was admissible for the purpose of characterizing the house, and showing the object of their visits. *Henson v. State*, 62 Md. 231; *Herzinger v. State*, 70 Md. 278, 17 Atl. 81; *Beard v. State*, 71 Md. 275, 17 Atl. 1044. But since the act of 1892 (chapter 522), upon the trial of any person charged with keeping a bawdy house or house of ill-fame, it is competent for the prosecution to offer in evidence the general reputation of the house kept by the person on trial in support of the charge. We find no error in the rulings of the court, and the judgment will be affirmed, with costs. Judgment affirmed, with costs.

(86 Md. 595)

**EDELHOFF et al. v. HORNER-MILLER
STRAW-GOODS MFG. CO. OF BAL-
TIMORE CITY et al.**

(Court of Appeals of Maryland. Jan. 4, 1898.)
**BILL OF EXCEPTIONS—CORPORATIONS—ACTS OF
OFFICERS—RATIFICATION—CHATTEL MORTGAGE—
LIEN—VALIDITY—SALES—FRAUD OF BUYER.**

1. Under Code Pub. Loc. Laws, art. 4, § 170, providing that bills of exceptions "may be signed" at any time within thirty days after the rendition of the verdict, etc., "but not thereafter, unless the time for signing the same shall have been previously extended by order of the court, or by consent of parties," etc., the court has power to grant several extensions of time for signing and sealing a bill of exceptions, provided the first extension be granted within said 80 days, and that each succeeding extension be made within the time granted in the previous extension.

2. Evidence merely of the existence of an agreement between the parties to a chattel

mortgage not to record the instrument would not justify a finding that the agreement was made when the mortgage was executed, or before that time.

3. When a mortgage of the chattels of a corporation is made by its officers, without authority, to secure funds to pay its debts and continue the business, and it receives the full benefit of the transaction, without objection, it will be presumed to have authorized or ratified the mortgage.

4. The lien of a chattel mortgage is not impaired by a commingling of the goods mortgaged with other goods without the knowledge or consent of the mortgagee.

5. A mortgage of a stock of goods, accompanied by an agreement that the mortgagors are to sell the goods, and that the proceeds of such sales are to be turned over to the mortgagee as the sales are made, to be applied on the mortgage, is not invalid, as having the effect of hindering or delaying creditors.

6. A sale of goods to an insolvent corporation cannot be rescinded by the seller on the ground of fraud, in the absence of false representations, unless the officers of the corporation, at the time of the purchase, had no reasonable expectation of making payment at the maturity of the bill.

7. In replevin for goods sold an insolvent corporation, on the ground of fraud in their purchase, a charge that, if the officers of the corporation had a reasonable expectation to pay the account when due, "based on all its resources, including assets in hand and available, its lines of credit, and money to be realized in the future from the sale of its manufactured products," etc., is error, in that it is not necessary, in determining the question of the reasonableness, to consider whether the company was able to meet all its obligations to other parties.

Appeal from court of common pleas.

Replevin by Charles A. Edelhoff and another against the Horner-Miller Straw-Goods Manufacturing Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, and PAGE, JJ.

Steiner & Putzel, for appellants. W. Burns Trundle, Thomas G. Hayes, and James P. Gorter, for appellees.

PAGE, J. The appellees have moved to dismiss this appeal, upon the ground that the bill of exception was not signed by the judge within the time allowed by the statute, and this motion will be first considered. The verdict was rendered on the 20th of April, 1897. On the 7th of May the parties agreed that the time for signing and sealing the exception should be extended for the period of 30 days from that date, and on the 17th of May the court so ordered. On the 28th of May the parties again agreed there should be a further extension until the 15th of June, and on the 29th May the court passed an order in conformity with the agreement. On the 10th of June the court ordered another extension until the 28th of June. On the 23d of June the appellees filed a protest against the signing and sealing of any bill of exception, for the reasons therein stated. The court, however, sua sponte, on the 20th June further extended the time until the 20th of August. Both parties agreed at the argument that the bill of exceptions was signed and

sealed, and filed on the 18th of August. The question presented depends upon the proper construction of article 4, § 170, Code Pub. Loc. Laws. That section provides that bills of exception "may be signed" at any time within 30 days after the rendition of the verdict, etc., "but, not thereafter," unless the time for signing the same "shall have been previously extended by order of court or by consent of parties," etc. The power of the court is here defined with respect to the time at which bills of exception may be signed. The court is given power to sign within 30 days after verdict, or thereafter, when the time therefor has been previously extended by its own order or by the consent of parties. The effect of the consent of parties in cases where the 30 days have expired, and there has been no previous order of extension, is to confer upon the court the same authority to sign as if there had previously been an order of extension. Aside from the statute, the judge who tried the case had power to sign and seal bills of exception at any time during the term at which the trial occurred, but by express permission of the court given during the term he could sign after the term. If presented after the term, and the parties consent that he shall sign, both parties are afterwards estopped from raising an objection as to his right and power. *Thomas v. Ford*, 63 Md. 348. This statute embodies this principle of estoppel against the consenting parties, and converts what had theretofore been a matter of practice into a statutory requirement. We cannot, therefore, agree with the contention that the orders of the 17th May and of the 29th May were inoperative, because of the consent of parties previously given that the extension contained in them should be allowed. Consent alone cannot be the same as a judicial order. The former is quite sufficient to raise an estoppel, but the latter is an act demanding the exercise of discretion and judgment. Even though the parties consent, it is within the authority of the judge to refuse to sign, in cases where, in the exercise of a judicial discretion, he deems it consistent with justice so to do. It is as dangerous now as it ever was "to allow a bill of exceptions of matters dependent upon memory at a distant period, when he may not accurately recollect them," as was said many years ago by Chief Justice Marshall in *Ex parte Bradstreet*, 4 Pet. 102. *Wheeler v. Briscoe*, 44 Md. 311; *Association, etc., v. Grant*, 41 Md. 564; *Village of Marseilles v. Howland*, 34 Ill. App. 350. In this case the first order of extension was passed within the 30 days, and the second within the period of extension; both of these upon the consent of parties. The subsequent extensions were made by the court within the life of the preceding orders. It is therefore within the rulings of this court in *Gottlieb v. Fred W. Wolf Co.*, 75 Md. 126, 23 Atl. 198. For these reasons, the motion to dismiss the appeal must be overruled.

This is an action of replevin, in which the appellants are seeking to recover the possession of certain goods and chattels from

the appellees, who are trustees under a deed of trust for the benefit of creditors from the Horner-Miller Straw-Goods Manufacturing Company of Baltimore City, which will be hereinafter referred to as the "corporation." The articles replevied are ribbon bands, suitable to be used in the manufacture of hats. They were ordered by the corporation from the appellants in the month of May, 1895, and were delivered, from time to time, from the 2d day of August up to the 6th of September following. The pleas of the appellees are non cepit, property in Shethar & Sanford, and property in the trustees. The appellants offered evidence tending to prove—First, that the corporation was insolvent at the time of the purchase, and that its officers knew or had good reason to know, of its insolvency, and had no reasonable expectation of paying the bill at maturity; and, secondly, that before the goods were delivered the president and secretary induced the appellants to deliver the goods by means of certain fraudulent representations as to the corporation's business and its ability to pay its debts. It also appeared in proof that on the 31st of August, 1895, the corporation executed and delivered a chattel mortgage to Shethar & Sanford, which was not recorded until the 16th of September, and it is claimed by the appellants that this mortgage is fraudulent and void as against them, for reasons that will be more fully referred to hereafter. There were many prayers asked for on the trial,—the appellants having presented 28, and the appellees 10,—and it is to the action of the court in disposing of them that this appeal is taken. The appellee interposed special exceptions to many of the prayers of the appellants, and these will now be considered.

In the first and eighth instructions asked by the appellants, one of the facts upon which the plaintiffs' right of recovery depended was that it was agreed between the parties "at the time" of the making of the chattel mortgage that the same was not to be recorded, and the special exception is there was no legally sufficient evidence of such agreement. It must be noted that the prayer requires the jury to find there was such agreement, and that it was entered into at the time the mortgage was made. Now, there was evidence tending to prove there was an agreement of such a character made at a time which does not appear, and the court, in the appellants' second and thirteenth prayers, instructed the jury upon that condition of the proof. If there was such agreement made after the execution and delivery of the mortgage for a valid consideration, and for the purpose of deceiving the creditors of the corporation, it was a fraud, and the mortgage in that event would offer no obstruction to the plaintiffs' right of recovery. This the court rightly ruled in granting these last-mentioned prayers. But the first and eighth prayers of the appellants go much further. They are based upon the theory that evidence had gone to the jury

from which they could find that such agreement was made at or before the making of the mortgage. We do not think this theory can be maintained. The testimony of Mr. Putzel substantially is that at a meeting of the creditors of the corporation, at which either Shethar or Sanford was present, he heard that there was an agreement not to record the mortgage. Conceding, however, that Shethar or Sanford was present, and, having heard the statement, was bound in *foro conscientiæ* to reply, there is nothing in the statement that could warrant the jury in finding that the agreement was made at the time of the making of the mortgage. The same criticism may be made with respect to the evidence of Mr. Horner. He states: "The chattel mortgage was not to be recorded. That was understood. * * * It was to be renewed every two weeks." He does not give the agreement, nor by whom it was so understood. If he intended that the agreement not to record was made prior to or contemporaneously with the mortgage, or that the agreement was a condition precedent to the completion of the transaction, it should have been stated in such terms as would enable the jury reasonably to draw such inferences. As the evidence stands, the understanding may have been on the part of Mr. Horner only, or it may have arisen after the transaction had been completed, or grown out of an intention on the part of Shethar & Sanford (known to Mr. Horner), which they were at liberty to carry out or not, at their own pleasure. Such testimony we do not think was sufficient to support the theory of these prayers.

The appellees also excepted specially, on the ground of want of evidence: First, to the 3d, 4th, 10th, 12th, and 15th prayers of the appellants, that at the time of the execution of the chattel mortgage it was agreed that the mortgagors were to remain in possession of the chattels conveyed, with the power to sell and dispose of them; second, to the 5th, that the mortgage was given for money to be advanced from time to time, after its execution and delivery; third, to the 6th, that the mortgage was given in consideration of the payment of \$25,000, and only \$10,000 were in fact paid; and, fourth, to the 17th, that after the execution of the mortgage the property transferred, and, with the knowledge of Shethar & Sanford, was so intermingled with the after-acquired property of the corporation as not to be distinguishable therefrom. The chattel mortgage to Shethar & Sanford was executed by the corporation, and delivered on the 31st of August. On its face it purports to have been given in consideration of the sum of \$25,000 due to them from the corporation. It conveys all the "braids, bands, and sundries," machinery, and all other goods and chattels, then in the factory. It provides that until default the corporation shall possess the mortgaged property, and, after default, that the mortgagees may take possession, etc.; and on payment of the said sum on or before the 1st day of May next it is to become null and void. It

assuredly cannot be contended successfully that by any of these provisions, or all of them taken collectively, authority is conferred upon the mortgagors to sell the goods and chattels, or intermingle them with such chattels as it might thereafter acquire. It was executed by the president, vice president, and treasurer of the corporation, and it is contended that, in the absence of express authority, these officers had no power to pledge its assets. The evidence shows that under and by virtue of the contract Shethar & Sanford, on the day of the execution of the mortgage, paid \$5,000, and a like sum on the 4th of September. These sums were received by the president, and were duly deposited in the National Marine Bank to the credit of the corporation, and were checked upon and used for the benefit of the latter in the ordinary course of business. Now, while it may be true, as a general rule, that ministerial officers of a corporation, without authority expressly conferred, or to be implied from previous conduct, cannot pledge the property of the corporation, yet, when a mortgage of its chattels have been made by such officers for the purpose of securing funds to pay its debts and continue its business, and it receives the full benefit of the transaction, without objection being made, it will be presumed to have authorized or ratified the acts of its officers. *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770; *5 Thomp. Corp. § 6175*. This principle is founded on considerations of common honesty. One who neglects to disavow promptly the act of his agent, but, on the contrary, receives and appropriates to his own use the benefit thereof, ought not to be permitted afterwards to relieve himself of the burdens of the transaction by denying the authority of the agent. In such a case he makes the act his own. *Stokes v. Detrick*, 75 Md. 263, 23 Atl. 846; *Creswell v. Lanahan*, 101 U. S. 347. We are of opinion, therefore, that the corporation, having received the money of Shethar & Sanford, and applied it to its own use, cannot now repudiate the act of its officers. The plaintiffs' sixteenth prayer was properly refused.

The consideration set forth in the mortgage is the sum of \$25,000, due from the mortgagor to the mortgagees. After the execution of the instrument, that sum was in the hands of Shethar & Sanford, and the corporation could draw on it at its own pleasure. There is no evidence that the mortgage was executed for the purpose of securing other sums to be thereafter advanced. The sum to be secured having been particularly mentioned, the mortgage cannot be within the inhibitions of section 2, art. 66, Code Pub. Gen. Laws. Nor is there any evidence of any commingling of goods with the knowledge or consent of either Shethar or Sanford, and without such knowledge or consent the lien of the mortgage could not be impaired. *Kreuzer v. Cooney*, 45 Md. 591.

The mortgage also provides that the corporation shall remain in possession of the goods, but there is no right or power of sale reserved

by any of its provisions to the grantor. Aside from that instrument, was there any contract or understanding between the parties permitting the corporation to sell for its own use or otherwise? Mr. Horner testifies that "Shethar and Sanford were to sell the product of the company"; that they were to be billed from Shethar & Sanford, and to have on the bills, "Manufactured by the Horner-Miller Straw-Goods Mfg. Co. of Baltimore"; and that "all orders taken by the company were to be turned over to them." Sanford states that: "All the merchandise included in the mortgage had to pass through his hands in this way, viz.: The merchandise was delivered to purchasers. A memorandum thereof was sent to his firm, who sent the bills to the purchasers, and collected the money due thereon." Thus it seems the corporation was authorized to find purchasers and deliver the goods; but the bills were to be made out in the name of Shethar & Sanford, and were to be sent to and collected by them. An arrangement like this obviously was not intended to subserve the interests of the corporation, but it was entered into for the benefit of Shethar & Sanford, to enable them more certainly to secure the prompt payment of the corporation's notes as they became due. These notes, given for the money advanced by the firm, were 10 in number, each for \$2,500, and were payable the first one on the 15th of December, 1895, and the others, respectively, on the 1st and 15th of each successive month. Both parties relied on the sales of goods to enable the corporation to meet these obligations, and it was therefore for that reason that it was understood that the corporation should deliver the goods to purchasers in the name of Shethar & Sanford, and remit the bills to them, to be collected by them. It was, in fact, but little more than authorizing the corporation to act as the agent of Shethar & Sanford to dispose of the goods for their benefit, without power to collect the purchase money. There is no evidence in the case of authority to the corporation to make sales for its own use and benefit.

It has been held by some courts that a mortgage conveying a stock in trade, and containing an express covenant, or accompanied by an independent agreement, permitting the mortgagor to remain in possession, with power to sell for his own use and benefit, is fraudulent in law. *Bank v. Lindenstruth*, 79 Md. 139, 28 Atl. 807. But that is not the question now before us. In this case the mortgage contains no covenant permitting the mortgagor to sell, and the verbal agreement which accompanied it contemplates only sales for the use and benefit of the mortgagees. The cases cited by the appellants belong to the class in which the mortgagor is authorized to sell or dispose of the mortgaged property for his own use. *Freeman v. Rawson*, 5 Ohio St. 1; *Russell v. Winne*, 37 N. Y. 591. See *Pierce, Mortg. Merch.* § 114 et seq. The principle laid down in these cases is a highly salutary one. It is

founded upon the reason that a power to the mortgagor to sell the goods and chattels conveyed for his own use has the effect of hindering and delaying creditors. A chattel mortgage containing a covenant permitting this to be done leaves the mortgagor in full control of his property and business, and at the same time operates as a "shield against the attacks of creditors." But no such reasons can be assigned in a case where the agreement accompanying the mortgage only authorizes the mortgagor in possession to find purchasers, and to deliver the chattels on behalf of the mortgagee, and for his benefit. Such an agreement, if made and carried out in good faith, is not open to the objections we have just stated. It cannot operate to hinder, delay, or defraud creditors; and, in the absence of proof of actual fraud, ought to be respected. This subject was ably discussed by Mr. Justice Brewer in the case of *Etheridge v. Sperry*, 139 U. S. 266, 11 Atl. 565. There the decision turned on the question as to the ruling in the state of Iowa. After a review of the cases from that state, and after determining that the settled construction of the doctrine by these courts was that a power of sale to the mortgagor for the benefit of the mortgagee does not, as matter of law, invalidate a chattel mortgage, the learned judge concludes his opinion by saying: "So, if the question were open, or a new one, unaffected by any settled law of the state, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith, and that the decision of the supreme court of Iowa rests on sound principles." *Manhattan Brass Co. v. Webster Glass & Queensware Co.*, 37 Mo. App. 145; *Simis v. Hodge*, 50 Hun, 410, 3 N. Y. Supp. 228; *Langert v. Brown*, 3 Wash. T. 102, 13 Pac. 704; *Howard v. Rohlfing*, 36 Kan. 357, 13 Pac. 566; *Murray v. McNealy*, 86 Ala. 234, 5 South. 565; *Means v. Dowd*, 128 U. S. 273, 9 Sup. Ct. 65. From what has been said it follows that there is no error in the rulings of the court upon the several special exceptions of the appellees to the appellants' prayers.

The appellants' fourteenth and eighteenth prayers should have been refused.

The remaining prayers of the appellants having been granted, we are now to consider those allowed by the court on behalf of the appellees.

The main legal proposition contained in all of the prayers on both sides is conceded; that is, that if the appellants were induced by the fraud of the officers of the corporation to make sale of the goods in question, upon becoming cognizant of the fraud, had they the right to rescind the contract, and demand the return of the goods? But the jury in this case would not be warranted in finding there was such fraud, even though the corporation was in fact insolvent, unless its officers, at the time of the purchase, had no reasonable expectation of making

payment at the maturity of the bill. *Powell v. Bradlee*, 9 Gill & J. 222; *Diggs v. Denny* (officially unreported as yet) 37 Atl. 1037. There were, therefore, two questions before the jury of the first importance: First, was the corporation insolvent when the purchase was made? And, second, if it was, had its officers then a reasonable expectation of being able to make payment, when the bill became due? The first prayer of the appellees instructed the jury that, if they found the corporation was insolvent when the purchase was made, yet, if its officers had a reasonable expectation to pay the account when due, "based on all its resources, including assets in hand and available, its lines of credit, and money to be realized from the sale of manufactured products, and that," etc. This prayer not only required the jury to find whether its officers had a reasonable expectation, but it determined for them the basis upon which that was to be decided. They were told it was on the basis of "all its resources, including assets in hand and available, its lines of credit, and money to be realized in the future from the sale of its manufactured products," etc. It was not necessary, in determining the question of reasonableness, to consider whether the company was able to meet all its obligations to other parties. *Peters v. Hilles*, 48 Md. 512. It is easy to understand how a person, having in view his business, his assets, and his credit, may reasonably expect to be able to pay a claim at a specified time, although, in point of fact, he would be unable to discharge all his indebtedness. And yet the general indebtedness, and the time or times when it, or any part of it, becomes due, may—indeed must—be an important factor in determining whether such expectation is reasonable or not. This court, in *Peters v. Hilles*, *supra*, said that "general indebtedness was a matter that might very properly be considered by them [the jury] in the solution of the inquiry," and we may now add that, if it was proper, it ought to be included in any statement that undertook to instruct the jury as to the basis upon which their decision of the matter must rest. The gravamen of the whole inquiry the jury were called on to make was as to the bona fides of the corporation in making the purchase. If it acted honestly; if, in the reasonable exercise of an honest judgment, its officers believed it would be able to meet the bill when it matured,—it cannot be put on the footing of one who has acted fraudulently. *Diggs v. Denny*, *supra*. The prayer would have been wholly free from objection if it had required the jury to find there was a "reasonable expectation," but, if it was proposed to instruct as to the "basis" of a reasonable expectation, it is manifestly error to affirm that an expectation based only upon assets and credit, and that utterly ignores the general financial condition of the person, no matter how stringent and press-

ing it may be, is necessarily a reasonable expectation. It is entirely possible the general indebtedness may be of such a character and amount, and in part or in whole to mature at such periods, as to stamp any expectation of being able to pay a particular indebtedness at a specified time as utterly unreasonable. In such a case it cannot be questioned that the general indebtedness would be a most important factor in the consideration of a question whether the expectation of being able to pay the particular account was reasonable or not. In the case at bar the evidence shows the corporation owed large sums of money, and we are of opinion that, if it was proposed to instruct the jury as to the basis upon which the alleged expectation rested, they should have been told to consider such general indebtedness as affecting the reasonableness of such expectation. We think, therefore, there was error in granting this prayer.

The defendants' fifth and seventh prayers were granted properly.

For error in the defendants' first prayer, the judgment must be reversed, and new trial awarded. Judgment reversed, and new trial awarded.

(96 Md. 658)

GARDNER et al. v. GAMBRILL.

(Court of Appeals of Maryland. Jan. 4, 1896.)

INSOLVENT TRADERS—EFFECT OF DEED OF TRUST.

1. A trader who, before default has been made in the payment of a draft drawn by him, makes a general assignment for the benefit of his creditors, does not cease to be a trader so as to escape the provisions of the insolvent law (Pub. Gen. Laws, art. 47, § 22, as amended by Act 1896, c. 446), providing for the insolvency of merchants and traders.

2. Act 1894, c. 568, which exempts from the operation of the insolvent law bona fide deeds of trust for the benefit of creditors, does not bar insolvency proceedings against such grantor.

Appeal from circuit court, Frederick county.

Petition by Elias N. Gardner and others against James H. Gambrill praying the adjudication of defendant as an insolvent debtor. From an order dismissing the petition, plaintiffs appeal. Reversed.

Argued before MCSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, BOYD, and ROBERTS, JJ.

S. D. Schmucker, George Whitelock, and J. C. Motter, for appellants. Charles W. Ross and John S. Newman, for appellee.

BRYAN, J. On the 9th day of June, 1897, Gardner & Co. filed a petition in insolvency against James H. Gambrill. It was alleged that the petitioners on the 5th day of February, 1897, accepted an accommodation draft drawn on them by the respondent for the sum of \$900, payable 60 days after date, and that the petitioners have paid the same. It was further alleged that on the 14th day of January, 1897, the respondent drew an accommodation draft on J. H. Sherbert & Co. in fa-

vor of the Central National Bank of Frederick for the sum of \$1,000, payable 60 days after date, and that Sherbert & Co. accepted the same, but that neither Sherbert & Co. nor the respondent have paid it, although more than 20 days have elapsed since its maturity. The answer sets forth that Gambrill, on the 15th day of March of the same year, executed to certain trustees deeds of trust conveying all his property for the benefit of his creditors, without any preference or priority, and the said deeds were executed and delivered about 10 o'clock in the morning. This was on the day when the Sherbert draft fell due. The case was heard by the court on petition and answer. It was dismissed by the court.

The defense maintains the theory that Gambrill had ceased to be a merchant and trader when he made the defaults alleged against him, and that he was not, therefore, subject to the provisions of the twenty-second section of the insolvent law, as amended by Act 1896, c. 446. This section enacts that if any merchant or trader, or other person named therein, but not necessary now to mention, shall suspend payment of his negotiable paper, and fail to resume the same within 20 days, he shall be deemed to have committed an act of insolvency. The twenty-third section makes such merchant or trader liable to an adjudication of insolvency at the suit of any creditor whose debt shall amount to \$250, provided he shall file his petition within four months after the act of insolvency. Section 22 contains a provision that if a banker or broker shall fail for 20 days to pay any depositor, on demand lawfully made, he shall be deemed to have committed an act of insolvency. It was the object of this section to place these classes under severe penalties for their defaults, so as to compel them to comply punctually with their duties in the respects which are mentioned. It could not have been intended that a banker who had received a depositor's money should have the power of evading the penalty of his misconduct by the simple act of retiring from business. If such be the construction of the statute, it affords to the depositor a very precarious protection. It might almost be said to be merely illusory. And the same may be said in reference to merchants and traders. They are embraced in the same section, and are evidently to be dealt with in the same manner. The penalty is imposed on the persons included in these classes, because of a failure to discharge commercial liabilities. Gambrill, when he drew the accommodation bill on Gardiner & Co., by so doing entered into a contract with them that, if they would pay it, he would reimburse them; and when he drew a bill of the same character on Sherbert & Co., and had it discounted by the bank, his contract with the bank was that he would take it up, if Sherbert & Co. should fail to pay it. The obligation of these contracts was in no manner impaired by the circumstance that the contracting party had ceased to be a merchant. The twenty-second section of the statute was intended to

compel the prompt performance of the second of these contracts, and it is impossible to find in it any intimation that the delinquent was authorized to defeat its operation by ceasing to be a merchant. This question has arisen on other statutes with similar provisions. From very many decisions of the same purport it is sufficient to cite two. In *Baille v. Grant*, 9 Bing. 121, the house of lords referred the question to all the judges, and in their unanimous opinion it was said: "It has also been established beyond dispute that a petitioning creditor's debt, contracted during the trading of the debtor, will support a commission taken out against him on an act of bankruptcy committed after the trading has ceased. This point has been settled to be law by various decisions, commencing with that of *Heylor v. Hall*, Palmer, 325, and ending with that of *Ex parte Bamford*, 15 Ves. 449." In *Ex parte Griffiths*, 3 De Gex, M. & G. 176, the Lord Justice Knight Bruce said: "I apprehend that by the spirit and intent of the bankrupt laws, according to principle and authority, the rule is established that a trader who, after becoming indebted, leaves off trading, is not to be heard to say to his creditor that the trading has been left off, if a question arises whether the debtor can or cannot be, as a trader, made a bankrupt." He added that he believed no lawyer would now dispute this proposition. Act 1894, c. 568, declares that the insolvent law shall not impair any bona fide deed which conveys all the property of a grantor for the equal benefit of his creditors, without preferences. It, however, recognizes the right of any creditor to proceed against the debtor under the provisions of the insolvent law after the execution and recording of the deed, but gives to the trustee under the voluntary deed the right to administer the trusts created by it, without any interference by the trustee in insolvency. It would not be in the power of the voluntary assignee to set aside any deed which his grantor might have made in fraud of creditors previous to the assignment. This is firmly settled. *Brown v. Deford*, 83 Md. 297, 34 Atl. 788, and cases there cited. The trustee in insolvency represents the creditors, and it is his duty to claim in their behalf all property which ought to be subjected to the payment of the debts due to them, whether it was obtained from the insolvent by a fraud practiced on him, or whether he himself conveyed it away in fraud of his creditors. We do not know that this principle has ever been doubted. Certainly it has never been questioned in this court since the decision in *Gardner v. Lewis*, 7 Gill, 378, and in a great many cases it has been recognized as well established. It is not shown that any disposition of his property has been made by Gambrill in derogation of the rights of his creditors, and therefore it does not appear that the trustee in insolvency would be able to recover anything. But the time to consider this question has not arrived, and it could not be decided on this petition. Under it the only question which it

is competent to decide is whether Gambrell has committed the act of insolvency which is alleged. If he has committed it, the statute requires an adjudication of insolvency. If a trustee is appointed, it will be his duty to proceed on such information as he may have; and, when a question of subjecting property to the claims of creditors is brought before the courts, it will be seasonably decided. At present there is no jurisdiction to entertain the question. We think that an act of insolvency has been committed, and that there ought to be an adjudication accordingly. We will therefore reverse the order of the court below, with costs in both courts, and remand the case, in order that an adjudication of insolvency may be made. Reversed and remanded.

(37 Md. 54)

FREDERICK COUNTY NAT. BANK v. SHAFER et ux.

(Court of Appeals of Maryland. Jan. 5, 1898.)
INJUNCTION—WHEN ALLOWED—PAYMENT OF DEBT.

1. A court of equity has no power to grant an injunction enjoining an insolvent defendant, who is indebted to plaintiff, from disposing of a particular fund, where plaintiff has no lien by judgment or otherwise.

2. Act 1888, c. 260 (Code, art. 16, § 69), providing that no court shall refuse to issue an injunction on the ground that the party asking for it has an adequate remedy in damages, does not authorize an injunction to be issued to pay a debt.

Appeal from circuit court, Frederick county.

Bill by the Frederick County National Bank, of Frederick, Md., against William E. Shafer and others, for a decree directing the trustees in insolvency to pay over to plaintiff certain money belonging to one of defendants, and for an injunction enjoining her from disposing of the same, or the claim therefor. From an order sustaining a demurrer to the bill, and dissolving a preliminary injunction, plaintiff appeals. Affirmed.

Argued before BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Wm. P. Maulsby, Jr., John S. Newman, and Benj. F. Reich, for appellant. Milton G. Urner and P. Frank Pampel, for appellees.

BOYD, J. This case was virtually disposed of at the hearing, as it was announced then that we were of opinion that a court of equity could not interfere on the facts set out in the bill. Further reflection and examination of the authorities have not in any wise changed our views, but have only strengthened the opinion we then had. The bill was filed in the circuit court for Frederick county, and alleges that the plaintiff is the holder of four promissory notes, subject to certain credits, signed by William E. Shafer, Daisy E. Shafer, and Margaret Shafer; each being payable six months after date, and all being due six months or more before the bill was filed. It is alleged that there has been audited in No. 4,785, insolvencies, in the circuit court for Frederick county, to Dal-

sy E. Shafer, as a creditor of William, the sum of \$439.53; that she is utterly insolvent, and has no property out of which plaintiff can make its claim; that the audit is about ready for ratification, and, if the money is paid over to her, the plaintiff will be entirely without means of enforcing payment of its debts. The bill then prays for a decree directing the trustees in insolvency to pay to the plaintiff the money audited to her, and that she may be enjoined from assigning, transferring, or disposing of said sum of money, and the claim upon which the allowance is made. A preliminary injunction was granted, and a demurrer interposed by Mrs. Shafer and her husband. Upon petition, leave was granted to amend the bill, which was done by alleging that since the injunction was issued the audit had been ratified; that the plaintiff had on the 9th day of August, 1897, brought suit on the law side of the court on the cause of action mentioned in the bill; and that the plaintiff is advised that, even if not entitled to have the money paid over to it, it is entitled to have the trustees in insolvency restrained from paying it over to Mrs. Shafer, and to have her enjoined from assigning, etc., the claim, until the plaintiff's right in the suit at law can be disposed of, as otherwise it will be remediless, by reason of her insolvency. The prayer for relief was amended so as to have the injunction in force pending the determination of the law case, as well as this case. After the amendment the demurrer was refiled, and, having been sustained, the injunction was dissolved and the bill dismissed.

The claim of the plaintiff is purely a legal one, and it is simply a general creditor, without a judgment to establish the indebtedness of the defendant, or the amount due. There is no suggestion of fraud on the part of the defendants, or any of them. That the plaintiff has no special right to this fund must be conceded, and it certainly is no more entitled to it than any other general creditor. It is possible that Mrs. Shafer intends to apply it, when she gets it, to the payment of some other debt, just as meritorious and binding on her as the notes of the plaintiff. Upon what principle could a court of equity prevent her from doing so, if she saw proper to so use the money? The mere suggestion of such a result would seem to be enough to show that a court of equity neither has, nor ought to have, any such powers. If they could be exercised with reference to choses in action, why not prohibit the unfortunate debtor, who has no property but the house he lives in, or his household furniture, from transferring it until his creditors can obtain judgment at law against him? The owner is entitled to his property, and to the use of it, whether it be real estate, chattels, choses in action, or money; and no court has the right to lay hold of it, or interfere with his lawful use of it, simply to await the result of a suit at law. If it is an open question elsewhere, a reference to some of the decisions of this court will show that it is not so in this state. In *Uhl v. Dillon*, 10 Md. 500, the bill alleged that the

defendant was indebted to the complainant in a specified sum; that he was disposing of his property, and collecting the debts due him, and secreting the same, with intent to defraud his creditors; and that he intended, as soon as he completed such sales and collections, to abscond, for the purpose of hindering, delaying, and defrauding his creditors. But an injunction was refused. The court, through Bartel, J., said: "No authority has been shown to this court, nor can any be produced, entitled to consideration, which sanctions the exercise of the high and extraordinary power of a court of chancery to interpose by writ of injunction in a case like the one before us, restraining a debtor in the enjoyment and power of disposition of its property. The appellees [the complainants below] are merely general creditors of the appellant, who have not prosecuted their claim to judgment and execution, nor in any other manner acquired a lien upon the debtor's property, and were not entitled to the writ of injunction, nor to the appointment of a receiver." In *Rich v. Levy*, 16 Md. 74, the bill alleged that the debtor was selling his goods, and applying the proceeds to his own use, and was utterly insolvent, etc.; but the court refused to restrain him at the instance of a creditor who had not reduced his claim to judgment and execution, nor in any other manner acquired a lien upon his debtor's property. In *Balls v. Balls*, 69 Md. 388, 16 Atl. 18, it was held that a court of equity would not, at the instance of a holder of a promissory note upon which he had not obtained judgment, enjoin the maker from conveying his property, on the ground that the object of such conveyance was to delay and hinder the creditor in the collection of his debt. It was determined that the act of 1835 (chapter 380, section 46 of article 16 of the Code), dispensing with the necessity of a judgment "to vacate any conveyance or contract, or other act as fraudulent against creditors," did not apply when the thing complained of has not been executed, but rests merely in contemplation or intention. See, also, *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341, and 15 Atl. 298, where a court of equity refused to aid a creditor in enforcing the inchoate lien which he may have acquired by an attachment without condemnation. He must perfect his lien at law before a resort can be had to equity. In *Harper v. Clayton*, 84 Md. 346, 35 Atl. 1083, there is a very full and able review of the cases in England and in this country as to the powers of courts of equity over the choses in action of debtors, in the absence of statutory authority, fraud, or some other ground of equity jurisdiction. The reasoning of that case is very applicable to this. As was well said there, "a court of equity, however broad and far-reaching its powers are, cannot create new rights, not before existing at law, and then take jurisdiction to pass upon and enforce them, because the law affords no remedy." The case of *Keerl v. Keerl*, 28 Md. 157, was relied on by the appellant; but the bill in that case was filed by a wife to recover al-

mony from her husband, and to restrain a trustee in the superior court from paying over money to him. The question passed upon was as to the right of the circuit court to restrain a trustee appointed by the superior court from paying the money. But it was a wholly different case from this, as it was a claim for alimony, and therefore one to be enforced in a court of equity. That court has the power, and it is one of the usual ways of securing the wife's claim for alimony, to enjoin the husband from disposing of his property if the necessary allegations are made. The case, therefore, has no application to the one before us.

Nor does the act of 1888 (chapter 260; section 69 of article 16 of the Code) aid the appellant's contention. It never was intended to apply to cases of this character. It says that "no court shall refuse to issue a mandamus or an injunction on the mere ground that the party asking for the same has an adequate remedy in damages," etc. The legislature did not intend to authorize a mandamus or mandatory injunction to be issued to require the payment of a debt, but it only meant that a mandamus or injunction should not be refused merely because the complainant could sue and recover adequate damages for the act sought to be restrained or enforced. The statute was intended to reach the class of cases in which injunction or mandamus had been refused because the plaintiff could be compensated in damages in suits at law. The learned judge below was right in holding that the "statute has relation to cases where damages, as contradistinguished from a debt, are involved." But the refusal to grant the injunction need not be on the mere ground that the appellant had an adequate remedy at law, but on the broader ground that it was not in a position to ask the court to lay hold of the fund, as it had not shown itself in any manner entitled to it. Just as, prior to the act of 1835, courts of equity would not interfere, even against fraudulent conveyances, until judgment had been obtained, because the creditor was not in a position to assert a claim against the property, so in this case the court could well base its refusal on that ground, or it might go further, and refuse to exercise a power fraught with such danger as to thus lay hold of or impound the money or property of a party, merely because it is all he has, and he is alleged to owe the plaintiff. It would be practically equivalent to an attachment in equity, which is purely a creation of statute, and does not exist in this state. The decree must be affirmed. Decree affirmed; costs to be paid by appellant.

(36 Md. 606)

STEBBINS v. CULBRETH.

(Court of Appeals of Maryland. Jan. 4, 1896.)

MECHANICS' LIENS—PROPERTY SUBJECT.

Under Code, art. 63, § 22, providing that machines are subject to a lien in like manner as buildings, a lien cannot be claimed on a steam-heating apparatus consisting of a boiler

and furnace, built in brick and cement, with pipes and radiators throughout the building, as such apparatus is a fixture.

Appeal from circuit court of Baltimore city.

Bill in equity by Wallace Stebbins against Ella Culbreth. From a decree for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

E. H. Gans, B. H. Haman, and Vernon Cook, for appellant. R. S. Culbreth, for appellee.

BRISCOE, J. This is a bill in equity to enforce a mechanic's lien, under section 22 of article 63 of the Code, for materials supplied in the repair of the steam-heating apparatus erected in the Albion Hotel, at the corner of Richmond and Cathedral streets, Baltimore. The hotel is owned by the appellee, Miss Culbreth, who some time in the year 1895 entered into a contract with a certain George F. Simonson to place the necessary repairs upon the heating apparatus of the hotel. The bill alleges that the appellant, Stebbins, at the request of the contractor, Simonson, had furnished a large quantity of materials to be used in this work; and, at the time of the filing of his claim, there was due him the sum of \$1,897 for materials thus furnished. The contract price for the work, amounting to about \$2,300, was paid by the appellee to the contractor; but he failed to pay for a large portion of the materials, which had been furnished him, and this proceeding is adopted for the purpose of enforcing its payment.

The appellant's claim is resisted upon two grounds: First, the right to recover, if any, must be under section 1 of article 63 of the Code, and not under section 22 of that article; secondly, that the appellant is estopped by his conduct and representations from claiming a lien. It is provided by section 1 of article 63 of the Code that every building erected, and every building repaired, rebuilt, or improved to the extent of one-fourth its value, shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the same. And by section 22 of the same article it is provided that every machine, wharf, and bridge erected, constructed, or repaired within this state shall be subject to a lien in like manner as buildings are made subject under the provisions of this act. Now, it is clear that the plaintiff is not entitled to a lien under section 1 of article 63 of the Code, because the proof shows that the repairs or improvements upon the hotel did not amount to one-fourth of its entire value. The sole question, then, is whether the steam-heating apparatus described in this case, is a machine, within the meaning of section 22 of article 63 of the Code. The steam-heating apparatus upon which the right of lien is sought to be maintained in this case consists of a boiler and furnace built in the cellar of the hotel, in brick and cement, with pipes and heating radiators extending through the hotel.

This structure is a part of the building, and is in the nature of a permanent fixture, and necessary for the comfortable, convenient, and customary use of the building as an hotel. If removed, it would not only impair the use of the hotel, but would practically destroy the purposes for which the building was used. The legislature could never have intended to give a lien upon a structure, such as the one described in this case. A machine, within the contemplation of section 4 of the act of 1845 (Code, art. 63, § 22), is such a machine as is not an integral part of a building, and has not lost its character as a movable chattel. In *Weber v. Weatherby*, 34 Md. 661, this court said that both range and furnace for heating a dwelling were fixtures, and within section 1 of article 63 of the Code. And in *Schaper v. Bibb*, 71 Md. 150, 17 Atl. 935, it was also said that, for the same reason that the lien exists for range and furnace, it should exist for the heaters, registers, etc., fitted in the house as permanent fixtures. We are clearly, then, of the opinion, that the heating apparatus in this case is not such a machine as is contemplated by section 4 of the act of 1845. Code, art. 63, § 22. It is not, then, necessary to pass upon the question of estoppel relied upon by the appellee in this case. Decree affirmed.

(87 Md. 19)

NEAL v. HOPKINS.

(Court of Appeals of Maryland. Jan. 4, 1898.)

PARTIES—EJECTMENT—EVIDENCE—DECLARATIONS—DEED—VARYING DESCRIPTION—LAND EMBRACED—DEDICATION.

1. Life tenant having appeared to action by remainder-man to sell the property for better investment, and filed an agreement that the property be sold under direction of the court, free of his estate, he to receive in lieu thereof such amount as the court decides, must be deemed a party whose interest is included in the deed of the trustee appointed to make sale of the property decreed by the court, the deed conveying "all the right and title of all the parties to the aforesaid cause."

2. Contract for sale of land is not admissible to contradict deed given in execution thereof.

3. Statement of vendor to purchaser at time of sale as to location of street, being a declaration against interest, is admissible.

4. Testimony of witness in ejectment suit, as to location of fence not located on the plat, is inadmissible.

5. The question in ejectment being as to location of W. street, a boundary of defendant's land, and its outlines not having been designated by bounders or plats, all acts prior to date of defendant's deed, of persons owning abutting property, are admissible as evidence of what had been dedicated; not so their acts after such date.

6. The designation in deed of place of beginning, as "on the north side of W. street, beginning, for outbounds, east 160 feet from L. street, extended to the east corner of lot * * * owned by B., and running with W. street," is unambiguous, and cannot be varied or explained by testimony as to understanding of the parties.

7. The moving back of a fence from a highway, while not in itself a dedication, is evidence tending, in connection with other facts, to prove it.

8. Though one establish a gutter and sidewalk on his land in front of his lot with intent to widen a street; still, there having been, at that time, no dedication of the street at that point, but only up to one side of the lot, and there being a fence across the street on the other side of the lot, such intent must be referred to a widening he intended to make in the future, when he should dedicate the street.

9. A deed by metes and bounds, beginning at "a post planted" at intersection of W. and S. streets, thence northwesterly 500 feet, etc., thence to a "post planted on the line of W. street," conveys no part of the street.

Appeal from circuit court, Dorchester county.

Action by William D. Hopkins against Joseph H. Neal. From a judgment for plaintiff, defendant appeals. Reversed.

Defendant's fifth exception was as follows: "The defendant offered his own testimony to show that on the day he and the plaintiff bargained for the land described in the said deed between them, and at the very time that the price was agreed on, and the bargain finally struck, the same being on the day before the execution of said deed, the two were standing on the spot marked red letter L on the plat, and the plaintiff, pointing out the lamp post on the north corner of Locust and Willis streets as the point of beginning of the northwest line of Willis street, said that the said line, extended to the Choptank river, would, he thought, about cross said spot where they were standing, and that the cedars and ditch, and old gate before them (all delineated on the plat), would certainly be within his (the defendant's) lines, if he bought the lot offered for sale and which is described in said deed; and thereupon the defendant agreed to buy and did buy, by the northwest line of Willis street extended, as subsequently embodied in said deed from the plaintiff to the defendant. But the court refused to permit said testimony to go to the jury, to which refusal the defendant objected."

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

John R. Pattison, Clem. Sullivane, and Sewell T. Milbourne, for appellant. Thos. W. Simmons and Alonzo L. Miles, for appellee.

PAGE, J. This is an action of ejectment, brought by the appellee against the appellant, to recover certain property in the town of Cambridge. A warrant of resurvey was issued, and the certificate of the survey and plats were made and returned, and are now contained in the record. The plaintiff, in establishing his case, offered in evidence certain deeds, to which no objection as to location was made; and also proof to show ouster on the part of the defendant.

The first exception and the plaintiff's fourth prayer related to the manner of damages, and, inasmuch as the verdict of the jury was for nominal damages only, those will require no attention in this opinion.

After the plaintiff had rested his case, the

defendant asked the court to instruct the jury that there was no legally sufficient evidence to entitle the plaintiff to recover. The court refused so to do, and this constitutes the defendant's second exception. The defendant claims this was error, because he alleges the proof shows that one William Jackson still retains a life estate in the property. It appears from the proceedings set out in the record of a cause in the circuit court of Dorchester county that, in 1853, a certain Henrietta N. Jackson, being seised in remainder of the land in question, by her next friend filed a bill in equity to sell the property for better investment. The life tenant was not made a party by the bill, but during the progress of the cause he filed a paper by which he agreed "that the said real estate shall be sold under the direction of the court, free from any incumbrance of my [his] life estate therein, and that in lieu thereof I [he] will accept such proportion of the proceeds of sale of said estate as this court shall judge to be reasonable." The court thereupon decreed that the property be sold, appointed Thomas W. Anderson trustee to make the sale, and directed him, on payment of the purchase money, to convey the property to the purchaser discharged of all claims "of the parties to this cause, and of William Jackson, who has assented to the sale of his interest therein." The property was accordingly sold, and out of the proceeds thereof William Jackson was awarded and received a sum of money deemed by the court to be reasonable for his interest. The deed of the trustee, Anderson, conveys "all the right and title of all the parties to the aforesaid cause" in and to, etc. The appellant, on these facts, claims that the interest of William Jackson did not pass, but is still outstanding. Now, when a defendant in ejectment relies upon an outstanding title in a third party, it must be such a title that such third party could recover against either party. *Iron Co. v. Detmold*, 1 Md. 234. Here Jackson voluntarily appeared to the cause, agreed that the property should be sold, and received a share of the proceeds of sale. Under these circumstances, he must be held as a party. It would violate every principle of equity and good faith to allow him now to set up any claim to the land. *Bank v. Thomas*, 37 Md. 258; *Thomas v. Bank*, 46 Md. 56.

The defendant, to sustain the issues on his part, having offered the deed from the plaintiff under which he claims title, proposed to follow it up by a contract in writing, relating to the sale of property between himself and plaintiff, made on the same day with the deed; but the court refused to allow it to go to the jury, and this constitutes the defendant's third and fourth exceptions. It is clear from the terms of the contract that it was entered into before the execution of the deed. The parties agree therein for the sale of certain property for \$1,400, part to be paid "on the delivery of a good and sufficient

deed," and the residue in two equal annual installments. Now, if there be a difference between the deed and this contract (and that there is, is not obvious to us), which paper is to control,—the deed or the agreement? If there were no other reason, it would seem proper that the last and effectual expression of the parties should prevail. The deed contains no ambiguous phrases; its language is clear and unmistakable; there can be no doubt as to its purport; and it is a familiar rule that the provisions of the deed must speak for themselves. If it should be conceded, as contended, that the deed and the agreement, being both under seal, are of equal dignity, the last executed must control the first. In *Dorsey v. Smith*, 7 Har. & J. 363, it was said: "If the two papers differ, the last must be regarded as a modification of the first, and, being the last stipulation, must be considered as binding on the parties." *Worthington v. Bullitt*, 6 Md. 196. We find no error in the ruling of the court set out in these exceptions.

The testimony set out in the fifth exception should have been admitted. It was a declaration by the plaintiff against his interest, and tended to throw light upon the true location of Willis street extended. The issue presented to the jury was the location of the point where Willis street extended would intersect School street extended, and, the location of School street being admitted, the controversy was over the proper location of Willis street extended. Willis street, eastwardly from Locust street for some distance, had been dedicated to the public by the sale of certain lots binding thereon, and, to the extent of these lots, had been opened, but, so far as the record shows, had never been accepted by the municipality. From Glascon street on the west, across Locust street, for a distance of 160 feet, it was a clearly-defined street, with fences and trees to mark its line. If the lines of the street so marked now extended in straight lines, it would support the contention of the defendant. The defendant, after offering the deeds of the lot-holders along that portion of Willis street to show the outline of Willis street, introduced Charles C. Bleckson, the husband of Fannie L. Bleckson, the owner of the lot designated on the plat as the "Bleckson lot." He testified that he erected a fence along the front of his lot on Willis street. Later on he moved it back some seven feet, in consequence of an agreement to widen Willis street, and, later still, moved it back to its original position on Willis street, where it now stands; and that he did so because they expected "to get the commissioner to pay Mr. Perry to move his fence back also, but the said authorities refused." On cross-examination he testified it was while his fence was set back that Dr. Mace bought the lot to the eastward of his lot, and built the fence in line with that of witness, being about seven feet from the east corner of witness' lot. The defendant object-

ed to this on the ground that Mace's fence was not located on the plat, but the court overruled the objection.

The case of *Carroll v. Norwood*, 1 Har. & J. 177, is decisive on the point which is raised in the sixth exception. Then the defendant offered evidence of the place where an ancient tree stood, it being on the line of a fence which was located on the plats; but the court held the evidence inadmissible, inasmuch as the tree was not located, though the fence, on the line of which it stood, was.

The evidence objected to in the seventh and eighth exceptions was proper to go to the jury. The question being as to the location of Willis street, and its outlines not having been designated by bounders or plats, all acts prior to the date of defendant's deed, of persons owning abutting property, were proper to go to the jury, to be considered by them in determining what had been dedicated to the public.

Ninth exception: The deed to John Mace from the plaintiff designates the place of beginning to be "on the north side of Willis street, beginning, for outbounds, east 160 feet from Locust street, extended to the east corner of lot of ground owned by C. C. Bleckson, and running with Willis street," etc. The point must be on Willis street, 160 feet from Locust street, and at the east corner of the lot owned by Bleckson. It was an attempt to vary or explain the clear meaning of the deed by parol, to permit testimony to go to the jury as to what the understanding of the parties was.

Tenth exception: Foxwell's deed is dated 25th January, 1896. What the plaintiff did, after the deed to the defendant,—that is, after October 11, 1896,—was not evidence. It could throw no light upon the question as to whose Willis street was when the defendant bought the property.

The court granted the first, second, and third prayers on behalf of the plaintiff, and rejected all asked for by the defendant, and this forms the eleventh exception. The plaintiff's first prayer was not attacked in argument, and we treat it as being conceded. By the second of the plaintiff's prayers, the jury were directed that if they found the deed of Hopkins to Mace, and the said deed described said lot as beginning 100 feet from Locust street to the east corner of Bleckson's lot, and should further believe that the beginning point of the Mace lot so conveyed is at the black cross on the plat, and that said deed described said lot as running with Willis street, etc. This prayer assumes that, by the proper construction of the Mace deed, the beginning boulder thereof could be located at the black cross on the plat, which, by reference thereto, appears to be seven feet or more from the east corner of the Kleckner lot. That deed, however, contains an imperative call,—that is, the east corner of the Bleckson lot,—and this must be gratified. This prayer permits

the jury to ignore this call, and find it at another place. Moreover, if the true location be at the east corner of the Bleckson lot, the grant by Hopkins to Mace could not operate as a dedication further than the line of the Mace deed, which was to begin at the east corner of the Bleckson lot and along Willis street. The prayer, therefore, was bad—First, because it authorizes the jury to find a location of the Mace deed not warranted by its terms; and, secondly, that it declares that the operation of that deed was a dedication of Willis street up to a line to be run more than seven feet from the correct location of the east corner of the lot. The defendant's first prayer proceeds upon the theory that if William Hopkins, before his grant to W. O. Hopkins, dedicated Willis street by the sale of lots binding thereon, and afterwards moved his fence within the limits of the street as so dedicated, it was a mere encroachment on his part, and that the conveyance to Bleckson by the removal of his fence, as described in the evidence, in no manner changed such direction; nor did the deed to Mace, nor the erection of the fence on the Foxwell lot by William O. Hopkins, furnish any evidence of a further dedication of Willis street. If the street was dedicated, and its limits determined, as far easterly as the Bleckson lot, then neither the conveyances to Bleckson nor to Mace altered the direction, because both said deeds call for bounders on the street so dedicated, and run with that street extended.

The prayer also asks the court to rule that the act of W. D. Hopkins in the erection of the fence on the Foxwell lot, back from the corner of the street, as stated, furnishes no evidence of a further dedication. The court is not asked now to rule whether this was or was not in itself a dedication, but that it furnished no evidence, etc. The mere removal of a fence, or the making of a sidewalk and planting trees, may not, in themselves, always be sufficient to establish a dedication. They do not amount to a clear act of dedication, but do furnish evidence tending, in connection with other facts, to prove it. The prayer was therefore properly rejected.

The remaining prayers of the defendant will not be considered in detail. They announce the following propositions: (1) That the direction and course of Willis street were determined by the line of the lots which the plaintiff, William Hopkins, transferred before the defendant's purchase; (2) that the act of Bleckson in moving his fence inward from the street, and then back again to the line of the street, did not amount to a further dedication of the street; (3) nor did the act of Hopkins in placing his fence back on the Foxwell lot alter the general direction of Willis street, even though there was a dedication of the sidewalk; (4) and that if the jury found that the street so located, when extended, would exclude the

parcel of ground for which this suit was brought, the defendant would be entitled to the verdict. It is plain Bleckson moved his fence to remain only conditionally. He states he moved his fence back, expecting to get the commissioners to get Mr. Perry to move his fence back also, but the authorities refused, and therefore he moved his fence back to its original position. To prove a dedication, the intention must be clearly proved by the facts and circumstances. *McCormick v. Mayor, etc.*, 45 Md. 524.

The next proposition is as to the effect of the act of Hopkins in moving the fence back in front of the lot afterwards sold by him to Irene Foxwell. He states that before the sale to the defendant he established a gutter and sidewalk in front of the Foxwell lot, eastwardly to the barn, planted trees along it up to the fence, across Willis street, "for the purpose of widening the street." At that time, and when the defendant purchased his lot, Willis street had not been opened further eastwardly than this fence, and from the place where it stood to Chop-tank river there was an open field. School and Trams streets were also unopened. The Mace lot was the furthest lot from Locust street that had been sold by Hopkins. From the eastern corner of the Mace lot towards the river extended the Foxwell lot, and at the eastern corner of that lot was the fence across the street. So that it appears Willis street, from the eastwardly end of the Mace lot to the fence across at the barn, was a mere end, etc., owned altogether by the plaintiff. It is also in evidence that the gutter and sidewalk below the Mace lot, in front of the Foxwell lot, to the barn, at the time of the defendant's purchase, were overgrown with weeds, and that the barn was the only building between the Mace lot on the northwest and the Gordy lot on the southeast of Willis street and the river. The question is, under these circumstances, did the act of Hopkins, in thus laying off a sidewalk "for the purpose of widening the street," amount to a dedication, so as to alter the direction and extent of Willis street?

It must be noted there is no evidence that the lot of the defendant, nor any of the lots of other persons, were sold with reference to maps or plats. The dedication of Willis street, to the extent of the lots of Perry, Bleckson, and Mace, was effected only on the doctrine of an implied covenant that the street called for by the deeds shall always remain open as a public street. Having thus set apart the street for a public use, it would be a violation of good faith to the public, and those who have acquired private property, to revoke the dedication, and for that reason it cannot be done. *City of Cincinnati v. White*, 6 Pet. 488. But such dedication does not create a right of way over all the lands of the vendor, the "true doctrine" being "that the purchaser of a lot calling to bind on a street, not yet opened by the public authorities, is entitled to a right of way

over it, if it is of the lands of his vendor, to the full extent and dimensions, only until it reaches some other street or public way." The dedication "must necessarily be measured by the limits of the right" the purchaser has acquired by virtue of his front. *Hawley's Case*, 33 Md. 280; *Mayor, etc., v. Frick*, 82 Md. 83, 33 Atl. 435. It is therefore clear that, prior to the time of the establishment of the sidewalk, the dedication of Willis street did not extend further eastwardly from Locust street than the eastern corner of the Mace lot, no lots binding on Willis street having been sold by the plaintiff to the east of that point. If this be so, the act of plaintiff in constructing the sidewalk on his own property, at the end of a cul de sac, for the purpose of widening a street that, later on, he proposed to dedicate to the public, cannot be regarded as an act from which to infer that he then intended to appropriate the sidewalk to the public. Such intention must be clear, from all the circumstances of the case. *McCormick v. Mayor, etc.*, 45 Md. 523; *Tinges v. Mayor, etc.*, 51 Md. 600. If Willis street had already been dedicated to the public use eastwardly from the Mace lot, other questions would arise, on which we do not now pass. This sidewalk was not established under covenants entered into with other parties. It seems never to have been used by the public, or by any one, for it was overgrown with weeds, and it led, not from one highway to another, but by and along that portion of the street that the plaintiff had power to close, to the entire extent of the walk, and it ended, not at a public street, but at a fence located on his own land. It may be conceded that the plaintiff established the gutter with intent to widen the street, but, as we have said, the street itself had not been dedicated as to that part of it, at that time, and therefore his intent must be referred to a widening he intended to make in the future, when he afterwards came to dedicate the street. To make a valid dedication, there would be an intention to dedicate the land to a public use. *Mayor, etc., v. Fear*, 82 Md. 257, 33 Atl. 637; *Barracrough v. Johnson*, 8 Auol. & E. 99. In a word, it seems this sidewalk, which led only to the property of the plaintiff, and which, up to the time of the purchase of the defendant, was not used, or, indeed, capable of being used, by the public, was intended for his own use and that of those persons who may have had occasion to visit the property. Under such circumstances, such an act cannot have the effect of changing the general corner and direction of Willis street as heretofore it existed.

The third prayer was properly rejected. The deed of the plaintiff was by metes and bounds, and the defendant cannot claim outside his lines. It begins at "a post planted" at the intersection of Willis and School streets; thence northwesterly 500 feet, etc.; thence to a "post planted on the line of Willis street," etc. Under such a grant, the lines of the defendant must stop at Willis street. *Gump v. Sibley*, 79 Md. 165, 28 Atl. 977.

The fourth and fifth prayers were properly rejected. If the street had been widened, and that fact was known to the defendant at the time of his purchase, or if he was chargeable with such notice, it might very seriously affect the contention of the parties. It follows, from what has been said, the judgment must be reversed, and a new trial awarded. Judgment reversed, and new trial awarded.

(20 R. I. 381)

SWEET v. CONLEY.

(Supreme Court of Rhode Island. Feb. 2, 1898.)

MANDAMUS — WHEN LIES — TOWNS — CHANGE OF STREET GRADE — RESTORATION — SURVEYOR OF HIGHWAYS — DUTIES — NUISANCE — SURFACE WATER.

1. In mandamus against a surveyor of highways to compel the restoration of a street grade, relator must show a clear right to such relief.

2. Though an abutter have a right to the restoration of a street grade, it is not the duty of the surveyor of highways to restore it, or to work it to a grade established of record, as he is merely a ministerial officer of the town council, and has no authority to incur any indebtedness, except, perhaps, in case of emergency.

3. A surveyor of highways would not be compelled by mandamus to restore at his own expense a street grade which he had changed by order of the town council, although the council had no right to order a change of grade, and the surveyor had no right to comply with such order.

4. It is an actionable nuisance to wrongfully cause the surface water of a street to collect and remain in front of another's premises, so as to injure him in the use and enjoyment thereof.

5. Mandamus will not lie when one has an adequate remedy in the ordinary course of law.

6. Mandamus will not lie to undo what has been done.

Mandamus by Whitford H. Sweet against Phineas A. Conley, surveyor of highways. Proceeding quashed.

Bassett & Mitchell, for petitioner. John Palmer, for respondent.

TILLINGHAST, J. The relator sets out, in substance, that he is the owner of certain real estate situate on Cranston street, in the town of Cranston; that on the 27th of November, 1886, the town council of said town, in accordance with the provisions of the statute in such case made and provided, established a grade for said street from the Pocasset bridge northerly for a considerable portion of said street; that said grade was uniform, the lowest point in which was at said bridge, and, rising therefrom, passed the real estate of the relator at a uniform rise, so that the surface water flowed down said street past his estate. He further sets out that after the establishment of said grade said street was altered and widened, and a new bridge built across Pocasset brook, and that the respondent, Phineas Conley, surveyor of highways of said town, acting under the orders of the town council, proceeded to make said street, so altered and

widened as aforesaid, safe and passable as a highway; that, in so doing, said surveyor was in duty bound either to work said street to the established grade, or, at least, to do nothing inconsistent with such grade; but that said surveyor, unmindful of his duty, has not only not brought said street to the established grade, but has raised the surface thereof, at and near said bridge, above the grade, by reason whereof the surface water, which formerly passed freely beyond and southerly from relator's premises into said brook, is obstructed and ponded in said street in front of his estate, whereby he suffers damage. He therefore prays that a writ of mandamus may issue to said Conley, surveyor of highways, to compel him to remove the obstruction so placed by him southerly from relator's premises, and either bring the surface of the street to the established grade, or else restore the street to the condition it was in at the time of the establishing of the grade as aforesaid. The respondent demurs to the alternative writ which has been issued on the grounds: (1) That there is no allegation that, for any damage sustained, the relator has not his ordinary remedy at law; (2) that there is no allegation in what his damage consists; (3) that there is no allegation of what the grade should be, or how much above, if any, it has been raised; (4) that there is no allegation of demand and refusal; and (5) that the respondent is under and subject to the direction of the town council, or a committee of it, and has no authority to expend money on any highway, without the approval of said council or committee, except on occasions as required by the statutes, and there is no allegation of such occasion, and that he has no authority to make, alter, or change a grade.

We think the demurrer should be sustained. In order to grant the extraordinary relief prayed for, it must clearly appear, not only that the relator is entitled to have said street restored to its original condition so far as the grade is concerned, but also that it is the duty of the respondent to thus restore it by undoing what he has done under the direction of his superior, the town council of said town. In other words, he must show a clear legal right to have the thing done which he asks for, and, if the right be doubtful, the writ will be refused. It is certainly very doubtful, to say the least, whether the relator, in any event, is entitled to have said street restored to its former condition; for, even admitting that a change has been made in the grade thereof without pursuing the statutory method, yet it does not necessarily follow that the relator is entitled to have the former grade restored, and we have not been referred to any case, nor are we aware of any, where it has been decided that such a right exists. But, even conceding that it does, is it clearly the duty of the respondent, who is the surveyor of

highways of said town, to either restore said street to its actual grade as it existed before said change, or else to work it to the grade as established of record? We think not. A surveyor of highways is merely a ministerial officer of the town council, subject to their direction and control, with no authority to incur any indebtedness against the town, except, perhaps, in case of emergency, such as the removal of snow or other obstruction from the highways, and is clothed with very limited and well-defined powers and duties. *Mathewson v. Hawkins*, 19 R. I. 16, 31 Atl. 430. See, also, *State v. White*, 16 R. I. 591, 18 Atl. 179, 1038. He has no power to change the established grade of a highway, nor has he any power to change the actual grade thereof, whether this be the record grade or not, except in so far as such change may be necessary to make the same safe and convenient for travelers; and, having no power to make any such change, it necessarily follows that no duty rests upon him in this regard. This being so, then, can this court properly command the respondent to take up said bridge, and dig down the approaches thereto, so as either to reduce the surface of the street in question to its original grade, or else to reconstruct it in accordance with the record grade thereof, as prayed for in the petition? In other words, can the court order the respondent, at his own expense (for it is clear that it cannot be ordered at the expense of the town), to undo what he has done by direction of the town council, and then proceed to do it over again in some other way? We think not. Suppose such a change should cost \$1,000 or even \$5,000, and suppose, also, that by reason of financial inability, it should be impossible for the respondent to raise the money; how could the court compel the performance of such an order? Still, further, can this court by mandamus take from the town council of said town their statutory power over highways and highway surveyors, and command the alteration of a street in a given way? These are certainly pertinent and practical questions, in connection with the relief which is sought, and they show that very serious, if not insuperable, difficulties might, and probably would, be encountered in attempting to proceed by mandamus for the redress of the grievances complained of, even if the court should find that this form of action could be maintained. Nor do we see that the fact (for such it appears to be from the relation) that both the respondent and the town council acted without authority of law in raising the surface of said street above the established grade thereof makes any difference in the questions before us. In other words, the mere fact that the town council had no authority to order the respondent to raise said grade, and also that the respondent had no right to comply with such order, does not give to the relator the right to redress in this form of action. On the contrary, the

facts alleged would seem to show quite clearly that the relator has an adequate legal remedy for the damages sustained. To wrongfully and illegally cause the surface water of a street to collect and remain in front of one's premises, so as to materially injure and damage him in the use and enjoyment thereof, is a nuisance, and although, being in a highway, it may be a public nuisance, yet, if one suffers peculiar and special damage therefrom, we see no reason why he may not maintain a private action to recover the same; and, where this is so, the extraordinary and summary proceeding by mandamus will not be entertained. As said by Greene, C. J., in *Wilkinson v. Bank*, 3 R. I. 22, in speaking of this form of action: "The proof is taken by *ex parte* affidavits, and the facts must be tried by the court, and not by a jury. The law, therefore, wisely restricts its application, as a remedy to enforce mere private rights of property, to cases where the applicant has no adequate remedy by action in the due course of the common law." See, also, *Simmons v. Davis*, 18 R. I. 46, 25 Atl. 691; *Foster v. Angell*, 19 R. I. 285, 33 Atl. 406; 2 *Spell. Extr. Rel.* § 1374, and cases cited. Moreover, it has frequently been held that this form of action will not lie to undo what ought not to have been done. Thus in *Ex parte Nash*, 15 Q. B. 92, Lord Campbell, C. J., said: "The writ of mandamus is most beneficial; but we must keep its operation within legal bounds, and not grant it at the fancy of all mankind. We grant it when that has not been done which a statute orders to be done, but not for the purpose of undoing what has been done." To the same effect is the able opinion of Chancellor East in *Turnpike Co. v. Marshall*, 2 Baxt. 121 et seq. See, also, *Merrill*, Mand. § 42. Other good reasons why the writ should not be granted in this case are suggested by the demurrer, but, as we deem those already given quite sufficient, we need not consider them. The demurrer is sustained, and the proceeding quashed, with costs.

(20 R. I. 386)

MORGRIDGE v. PROVIDENCE TEL. CO.
(Supreme Court of Rhode Island. Feb. 8, 1898.)

FELLOW SERVANT.

A superintendent in charge of the work of moving and erecting a telephone pole, the moving to be done by having one end placed on a carriage, is a fellow servant of the workmen in directing them to "let go" before the carriage has been backed far enough under the pole.

Action by Edward Morgridge against the Providence Telephone Company. Heard on demurrer to declaration. Demurrer sustained.

Ballou & Tower, for plaintiff. David S. Baker and Walter B. Vincent, for defendant.

TILLINGHAST J. We think the demurrer should be sustained. The plaintiff, while

assisting in the moving of a large telephone pole, was injured by reason of the falling thereof upon his body. The declaration shows that the superintendent in charge of the work had directed the plaintiff and several other fellow servants of his to raise the top end of the pole in order that a carriage on two wheels, called a "dinkey," could be placed under said pole for the purpose of moving it to the hole where it was to be erected. After the pole had been raised, said dinkey was wheeled under the same, by direction of the superintendent, but, before it had reached the place where it was intended it should receive said pole,—that is, before it came in contact with the pole so as to support the same,—the superintendent gave the order to "let go"; whereupon the plaintiff, supposing that the dinkey was so placed as to instantly receive the weight of said pole, he not being in a position where he could see the dinkey, obeyed the order, and, by reason of the fact that the pole was some distance above the dinkey when said order was given, it fell, striking the plaintiff, and seriously injuring him.

In support of the declaration it is contended that the act of the superintendent in ordering the plaintiff and his fellow servants to let go their hold on the pole was, in law, the act of the defendant corporation, and, being a negligent act, gives the plaintiff a right of action. This contention is not tenable. In directing the plaintiff and his fellow servants to let go their hold on the pole, the superintendent was not performing on behalf of the defendant corporation any duty imposed by law upon it; that is, it was not an act which legally devolved upon the defendant to perform. The order to let go might as well have been given by any other employé as by the superintendent. It was a mere incident in connection with the raising of the pole. And as it is the character of the act, and not the rank of the person performing it, which is the test by which to determine whether, in the performance thereof, the person acting is the representative of the master (*Hanna v. Granger*, 18 R. I. 512, 28 Atl. 659; *Larich v. Moles*, 18 R. I. 513, 28 Atl. 661; *Moody v. Manufacturing Co.*, 159 Mass. 70, 34 N. E. 185), it is clear that in the giving of said order the superintendent was acting as a fellow servant. The recent case of *Donnelly v. Bridge Co.*, 117 Cal. 417, 49 Pac. 550, is singularly pertinent. There the plaintiff was injured while engaged in the work of pile driving. A pile had been driven too deep, and the plaintiff, with other men, was sent by the superintendent to lay a foundation for a jack screw to raise the pile. This required the plaintiff to work under the pile driver. He was engaged in carrying and arranging blocks upon which to place the jack. The blocks were supplied from a place 10 or 12 feet above, from which height they were thrown down to the workmen below, the superintendent directing the work. While the plaintiff was stooping down to pick up a block, he was struck by one

thrown from above. The man above inquired before he threw the block if all was clear below, and was answered in the affirmative by the superintendent and others, and the block was thrown. The superintendent, when he gave his answer, was standing within a few feet of the plaintiff, and there was nothing to obstruct his view of him. It appeared that the superintendent noticed the plaintiff the instant after he had given the order, and called to the workmen above to hold, but it was too late, as the block was already falling. The court below held that the injury resulted from the negligent performance of an act which it was no part of the duty of the defendant to perform, and hence that as to that act the superintendent was not the representative of the master, and reversed the judgment of the court below, which was in favor of the plaintiff. We think it is clear, both from our own decisions and from the weight of authority generally, that the declaration does not state any cause of action. Demurrer sustained, and case remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

(68 N. H. 366)

POLLARD v. POLLARD.

(Supreme Court of New Hampshire. Sullivan. July 28, 1895.)

EQUITABLE ASSIGNMENTS—ATTACHMENT—CLAIMS BY THIRD PERSONS.

1. A school district owed defendant and R. on a building contract. Defendant executed an order addressed to B. personally, who was one of three building committeemen, and who, with R.'s oral consent, accepted the order, signing the acceptance B., "Committee." Held, that the order was an equitable assignment.

2. An order equitably assigning a claim due defendant is valid against an attachment, though defendant's debtor was served with the writ before he had notice of the assignment or had accepted the order.

Exceptions from Sullivan county court.

Attachment by Kimball Pollard against Rolon D. Pollard, the Lempster School District, trustee, and Mabel L. Nichols, claimant. The trustee was discharged, and plaintiff brings exceptions. Overruled.

In 1894 the defendant and Raymond M. Pollard jointly contracted to erect a school house for the Lempster school district, agreeing between themselves to share the profits and losses of the contract equally. The district acted by its building committee, consisting of three persons, of whom Arthur L. Benway was one. May 3, 1894, the defendant gave the claimant an order as follows: "Lempster, May 3d, 1894. Mr. Arthur L. Benway: Please pay Mrs. Mabel L. Nichols eighty-two dollars, and charge the same to my account, it being for forty-one weeks' board." An acceptance was indorsed upon the order in these words: "May 3d, 1894. I hereby accept the within order. A. L. Benway, Committee." Raymond was present when the acceptance was made, and orally consented to the same.

The order being regarded as an equitable assignment, the trustee was discharged, subject to the plaintiff's exception.

George R. Brown, for plaintiff. Hosea W. Parker, for claimant.

CHASE, J. The order was, in effect, an equitable assignment, by Rolon D. and Raymond M. Pollard to the claimant, of a part of their claim against the Lempster school district. Conway v. Cutting, 51 N. H. 407; Garland v. Harrington, Id. 409. Although it is addressed to Benway personally, and is signed by Rolon only, and directs the charging of the sum mentioned to his account, the circumstances show that all parties understood it referred to the money that would become due to the Pollards jointly from the district upon the completion of their contract. Benway was one of the three members of the district's building committee, and it appears from the form of his acceptance of the order that he acted in that capacity. So far as appears, he was not personally indebted to the Pollards, or either of them. Raymond's oral consent to the order was a valid transfer of his interest in the subject of the assignment. Thompson v. Emery, 27 N. H. 269; Brewer v. Franklin Mills, 42 N. H. 292; Jordan v. Gillen, 44 N. H. 424, 427; Pierce v. Insurance Co., 50 N. H. 297; Gage v. Dow, 59 N. H. 383; Brown v. Mansur, 64 N. H. 39, 5 Atl. 768. The question whether Benway was authorized to bind the district by an acceptance need not be considered, for an acceptance is not required to make the order operate as an equitable assignment. Garland v. Harrington, supra. The assignment was good as against the plaintiff, even if the district did not have sufficient notice of it before the plaintiff's writ was served. Such assignments are upheld in law, as well as in equity, against subsequent attachments. Gerrish v. Clough, 36 N. H. 519, 524; Chapman v. Haley, 43 N. H. 300, 306; Brown v. Mansur, supra. Exception overruled.

SMITH, J., did not sit. The others concurred.

(68 N. H. 370)

FOWLER v. OWEN.

(Supreme Court of New Hampshire. Rockingham. July 28, 1895.)

TRESPASS QUARE CLAUSUM—TITLE—DAMAGES—EVIDENCE—JOINT TORT FEASORS—RELEASE.

1. In trespass q. c. f., plaintiff may recover, as part of the damages, the costs necessarily incurred in a former suit in equity to gain possession of the land, which plaintiff was compelled to bring in consequence of defendant's acts.

2. In trespass for damages to realty, it is competent to show that defendant had defended an action of trespass by plaintiff against one who claimed to be defendant's tenant on such land, and acted under his authority.

3. An unsatisfied judgment against one of two joint trespassers is no bar to an action against the other.

4. One may maintain trespass q. c. f. against another who shows no better right, even though title be in a third person.

Exceptions from Rockingham county court.

Trespass quare clausum fregit by Richard Fowler against Reese Owen for the recovery of damages for acts done January 1, 1887, and on divers days between that day and the date of the writ, March 19, 1892, and of the expenses incurred in regaining possession of the land from the defendant and his tenants and servants. Verdict for the plaintiff. Subject to the defendant's exception, evidence was received tending to show the following facts: In 1890 the plaintiff recovered judgment in an action of trespass against Asa Beckman for building a house upon the premises. Owen, claiming to own the premises, and that Beckman was his tenant, defended the action. The question of title was the only one tried. The judgment has not been satisfied. Owen and Beckman retaining possession notwithstanding the judgment, the plaintiff filed a bill in equity against them, praying for an injunction to restrain them from committing further trespasses, and to compel them to leave the premises. The bill was taken pro confesso, and a decree made enjoining the defendants to leave the land forthwith, and desist from committing further trespasses upon it and ordering that a writ of possession be issued against them. Copies of the decree were given to them, and a writ of possession issued, by virtue of which an attempt was made to put the plaintiff in possession, but without success. In a subsequent proceeding against Owen, Beckman, and another for violating the injunction, it was found that they were guilty of contempt. As a result of all these proceedings, the plaintiff got possession of the premises in 1891. See 66 N. H. 424, 30 Atl. 1117. It was ruled, subject to the defendant's exception, that the plaintiff was entitled to recover the expenses necessarily incurred and actually paid by him in the equity suit, and the proceeding for violating the injunction. The defendant offered to show that in 1742 the title to the premises was in the province of New Hampshire, and that it has ever since been in the province and the state. The evidence was excluded, subject to the defendant's exception. Judgment on the verdict.

Samuel H. Goodale and John S. H. Frink, for plaintiff. Samuel W. Emery, for defendant.

CHASE, J. At common law, after a party obtains judgment in ejectment he may maintain trespass for mesne profits, and recover, as a part of the damages, the costs necessarily incurred in the action of ejectment. 1 Chit. Pl. 192, 196; 2 Chit. Pl. 870; Aslin v. Parkin, 2 Burrows, 685; Nowell v. Roake, 7 Barn. & C. 404; Symonds v. Page, 1 Crompt. & J. 30; Baron v. Abeel, 3 Johns. 481. In Nowell v. Roake a judgment recovered by the defendant in ejectment was reversed upon a writ of error, and it was held that the costs in the writ of error, taxed as between attorney and client, were recoverable as a part of the damages in the action for mesne profits. Lord Tenterden, C. J., said, "The expenses incurred in the court

of error were part of the damages sustained by the plaintiff by reason of his having been wrongfully kept out of possession by the act of the defendant." The right to recover the expenses of the former action depends upon the necessity for the action, and not upon its particular form. It is immaterial that the plaintiff's preliminary proceedings were in equity, instead of law. The necessary consequence of the defendant's acts was to compel the plaintiff to resort to an equitable or legal action in order to obtain his rights. It is suggested that there may be cases in which the costs of the previous proceedings were in part, at least, unnecessarily incurred, and due to the plaintiff's folly, and which require such a balancing and adjustment of the consequences of wrong as can be done only in equity, and hence that the plaintiff's remedy is by bill in equity, instead of this action. Under the practice in this state, time spent in the consideration of the form of remedy is wasted. *Peaslee v. Dudley*, 63 N. H. 220; *Gage v. Gage*, 66 N. H. 282, 293, 29 Atl. 543. The plaintiff may at any time file a bill in equity as an amendment.

The evidence that Owen defended the plaintiff's action against Beckman was competent. Whatever Beckman did by the procurement of Owen, or under his authority, was Owen's act, as well as Beckman's. For such acts they were jointly and severally liable. The plaintiff was at liberty to sue either of them separately. The unsatisfied judgment against Beckman is no bar to the plaintiff's right to recover in this action. *Snow v. Chandler*, 10 N. H. 92.

The testimony offered by the defendant that since 1742 the title to the land was in the state, and not in the plaintiff, was properly excluded. The defendant made no claim to a right of possession under the state. The plaintiff's possession was sufficient to enable him to maintain the action against one showing no better right, even if the state had the title. *Bailey v. March*, 2 N. H. 522; *Id.*, 3 N. H. 274; *Locke v. Whitney*, 63 N. H. 597, 8 Atl. 920; *Colbath v. Anderson*, 63 N. H. 617; *Sweetland v. Stetson*, 115 Mass. 49; *Nickerson v. Thacher*, 146 Mass. 609, 16 N. E. 581; *Jack. Real Act.* 157; 1 Chit. Pl. 176. An intruder upon the crown may maintain trespass against a stranger. *Harper v. Charlesworth*, 4 Barn. & C. 574. Upon the plaintiff's filing a bill in equity, there will be judgment upon the verdict.

CLARK and CARPENTER, JJ., did not sit. The others concurred.

(67 N. H. 450)

MEREDITH MECHANIC ASS'N v. AMERICAN TWIST-DRILL CO.

(Supreme Court of New Hampshire. Belknap. July 28, 1893.)

RES JUDICATA—ACTION FOR RENT—COVENANT TO REPAIR.

1. A judgment rendered for defendant in a former suit under a lease for rent, upon the

ground that the form of action was misconceived, is no bar to an action in assumpsit for use and occupation for the same period.

2. The breach of a covenant to repair is not a defense to the payment of rent, but only enables defendant to set up a claim for damages for breach of the covenant, either by way of recoupment or cross action.

Assumpsit by the Meredith Mechanic Association against the American Twist-Drill Company for the use and occupation of a mill from July 1, 1887, to July 1, 1888, and from July 1, 1888, to July 1, 1890. Writ dated September 2, 1891. Plea, general issue, with a brief statement of defense, in substance as follows: (1) The use and occupation for which the plaintiff seeks to recover were under a written and sealed lease, and an action of assumpsit cannot be maintained therefor. (2) The plaintiff heretofore brought an action of debt against the defendant, to recover the rent for the first year mentioned in the plaintiff's present declaration, due by the terms of a lease under which the defendant occupied. In that suit the defendant pleaded it did not owe the sum demanded, or any part thereof, and filed a brief statement that the plaintiff had evicted it from a certain portion of the premises; and upon a trial of the case the jury found as a fact that such eviction had occurred, and returned a verdict for the defendant. After the verdict the plaintiff moved for leave to amend its declaration by adding a count in assumpsit, which was refused, and judgment ordered on the verdict. The defendant says that judgment is a bar to the maintenance of this action for the period from July 1, 1887, to July 1, 1888. (3) This eviction, continued during the term mentioned in the declaration, justified the defendant in abandoning the premises; and it did so abandon all that it was able, and received no beneficial use from any part. (4) The plaintiff, by its breach of the covenant to repair contained in the lease, justified the defendant in abandoning the premises; and it did so abandon all that it was able, and receive no beneficial use from any part. The plaintiff moved to reject the brief statement, and offered to show that the defendant had a beneficial use of the property described in the writ during each of the years named therein. Case discharged.

Mr. Wilson and Bingham & Bingham, for plaintiff. E. A. & C. B. Hibbard, for defendant.

WALLACE, J. It was settled by a former decision in a case between these same parties that the plaintiff can, under the quantum meruit counts in assumpsit, recover for any beneficial use the defendant had of the premises in question, on the principle laid down in *Britton v. Turner*, 6 N. H. 481, notwithstanding the defendant was holding under a written lease under seal. *Meredith Mechanic Ass'n v. American Twist-Drill Co.*,

66 N. H. 539, 30 Aft. 1119. The plaintiff can recover under the quantum meruit counts in assumpsit for the use and occupation of the premises from July 1, 1887, to July 1, 1888, notwithstanding it has already brought one suit in debt for rent on a written lease under seal, covering the same period, and a judgment was rendered against it upon the ground that the form of action was misconceived. The issue in this case is not the same as in the former case, although both suits may have reference to the same subject-matter. The issue in the former suit was, did the plaintiff evict the defendant? The issue in this suit is, did the defendant have any beneficial use of the premises? And the judgment in the former suit, not being on the merits of this, is not a bar. *King v. Chase*, 15 N. H. 9; *Gage v. Holmes*, 12 Gray, 428. The denial of the motion to change the form of action after the verdict in the former suit, on the ground that, at that late date, justice did not require the amendment, has no bearing on the question whether the former judgment for the defendant, not on the merits, but on the defect in the form of action, is a bar to this action.

The defendant's ground of defense, that, by reason of the plaintiff's breach of his covenant to repair, it is excused from paying rent, is not well taken. The breach of the covenant to repair is not a defense to the payment of rent. It enables the defendant to set up a claim for damages for breach of the covenant, either by way of recoupment, or by way of cross action, as it may elect. *Tayl. Landl. & Ten.* 331. The plaintiff has the right to go to trial on the question whether the defendant had any beneficial use of the premises during the time specified in the declaration, in excess of the damage resulting from the breach of the covenants of the lease. Case discharged.

BLODGETT, J., did not sit. The others concurred.

(67 N. H. 342)

HERVEY et al. v. DIMOND.

(Supreme Court of New Hampshire. Merrimack. March 17, 1893.)

CONDITIONAL SALES—FORFEITURE—ATTACHABLE INTEREST—RIGHTS OF CREDITOR.

1. A right to a forfeiture by failure to make monthly payments on a lease contract when due is waived by a subsequent acceptance of them.

2. Where goods are delivered under a contract called a "lease," providing that the lessors shall remain absolute owners of the goods until the lessee has paid the full amount due, in monthly installments, the lessee has an assignable interest to the extent of the installments paid, which may be attached.

3. A creditor who attaches goods in which his debtor has the interest of a special owner, by reason of partial payments thereon under a lease contract, can hold the goods as against the general owner, if he seasonably tenders him so much of the price as may be due.

Replevia by William H. Hervey & Co. against G. H. Diamond. Facts agreed. Case discharged.

February 5, 1891, the plaintiffs delivered from their place of business, in Boston, to one Fred D. Story, at Penacook, a lot of household furniture, under a contract in writing, in which it was stipulated that he had hired and received the same of the plaintiffs, and would pay them, for the rent and use thereof, the sum of \$5 per month, until the price, \$77.88, should be paid; that the plaintiffs were to remain absolute owners of the property until the full price should be paid, when they were to "release their claim and right in the goods above leased" to Story. The contract further provided that if Story should fail to pay the rent as stipulated, or should remove the goods from Penacook, or sell or underlet them, or suffer them to be attached, he would thereby forfeit all right to the goods, and to the further use of them, and to all moneys paid, and that the plaintiffs might enter the premises of Story, and remove the same. August 14, 1891, Story paid, and the plaintiffs accepted, a monthly installment, making the whole amount paid by him under the contract \$80. On that day, the defendant, as deputy sheriff, attached the goods, as the property of Story, in the freight station at Penacook, awaiting shipment to Boston, on a writ in favor of one Whitaker. In answer to a letter from the defendant inquiring the amount due them upon the contract, the plaintiffs replied, August 18th, that the balance due was \$47.88; that they had given Story permission to move the goods to East Boston; and concluded, "So, we do not presume that you would care to detain the goods knowing they were leased property." A demand made September 8th for the goods was refused. On that day, Whitaker, the attaching creditor, tendered them \$47.88, which was refused. Later, the same day, the defendant demanded in writing, of the plaintiffs, an account, under oath, of the sum due them by virtue of any contract with Story. The plaintiffs never made any reply to the demand. September 12, 1891, they replevied the goods, and took them to Boston.

Streeter, Walker & Chase, for plaintiffs. Albin & Martin, for defendant.

SMITH, J. The contract (called a "lease") does not, in legal effect, differ materially from a conditional sale. Although, by the contract, it was stipulated that the plaintiffs should remain absolute owners of the goods until the full price should be paid, it does not follow that Story had no interest in the property. He had the right to pay the balance due, and become the owner of the property. While the plaintiffs remained the general owners until the full price should be paid, Story's interest was that of a special owner, which the law recognizes and protects. It was an assignable and attachable interest, his assignee or attaching creditor acquiring the same rights as

he had. If Story failed to make the monthly payments according to the contract, and the plaintiffs might for that reason have asserted a forfeiture, they waived the default by accepting an installment August 14th.

Although the attachment was nominally of the property, yet it plainly appears that Whitaker did not intend to attach in disregard of the plaintiffs' rights, and he fully recognized them by tendering the amount due. If necessary, the officer's return can be amended to conform to the fact. By the tender of the amount due the plaintiffs, their title to the goods became vested in Story, subject to Whitaker's attachment. As Whitaker seasonably tendered the amount of their claim, the defendant is entitled to judgment for the value of the property, and for his costs. A few of the authorities in support of these views are *Sargent v. Gile*, 8 N. H. 325; *Porter v. Pettengill*, 12 N. H. 299; *Bailey v. Colby*, 34 N. H. 29; *McFarland v. Farmer*, 42 N. H. 386; *Partridge v. Philbrick*, 60 N. H. 556.

There is a clause in the contract that Story, by suffering the property to be attached, would forfeit all right to and use of the goods. It does not appear that Story procured or advised the attachment to be made. Whether he can be said to have "suffered" the attachment to be made, when it was not made by his procurement or with his consent, and when, so far as appears, he could not prevent it, is a question not made. The plaintiffs have not contended or suggested that Story's interest in the goods was terminated by the attachment. Case discharged. All concurred.

(67 N. H. 344)

SMITH v. SHERHAN et al.

(Supreme Court of New Hampshire. Merri-mack. March 17, 1893.)

WILLS—CONSTRUCTION—PROVISION FOR CHILDREN.

Where testator bequeathed his residuary estate in trust to be expended, so far as necessary, for the support of the wife, with remainder over to "legal heirs," two of the testator's children, otherwise omitted from the will, are not entitled to the portion coming to them, as if the father was intestate, under St. 1822, § 3 (Laws [Ed. 1830] p. 355).

Bill by Leland A. Smith, executor, against William H. Sheehan and others, for the construction of a will. Case discharged.

The will, after legacies to several of the testator's children and others, and making a partial provision for the widow, contains a residuary clause as follows: "Fourth. All the rest and residue of my estate I give to said Leland A. Smith, in trust, to expend so much thereof as may be, in his opinion, necessary for the support of my said wife during her life, and whatever may remain at her decease I give, bequeath, and devise the same to my legal heirs in the same proportion as if no will had been made; it being my wish that said trustee should use this fund for the support of my said wife." The widow died a few days after the testator. William H. and James, sons of the

testator, are two of the five legal heirs. They are not named or referred to in the will, except as "legal heirs" in the clause quoted, and claim that they are not devisees or legatees, and that they are entitled to the same portion of their father's estate as they would be if he had died intestate. The other defendants claim that William and James are referred to in the will, and are legatees, within the meaning of the statute. The property to be disposed of under the residuary clause consists of real estate and about \$3,100 in money in the hands of the plaintiff.

John M. Mitchell, for William H. Sheehan and James Sheehan. Leach & Stevens, for Thomas Sheehan, John F. Sheehan, and Nora Sheehan.

SMITH, J. Section 3 of the statute of 1789 provided "that any child or children, or their legal representatives, in case of their death, not having a legacy given him or them in the will of their father or mother, shall have a portion of the estate of the testator assigned unto him, her or them, as though such parent had died intestate." Laws (Ed. 1815) p. 198. In *Merrill v. Sanborn*, 2 N. H. 499, decided in 1822, a testator, among other descendants, left seven grandchildren, the children of a deceased son. In his will he mentioned two of his grandchildren and their father. It was held that the presumption of law was the other five grandchildren were not omitted through forgetfulness. The court said: "It is incredible that he should have passed over five out of seven grandchildren through forgetfulness." The case came within the strict letter of the statute, but the decision went upon the ground that the omission was not unintentional. Section 3 of the statute of 1822 provided "that if there be any child, or any lineal heir of a child in the descending line, which has no devise or legacy by the will of a deceased father or mother, and which is not named or referred to in such a manner as to show that it was not out of the mind of the testator at the time of making the will, * * * every such child or heir shall inherit and have assigned to it the same portion in the estate of the deceased as it would be entitled to if such deceased person had died intestate." Laws (Ed. 1830) p. 355. The provisions of Pub. St. c. 186, § 10, identical with Rev. St. c. 156, § 9, Gen. St. c. 174, § 10, and Gen. Laws, c. 193, § 10, are as follows: "Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate." In 1854 a case arose where a testator in one clause of his will gave a legacy to a son, and in another a legacy to a grandson, child of another son to whom no legacy or devise was given, and who was not named or referred to in the will. It was held that the naming of one person, however closely related to another, without more, will not be

deemed a reference to such other; that the naming of a grandson, and describing him as such, in a devise or legacy to him as such, will not be deemed, without more, a reference to his father or mother,—thus practically overruling *Merrill v. Sanborn*. *Gage v. Gage*, 29 N. H. 533. The court said (page 543): "The true rule of law is just what is laid down in the statute,—if a child or grandchild is not named or referred to in the will, and is not a devisee or legatee, he will take his share as if the estate was intestate." And (page 542): "To be entitled to a distributive share, a child or grandchild must be neither named nor referred to, nor a legatee or devisee." Were the two sons whose names are not mentioned in the will "referred to," and are they devisees or legatees? Both questions must be answered in the affirmative. There is no reasonable doubt that by the words "legal heirs" the testator had in mind his five children. "Child" and "heir," in common speech, often mean the same person. If he had used instead the words "my children," or "my daughter and sons," or "my daughter and four sons," his meaning would not be open to doubt. His intention would have been as certain as if he had inserted their names in his will. His words, "to my legal heirs in the same proportion as if no will had been made," show that he intended his children. Having in mind as his heirs his children or the descendants of deceased children, the beneficiaries intended are made as certain as if they had been mentioned by name. That the two contesting sons are two of a class of five is not important. They are none the less legatees. It is not questioned that the five children take each a considerable property under the residuary clause. Though the entire residue might possibly be consumed in the support of their mother, it may reasonably be inferred that the testator understood it would not all be needed for that purpose, and the legacies to his children would be substantial in amount. The decisions cited and commented upon by counsel for the contestants are cases where there was a posthumous child, and therefore not specially applicable. Under the facts existing in such cases, it will generally appear that a posthumous child could not have been in the mind of the testator. Case discharged.

BLODGETT, J., did not sit. The others concurred.

(87 N. H. 440)

McMURPHY v. ADAMS.

(Supreme Court of New Hampshire. Rockingham. July 28, 1893.)

MORTGAGES—RIGHT TO ATTACE.

A mortgagee cannot question the validity of a prior mortgage which is valid between the parties thereto, and to which his mortgage is in terms subjected.

Exceptions from Rockingham county.

Bill in equity by Alexander McMurphy, the holder of a second mortgage, to redeem from

Benjamin Adams, administrator, the holder of the first mortgage, in possession. Facts found by the court: The defendant's mortgage was originally made to secure a note for \$547. After its execution the defendant loaned the mortgagor \$100 more, surrendered the note for \$547, and took a new note for \$647. The condition of the mortgage was changed to correspond with the new note, and the mortgage was then recorded. Afterwards the plaintiff took his mortgage, which was made expressly subject to the defendant's mortgage for the security of the note for \$647. The court ruled that, in order to redeem, the plaintiff must pay the amount due upon the \$647 note, and the plaintiff excepted. Exceptions overruled.

Crawford & Pillsbury, for plaintiff. G. K. Bartlett, for defendant.

WALLACE, J. The mortgage, when the last \$100 was loaned, was changed from a mortgage securing the payment of \$547 to one securing the payment of \$647, and was re-delivered on the date this change was made. The payment of this \$100 was not a future advancement, as both the note and mortgage as changed called for the payment of \$647, the exact amount which the mortgagee had loaned the mortgagor at the time of the re-delivery of the mortgage. It is urged against this mortgage that it was not acknowledged and recorded in accordance with sections 4 and 7, c. 121, Gen. St. It was good between the original parties to it, and against others who had notice of it. *Montgomery v. Dorion*, 6 N. H. 250; *Stevens v. Morse*, 47 N. H. 532; *Gooding v. Riley*, 50 N. H. 400, 405; *Sanborn v. Robinson*, 54 N. H. 239; *Moore v. Kidder*, 55 N. H. 488, 496; *Adams v. Rice*, 65 N. H. 186, 18 Atl. 652. The plaintiff had notice in his deed of the existence of the first mortgage and its amount, and took his mortgage claim upon the express stipulation that it was subject to the first mortgage, and that the first mortgage was given to secure a note of \$647; and there is no reason why, in redeeming, he should be relieved from paying the full amount due on the \$647 note. *Flanders v. Jones*, 30 N. H. 154, 161, 163; *True v. Congdon*, 44 N. H. 48, 58. Exceptions overruled.

OLARK, J., did not sit. The others concurred.

(67 N. H. 483)

KIMBALL CARRIAGE CO. v. CITY OF MANCHESTER.

(Supreme Court of New Hampshire. Hillsborough. July 28, 1893.)

TAXATION—EXEMPTION—MANUFACTURES.

Under Gen. Laws, c. 53, § 10, which is part of an act to encourage manufacturing, towns may exempt from taxation any establishment for the manufacture of fabrics of wood, iron, etc., and the capital used for operating the same. *Held*, that a company so exempted, whose business was manufacturing carriages,

was subject to taxation on a stock of carriages which it purchased and did not manufacture.

Action by the Kimball Carriage Company to compel the city of Manchester to abate its taxes. Facts found by the court. Dismissed.

O. E. Branch, for plaintiff. Edwin F. Jones, for defendant.

WALLACE, J. April 1, 1890, the city of Manchester passed the following vote: "Resolved by the mayor, aldermen, and common council of the city of Manchester, in council assembled, as follows: Whereas, the Kimball Carriage Company, a corporation duly established by law, with a capital of \$30,000, desire to locate their factory and carry on their business in the city of Manchester, providing sufficient inducements are given them by the city government: Resolved, that if the Kimball Carriage Company will locate and establish their business in this city, that the factory and real estate in which the same is located, and the machinery therein and other property necessary in conducting said business, shall be exempt from all taxation for a period of ten years from April 1, 1890." Thereupon, and in consideration of the passage of the resolution of exemption, the Kimball Carriage Company, a corporation whose business is "manufacturing, repairing, and dealing in carriages, sleighs, harnesses, robes, and stable furnishings," established, and has since carried on, its business in the city of Manchester. It does a manufacturing business and a commercial business in buying and selling carriages and other goods which it does not manufacture. The city of Manchester, in 1891, assessed a tax on the stock of carriages and other goods which the company purchased and did not manufacture. The plaintiff asks an abatement of this tax.

The question is whether the stock of goods kept for sale by the plaintiff, which it purchased and did not manufacture, is exempt from taxation under the vote of the city. This raises the inquiry whether the city has the power to exempt from taxation any property not employed in some kind of manufacturing. The statute provides that "towns may by vote exempt from taxation, for a term not exceeding ten years, any establishment therein, or proposed to be erected or put in operation therein, and the capital used in operating the same, for the manufacture of fabrics of cotton, wool, wood, iron, or any other material; and such vote shall be a contract binding for the term specified therein." Gen. Laws, c. 53, § 10. "The title of the original act (Laws 1860, c. 2361) was 'An act to encourage manufactures.' The general purpose of the law was to increase employments, means of support, and profit, home markets, business, and population, by the extension of manufacturing industry, upon which the general pros-

perity of the state is so largely dependent." Opinion of Court, 58 N. H. 623. The language of the statute authorizing the exemption from taxation of "any establishment," and "the capital used in operating the same, for the manufacture of fabrics of cotton, wool, wood, iron, or any other material," limits the power of exemption from taxation to establishments and capital used in the manufacture of fabrics of some kind. This construction gives full effect to every word of the statute, and makes manufacturing the test of exemption. A statutory exemption from taxation is strictly construed. It will never be extended in scope or duration beyond what the language of the statute clearly requires. *Factory v. McConihe*, 7 N. H. 309; *Academy v. Exeter*, 58 N. H. 306; *Boody v. Watson*, 63 N. H. 320. It is immaterial whether the vote was broad enough to cover the plaintiff's stock in trade, because the city had no power to exempt from taxation any property not engaged in manufactures. Petition dismissed.

CLARK, J., did not sit. The others concurred.

(68 N. H. 340)

BLOOD et al. v. MANCHESTER ELECTRIC LIGHT CO. et al.

(Supreme Court of New Hampshire. Hillsboro. July 26, 1895.)

MUNICIPAL CORPORATIONS—TAXPAYERS' RIGHT TO SUE—POWERS—CONTRACTS—FRAUD—SUFFICIENCY OF PLEADING.

1. A taxpayer may resort to equity to restrain a municipal corporation and its officers from appropriating money raised by taxation to unauthorized uses.

2. Council of Manchester may contract for street lighting for a period beyond the unexpired terms of their office, under Pub. St. c. 40, § 3, giving towns "power to make any contracts necessary and convenient for the transaction of the public business," and Pub. St. c. 50, § 1 (Laws 1848, c. 384, § 14), giving the city councils of Manchester authority to exercise "all the powers vested by law in towns."

3. General allegations of fraud, without specifying the facts, are insufficient on demurrer.

Bill by Aretas Blood and another against the Manchester Electric Light Company and another to set aside a contract made May 23, 1893, by the city councils of the city of Manchester, with the Manchester Electric Light Company, for lighting the streets of the city for a period of 10 years, on the ground that the councils did not have power to make a contract for such a period, and that the contract is void because of fraudulent conduct of members of the city councils and of the agents of the company in making it. The facts constituting the alleged fraud are not set forth. The defendants demurred. Sustained.

David Cross, Sulloway & Topliff, and Burnham, Brown & Warren, for plaintiffs. James F. Briggs and Oliver E. Branch, for defendant Manchester Electric Light Company. Edwin F. Jones, for defendant city of Manchester.

CHASE, J. In this state, taxpayers have a right to resort to equity to restrain a municipal corporation and its officers from appropriating money raised by taxation to illegal or unauthorized uses. *Brown v. Marsh*, 21 N. H. 81; *Merrill v. Plainfield*, 45 N. H. 126; *Gates v. Hancock*, Id. 528; *Greenland v. Weeks*, 49 N. H. 472, 480; *Brown v. Reding*, 50 N. H. 336, 348; *Brown v. Concord*, 56 N. H. 375. The remedy is direct, convenient, and adequate, and falls within the rule which entitles parties to the best practical remedy for the redress of their wrongs. The object of such a suit is to enforce a trust lodged with a municipal corporation in behalf of its taxpayers,—a matter that is clearly within equity jurisdiction. 2 Dill. Mun. Corp. § 915. The case is analogous to those in which stockholders of a private corporation resort to equity to have the corporation and its officers restrained from doing unauthorized acts. *Marsh v. Railroad Co.*, 40 N. H. 548; *Pearson v. Railroad Corp.*, 62 N. H. 537. If there are authorities to the contrary elsewhere, they are not approved. This cause of demurrer is overruled.

Another ground of demurrer is that the facts alleged in the bill do not show that the contract is void for want of power in the city councils to make it. The particular question submitted in this connection is whether it was within the power of the councils to make a contract for lighting streets for so long a term as 10 years. The plaintiffs claim that the councils could not bind the city beyond the term of their office. The powers of the city, and the authority of its councils to act for it, are conferred by statute. Section 1, c. 40, Pub. St., provides that "every town is a body corporate and politic, and by its corporate name can sue and be sued, prosecute and defend, in any court or elsewhere." Section 3 empowers a town to purchase and hold real and personal estate for the public uses of its inhabitants, and to sell and convey the same, and to "make any contracts which may be necessary and convenient for the transaction of the public business of the town." The lighting of public streets is public business, and towns are expressly empowered to vote money for that purpose. Pub. St. c. 40, § 4. No limitation is put upon this power in reference to the lighting of streets that does not pertain to it in reference to other subjects. A town has as complete power to contract for lighting its streets as for building its highways or other public works. The only limitation is the general one that the contract shall be "necessary and convenient" for the transaction of the town's business. This is simply a declaration of the common law, applicable to all corporations, public as well as private, confining their powers to contract to those subjects which are necessary and proper to enable them to fulfill the object of their incorporation. The city councils of Manchester were authorized to exercise the powers of the corporation, namely, "all the powers vested by law in towns or in the inhabitants thereof."

Pub. St. c. 50, § 1; Laws 1846, c. 384, § 14. This language excludes all ground for believing that the legislature intended to limit the authority of the councils so that they could not bind the corporation beyond the unexpired part of their term of office. The legislature would not leave such intention to be inferred from language which conveys no suggestion of the limitation. The necessity for continuity in the operations of the government is a reason why there should be no such limitation. The agencies of the government change, but the government goes on without interruption. The authority of the city councils while in office being co-extensive with the powers of the city or its inhabitants, the limitation in their term of office is immaterial in the decision of the question under consideration. The contract stands the same as if it had been made by a vote of the inhabitants acting under a town organization.

It is claimed by the plaintiffs that a town cannot bind itself by a contract for a term of years, because it would disable the town from performing its legislative functions to their full extent for the time being. If this were so, a town's power to contract would be nominal, rather than real. It would not answer the requirements of its business. If a town could disregard its contracts at will, on the ground that it has no power to bind itself beyond the moment employed. In making them, people would be reluctant to enter into contracts with it. A person would not ordinarily risk his labor and money in ventures so precarious, certainly not unless the compensation corresponded to the risk. For example, if the city councils of Manchester had been able to induce any one to light its streets for a time to be measured by their will, and to furnish the necessary apparatus and fixtures for so doing (which is exceedingly doubtful), they would have been able to do it only upon payment of a large price, much larger than would have been necessary if the time of the service was fixed by the agreement of the parties. Moreover, a service depending upon such a contract would be unreliable, and subject to constant interruptions, and would not meet the public needs.

The reason assigned for the disability alleged is not sound. In making contracts, a town or city does not act in its legislative capacity, but in what is termed, for the sake of distinction, its private capacity. 1 Dill. Mun. Corp. §§ 27, 39. In this capacity it resembles an individual or private corporation; and its contracts have the same binding force upon it that the contracts of individuals and private corporations have upon them (*Greenland v. Weeks*, 49 N. H. 472, 480, et seq.; *South Hampton v. Fowler*, 52 N. H. 225, 231; *Small v. Inhabitants of Danville*, 51 Me. 359, 361), and are equally protected by the federal constitution from impairment by subsequent legislation on the part of either the state or the town (*Fletcher v. Peck*, 6 Cranch, 87; *Gale v. Village of Kalamazoo*, 23 Mich. 344; *City*

of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396; *City of Valparaiso v. Gardner*, 97 Ind. 1; *New Orleans, M. & C. R. Co. v. City of New Orleans*, 26 La. Ann. 478, 481; *Philadelphia v. Fox*, 64 Pa. St. 169; *Western College v. Cleveland*, 12 Ohio St. 375, 377; 1 Dill. Mun. Corp. §§ 66 et seq., 116). The city councils, in exercising the powers of the city, could determine the kind of lights to be used for lighting the streets, their location, when they should be lighted, and all other details of the business. They had power also to determine the length of time a contract for lighting should continue, in view of the necessity and convenience of the service required. If they in good faith exercised the discretion lodged with them, their contract is a legal contract, and will bind the city the same as a similar contract made by the directors of a private corporation binds it. *Dibble v. Town of New Haven*, 58 Conn. 199, 14 Atl. 210; *Putnam v. Grand Rapids*, 58 Mich. 416, 419, 25 N. W. 330. If they should make a contract for a term of unreasonable duration, this circumstance would be evidence of want of good faith on their part. There is no better reason for claiming that they may bind the city for 100 years if they can bind it for 10 years than there is for claiming that they cannot bind it for a day if they are incapable of binding it for a term of years. Extreme cases either way furnish little aid in the argument, except to make more prominent, as a test of good faith, the reasonableness of the term when considered in view of the necessity and convenience of the undertaking. This is the limit which the statute has placed upon their powers. It does not appear that the councils went outside these limits in making the contract under consideration, and the demurrer cannot be sustained on that ground. 1 Dill. Mun. Corp. §§ 311 (note 4), 319, 327. The allegations of fraud, being in general terms, without specifying the facts, are insufficient. *Eastman v. Thayer*, 60 N. H. 408, 413. Demurrer sustained. All concurred.

(57 N. H. 549)

BROWN v. MERRIMAOK RIVER SAV. BANK.

(Supreme Court of New Hampshire. Hillsboro. March 16, 1894.)

SAVINGS BANKS — BY-LAWS — STOLEN DEPOSIT BOOK — RIGHTS OF DEPOSITOR — DUTY OF BANK — NEGLIGENCE — TRIAL — NONSUIT — QUESTIONS FOR JURY — EVIDENCE — INSTRUCTIONS.

1. Where a depositor, on making his first deposit in a savings bank, signed an agreement to be bound by the by-laws printed in the deposit book then given him, such by-laws governed the rights of the parties, as a material part of the contract of deposit.

2. A by-law of a savings bank, warning the depositor that "the institution will not be responsible for loss sustained, when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentation," did not relieve such bank from the duty of acting in good faith, and with reasonable care, in making payment on presentation of such book.

3. In an action against a savings bank to recover for money deposited, which had been paid to another than the depositor on presentation of his deposit book, which had been stolen, a motion for a nonsuit was properly denied, where there was evidence of negligence on the part of defendant, in not requiring such person to identify himself, and in not comparing his signature with that of such depositor on the bank's books.

4. The only question for determination in such case was whether defendant exercised ordinary care in so paying such money, which was for the determination by the jury.

5. Evidence that such depositor at the time of his death, about 2½ months after such money was drawn, possessed but a small amount of money, was properly admitted, as tending to negative defendant's position that such depositor, or some one with whom he was in collusion to defraud defendant, drew such money.

6. Where the issue involved was the exercise of reasonable care by defendant, a request to instruct was erroneous, which limited the duty of defendant to the exercise of ordinary care in regard to the "facts and circumstances within its knowledge," instead of to the facts and circumstances which by the use of due care it might have known.

7. A request to instruct was erroneous, which asked that the degree of care ordinarily exercised by defendant in its business should be the standard whereby the liability of defendant should be determined, instead of the degree of care exercised by persons of average prudence.

Exceptions from Hillsboro county.

Assumpsit by Albert O. Brown, administrator of the estate of Sale Page, deceased, against the Merrimack River Savings Bank, for money deposited by plaintiff's intestate in the defendant bank, and dividends and interest. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

There was evidence tending to show: That Sale Page deposited in the defendant bank, October 8, 1889, \$200, and signed an agreement to be bound by the by-laws of the bank, and received a deposit book, in which the rules and by-laws of the bank were printed in conspicuous type, among which by-laws was the following: "Guard against Fraud in Withdrawing Deposits. As the officers of this institution may be unable to identify every depositor transacting business at the bank, the institution will not be responsible for loss sustained, when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentation." That on the 11th day of December, 1890, he made a further deposit of \$100, which was entered in his book. That the officers of the bank had no personal acquaintance with him. That it was the custom of the bank to pay deposits to the person presenting the deposit book and signing the receipt book, unless something in the conduct or appearance of the person, or the circumstances attending the withdrawal, excited suspicion concerning his identity. That on the 11th day of November, 1891, some person presented the deposit book of Page to the bank, and requested payment. That there was nothing in the request, manner, or appearance of the person that excited the suspicion of the bank teller respecting

his identity. That the money was paid to him in good faith by the teller, without making any inquiry concerning his identity; he believing the person to be Sale Page, the owner of the deposit. That the total number of depositors at that time was 6,400, not more than 5 per cent. of whom were personally known to the bank officers. That in the morning of the second day after the withdrawal, and immediately after Page discovered his loss, he went to the bank, and made inquiry if his deposit had been paid, and complained that his book had been stolen from his trunk, where he had kept it. That he kept his book and clothing locked in an ordinary trunk in his room, which was locked while he was absent from it. That the room was in a lodging house having 35 to 45 lodgers, and open at all hours of day and night. And that he was employed as a fireman, and worked nights.

(1) At the close of the evidence the defendants moved for a nonsuit, which was denied, and they excepted.

(2) A witness testified that one Merryfield was suspected of the theft, and was taken to the police station, and questioned about it, but was not arrested, and that Page had stated that Merryfield had been in his room. The defendants offered to show that Merryfield kept a disreputable place near where Page roomed. The evidence was excluded, and the defendants excepted.

(3) Page lived about two months and a half after the alleged theft. He was a single man, and the evidence tended to show that he was industrious and economical in his habits. The amount paid by the defendants to the person who presented the book was \$322.06. Page had deposits in three other savings banks. There was evidence tending to show that all the bank books were stolen at the time the one in question was stolen, and that the thief collected the amounts due upon two of them; also, that Page had no property except those deposits and his clothing. As bearing on the question whether Page himself, or some one with whom he was in collusion to defraud the defendants, received payment from them (which was one ground of defense), the plaintiff was allowed to introduce evidence, subject to the defendants' exception, tending to show that Page possessed only \$15.10 in money, and some clothing, at the time of his decease, and also that he changed his room and boarding place soon after the alleged theft, for room and board at somewhat cheaper rates.

(4) The defendants requested the following instructions: "If the bank, having no notice of the loss of the book, acted in good faith, and with reasonable care, under all the facts and circumstances within its knowledge, in paying this deposit to the person presenting the book, the plaintiff cannot recover. Reasonable care, in this case, is such care as the bank exercised in the transaction

of its usual and ordinary business under the same or similar circumstances. The plaintiff's intestate, under his contract with the bank, was bound to keep his bank book in close and careful custody. If he failed to do so, he cannot recover. The kind and degree of care he was bound to exercise are measured by the danger and liability of loss to which his book was exposed." These instructions were not given, except so far as they were embodied in those given. After stating to the jury that the defendants were bound by the acts and admissions, if any, of their teller, Mr. Emerson, and explaining the legal effect of the by-law above quoted, the following instructions, among others, were given: "Did the bank, or, in other words, did Mr. Emerson, in paying the money to the man who presented the book, exercise reasonable care (that is to say, ordinary care) in discovering whether that man was Sale Page? * * * Ordinary care is such care as persons of average prudence would exercise under the same circumstances. * * * If Mr. Emerson exercised that degree of care, the bank has fulfilled its contract with Sale Page, and is not required to pay the plaintiff again. If he did not exercise such care, the payment was not good,—it was not a fulfillment of the bank's contract with Mr. Page,—and the bank is still liable to the plaintiff, notwithstanding the payment." There was no exception to the instructions given. The defendants moved to set aside the verdict for errors covered by the foregoing exceptions.

Burnham, Brown & Warren, for plaintiff.
David Cross and Sulloway & Topliff, for defendant.

WALLACE, J. The by-law of the bank, that "the institution will not be responsible for loss sustained, when the depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentation," was a material part of the contract of deposit entered into by the bank and Page when he made his first deposit, and signed the agreement to be bound by the by-laws which were printed in the deposit book then given him, and governs the rights of the parties. *Heath v. Bank*, 46 N. H. 78; *Wall v. Institution*, 6 Allen, 320. It, however, did not relieve the bank from the duty of acting in good faith, and with reasonable care. *Kimball v. Norton*, 59 N. H. 1; *Wall v. Bank*, 64 Hun, 249, 19 N. Y. Supp. 194; *Wegner v. Bank*, 76 Wis. 242, 44 N. W. 1096; *Allen v. Bank*, 69 N. Y. 314. The motion for a nonsuit was properly denied, because there was some evidence tending to show negligence on the part of the defendant, in not requiring the person who presented the book to identify himself, and in not comparing his signature with that of Page on the bank's books. The question of contributory negligence is not involved. The

plaintiff's loss of his bank book, whether with or without negligence on his part, was not the legal cause of the injury complained of, but only the occasion of it, or merely an antecedent condition of it. The only question is whether the defendant exercised ordinary care in paying this money in the way it did. If it did, it is without fault, and is not liable. If it did not, its negligence is, in law, the sole cause of the plaintiff's loss. *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 163. The question was rightfully submitted to the determination of the jury. *Paine v. Railway Co.*, 58 N. H. 611, 613.

The offer of the defendant to show that Merryfield, who was suspected of the theft of Page's book, kept a disreputable place near where Page roomed, was properly denied, as that evidence does not bear on the question at issue.

As bearing on the claim of the defense that Page himself, or some one with whom he was in collusion to defraud the defendant, drew the money from the bank, the plaintiff was properly allowed to show that Page, at the time of his death, about two months and a half after the money was drawn, possessed but a small amount of money, as having some tendency to negative this position of the defendant.

In regard to the instructions requested by the defendant, the first request was erroneous, because it limited the duty of the bank to the exercise of ordinary care in regard to the "facts and circumstances within its knowledge," instead of to the facts and circumstances which, by the use of due care it might have known; thus relieving it from the consequences of "culpable ignorance." The second request was erroneous, because it asked that the degree of care ordinarily exercised by the defendant in its business should be the standard which should determine the defendant's liability. Instead of the degree of care which persons of average prudence exercise. The instructions given in regard to these matters were unobjectionable. The third and fourth requests were properly refused, in view of the position already taken in regard to contributory negligence. Exceptions overruled.

CHASE, J., did not sit. The others concurred.

(91 Me. 17)

INHABITANTS OF PALMYRA v. NICHOLS
(Supreme Judicial Court of Maine. Nov. 4, 1897.)

CONTRACT OF INDEMNITY—CONSTRUCTION—SUPPORT OF PAUPER—CONTRACT OF TOWN.

1. *Held*, that a contract under seal, wherein the obligor agreed to release a town from the support of a person named, and to maintain such person through his natural life, and pay all doctor's bills and expenses, with the condition that, if the obligor indemnified the town from all expenses, costs, and damages which might accrue

by reason of such person, the contract should be void, and providing, also, that, if the obligor failed to fulfill her obligation, the town should have a right of action against her, is a contract of indemnity merely.

2. The punctuation of an instrument may be disregarded, if the meaning is clear.

3. A town may indemnify itself, by proper contract, against the contingent liability of furnishing pauper supplies to one who at the time of the contract has a pauper settlement within the town; and this, without regard to whether he is in present need or not, or whether he knows that he is receiving pauper supplies or not. *Held*, that the contract in this case, being of such a character, is legal and enforceable.

4. The overseers of the poor are the agents of the town in matters relating to the care and oversight of the poor, and, as such, have authority to take such a contract for the town, without special instructions.

(Official.)

Exceptions from supreme judicial court, Somerset county.

Action by the inhabitants of Palmyra against Susan H. Nichols. Verdict for plaintiff. Defendant excepts, and moves for a new trial. Motion and exceptions overruled.

J. W. Manson and G. H. Morse, for plaintiff.
E. N. Merrill, for defendant.

SAVAGE, J. This is an action of covenant broken brought upon the following instrument:

"Newport, Jany. 14th 1895.

"Know all men by these presents that I, Susan H. Nichols of Newport Co. of Penobscot and state of Maine. I do hereby agree & obligate myself my heirs and executors that I will release the town of Palmyra, from further support of Enoch H. Clark, & further promise & agree that I will maintain said Clark through his natural life, & pay all Drs. bills & funeral expenses. The condition of this obligation is such that if said Susan H. Nichols shall indemnify the said town of Palmyra from all expenses, costs & damages which may accrue by reason of said Clark. Then this obligation is void, otherwise if said Susan H. Nichols fails to fulfil this obligation said town of Palmyra will sue said Susan H. Nichols or her heirs or executors & recover for the support of said Clark with expenses added thereto.

"Susan H. Nichols [Seal.]

"Signed sealed in the presence of

"Mary J. Kelley & F. L. Brown.

"Newport Jany. 14th 1895.

"Penobscot ss.

"Personally appeared Susan H. Nichols & made oath to the above statement to be her free act. Before me

"F. L. Brown, Justice of the Peace."

1. The defendant, the verdict being against her, contends that the instrument is so intentionally drawn that it means nothing,—in short, that it is not a contract,—and has excepted to the construction placed upon it by the presiding justice in his charge to the jury in the following language:

"I give you this ruling and construe this instrument to be an obligation upon the part of

Mrs. Nichols,—a contract between her and the town of Palmyra,—so far as the instrument shows upon its face, to indemnify the town of Palmyra against all expense that it may subsequently be put to at any time for the relief of the person therein named, Enoch H. Clark, as a pauper."

We think the ruling was correct, and that taking the instrument as a whole, giving due effect to each part, it is clearly to be interpreted as a contract of indemnity. It is, indeed, unskillfully drawn. The scrivener was evidently not a lawyer. He seems to have tried to draft a bond, but he omitted the penal part. He did, however, incorporate a condition which is intelligible and clear. It is not difficult to understand what the parties intended by this instrument, and to that intention, as gathered from the instrument itself, it is our duty to give effect. The defendant agreed to "relieve the town of Palmyra from further support of Enoch H. Clark." The condition in the obligation is "that if said Susan H. Nichols shall indemnify the said town of Palmyra from all expenses, costs, and damages which may accrue by reason of said Clark, then this obligation is void. Otherwise, if said Susan H. Nichols fails to fulfil this obligation, said town of Palmyra will sue," i. e. shall have the right to sue, "said Susan H. Nichols, * * * and recover for the support of said Clark. * * *" It is here written as it should be read. The punctuation of the instrument may be disregarded, if the meaning is clear. It is an uncertain guide.—*State v. McNally*, 84 Me. 210. So of the use of capital letters to indicate the beginning of new sentences. Unskilled persons are inaccurate in such matters. This is not a contract for support, properly so called, notwithstanding the clause: "I further promise and agree that I will maintain said Clark through his natural life." By doing this, she would, in fact, release and indemnify the town. The contract itself was to be void, if she indemnified the town.

In this connection, the defendant urges that the contract is not enforceable, "because no one is named as obligee in it or bound by it." We think it sufficiently appears that the contract was made with the town of Palmyra.

2. The defendant contends, in the next place, that the contract is void, because neither the municipal officers, nor even the town of Palmyra itself, had authority to make such a contract.

The instructions of the presiding justice to the jury, upon this point, to which exceptions were taken, were that the instrument "was a legal contract for the overseers of the poor of Palmyra to make, provided Mr. Clark, at the time it was made, had his pauper settlement in the town of Palmyra"; that, in such case, "this was a competent contract for the town, through its municipal officers, the selectmen and overseers, to make with Mrs. Nichols"; that it is not "incumbent upon the plaintiff to show that Clark knew he was receiving pauper supplies at the time, in order that the con-

tract may be made"; "that it was not necessary that Clark should have been in want at the time of making the contract"; and that "the selectmen would be authorized to take a contract, from a person competent to make a contract, to take care of any pauper for any term of years, or for life, for a sufficient consideration."

We think these rulings are unexceptionable. We have construed this contract to be one of indemnity merely, and these exceptions must be considered in the light of that interpretation. The language of the presiding justice last quoted must be read in connection with his previous instruction that this is a contract of indemnity. It is not a contract for the support of a pauper.

The argument of counsel is largely directed to the point that a "town has no authority to raise money to relieve itself from the possible, contingent, or future liability of one of its citizens becoming a pauper, who at the time was not a pauper, nor in want." Conceding this to be so, nothing appears in this case to which such an argument can be directed. This is not a question of the power of a town to raise money. This is not a contract by which the town is to incur, but rather to avert, a liability. The contract does not show that any money was paid or required. It is under seal, which of itself imports a sufficient consideration. The defendant, from motives of family pride or kindness, may have been willing to enter into a contract to indemnify the town against the expense of the support of Clark, who was her brother, but that matters not.

The naked question is, can a town indemnify itself, by proper contract, against the contingent liability of furnishing pauper supplies to one who at the time of the contract has a pauper settlement within the town, and this without regard to whether he is in present need or not, or whether the person affected knows that he is receiving pauper supplies or not? We see no good reason why it cannot. On the other hand, to do so must in many cases be the exercise of a wise business discretion. It is true that the power is not prescribed by statute in terms, but towns possess many incidental powers which are not defined by statute. It is their duty to "relieve persons having a settlement therein, when on account of poverty, they need relief." Rev. St. c. 24, § 10. Such relief will cause expense. Towns have an interest in preventing such expense, and this interest exists whether the persons concerned are now chargeable or may become chargeable hereafter. Towns, as well as individuals, may be prudent and far-seeing. In matters like this, they may properly avert or prevent liability. *Dennett v. Nevers*, 7 Me. 399; *Augusta v. Leadbetter*, 16 Me. 45. The supreme court of Vermont, in a case involving the power of a town to take a bond of indemnity, like the contract in the case at bar, said: "Where the subject-matter of the contract is the appropriate business and interest of the town, the court discovers no reason why the contract with the town, suitably

framed to secure that interest, should not bind the signers as fully as if made to an individual concerning his interest." *Pawlet v. Strong*, 2 Vt. 442, affirmed in *Williston v. White*, 11 Vt. 40.

The contract here being within the proper exercise of municipal authority, the only question remaining is whether the overseers of the poor were authorized to take it without instructions from the town. We think they acted within the scope of their power. Overseers of the poor have the care and oversight of the poor, and in the discharge of their duties they are the authorized agents of the town. Necessarily, they may transact a variety of business incidental to their general powers. To prevent the town from becoming subjected to expense for pauper supplies on account of one who has his legal settlement in their town seems not only lawful, but meritorious. *Peru v. Turner*, 10 Me. 185; *Unity v. Thorndike*, 15 Me. 184. Moreover, the town has adopted this contract and brought suit upon it.

It is the opinion of the court that the exceptions should be overruled. The defendant has not pressed her motion for a new trial.

Motion and exceptions overruled.

(31 Me. 26)

COWAN v. UMBAGOG PULP CO.

(Supreme Judicial Court of Maine. Nov. 15, 1897.)

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE MACHINERY—FELLOW SERVANT—JURY.

1. The master is not responsible to the servant for an injury caused by the negligence of a fellow servant.
2. It is the duty of the master to provide good and sufficient machinery for the servant to operate, and to exercise reasonable care in keeping it so; but the master is not liable for injuries occasioned by machinery which has become defective and unsafe, whether rendered so by a fellow servant or otherwise, unless he knew, or ought to have known, its defective and unsafe condition.
3. It is not error for the presiding justice to impress upon the jury the propriety of coming to an agreement, and of harmonizing their views. This is a discretionary power to be exercised wisely by the presiding justice.
4. Exceptions will not be sustained when it does not appear that the jury were sent out a third time in consequence of their disagreement, nor where it does not appear that they were sent out at all after the first time on account of difficulties not stated when they first came into court.

(Official.)

Exceptions from supreme judicial court, Franklin county.

Action by Thomas Cowan against the Umbagog Pulp Company.

This was an action on the case to recover damages for personal injuries received by the plaintiff while operating machinery of the defendant.

Plea, general issue. Verdict for defendant. Motion for new trial and exceptions by plaintiff overruled.

The plaintiff introduced evidence tending to prove that one Roderick, a foreman in charge of a crew operating grinders in the defendant's mill, plugged a certain pipe, supplying water which furnished power or pressure to one of the pockets of the grinder operated by the plaintiff, and that the plugging of this pipe rendered the machine operated by the plaintiff unsafe and dangerous to operate; and that the injuries sustained by the plaintiff resulted, or may have resulted, from the condition of the machine rendered unsafe and dangerous to operate by this act of Roderick. The plaintiff had been at work in this mill, as grinder, about five months prior to the accident. Upon this point the presiding justice instructed the jury as follows: "Every servant, every laborer, every operative, in a mill like this, assumes all the risks which may arise in the way of injury or accident from the negligence of any fellow servant; and it is immaterial that the fellow servant may not be of the same grade as himself. While they are in the same common employment, laboring to accomplish the same general purpose, under the same head, they are fellow servants, although not in the same grade, or the same degree of authority. The one whose duty it is to repair machinery is not, in contemplation of law, a fellow servant with the one who operates that machinery. It is not in controversy here that Mr. Roderick was a fellow servant with this plaintiff. He was an operative in the mill,—foreman, indeed, of the crew; but it is immaterial that he held a higher position, as operative, than the plaintiff. He was an operative, although foreman of the crew. He was a fellow servant, in the eye of the law, with this plaintiff, and the company would not be responsible for any injury to the plaintiff caused by the negligence of Mr. Roderick as a fellow servant. If, therefore, you find that without authority he invaded the province of another, and negligently, without authority, made a change in the machinery, that would be the negligence of a fellow servant, so far as this plaintiff is concerned; and the defendants would not be liable for the consequences of that neglect, of which Mr. Roderick himself was guilty, unless you find that the defendants' servants whose duty it was to make repairs were also guilty of a want of diligence in not discovering it before the accident occurred, because the defendants will be responsible for any want of diligence or due care or caution on the part of those whose duty it is to make repairs, and the company would be liable for the consequences of any such want of diligence or care, provided there was no want of care, no fault, on the part of the plaintiff. So you will understand, if you find that this was a negligent, unauthorized act of Roderick, in making this change in the machinery, the defendants would not be liable for any injury caused by that, if the injury was caused by it, unless you find further that there was also negligence on the part of those whose duty it was to make those repairs, in not discovering

it before the accident; and, as bearing on that, it has been called to your attention by counsel that it appears from Roderick's own testimony that he did not inform any of those whose duty it was to make repairs on the machinery that he had made that change."

The case was given to the jury between 5 and 6 o'clock in the evening. At the opening of court at 9 o'clock the next morning the jury came in, and reported that they had not yet agreed. Thereupon the presiding justice read from the case of *Com. v. Tuey*, 8 Cush. 1, made some remarks of his own, and sent them back for further deliberation.

At a few minutes before noon a written communication was received by the presiding justice from a member of the jury, whereupon he called the jury into court, and addressed and instructed them as follows: "I have received an inquiry from a member of the panel whether it is the duty of one juror to violate his conscience and sense of justice by voting with the majority, for the sake of uniformity in this case. I have not so instructed the jury, and such was not the purport of the matter read from the decision in *Massachusetts*. Of course, every juror has a right to his conscientious convictions. The purport of the instructions was that, on open-minded conference with his fellows, every juror should endeavor to bring his sense of justice and his convictions in harmony with that of the majority. The purport, also, may be said to be that he should be careful not to mistake power of will or pride of opinion for conscience and sense of justice, and that, as I said before, by good-natured and open-minded conference with his fellows he should endeavor, as far as practicable, to bring his own views into harmony with the majority, on the principle that all men usually know more than one man, and that he ought to give due deference to the opinions of the majority. I do not know, of course, how the jury stand on this matter. I only give these general replies to the questions that have been propounded."

The jury again retired to their room, and in a few minutes returned with a verdict of not guilty, which verdict, without polling the jury, the presiding justice immediately ordered to be recorded. No request was made to the court by either party, or by any member of the jury, that the jury should be polled.

To these instructions and orders the plaintiff took exceptions.

S. Clifford Belcher, for plaintiff. Jos. C. Holman, O. D. Baker, and F. L. Staples, for defendant.

SAVAGE, J. Action to recover damages for personal injuries suffered by the plaintiff while operating machinery in the pulp mill of the defendant.

One Roderick, a foreman in charge of a crew operating the grinders in the defendant's mill, plugged a certain pipe, supplying water which furnished power or pressure to one of the pockets of the grinder operated by the

plaintiff, who was the defendant's servant. It is claimed that the plugging of this pipe rendered the machine operated by the plaintiff unsafe and dangerous to operate, and that the injuries sustained by the plaintiff resulted from the condition of the machine so rendered unsafe and dangerous to operate by this act of Roderick.

We must hold, in accordance with well-settled rules of law, that Roderick was the plaintiff's fellow servant (*Doughty v. Log-Driving Co.*, 76 Me. 143; *Dube v. City of Lewiston*, 83 Me. 211, 22 Atl. 112); that the plaintiff assumed all the risks which might arise from the negligence of any fellow-servant, though the latter might not be of the same grade as himself; and that the defendant is not responsible to the plaintiff for any injury caused by the negligence of Roderick as a fellow servant (*Lawler v. Railroad Co.*, 62 Me. 463; *Conley v. Portland*, 78 Me. 217, 3 Atl. 658). The jury were correctly so instructed.

But the counsel for the plaintiff claims that "if a machine is rendered unsafe and dangerous to operate, even by a fellow servant, and injuries are received in consequence, the condition of the machine is the proximate cause; and the master is not relieved from liability simply because the machine was rendered unsafe by a fellow servant."

Assuming this to be a correct statement of the law, we think it is not applicable to this case, unless it also appears that the master was at fault in not discovering and amending the unsafe and dangerous condition of the machine after it was rendered so by Roderick. The case does not disclose what the plaintiff's contention was upon this question of fact. If we assume that this question was in issue before the jury, we must also assume that appropriate instructions were given. *Lewiston v. Harrison*, 69 Me. 504. In fact, the jury were instructed that "the defendant would be responsible for the consequences of any want of diligence or due care or caution on the part of those whose duty it was to make repairs, but that it would not be responsible for the negligent and unauthorized act of Roderick, unless there was also negligence on the part of those whose duty it was to make repairs, in not discovering the dangerous condition before the accident." The instructions were full, accurate, and apposite. It is the duty of the master to provide good and sufficient machinery for the servant to operate, and to exercise reasonable care in keeping it so. *Shanny v. Mills*, 66 Me. 420. But the master is not liable for injuries occasioned by machinery which has become defective and unsafe, whether rendered so by a fellow servant or otherwise, unless he knew, or ought to have known, its defective and unsafe condition. *Hull v. Hall*, 78 Me. 114, 3 Atl. 38.

The plaintiff complains that undue pressure was put upon the jury by the court, to make them agree. It is not error for the presiding justice to impress upon the jury the propriety of coming to an agreement,—of harmonizing

their views. *Emery v. Bates*, 31 Me. 155; *Virgie v. Stetson*, 73 Me. 452; *State v. Rollins*, 77 Me. 380. It is a discretion to be exercised wisely by the presiding justice. A careful examination of the proceedings in this case discloses no abuse of that discretion.

The plaintiff claims that the jury were sent out a third time, in violation of Rev. St. c. 82, § 86. But it does not appear that they were sent out a third time "in consequence of their disagreement," nor does it appear that they were sent out at all, after the first time, "on account of difficulties not stated when they first came into court."

The motion for a new trial is not relied upon. Motion and exceptions overruled.

(91 Me. 31)

STATE v. PETERS.

(Supreme Judicial Court of Maine. Nov. 17, 1897.)

SALES—DELIVERY—PLACE—COMPLETION OF CONTRACT.

1. Delivery to the carrier designated by the consignee is a delivery to the consignee, subject to the vendor's lien.

2. An indictment for the illegal sale of goods in Kennebec county will not be sustained where the evidence of the sale shows that it took place in another county.

3. A., at Augusta, wrote the company of which the respondent was general manager, at Portland, asking for quotation of price of butterine; also, how soon it could be shipped upon receipt of order. The respondent answered, giving quotation, and saying, "If we receive your order at once, same will be shipped in car from Chicago, Thursday, arriving here [Portland] a week from Monday." Thereupon, A., at Augusta, gave the following order: "You may ship me, via American Express, C. O. D., as soon as possible, three 40-pound tubs butterine (Lincoln flats, colored), same as I have been using at 14c." The respondent did not answer, but filled the order by delivering the butterine in question to the American Express Company at Portland, to be sent C. O. D. to A. The American Express Company delivered the butterine to A., at Augusta.

The state claimed that the respondent's reply to A.'s letter of inquiry was an offer to sell butterine, and that A.'s order was an acceptance of the offer, and, having been written and mailed at Augusta, the sale was made at Augusta. *Held*, that respondent's letter was not an offer to sell, but that A.'s order was an offer to buy, and that it was accepted, and the sale completed, at Portland, by the delivery of the butterine to the American Express Company as directed.

4. Also, that this result follows, although the butterine was ordered to be sent, and was sent, C. O. D., and although the seller, as soon as the butterine was delivered to the consignee, attempted to attach it to secure a prior debt.

State v. Intoxicating Liquors, 73 Me. 278, affirmed.

(Official.)

Exceptions from superior court, Kennebec county.

Henry B. Peters was indicted for selling butterine contrary to section 3, c. 128, Rev. St., prohibiting the sale and manufacture of adulterated butter.

When the case was closed for the state, the respondent submitted his cause without evi-

dence, and seasonably asked the court to instruct the jury that, upon all the facts of the case, the sale alleged in the indictment did not take place in the county of Kennebec, and that it was therefore the duty of the jury to render a verdict of not guilty. The presiding justice declined to so rule, and a verdict of guilty was thereupon rendered, and respondent brings exceptions. Sustained.

Geo. W. Heselton, Co. Atty., for the State.
H. M. Heath, C. L. Andrews, and F. H. Harford, for defendant.

SAVAGE, J. The only question presented by the exceptions in this case is whether, upon all the facts in the case, the sale of butterine alleged in the indictment did or did not take place in the county of Kennebec.

From the undisputed facts it appears that on December 14, 1896, one McLaughlin, then residing in Augusta, wrote to the Portland Beef Company, of which concern the respondent was manager, the following letter:

"Old Orchard, Me., Dec. 14th, 1896. Portland Beef Co.—Gentlemen: Quote me price of butterine, the same I have used the past two seasons (Lincoln flats, colored). Upon receipt of order, how soon can you ship me three (3) tubs, C. O. D. American express? An early reply will oblige. Resp'y, yours, C. E. McLaughlin."

The respondent on the same day answered as follows:

"Portland, Me., Dec. 14th, 1896. Mr. C. E. McLaughlin, Old Orchard—Dear Sir: Replying to your letter of Dec. 14th, quote you 3 40-lb. tubs butterine, 14c. If we receive your order at once, same will be shipped in car from Chicago, Thursday, arriving here a week from Monday. Yours, respectfully, H. B. Peters."

On the following day, McLaughlin wrote this letter to the Portland Beef Company:

"Old Orchard, Me., Dec. 15th, 1896. Portland Beef Co.—Gentlemen: You may ship me via American Express, C. O. D., as soon as possible, 3 40-pound tubs butterine (Lincoln flats, colored), same as I have been using, at 14c. Very resp'y, C. E. McLaughlin, Old Orchard."

Although McLaughlin's letters were dated "Old Orchard" for reasons of his own, they were in fact written and mailed at Augusta. To the last letter the respondent made no reply, but on December 24, 1896, he delivered the three tubs of butterine ordered to the American Express Company, at Portland, to be sent C. O. D. to McLaughlin, at Old Orchard. Subsequently, by direction of McLaughlin, with the consent of the respondent, the butterine in question was reshipped from Old Orchard to Augusta by the express company, and there delivered to McLaughlin upon payment of the price and the transportation charges.

It is contended on the part of the state that these transactions constituted a sale of the butterine at Augusta. It is strenuously claimed that the respondent's letter of December

14th was an offer or proposal to sell McLaughlin three 40-pound tubs of butterine at 14 cents a pound, and that McLaughlin's letter of December 15th, written and mailed at Augusta, was an acceptance of that offer. Hence it is argued that the sale was made at Augusta.

If the state is right in its premises, it is also right in its conclusion. If we regard the respondent's letter as an offer, the acceptance of that offer completed the trade, accomplished the sale, struck the bargain; and, in accordance with well-settled principles of law, such a sale would be deemed to have been made at Augusta, the place where the offer was accepted.

But the trouble with the position of the state is that the respondent's letter of December 14th cannot be considered as an offer or proposal. It was simply an answer to McLaughlin's letter of inquiry of the same date. McLaughlin asked for a quotation of prices, and how soon the butterine could be shipped on receipt of an order. The respondent gave the desired information,—nothing more. The most that can be said is that it contemplated a possible offer by McLaughlin to buy if the price and time of delivery were satisfactory. If, after this, the respondent had refused to fill McLaughlin's order of December 15th, he could not have been held liable for a breach of contract to sell. The letter of the respondent contained no undertaking whatever to sell. *Howard v. Industrial School*, 78 Me. 230, 3 Atl. 657; *Smith v. Gowdy*, 8 Allen, 566.

In McLaughlin's letter of December 15th we find the first offer. It was an order,—an offer to buy. His proposition to buy was accepted by the respondent, by delivering the butterine ordered to the carrier designated by the consignee. This constituted the sale. The delivery was at Portland, and not at Augusta.

But the state contends that, taking the transaction as a whole, it is evident that the vendor did not intend to part with the title to the butterine until it was paid for by the consignee to the carrier; that from the fact that the butterine was shipped C. O. D., which means to "deliver upon payment of the charges due the seller for the price, and the carrier for the carriage of the goods" (*State v. Intoxicating Liquors*, 73 Me. 278), the jury would be authorized to find that the vendor reserved the *jus disponendi* until payment. And authorities to this effect are cited. But such is not the law in this state, in the absence of controlling circumstances; and there was nothing in the order, or in the acceptance and the shipment of the butterine in this case, to take it out of the general rule touching the shipment of goods on order C. O. D. The delivery to the carrier designated by the consignee was a delivery to the consignee, subject to the vendor's lien. The language of Mr. Chief Justice Peters in *State v. Intoxicating Liquors*, supra, is full and expressive upon this point: "The contract stands upon the simple rule of the common law. The seller was entitled to his price, and

the buyer to his property, as concurrent acts. The title passed to the vendee when the bargain was struck. Any loss of the property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee, upon a tender of the price, could sue for the property." We adhere to this rule.

It further appears that, after the butterine was shipped, the Portland Beef Company, represented by the respondent, attempted to attach it at Old Orchard, and did attach it at Augusta, after McLaughlin had paid the C. O. D. bill, to secure an old debt due from McLaughlin. From the evidence it is claimed that an inference may be legitimately drawn, and that the jury were authorized to find, that it was not the intention of the respondent to part with the title until the butterine was paid for; that the respondent shadowed the goods so that they could be attached as soon as they became the property of McLaughlin by payment. We think otherwise. The acts of the respondent in the attempt to secure the old bill show rather an intention to attach as soon as the vendor's lien was removed by payment. It would have been fruitless to attach before.

There is no evidence in the case which would warrant the jury in finding that the sale of the butterine took place at Augusta. The jury should have been so instructed, as requested by the respondent, in substance. The presiding judge declined to so instruct, and the jury were permitted to find that the sale did in fact take place in Augusta,—a finding which had no evidence to support it.

Exceptions sustained.

(21 Me. 38)

NOLAN v. CLARK.

(Supreme Judicial Court of Maine. Dec. 9, 1897.)

GAMING—MARGINS—AGENCY—EVIDENCE—UNDISCLOSED PRINCIPAL.

1. Gambling and betting in margins on the future price of corn are prohibited by the statutes of this state, and the money so lost may be recovered by the loser in an action commenced within three months thereafter.

2. The plaintiff obtained a verdict in an action to recover money so lost, and the defendant moved for a new trial. The court overruled the motion, and considers that it is satisfied with the conclusion reached by the jury, notwithstanding the forms of sale and purchase were observed by the parties.

3. The defendant denied his liability to the plaintiff upon the ground that he was not the principal, and asserted that he was but the agent of the Metropolitan Stock Exchange, and that all he did was in that capacity. The plaintiff claimed that he dealt with the defendant as principal, and had no knowledge of any agency, if any existed, and denied that there was any such agency in fact. The court instructed the jury, who found for the plaintiff upon this issue, that where a party deals with another, and that other lets it be known that he is a mere agent of a party, and is in fact an agent of a disclosed principal, then the party seeking redress for any acts or contracts of that agent, that are within the scope of his authority, it must be against his principal, not against the agent; that even if a party is agent of a prin-

cipal, and that person's name is not disclosed, but the agent deals as though he was the principal, without disclosing an agency to the party dealing with him, then the party desiring redress has an election to sue either the agent or principal, when he finds out who he is. If it is not till after the transaction, he can sue either. *Held*, that the finding of the jury must have been either that no agency existed, or, if it did exist, that the plaintiff was not informed of it, but dealt with the defendant as principal; also that, upon either ground, the defendant is personally responsible to the plaintiff.

4. The court admitted in evidence the daily statements of transactions between the defendant and the Metropolitan Stock Exchange, and furnished to the former by the latter, which had reference to the plaintiff's dealings with the defendant; but it excluded like statements, referring only to transactions with other parties. *Held*, that the excluded statements had no tendency to prove an agency.

5. *Held*, that the defendant is not entitled to an instruction to the jury that they may find an agency of the defendant from one piece of evidence alone, thereby excluding the effect of other and contradictory evidence upon the question of agency. It is the province of the jury to determine facts from all the evidence, and not from one detached portion.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

Action by James Nolan against Wallace W. Clark. There was a verdict for plaintiff, and defendant excepts, and moves for a new trial. Motion and exceptions overruled.

The first count in the declaration is as follows:

"In a plea of the case, for that whereas, on the first day of August, in the year of our Lord one thousand eight hundred and ninety-five, at Lewiston, in said county of Androscoggin, the plaintiff, by wagering, gambling, and betting with the defendant, lost to the said defendant the sum of thirty dollars, and then and there paid and delivered the same to the defendant.

"And the plaintiff avers that three months have not elapsed since said first day of August.

"Whereupon the plaintiff says that an action hath accrued to him, by virtue of the statute in such case made and provided, to sue for and recover the same of the said defendant in an action on the case; yet the defendant, though requested, hath not paid the said sum, but wholly refuses so to do.

"Also, for that the said plaintiff, on said day, and at said Lewiston, gambled with the defendant by betting with the defendant the sum of thirty dollars that the market price of three thousand bushels of September corn, so called, being then forty-three cents per bushel, would thereafter advance, on or before September 5, 1895, while the defendant bet that the market price of said corn would decrease to forty-two cents a bushel on or before said 5th day of September.

"And the plaintiff further avers that said betting was in the form of ostensible buying, by the plaintiff, of the defendant, of three thousand bushels of September corn, at forty-three cents a bushel, to be delivered on

or before said 5th day of September, but that in reality the defendant did not intend to sell and deliver, nor did the plaintiff to buy and receive, said corn, but that said thirty dollars was so deposited with the defendant as security to cover the margin of one cent a bushel on said three thousand bushels of corn, and that said transaction was in truth and in fact a gambling on the future price of corn between the plaintiff and defendant.

"And the plaintiff further avers that thereafter, upon the same day, the market price of corn decreased from forty-three cents a bushel to forty-two cents a bushel, and thereby the plaintiff lost his said thirty dollars to the defendant, and then and there paid and delivered the same to him.

"And the plaintiff avers that three months have not elapsed since said first day of August.

"Whereupon the plaintiff says that an action hath accrued to him, by virtue of the statute in such case made and provided, to sue for and recover the same of the said defendant in an action on the case; yet the defendant, though requested, hath not paid the said sum, but wholly refuses so to do."

Plea, general issue.

Verdict for plaintiff in the sum of \$686.18, which is the entire amount sued for, with interest from the date of the writ.

The plaintiff claimed and introduced testimony tending to show that in August, 1895, he had four transactions with the defendant, by which the plaintiff purported to buy of the defendant 8,000 bushels of corn, to be delivered at a future date, and paid to the defendant a margin of one cent a bushel each time corn fell one cent a bushel; that in fact the transactions were a gambling in margins on the future price of corn; that there were in fact no purchases of corn; that the plaintiff did not intend to buy or receive the corn, and the defendant did not intend to sell or deliver the corn; that the defendant was not the owner of any corn, and did not have in his possession or have the ability to deliver said corn to the plaintiff, but that both parties intended and understood the transactions to be a mere betting on margins; that if the market price of corn went up the defendant should pay the advance to the plaintiff, and if the market price of corn went down the plaintiff should lose to the defendant the sums advanced by him on such colorable purchase of corn, which are the sums sued for; that the parties contemplated no other transactions whatever; and that in such gambling transactions the plaintiff lost to the defendant the sum of \$650.

The testimony introduced by the defendant tended to show that he was acting at the time alleged as the agent of the Metropolitan Stock Exchange of Boston, with which his office in Lewiston was connected by a private wire; that the said agency was com-

municated to and known to the plaintiff, but this was denied by plaintiff; that as such agent he executed orders for stocks and grain for customers who had the privilege and option of buying or selling said stocks or grain at the prices quoted in said Metropolitan Stock Exchange; that the defendant, as such agent, was prepared at all times to deliver to said customers, in the manner stated in the testimony, the stock certificates or the grain, either in bulk or by warehouse receipts, so called; that his commission for executing said orders was one-eighth of 1 per cent.; that on the day following the close of each day's business he remitted to the Metropolitan Stock Exchange the sum received by him from customers on account of their transactions, reserving and saving out therefrom for himself merely his commission of one-eighth, as is indicated by defendant's exhibits; that in all of the transactions alleged in the plaintiff's declaration the defendant, as such agent, was at all times able and prepared to deliver to the plaintiff either the corn itself in bulk, or the warehouse receipts for the same, in the manner stated in the testimony, and that he so notified the plaintiff; that the defendant understood the transactions with the plaintiff to be real business transactions; and that in the four transactions described in the plaintiff's testimony the defendant delivered to the plaintiff four contracts specifying the nature of the transactions, as appears in the evidence.

The defendant offered to introduce in evidence the daily statements of the transactions between his office and Boston office of the Metropolitan Stock Exchange, mailed to him by the Metropolitan Stock Exchange, for the entire period covered by the plaintiff's alleged transactions, of like character to those admitted, but in reference to transactions with other parties, for the purpose of showing his invariable custom and method of transacting business, and also for the purpose of showing his said agency. The court admitted only such of said statements as contained particular reference to the plaintiff's alleged transactions, and excluded the remainder.

The defendant's counsel requested the presiding justice to give to the jury the following instruction, which was refused:

"If the jury are satisfied from the testimony that Clark remitted to the Metropolitan Stock Exchange the money received from Nolan, saving out only his commission of one-eighth, they will be justified in finding that Clark was not the principal, but the agent of the Metropolitan Stock Exchange."

To which rulings and refusal to instruct the jury the defendant excepted.

H. W. Oakes, for plaintiff. R. W. Crockett, for defendant.

STROUT, J. In August, 1895, plaintiff had four transactions with defendant, by which

plaintiff purported to buy of defendant 8,000 bushels of corn, to be delivered at a future date, and paid to defendant a margin of one cent a bushel each time corn fell in price one cent a bushel. He claims that the transaction was in fact a gambling in margins on the future price of corn, and that an actual purchase and sale were not intended or in contemplation by the parties. He seeks to recover back the money paid, under provision of Rev. St. c. 125, § 8. Defendant claimed that the transaction was one of legitimate business, and so understood by the parties. Upon this contention much evidence was introduced, and it was submitted to the jury, under appropriate instructions, to which no exception is taken, to find whether the transaction was in fact a legitimate business one, contemplating an actual purchase and sale, by both or either of the parties, or whether it was a gambling on the future price. The jury found it to be a gambling, and not a business, transaction.

Upon a careful examination of all the evidence, notwithstanding the forms of sale and purchase were observed, we are satisfied with the conclusion reached by the jury. It would be unprofitable to review the evidence in this opinion.

The defendant resisted plaintiff's claim upon another ground. He asserted that he was not the principal, but the agent of the Metropolitan Stock Exchange, and that all that he did was in that capacity; and that out of the moneys received by him he retained as his commission one-eighth, and remitted the balance daily to his principal in Boston; and that, if plaintiff had any claim under the statute, it was against the Metropolitan Stock Exchange, and not against the defendant. Plaintiff claimed that he dealt with defendant as principal, and had no knowledge of any agency, if any existed, and denied that there was any such agency in fact.

Upon this issue much evidence, both oral and documentary, was introduced. The court instructed the jury that "where a party deals with another, and that other lets it be known that he is a mere agent of a party, and is in fact an agent of a disclosed principal, then the party seeking redress for any acts or contracts of that agent that are within the scope of his authority must be against his principal, not against the agent." "That even if a party is agent of a principal, and that person's name is not disclosed, but the agent deals as though he was the principal, without disclosing an agency to the party dealing with him, then the party desiring redress has an election to sue either the agent or principal, when he finds out who he is. If it is not till after the transaction, he can sue either." The court carefully called the attention of the jury to the evidence bearing upon the question whether defendant was or not in fact an agent of the Metropolitan Stock Exchange, and acting in that capacity in his dealings with plaintiff; and whether such agency, if it existed, was

known to plaintiff, or whether plaintiff understood he was dealing with the defendant as principal. The evidence upon this issue was conflicting, but the jury found for the plaintiff; and, under the instructions, that finding must have been either that no agency existed, or, if it did, that plaintiff was not informed of it, but dealt with defendant as principal. Upon either ground, defendant would be personally responsible to plaintiff. We see no sufficient cause to disturb the verdict. The motion for a new trial must be overruled.

In regard to the exceptions, the daily statements of transactions between defendant and the Metropolitan Stock Exchange, which had reference to plaintiff's dealings, were admitted; but like statements, referring only to transactions with other parties, were excluded. The excluded statements had no tendency to prove an agency. They purported to be transactions between the defendant and the Metropolitan Exchange as two principals. They were directed to defendant, and stated "our transactions with you to-day are as follows." Then came a detailed statement. No word of agency appears or is suggested by the papers. The defendant was not prejudiced by their exclusion. They tended to corroborate plaintiff's claim, rather than that of defendant.

The requested instruction was rightly refused. It asked an instruction that the jury might find an agency of defendant from one piece of evidence alone, excluding the effect of other and contradictory evidence upon that question, and was therefore misleading. It is the province of the jury to determine the fact from all the evidence, not from one detached portion. The instructions given to the jury were full, and amply protected the rights of the defendant.

Motion and exceptions overruled.

(91 Me. 74)

MARCOTTE v. ALLEN.

Supreme Judicial Court of Maine. Dec. 13, 1897.)

PAYMENT—FRAUD—IGNORANCE OF LAW—OFFICES—FEES—NONSUIT.

1. Whenever a payment made in ignorance of the law is induced by the fraud or imposition of the other party, and especially if the parties are not upon an equal footing, an action to recover it back is maintainable.

2. For a public officer, whose fees, by law, are to be paid by the city, and are paid by the city, to receive fees to which he knows he is not entitled, and which he knows are being paid to him by a party ignorant of the law, who would not pay if he knew the law, and not to inform him that he was not bound to pay, is fraudulent; and such officer should restore the money, which he cannot conscientiously retain.

3. In this case the court holds that the admission of the defendant, and the evidence introduced by the plaintiff, if true, bring the case within this rule.

4. In deciding whether an order directing a nonsuit is correct, the court must assume that the plaintiff's evidence is true.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

Action by François X. Marcotte against Charles V. Allen. The presiding justice directed a nonsuit, and plaintiff excepted. Exceptions sustained.

J. G. Chabot, for plaintiff. W. H. Newell and W. B. Skelton, for defendant.

SAVAGE, J. The plaintiff is an undertaker. The defendant is city clerk of the city of Lewiston. The plaintiff sues in this action, for money had and received, to recover back fees paid to the defendant for 376 burial permits issued under the provisions of Pub. Laws 1891, c. 118, as amended by Pub. Laws 1895, c. 154. At the conclusion of the plaintiff's evidence, the presiding justice directed a nonsuit, to which ruling the plaintiff excepted.

By statute, the fees of city clerks for issuing burial permits are to be paid by the cities and towns; and it was admitted that "the defendant was paid his legal fees by the city of Lewiston for all the burial permits mentioned in this action prior to March, 1896."

Assuming, as we must, that the plaintiff's evidence was true, the case discloses the following facts: The plaintiff paid the money sued for to the defendant, as fees for burial permits issued by him. A fee of 25 cents was paid each time the plaintiff had occasion to require a permit. The plaintiff did not know that the statute required the city to pay the city clerk for his services in issuing permits, nor that the defendant was being paid by the city for the same. The defendant received and kept the money, and did not inform the plaintiff that the city was bound to pay, or was paying, his legal fees. The evidence does not show that the defendant demanded pay of the plaintiff, as a prerequisite to the issuing of the permits; but the defendant's predecessor in office asked the plaintiff to pay for such permits, which he did, and he "supposed it was the same rule, and paid him [the defendant] right along." From these facts it can hardly be inferred that the defendant thought these payments were gratuities, and we are satisfied that he must have known that the plaintiff paid these fees because he supposed he was bound to. It is clearly a case of payments made in ignorance of the law, and the defendant relies upon the well-settled rule that voluntary payments, made with full knowledge of all the facts, but under a mistake or through ignorance of the law, cannot be recovered. *Norris v. Blethen*, 19 Me. 348.

The defendant is a public officer, and, though he did not expressly demand the payment of these fees, he took them, knowing that the plaintiff was acting upon a mistaken view of his legal rights. The parties did not stand upon a level. The defendant was in a position where the plaintiff was justified in relying upon his conduct. A public officer must deal fairly with the public. Some courts have sustained actions like this on the ground of public

policy. In *Steamship Co. v. Young*, 89 Pa. St. 186, the court said of the relations between a public officer and the public: "He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services. But with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands." See *Mayor, etc., v. Lefferman*, 4 Gill, 425; 45 Am. Dec. 145, note; *Walker v. Ham*, 2 N. H. 238; *Stevenson v. Mortimer*, Cowp. 805.

But, without deciding that this action is maintainable on the ground of public policy, we think it can be maintained upon another ground. Whenever a payment made in ignorance of the law is induced by the fraud or imposition of the other party, and especially if the parties are not upon an equal footing, an action to recover it back is maintainable. *Stover v. Poole*, 87 Me. 217; *Silliman v. Wing*, 7 Hill, 159; *Bank v. Daniel*, 12 Pet. 32. This court has declared in *Freeman v. Curtis*, 51 Me. 140, and in *Jordan v. Stevens*, Id. 78, that when one, who himself knows the law, and knows another to be ignorant of it, takes advantage of his ignorance, it may be regarded as fraud. His very silence may be fraudulent. *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407. For a public officer, whose fees, by law, are to be paid by the city, and are paid by the city, to receive fees to which he knows he is not entitled, and which he knows are being paid to him by a party ignorant of the law, who would not pay if he did know the law, and not to inform him that he was not bound to pay, is fraudulent; and such officer should restore the money, which he cannot conscientiously retain. To hold otherwise would be a reproach to the law.

It is the opinion of the court that the admission of the defendant, and the evidence introduced by the plaintiff, brought the case within this rule, and that the order directing a nonsuit was erroneous.

Exceptions sustained.

(91 Me. 47)

ADAMS v. ULMER et al.
(Supreme Judicial Court of Maine. Dec. 9, 1897.)

MANDAMUS—CLERK OF COUNTY COMMISSIONERS—LOCATION OF TOWN WAY—DISCONTINUANCE—BRIDGE OVER NAVIGABLE WATERS—WARRANT OF DISTRESS.

On appeal to the county commissioners, a town way had been located by them in South Thomaston, which crossed navigable tide waters. The legislature of 1880 had authorized a bridge over tide waters at that place. South Thomaston failed to build the bridge, and thereupon the county commissioners, on due proceedings, appointed the petitioner an agent to build

it. The way on land was constructed principally by the voluntary act of individuals, without charge. The agent caused the bridge to be built, and rendered his account to the county commissioners, which was duly allowed, and judgment entered against "the inhabitants of the town of South Thomaston, and against the real estate situated in said town of South Thomaston, whether owned by such town or not," for the sum of four thousand three hundred and ninety-two dollars and four cents; being the cost of the bridge, and the charges and expenses of the agent. The county commissioners ordered a warrant of distress to issue for the amount. All the proceedings were in accordance with law. The respondent clerk of the county commissioners refused to issue a warrant of distress. Upon a petition for mandamus, asking that he be compelled to do so, held:

1. That the clerk, as a ministerial officer, was bound by law to obey the order and judgment of the county commissioners,—that judgment appearing to be regular, and upon a matter within the jurisdiction of that board; that he cannot justify a refusal by showing mistake or misjudgment of the commissioners, nor raise the question of the sufficiency of the bridge, which had been accepted by the commissioners.

2. That the five years, in Rev. St. c. 18, § 23, within which the town cannot affect by any action the location of a town way by county commissioners, commenced to run on August 13, 1892, when the proceedings and judgment of the commissioners were affirmed by the supreme court, and that the attempted discontinuance of the way by South Thomaston on May 16, 1896, was premature and inoperative.

3. That the permission of the secretary of war to build a bridge over navigable tide waters was not necessary. The act of congress of September 19, 1890, which prohibits the erection of a bridge in navigable waters without permission of the secretary of war, excepts from its operation bridges the construction of which has been previously authorized by law. This bridge was authorized in 1880.

4. That the bridge is wholly within the town of South Thomaston.

5. That the petitioner is the proper party in whose favor the warrant of distress should issue.

(Official.)

Petition by Willis A. Adams for mandamus against Ralph R. Ulmer and the Inhabitants of South Thomaston. Writ granted.

True P. Pierce, for petitioner. C. E. & A. S. Littlefield, for defendants.

STROUT, J. A petition for a town way in South Thomaston had been presented to the selectmen of the town, who refused to locate; and thereupon a petition was presented to the county commissioners to locate the same way, upon the ground that the selectmen had unreasonably refused to locate. Upon this petition, the county commissioners, on the 3d day of December, 1890, located the town way as prayed for and as described in the petition. An appeal was taken to the supreme judicial court, and on the 13th day of August, 1892, the proceedings and judgment of the county commissioners were wholly affirmed by that court. All the proceedings thus far appear to be in accordance with law, and no objection is made, except that it is claimed that a part of the located way is in St. George.

The location included a bridge across navigable tide waters. Such bridge was author-

ized by the legislature of 1880, by chapter 239 of the Special Laws of that year. South Thomaston failed to open the way and build the bridge during the time limited therefor, and on May 21, 1896, on proper petition, the county commissioners ordered "that said town way and bridge be opened, built and made passable," and appointed Willis A. Adams, the present petitioner, agent "to open, build, and make passable said town way and bridge," and ordered South Thomaston to pay into the county treasury of Knox county the expense of the proceeding, taxed at \$63.50. A copy of this adjudication was duly mailed to the selectmen of South Thomaston on July 29, 1896. Willis A. Adams, the agent, filed in the clerk's office a copy of the contract made by him for the construction of the bridge upon the way; and on the same day the clerk of the county commissioners mailed by registered letter to the assessors of South Thomaston a certificate of the filing of the contract for building the bridge, the time for its completion, October 6, 1896, and the amount to be paid therefor, to wit, \$4,200, which certificate was received by one of the assessors of South Thomaston on the same day.

The contract for the bridge, dated July 8, 1896, was made with the Wrought-Iron Bridge Company, of Canton, Ohio, and by its terms was to be completed in "ninety days from the date of this agreement." The bridge was built, and on the 27th day of October, 1896, it was approved and accepted by the county commissioners. On the same day the account of the agent, Adams, was presented to the county commissioners, and notice duly given to South Thomaston. On February 15, 1897, at a session of the county commissioners, judgment was entered against South Thomaston, in favor of Willis A. Adams, agent, for the sum of "four thousand two hundred dollars, the amount due the Wrought-Iron Bridge Company, contractor with the said agent for the building of the said bridge upon the said town way, and the bill of the said Willis A. Adams for superintendence, as allowed by the county commissioners, for the sum of one hundred and ninety-two dollars and four cents, * * * and that, after the clerk shall have entered up such judgment, he shall transmit a certificate of the rendition thereof to the assessors of the said town of South Thomaston," and after 20 days thereafter, if the amount remains unpaid, he shall "issue a warrant of distress upon the judgment * * * according to the provisions of the statute in reference thereto." The record concludes "that Willis A. Adams [duly appointed agent] recover against the inhabitants of the town of South Thomaston, and against the real estate situated in said town of South Thomaston, whether owned by such town or not, the sum of four thousand three hundred and ninety-two dollars and four cents." A copy of this judgment was served upon one of the assessors of South Thomaston on the same day by the sheriff.

The respondent, who is clerk of the courts

for Knox county, and ex officio clerk of the county commissioners, refused to issue a warrant of distress in accordance with the judgment and direction of the commissioners, and the petitioner seeks by this process to compel him to do so.

In issuing a warrant of distress under the judgment and order of the county commissioners, the clerk acts ministerially. It is his duty to execute the direction of the commissioners, if they had jurisdiction of the subject-matter, and their proceedings are regular in form. It is his duty to extend the formal record of their doings. Errors of the commissioners anterior to their formal judgment and record can be corrected under proper process instituted for that purpose. Their clerk cannot do so by refusing to execute the judgment. In this case the commissioners had undoubted jurisdiction. Their judgment and record were regular in form. Their clerk cannot justify his refusal to obey their order by showing mistake or misjudgment of the commissioners. If, in auditing the charges of the agent, the commissioners have allowed illegal fees, as claimed by respondent, advantage of that cannot be taken in defense to this petition. Nor can the clerk in this proceeding raise the question of the sufficiency of the bridge, which had been accepted by the commissioners.

It is claimed in defense that prior to the appointment of the agent the town had discontinued the way. The location by the commissioners was on December 3, 1890; the attempted discontinuance by the town, on May 16, 1896. Rev. St. c. 18, § 23, provides that "when a town way has been laid out, graded or altered by the commissioners, their proceedings cannot be affected by any action of the town within five years." Whether this way was legally discontinued or not depends upon the question whether the five years began to run from the original location, December 3, 1890, or from the time when the proceedings and judgment of the commissioners were affirmed by the supreme court, August 13, 1892. If the former is the true date, the way had been discontinued before the appointment of the agent, and his appointment was invalid. If the latter date is the true one, the town was premature in its vote to discontinue, and it, being within the five years prescribed by the statute, was inoperative. It is earnestly contended that the five years began to run from December 3, 1890.

The appeal vacated the location by the commissioners, and arrested all further proceedings thereunder until the final adjudication by the supreme judicial court. Rev. St. c. 18, § 48; *Coombs v. Commissioners*, 71 Me. 240; *Winslow v. Commissioners*, 31 Me. 446. Until then the land cannot be entered upon, nor any right to damages accrue to its owner. Rev. St. c. 18, §§ 7, 20. Section 8 of the same chapter provides for an appeal from the assessment of damages, "at any time before the third day of the regular term succeeding that at which the commissioners' return is made,"

to the term of the supreme judicial court first held in the county more than 30 days after expiration of the time for appeal. But this court held in *Boston & M. R. Co. v. County Com'rs*, 78 Me. 170, 3 Atl. 273, that this provision applied only when there was no appeal from the location. If there was an appeal, then the claimant for increased damages could file his notice of appeal within 60 days after final decision in favor of the way, and file his complaint at a term of this court held more than 30 days after that. After this decision the legislature of 1887 (chapter 181) changed the statute to conform to it.

Upon a decision by the appellate court approving the location of the way, the commissioners are required to carry it into effect as if made by themselves. Rev. St. c. 18, § 50. By section 4 of the same chapter the commissioners were required, in their report of a location, to state when the way was to be opened, but that time must necessarily date from the final establishment of a located way. Prior to 1862 the location of a town way by county commissioners was final. In that year an appeal was given. Chapter 123. The then existing statute prohibiting towns from any action affecting "the proceedings" of the commissioners within five years was carried into the revision of 1871 without alteration; but in 1875 (chapter 25) the section was amended by adding the word "graded" after the words "laid out," and as thus amended it stands in the revision of 1883. After the determination of the appeal the commissioners have further "proceedings" to carry into effect the judgment. These proceedings were arrested by the appeal, but are not concluded till the appellate court has rendered its decision. The statute forbids the town doing any act affecting the proceedings of the commissioners.

Construing all these provisions in the light of the apparent intention of the legislature, it is evident that section 23, limiting the power of the town, refers to the proceedings which terminate in a final location and legal establishment of the way. As this did not occur till August 13, 1892, the action of the town within five years thereafter was invalid, and did not discontinue the way. *Coombs v. Commissioners*, supra.

It is objected that the bridge being over navigable tide waters, and possibly an obstruction to navigation, its existence was illegal, unless permission was had from the secretary of war. No such permission was had.

By chapter 239 of the Special Laws of Maine of 1880, authority was given for the location and establishment of a bridge, at this particular place, over tide waters. This court has repeatedly held that the legislature might authorize the construction of a bridge over navigable tide waters, although navigation might thereby be impaired. *Rogers v. Railroad Co.*, 35 Me. 323; *State v. Freeport*, 43 Me. 196; *State v. Portland & K. R. Co.*, 57 Me. 402; *State v. Leighton*, 83 Me. 419, 22 Atl. 390. So held in *Com. v. Proprietors of*

New Bedford Bridge, 2 Gray, 347. Under like authority from the state, wharves and docks are built and maintained. It is undoubtedly true that a large majority of the bridges over navigable tide waters, and wharves and landings in them, in this state, have been erected and are maintained without any express authority from the United States.

By the modern law of nations, the territorial jurisdiction of a state extends seaward the distance of a marine league. See authorities cited in note to Gould, Waters, p. 9. In England this jurisdiction was vested in the crown. At the time of the Revolution, when the people became sovereign, the respective states succeeded to the title of the crown in the tide waters within their territorial limits. The powers thus acquired by the states were those which in England, and in this country previous to the Revolution, could have been exercised by the king. *Martin v. Waddell*, 16 Pet. 367. This sovereignty of the state over tide waters for a marine league from the shore still resides in the state. It was never surrendered to the United States, but was restricted by the constitution of the United States only so far as the admiralty jurisdiction of the United States courts, and the power to regulate commerce with foreign nations and among the states, was conferred upon the general government. Neither of these is absolutely exclusive of state authority. The commerce clause of the constitution is the only one that can affect the question here involved, and that does not render nugatory state legislation which affects commerce but does not interfere with then existing regulations of congress upon the same subject. *Wilson v. Marsh Co.*, 2 Pet. 245. It is true that, under the power to regulate commerce given it by the constitution, congress has the right, by appropriate laws, to so regulate the construction of bridges that navigation shall not be unnecessarily obstructed; but as stated by the court in *Hamilton v. Railroad Co.*, 119 U. S. 231, 7 Sup. Ct. 206, "until congress intervenes in such cases, and exercises its authority, the power of the state is plenary. When the state provides for the form and character of the structure, its directions will control, except as against the action of congress, whether the bridge be with or without draws, irrespective of its effect upon navigation."

In *Gilman v. Philadelphia*, 3 Wall. 725, the court say: "The national government possesses no powers but such as have been delegated to it. The states have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the federal constitution. It has not been taken from the state. It must reside somewhere. They had it before the constitution was adopted, and they have it still." "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transpor-

tation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and, from the nature and objects of the two systems of government, they must always continue to exercise it,—subject, however, in all cases, to the paramount authority of congress whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation."

This doctrine has been repeatedly affirmed by that court. *Pound v. Turck*, 95 U. S. 462; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423; *Hamilton v. Railroad Co.*, supra; *Bridge Co. v. Hatch*, 125 U. S. 8, 8 Sup. Ct. 811.

We do not find that congress acted upon the general subject of bridges over navigable tide waters prior to the act of July 5, 1884. By that act it was provided that if an existing bridge, or one thereafter built, proved an obstruction to free navigation, "by reason of difficulty in passing the draw opening or the raft span of said bridge, by rafts, steamboats or other water craft," the secretary of war might require the owners "to cause such aids to the passage of said draw opening or of said raft span * * * to be constructed, placed and maintained * * * in the form of booms, dikes or other suitable and proper structures for the guiding of said rafts, steamboats and other water craft safely through." It will be noticed that this act recognized the rightful existence of the bridge, and only required a construction which would interfere as little as practicable with navigation, and that both the bridge and the navigable water were of public use,—the bridge, perhaps, of the greater public use. Both were intended to be enjoyed, but the one should not unnecessarily injure the other. The water craft could not insist upon absolute and uninterrupted navigation, requiring the removal of the bridge, but must enjoy its right subject to the necessary partial interruption and inconvenience which a suitable bridge would occasion. By the act of August 11, 1888, which applies particularly to navigable rivers, it was provided that if, by any bridge or pier therein, the current was changed so as to produce caving of the banks, the secretary of war might require the owners to repair the damage, or, by some means to be indicated by the secretary, prevent the injury. The act does not treat the bridge as a nuisance, but treats it as lawfully existing. Following this action of congress came the act of September 19, 1890, which prohibits the building of any wharf or bridge in any navigable waters, without the permission of the secretary of war, "in such manner as shall obstruct or impair navigation," etc.; but the act pro-

vides that this prohibition shall not apply to "any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law." The bridge in question was authorized to be built by the legislature of Maine in 1880. At that time congress had not acted upon the subject, and, under the authorities cited, the state then had full power to authorize its construction. The act of congress, in effect, is a consent that bridges before authorized by the state may be built and maintained without objection from the federal government. The same act provides that if "the secretary of war shall have good reason to believe that any railroad or other bridge now constructed, or which may be hereafter constructed over any of the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats or other water craft" after notice and hearing, he may require the owners "so to alter the same as to render navigation, through or under it reasonably free, easy and unobstructed." This act is a full expression of the will of congress. It does not authorize the secretary of war to require the removal of a bridge, nor to take any action, unless it is "an unreasonable obstruction." It recognizes, by implication, the right of a state to authorize the maintenance of such bridge, though of necessity some obstruction to navigation, but requires it to be so constructed as not to be an "unreasonable obstruction." The act is in line with the decision of the supreme court of the United States in *Railroad Co. v. Ward*, 2 Black, 485, where it was claimed that a bridge obstructing navigation was a nuisance, but the court applied the test, was it "an unreasonable obstruction?"

The act of 1890 was amended in 1892, but the amendment is not material here, though it is significant that, in that amendment, congress excepted from its operation bridges the construction of which had been previously authorized by law. Section 10 of the act of September 19, 1890, prohibiting obstruction to navigation, excepts bridges, piers, etc., erected for business purposes, "whether heretofore or hereafter erected."

The consent of the secretary of war was not necessary to the lawful construction of this bridge, and it is not subject to removal under any existing act of the federal government. The only question that can be raised in behalf of water navigation is whether, while it may be some obstruction, it is so constructed as to be an "unreasonable obstruction." If it is, its construction must be changed. If it is not, it has the right to exist as it is.

Whitehead v. Jessup, 53 Fed. 707, cited by respondent, was the case of a private bridge

over navigable water, not connected with any public way, and in which the public had no rights, and was not authorized by any legislative authority. It was rightly held to be a nuisance. This case has no application to a bridge erected, under legislative authority, for public use.

The case affords no evidence that the waters at this place have been, or are likely to be, used to any important extent for purposes of navigation; and from its location, and the position of the shore and adjacent islands, depth of water, and width of passage, it may be fairly presumed that no craft that cannot safely pass under the bridge will have occasion to navigate there.

It is also objected that a part of the bridge is in St. George. The act of 1863 setting off a part of St. George to South Thomaston, so far as important to this question, gives the boundary as "along the shore around Elwell's Point and still along the shore to the southerly line of South Thomaston and including Seal Harbor or Spruce Head Island and Burnt Island, lying on the west side of Muscle Ridge Channel." Elwell's Point is admitted to be in South Thomaston, and so is Spruce Head Island. The bridge is from Elwell's Point to the island, a distance of 448 feet, including the approaches to the bridge. In including the island as a part of South Thomaston, the legislature undoubtedly intended to include the water in the narrow passage between the island and mainland. There are large industries upon the island, requiring means of transportation by a bridge, the expense of which should be borne by South Thomaston. It can hardly be supposed that the legislature, when it annexed the island to South Thomaston, intended to leave a narrow space between it and the mainland in another town, but geographically detached from it. The rule that grants by the state are to be taken most strongly against the grantee does not apply. The legislature made no grant. It simply changed the boundaries of two towns, both created by the state. This objection was first made in the answer to this petition. In the carefully drawn written remonstrance presented by the selectmen to the county commissioners, it was not raised, or alluded to in the most distant manner. It is surprising that the selectmen, if they regarded the present contention as valid, should have omitted it in their remonstrance, because, if true, it was a perfect defense, and ousted the jurisdiction of the county commissioners. A town way must be located in one town, and cannot be in two. This objection is without merit.

It is also objected that the records of the commissioners do not show that the whole way has been made passable, but the evidence is that all that part of the way upon land had been opened and built before the bridge was completed. It is true that this was done by the residents without cost to the town, and

was by agreement with the commissioners. The public has obtained its entire town way, and South Thomaston cannot complain that it has been relieved of the cost of grading. So the deflections from the location in the graded road, made for convenience or saving of cost, and not complained of by the public, cannot excuse the town from liability to pay for the bridge. The commissioners appointed an agent to build the bridge and open the way. The agent found the way graded, and the bridge the only missing link, which he supplied. No objection is perceived to this. We have carefully examined the record of the commissioners, and, although several technical objections to it are made, we regard them all as untenable. It would be unprofitable to discuss them in detail.

It is true that, before the commissioners had made their return and entered judgment against South Thomaston, they ordered a warrant of distress to issue, and it was issued; but, before anything was done in execution of the warrant, the commissioners discovered that it had been prematurely issued, and recalled and revoked it, as it was their right and duty to do. Having been improvidently issued, it was invalid, and did not afford the foundation for an alias. Then they entered up a proper judgment, under their hands, in favor of the agent, and against South Thomaston, and directed their clerk to extend the record in due form; and in that judgment the commissioners ordered their clerk to issue a warrant of distress according to the statute, if the judgment was not paid within 20 days after the transmission of the certificate of the rendition thereof to the assessors of South Thomaston. Thereupon the clerk made a record in due form, and transmitted a copy of it to the assessors, under the seal of the court of county commissioners, duly attested by him, which was received by the assessors on February 15, 1897. All these proceedings appear to be regular and in accordance with law.

The commissioners made return of their doings and judgment, in writing, under their hands, as required by law, and their clerk duly extended the record. The commissioners ordered a warrant of distress to issue to the petitioner, as agent, for the cost of the bridge, and his expenses for superintendence and for procuring the allowance of his account.

The petitioner is the proper party in whose favor the warrant of distress should issue. He was the contractor for the bridge, and should collect from the town, and pay the builders.

The board of county commissioners is a court, having a seal and clerk. Their judgments are extended and recorded by their clerk. When the clerk issues a warrant of distress in accordance with the judgment and order of the commissioners, it is issued by that court, as required by statute. Their clerk is their hand, and his ministerial act in execution of their order is, in law, their act.

It results that it was the duty of the respondent,

as clerk of the commissioners, to issue a warrant of distress in accordance with the judgment and order of the county commissioners.

This case was reported to the law court by consent of parties, "to be heard upon the petition, objection, and evidence, documentary and otherwise," and "the law court is to decide the case upon the pleadings, and such evidence as is legally admissible, and to make such orders and decrees as the rights of the parties require." Under this agreement, the parties evidently contemplated that the law court should treat the pleadings as an alternative writ and return, and have thereby waived the right to an alternative writ, and authorized the court to issue the final peremptory writ.

No damages are claimed, and none are awarded.

Peremptory writ of mandamus to issue as prayed for.

(91 Me. 87)

DUNNING v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Dec. 20, 1897.)

RAILROAD—FIRE SET BY ENGINE—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

1. In the trial of an action for damages by fire alleged to have been communicated by a locomotive engine, when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, evidence that other fires were caused by the defendant's locomotives, at about the same time, and in the same vicinity, is relevant and admissible for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks, or the escape of coals.

2. That other engines of the same company, under the same general management, passing over the same track, at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind, as showing that it was possible for the engine in question to do likewise. Such testimony is illustrative of the character of the locomotive, as such, with respect to the emission of sparks, or the dropping of coals.

3. And this rule is applicable although, before the testimony was admitted, defendant's counsel claimed that the plaintiff had already identified the engine as one drawing a certain train, which was true, and gave notice that the engine drawing that train would be fully identified by the defendant, and although the defendant subsequently identified the engine by number.

4. This rule is also applicable, although, before the evidence was admitted, defendant's counsel expressly admitted the possibility of an engine setting fires.

5. It does not lie in the power of one party to prevent the introduction of relevant evidence of the other party by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove essential facts, and present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. *Hdd.*, that exceptions do not lie to the admission of relevant evidence under such circumstances.

6. The testimony of a witness that he saw fire in a pile of sleepers beside the railroad track, soon after a locomotive had passed, is ad-

missible, and should not be afterwards stricken out upon motion, although upon cross-examination he testified that he did not know how the fire caught, or how long it had been burning, though "it couldn't have been there a great while." The weight of the evidence is for the jury.

7. So in regard to the testimony of a witness who testified that he saw a fire soon after an engine had passed, though his statement upon cross-examination respecting the time he saw the fire was inconsistent with his testimony first given.

8. So in regard to the testimony of a witness who testified that he saw certain fires two or three days after the fire in question, although a witness for the defendant recollected these fires as having occurred between two and three months later. *Held* that, whatever the facts may have been, these are questions which cannot be settled upon exceptions. It is for the jury to consider, in view of all the testimony, whether the witnesses are credible and reliable. The court cannot exclude the testimony of a witness because it is inconsistent or inaccurate.

Thatcher v. Railroad Co., 27 Atl. 519, 85 Me. 502, affirmed.

(Official.)

Exceptions from supreme judicial court, Penobscot county.

Action by John G. Dunning against the Maine Central Railroad Company. Verdict for plaintiff. Motion for new trial, and exceptions. Motion and exceptions overruled.

This was an action on the case to recover for the loss of the ice houses, and property therein, formerly belonging to the Katahdin Ice Company, and situate in Bangor, between the track of the defendant company and the Penobscot river, at High Head. The case was tried to a jury in the court below, sitting in Penobscot county; and it was agreed that the case should be submitted to the jury upon the single question of the defendant's liability, with the understanding that, if there was a verdict for the plaintiff, it was to be heard by Mr. Justice Wiswell in damages.

The first count in the declaration is as follows:

"In a plea of the case, for that the said plaintiff, at Bangor aforesaid, on the 27th day of May, 1896, owned and was possessed of certain property, to wit, the ice houses formerly belonging to Katahdin Ice Company, and lying and being in Bangor aforesaid, between the track of said Maine Central Railroad Company and the Penobscot river, at High Head, so-called, and the boiler house connected therewith, all being of the value of twenty thousand dollars; and also of certain machinery, tools, and appliances, consisting of engine, boiler, elevator, shafting, belts, runs, rigging, and ice tools, all being of the value of three thousand dollars; and also of a large quantity of ice stored in said houses, to wit, twenty thousand tons of ice, of great value, to wit, of the value of twelve thousand dollars; all of which said buildings and property were then and there of the total value of thirty-five thousand dollars, and were then and there lawfully placed and

stored on land of said plaintiff, and adjoining the railroad of said Maine Central Railroad Company, and were then and there, and for a long time before had been, situated and deposited there, and were such property as said Maine Central Railroad Company had an insurable interest in, and could have procured insurance thereon; and then and there said Maine Central Railroad Company, so chartered by the laws of said state, did own and operate a railroad adjoining said premises and property of said plaintiff, and did then and there run and use, by its servants and agents, a locomotive engine, and cars attached thereto; and on said day, at said Bangor, while said locomotive engine was being run and used and operated on said railroad by said corporation, said property of said plaintiff was injured and destroyed by fire communicated by said locomotive engine, so being run and used by said corporation.

"And said plaintiff avers that his said property above named, and so situated as above, was totally destroyed at said time and place by said fire, and that the sole cause of said fire, and such injury and destruction of his property, was the fire communicated by the locomotive engine so being used and run by said corporation."

The jury returned a verdict in favor of the plaintiff, and the defendant filed a general motion for a new trial, and also took exceptions.

From the defendant's bill of exceptions it appears that the plaintiff's counsel, in his opening of the case, had claimed that the fire which caused the damage which is sued for in this case had been communicated by the locomotive of the defendant company which drew what was known as the "Dexter and Dover Train," that left Bangor on the afternoon of May 27, 1896, at 4:30 p. m.

Frank William Robinson, whose deposition was introduced by the plaintiff, testified that on the afternoon of May 27th he left his house, which was near the ice house that was destroyed, about 5 p. m., local time, or 4:30, standard time, in the afternoon of that day, and, going up the track towards the station in Bangor, he met a locomotive drawing the Dover and Dexter train, and that at about the time he got up to the city he heard the alarm of fire caused by the fire in question.

William H. Quine, a witness for the plaintiff, had testified that he saw an engine drawing the Dexter and Dover train go by 10 or 15 minutes before this fire in the ice house was discovered.

Margaret S. McCormick, a witness for the plaintiff, had testified that she saw the Dexter and Dover train go by between half past 4 and 25 minutes of 5, and that the fire in the ice house was discovered at 5 minutes after 5.

Philip P. McCormick had testified that it was 15 or 20 minutes, more or less, after the

Dexter train went out, that the fire in the ice house was first discovered.

It was claimed throughout the case by the plaintiff that this fire was caused by the particular locomotive which drew the Dexter and Dover train, leaving Bangor on that particular day at 4:30 o'clock in the afternoon.

Plaintiff's counsel offered testimony tending to show that, at various times shortly before and after the fire in the ice house constituting the cause of action in this case, other fires were seen on, or in the immediate vicinity of, the track, and that other engines of the defendant corporation, by emitting sparks, cinders, or coals, spread fire.

This testimony was not at first admitted, but after the introduction of the testimony hereinbefore stated, as to the identity of the engine which it was claimed, on the part of the plaintiff, set this particular fire, the presiding justice, against the objection and subject to the exception of the counsel for the defendant, ruled, for the purposes of this trial, that for the purpose of showing the capacity of locomotives used by the defendant company to cause fires, and for the purpose of showing the possibility that this fire was caused as claimed by the plaintiff, he would admit testimony tending to show that at various times about the time that this fire was caused, and in that vicinity, engines of the defendant corporation, by emitting sparks, cinders, or coals, spread fire, and that fires were seen on, or in the immediate vicinity of, the track, shortly after the passage of locomotives of defendant company.

Defendant's counsel thereupon gave notice that the engine drawing this train would be fully identified, and that it appeared already that the plaintiff had identified that engine as drawing that particular train, and that he, in behalf of the defendant, admitted the possibility of engines setting fires; but the presiding justice admitted the testimony, saying, further, that he thought the evidence should be of such a character as to show that these fires were caused by locomotives of the defendant company,—not merely that there were other fires at other times in the immediate vicinity of the track, but that sparks were emitted, or that coals were emitted, or shortly after the passage of other locomotives other fires were seen upon the track or along the track.

To this ruling, and the admission of such testimony, defendant took exceptions.

John Lee, a witness called by the plaintiff, was asked the following question: "Have you, at or about the time of this fire on the 27th day of May last, seen any fires about in the vicinity of the ice houses, and contiguous to the track, immediately or soon after the passage of any locomotives of the Maine Central Railroad?"

This question, objected to by counsel for the defendant, was admitted, subject to his objection and exception, whereupon the witness answered:

"Yes, sir; I have seen fires;" and went on

to state that he saw one that very afternoon that the fire in the ice house took place, and that it was in a pile of sleepers at the southerly end of High Head cut.

This same witness, upon cross-examination, testified that he did not know how this fire in the sleepers caught; he did not know how long it had been burning when he saw it; and that he did not know anything about it, except that he saw it. He subsequently said that it could not have been there a great while when he saw it, as he judged from the headway it had. This witness further testified that he left the stable on that day at 1 o'clock, local time, or half past 12, standard; that it took him about 15 minutes to go from the stable to the ice houses; that immediately upon his arrival they went to work loading up the teams; that they loaded up four teams that afternoon; and that it ordinarily took to load all the teams some two hours, more or less. He said that he saw this fire in the sleepers after they commenced to load, and that he could not say whether it was while they were loading the second team, or the first team, when he saw it, or the third or the fourth team.

It was admitted that a train left the Maine Central station at 1:40, standard, in the afternoon of that day. At the close of this witness' testimony and after said cross-examination, counsel for the defendant asked that this testimony relating to this fire in the sleepers be stricken out, whereupon the court ruled that it might stand, subject to objection.

To the admission of the aforesaid testimony, and the allowing it to stand, defendant excepted.

Thomas E. Smullen, a witness called by the plaintiff, was asked, "Did you ever notice cinders along the track?" and answered, "Yes, sir," and was further asked, "Now, within a few days or weeks of the fire at the ice house, have you seen other fires in the vicinity of the ice house, near the railroad track, and shortly after the passage of the locomotive within a short time before?" to which he answered, "Yes, sir;" and, the defendant's counsel objecting, the court said, "All of this is subject to the general objection."

To the admission of this testimony, defendant excepted.

Charles M. Stewart, a witness called by the plaintiff, subject to the same general objection on the part of the defendant was allowed to testify in relation to other fires, and testified particularly as to a lot of fires (13 different fires, he said) found on the sleepers of that section of the railroad in one day.

To the admission of this testimony, defendant excepted.

Defendant subsequently identified this particular engine drawing the Dexter and Dover train as engine No. 95, and showed that the engines in use on this particular railroad were built by different builders, of different sizes and different classes of construction, and further showed, particularly in relation to the great number of fires on one day in the sleep-

ers, testified to by Charles M. Stewart, that they were caused by another locomotive, No. 162, which had defective grate bars, allowing the dropping of coals onto the sleepers; the engine being a new one, and not having been fully fitted for its work. Defendant further showed that the cinders which are taken from the locomotives as they accumulate are loaded on cars, and distributed along the shoulders of the roadbed in this vicinity.

After all this testimony on the part of the defendant had been introduced, and at the close of the testimony in the case, defendant's counsel renewed his motion to strike out this evidence regarding other fires which had been objected to, but the court overruled the motion; to which overruling of the motion, and allowing the testimony to stand, the defendant excepted.

A full report of the evidence in the case, and a full copy of the charge of the presiding justice to the jury, as bearing upon the points of the exceptions, were made a part of the bill of exceptions.

Among other instructions given by the presiding justice to the jury are the following:

"Now, there has been certain other testimony introduced in this case. To some extent, guarded evidence has been offered, as you very well remember, tending to show that other locomotives, or locomotives generally of this road, at about the time of the fire, and in that vicinity, did scatter fire, by the emission of sparks or the escape of coals, or in some way that fire has escaped from other engines, and set fire to other inflammable material along the line of the track. That was offered, gentlemen, and admitted, for but one single purpose. * * * It was admitted for the purpose of showing the capacity of locomotive engines to set fire by the emission of sparks or the escape of coals,—to show the possibility that such things might happen from the engines that were in general use by this company (this defendant company) at this point; and it is not competent for any other purpose, and will not, I am sure, and cannot, have any other bearing in your minds."

Charles P. Stetson and John R. Mason, for plaintiff. Charles F. Woodard, for defendant.

SAVAGE, J. Action on the case to recover for the loss of property by fire alleged to have been communicated by a locomotive engine of the defendant corporation. The case comes up on a motion for a new trial, and on exceptions. The entire evidence and the charge of the presiding justice are made a part of the bill of exceptions. The plaintiff's claim is based solely upon the statute (Rev. St. c. 51, § 64) which provides that, "when a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury." No question of negligence on the part of the defendant is involved. The principal, if not the only, issue of fact submitted to the jury, was whether the

fire which occasioned the loss of the plaintiff's ice house was in fact communicated by one of the defendant's locomotives. The plaintiff relies upon circumstantial evidence. The defendant claims that the circumstances proved are not sufficient to raise a legitimate inference that the fire was communicated by one of its engines.

The evidence introduced by the plaintiff shows, we think, that on May 27, 1896, the Dover and Dexter train, drawn by one of the defendant's engines, passed the plaintiff's ice house at 4:35 o'clock p. m.; that, about 15 or 20 minutes later, fire was discovered burning on the roof of the ice house, which inclined towards the railroad, at a point about 55 feet from the railroad track, and somewhat higher than the level of the track, but lower than the top of the smokestack of the engine; that when first discovered the fire had burned over a space about 2 feet square; that when an attempt was made, immediately afterwards, to beat it out with a stick, it was scattered to others parts of the roof; that there was no appearance of fire within the building until after the fire burned through the roof; that on that day no ice had been taken from the building, the ice-house engine had not been run, and no fire had been made or used within the building; that two or three workmen had been employed about the building during the day, one of whom was the watchman; that he finished work and left the building 5 or 10 minutes before the passing of the Dover and Dexter train; that when he left there was no appearance of fire in or about the building; that no person had been seen upon or about the roof that day; that the season was very dry, the roof was dry, and the shingles old; that a strong wind was blowing towards the ice house, from the railroad; that, in the vicinity of the ice house, the railroad track, in the direction the Dover and Dexter train was going, had an up grade of 41 feet to the mile; that locomotive cinders were seen about the track at about the time of the fire; and that sparks were seen coming from a locomotive, but whether it was from the locomotive in question does not appear. There is no evidence that the fire was communicated by any of the defendant's engines, unless it was by the one drawing the Dover and Dexter train.

Against the objection of the defendant, the plaintiff was permitted to introduce evidence to show that at various times about the time that this fire was caused, and in that vicinity, engines of the defendant corporation, by emitting sparks, cinders, or coals, spread fires, and that fires were seen on, or in the immediate vicinity of, the track, shortly after the passage of defendant's engines, of such a character as to show that they were caused by such engines; and the admissibility of testimony of this class is the principal question raised by the defendant's exceptions. Before the testimony was admitted, the defendant's counsel claimed that the plaintiff had already identified the engine as the one drawing the Dover and Dexter train, and gave notice that the engine drawing

that train would be fully identified by the defendant, and the defendant did subsequently introduce evidence that the engine which drew that train was No. 95. Also, before the testimony concerning other fires was admitted, the defendant's counsel expressly admitted the possibility of engines setting fires; and he now claims that, because of this admission, the testimony, even if otherwise relevant and admissible to show such a possibility, should have been excluded. We do not think so.

It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts,—to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances.

To return to the principal question. In the case of *Thatcher v. Railroad Co.*, 85 Me. 502, 27 Atl. 519 (a case similar to the one now under consideration), this court said, respecting evidence tending to show other fires communicated by the locomotives used on the defendant's railroad at different times about the same time that the plaintiff's lumber was destroyed by fire, and in the same vicinity: "We think its competency, where the issue is whether the fire was communicated from a locomotive, is clearly established by courts of the highest authority. It tends to show the capacity of the inanimate thing to set fires along the road, and when a fire is discovered soon after a locomotive has passed, and there is no evidence tending to show that it might have been caused in some other way, it authorizes the inference that it was caused by the locomotive." The learned counsel for the defendant claims that the rule so stated is subject to modification, and that it is applicable only when the engine alleged to have caused the loss is not identified. He claims, also, that the case of *Thatcher v. Railroad Co.* itself recognizes such a modified rule. But that case merely recognizes that "there are several authorities declaring that to be the rule," and further says that, as "neither the plaintiff nor any of his witnesses were able to identify the locomotive by name or number," the evidence, when admitted, was "clearly within the modified rule." So that, even if the modified rule was the correct one, the defendant in that case had no good ground of complaint. This was not a recognition of the modified rule as the law in this state.

The defendant's counsel further contends that as the admissibility of the evidence in the *Thatcher Case* was finally sustained on the ground that at the time it was offered the particular engine had not been identified, so that in any event the case was brought within the modified rule claimed by the defendant, therefore the broader rule stated by the court—and

which we have quoted—should be regarded as obiter dictum, and we are asked to reconsider the whole question.

It may well be doubted whether the evidence in this case on the part of the plaintiff, as to the identity of the engine, is sufficient to bring the case within the modified rule contended for. It is true that during the trial the defendant gave notice that it would fully identify the engine, but proof of identity from the defendant at that time would be of little service to the plaintiff to enable him to investigate the character, or the previous history, as to fires, of that particular engine, if he was to be limited by the modified rule; and neither the notice that proof would be made, nor the fact that it was made subsequently by the defendant, can affect the question we are discussing. The engine was not identified, on the part of the plaintiff, by name or number, but only as the engine which drew the *Dover* and *Dexter* train that day. There was no mark upon it, known to the plaintiff, by which he could identify it elsewhere. He identified the train. Was he bound to know that the same engine hauled the *Dover* and *Dexter* train each day? The defendant says this engine was No. 95. True. No. 95 is the same identical engine, day after day; but the engine drawing the *Dover* and *Dexter* train may be identical day after day, and it may not be. It would be manifestly difficult, if not impossible, for an injured party who could identify an engine only by the train it drew on a particular occasion to obtain any information which, within the modified rule, would be of any service to him, except such as the servants of the railroad company were willing to communicate. And the authorities seem to be to the same effect. *Thatcher v. Railroad Co.* is in point. In *Railway Co. v. Richardson*, 91 U. S. 454, the trains were identified, but the court declared that the locomotives were not. So in *Diamond v. Railway Co.*, 6 Mont. 580, 13 Pac. 367; *Piggott v. Railway Co.*, 3 Man., G. & S. 228; *Koontz v. Navigation Co.*, 20 Or. 3, 23 Pac. 820. In many cases where the modified rule has been applied, the engines have been identified on the part of the plaintiff by name or number. *Inman v. Railroad Co.*, 90 Ga. 663, 16 S. E. 958; *Ireland v. Railroad Co.*, 79 Mich. 163, 44 N. W. 426; *Railroad Co. v. Schultz*, 93 Pa. St. 341; *Railway Co. v. Decker*, 78 Pa. St. 203. In *Henderson v. Railroad Co.*, 144 Pa. St. 461, 22 Atl. 851, cited by defendant's counsel, four trains had passed within an hour, the engine of one of which was identified by the plaintiff by number; the others, not. It was unknown which engine, if any, caused the fire. The court gave the modified rule as applicable in case of unidentified engine, and the broader rule, as stated by Libbey, J., in *Thatcher v. Railroad Co.*, as applicable in other cases, saying, "Where the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual

size, and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged."

But, without regard to the question of identity, upon a careful re-examination of the decided cases we are satisfied that the rule stated in *Thatcher v. Railroad Co.* is supported by reason, and by the great weight of authority. We think that when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, other fires caused by defendant's locomotives at about the same time, and in the same vicinity, may be given in evidence for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks or the escape of coals. It is admissible as "tending to prove the possibility, and a consequent probability, that some locomotive caused the fire,"—language from *Railway Co. v. Richardson*, 91 U. S. 464, which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track, at the same grade, at about the same time, and surrounded by the same physical conditions; have scattered sparks or dropped coals, so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive, as such, with respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability, and then to satisfactory proof. A simple enumeration of some of the authorities which sustain these views may be useful: *Sheldon v. Railroad Co.*, 14 N. Y. 218; *Field v. Railroad Co.*, 32 N. Y. 339; *Diamond v. Railway Co.*, 6 Mont 580, 13 Pac. 867; *Piggott v. Railway Co.*, 8 Man., G. & S. 229; *Koontz v. Navigation Co.*, 20 Or. 3, 23 Pac. 820; *Railway Co. v. Gilbert*, 3 O. C. A. 264, 52 Fed. 711; *Campbell v. Railway Co.*, 121 Mo. 340, 25 S. W. 936; *Smith v. Railroad Co.*, 10 R. I. 22; *Railroad Co. v. Gantt*, 39 Md. 124; 1 Thomp. Neg. 163.

The defendant has reserved exceptions to the admission of certain testimony as to other fires, which it claims does not fall even within the rule we have declared. In one instance a witness testified to seeing fire in a pile of sleepers beside the railroad track soon after a locomotive had passed. This was admissible, and if on cross-examination the witness testified that he did not know how the fire caught, or how long it had been burning, though "it couldn't have been there a great while," this does not render his testimony any the less admissible. The weight of it was for the jury.

It is claimed in regard to one witness, who testified to seeing a fire soon after an engine passed, that his statements on cross-examination respecting the time he saw the fire were inconsistent with his first testimony; and in regard to another witness, who testified to seeing certain fires two or three days after the

day of the ice-house fire, that a witness for the defendant recollected these last fires as having occurred between two and three months later, and hence too remote in time to be fairly within the rule.

Whatever the facts may have been, these are questions which cannot be settled upon exceptions. The testimony in chief as given by the witnesses was admissible. It was for the jury to consider, in view of all the testimony, whether the witnesses were credible and reliable. The court cannot exclude the testimony of a witness because it is inconsistent or inaccurate.

In considering the motion for a new trial, we do not think it profitable to extend this opinion by an analysis of the evidence. Many of the salient points have been stated already. The defendant introduced much testimony respecting engine No. 95, and upon other matters, to show the improbability that the fire was caused by its engine. The evidence was wholly circumstantial. Giving to the circumstances their due weight, we cannot say that the jury were not authorized to conclude that the fire was communicated by the defendant's locomotive.

Motion and exceptions overruled. Cause remanded for hearing in damages, as stipulated by the parties.

(61 N. J. L. 26)

STATE ex rel. CANFIELD v. DAVIES.
(Supreme Court of New Jersey. Feb. 3, 1898.)
CONSTITUTIONAL LAW—SPECIAL ACTS—TOWNSHIP OFFICERS.

Act April 14, 1891 (P. L. 1891, p. 417), applying only to "all towns * * * having a population of 10,000 inhabitants or over," and providing that the terms of the office of clerk shall be for two years, is repugnant to amended Const. art. 4, § 7, par. 11, subd. 3, prohibiting the passage of special laws regulating the internal affairs of towns.

Action in quo warranto at the relation of Burton E. Canfield against David Davies. Judgment for defendant.

Argued November term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Corbin & Corbin, for relator. Joseph Parker, Jr., and Edward Kenny, for defendant.

DEPUE, J. The contest in this case is over the office of clerk of the township of Kearney. The charter of the township of Kearney provides that the township committee shall appoint a clerk, who shall hold office for one year or until another is appointed in his stead. P. L. 1871, p. 1371. Both parties claim under appointments by the township committee. Canfield, the relator, was appointed April 20, 1896; Davies, the incumbent and defendant, was appointed April 19, 1897. Reckoning one year from his appointment, which is the term of office prescribed by the township charter, the relator's office expired in April, 1897, and the defendant's appointment was regular. To maintain a title to the office beyond the one

year to which the term was limited by the charter of the township, the relator relies upon Act April 14, 1891 (P. L. 1891, p. 417). This act was amended by the act of 1892 (P. L. 1892, p. 258). The latter act being unconstitutional, and so declared by this court in *Goldberg v. Dorland*, 56 N. J. Law, 364, 28 Atl. 599, the act of 1891 remained and is in force. The question material to the decision of this controversy is whether the act of 1891 is itself constitutional. The act provided that the terms of office of clerk, collector, and receiver of taxes thereafter elected or appointed should be for two years. The act also provided that it should take effect immediately. It was passed before the relator was appointed clerk, and, if valid, gave him a term of two years. The act applies only to "all towns and boroughs, and all townships having a population of 10,000 inhabitants or over, according to the last census." The township of Kearney had a population of 10,487 by the state census of 1895, which was promulgated according to law, January 15, 1896. The relator was appointed on April 20, 1896. In the summer of 1895 the borough of East Newark was formed out of the territory of Kearney township. It is said that the excision of this territory, with its inhabitants, in fact reduced the population of what was left of Kearney township below 10,000. We have no means of ascertaining how much the population was lessened by the separation of this territory, nor how much the remaining part was increased by the increase of population. The act makes the population as exhibited by the last preceding census the criterion by which the townships comprised in the legislation shall be ascertained, and is its own interpreter.

The question discussed by counsel is whether the statute is founded on a constitutional classification. At the date of its passage, of the 248 townships in this state only 2 came within the purview of the act. The act for the formation, establishment, and government of towns, passed March 7, 1895 (3 Gen. St. p. 3525), provides for the incorporation of the inhabitants of any town, village, borough, or township, which has or hereafter may have a population exceeding 5,000 inhabitants, by the name and title of the town of, etc., whenever the question of incorporating under the act is submitted and so decided by a majority of the voters thereof at any such election. This act provides for the election of town clerk at the annual town election, to hold office for the period of two years, and provides otherwise a scheme for municipal government. It is a general law in force throughout the state, and its provisions are open to be accepted by a popular vote whenever the requirements of the act are complied with. *State v. Borough of Clayton*, 53 N. J. Law, 277, 21 Atl. 1026. The township of Kearney has not become incorporated under this statute. The relator's title rests on the act of 1891, which confers the right to hold office for a period of years upon townships containing a population of 10,000

and upwards. The question is whether this classification is valid. The rule is thoroughly settled in this state that a law, in order to be general, must embrace an entire class of objects; that, if it deals with municipalities, they must either compose what, by common consent, is regarded as a class, such as all cities or all townships, or they must differ from other municipalities in some peculiar characteristic to which the law relates, and which is important enough to afford a reasonable ground for the legislation intended. If the statute excludes from its purview a single member of a class thus defined, it becomes special. *Tetrauit v. City of Orange*, 55 N. J. Law, 99-101, 25 Atl. 268; *Helper v. Simon*, 53 N. J. Law, 550, 22 Atl. 120; *Goldberg v. Dorland*, 56 N. J. Law, 364, 28 Atl. 599. There being no distinguishing feature in this act showing a fair relation between the class legislated for and the purpose of the legislation, and which in this respect segregates this class from other townships, the classification on which the act is based is vicious (*Goldberg v. Dorland*, supra); for it cannot be shown, at least it is not apparent to the court, that there is any substantial distinction between townships of 10,000 inhabitants and other townships in the state, which requires the former to be designated as a class by themselves in the matter of the term of office of the clerk. There should be judgment on the demurrer for the defendant.

FOLEY v. LOUGHRAN.

(Court of Errors and Appeals of New Jersey.
Jan. 18, 1898.)

Dissenting opinion. For majority opinion, see 38 Atl. 960.

GARRISON, J. (dissenting). The court charged the jury as follows: "Gentlemen of the Jury: This case was brought by the plaintiff, Peter Loughran, against Louis B. Foley, administrator of the estate of James T. Gibbons, deceased. It is brought to recover the sum of \$1,830.19 for the board, care, and maintenance of the children of James T. Gibbons,—for James H. Gibbons, from September 1, 1889, to April 21, 1892, at \$12 per month; Peter Gibbons, from September 1, 1889, to April 21, 1892, at the rate of \$12 per month; Richard Gibbons, from November 12, 1889, to April, 1892, at the rate of \$12 per month; Mary Elizabeth Gibbons, from July 8, 1890, to March 1, 1894, at the rate of \$12 per month; and for the board of three nurses from November 27, 1889, to February 21, 1892, at \$16 per month,—amounting to \$1,830.19. The plaintiff has brought this action for the board and maintenance of these children, against the administrator of their father's estate, which board and maintenance they claim has never been paid.

"Counsel for the defendant raises a point

of law which I will decide now. Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation.

"In this case the testimony shows that there was, at the time these children were taken to this place, such expectation upon both sides. The wife of the plaintiff, who was the grandmother of the children and mother-in-law of the deceased person, for whom Mr. Foley is administrator, states that she had conversation in which Mr. Gibbons told her to take care of these children, with instruction to render her bill for what she thought was right. He left it to her. If this is true, whether any price was agreed upon or not, there were expectations by both parties, and the testimony is that the services were expected to be remunerated for; and I charge you that, under the evidence in this case, these services were expected to be remunerated for,—that is, that the plaintiff expected to receive compensation, and that the defendant expected to pay. The case is a peculiar one in a great many of its aspects, and, as such, it requires your very careful consideration. This suit is not brought against Mr. Foley in his individual capacity. It makes no difference to him personally which way you decide this case. He is brought here as the defendant, as administrator of James T. Gibbons' estate, an estate which belongs to these children; and as such administrator of the estate, as guardian of these children, it is his duty to protect that fund for these children, and defend it against any cause which he believes to be an unjust one and not right; and that is the position in which he and the children are in.

"Now, you have the evidence here of Mrs. Loughran, the wife of the plaintiff, that she made this agreement, and that she took charge of these children; that the husband, the plaintiff here, was the head of that household; that he provided for the family; and that he also, of course, provided for the children. As the head of that family, he is the real plaintiff in this suit. You will scan the testimony very carefully in this case, because it looks to me like a case that should be carefully scrutinized. The fund belongs to these children, and this suit is brought for the maintenance of these children. The plaintiff is a poor man. The deceased was a man of means, and could have paid on de-

mand. If that bill has been paid, these children should not be obliged to pay it again; and, on the other hand, if it has not been paid, it is no more than right that it should be paid. You will take and consider all the evidence,—all the facts and circumstances which may surround it; and if you find that the plaintiff in this case has rendered services, and is entitled to this claim, your verdict, of course, will be for the sum sued for, less the credits allowed. As to whether the plaintiff has received anything or not himself upon this bill, there is no direct evidence. You only have the testimony of the plaintiff's wife, Mrs. Loughran. The plaintiff's wife is put upon the stand, and she claims that amount. Upon cross-examination she states that these children, except one, left there in 1892, in order to make room for other members of her family, and that after that time she borrowed money from this son-in-law. You will consider whether that is a reasonable state of affairs, and that she paid a part of it back. She borrowed \$400. She says it was a loan. Those are the words she used, I believe, and that there were other sums of money which she received from him. You will remember the testimony on that point, and that counsel for the defendant and plaintiff made the sum \$614.17. This was after the children had left the house of their grandmother. You will take the testimony, and find whether Mr. Loughran ever collected that money. He had a perfect right to do it. He was the head of that family, and, as such, he had the right to demand of his son-in-law the amount of the board and maintenance of the children. Whether he did or did not is a question for you, and the only way in which you can arrive at a conclusion is to take the facts and circumstances surrounding the case, and say whether or not the bill is reasonable and proper; that it is a just bill, running from September, 1889, to April, 1892, which is still unsettled; and whether it is a just bill against the deceased—that he owed this money for the board and maintenance of the children—is a question for you.

"The plaintiff has not gone upon the stand, and there is no evidence, except that given by the wife, that the amount which she states was all that she had received.

"Mr. Foley, as I have stated before, is sued here in a representative capacity; defends it as the guardian of these children,—as the administrator of their father's estate. It is proper that he should defend this suit, as he has an estate, according to his testimony, that was left to these children, of over some \$28,000.

"Take the facts as they have been presented here, and if you find that the \$614.17 was paid on account of these children, you will deduct that from the full amount claimed, which would then leave a balance of \$1,226.52 for the plaintiff, with interest. If you

find that has been paid, your verdict will be for the amount claimed, less that amount; or, if you find that the services rendered in boarding and taking care of these children have been remunerated for, your verdict will be for the defendant."

The theory of this charge is that if the deceased told Mrs. Loughran to take care of the children, and to render a bill for what she thought right, this criterion, viz. what Mrs. Loughran thought right, was the measure of damages in a suit brought by Mr. Loughran against administrators for the grandchildren's board. What Mrs. Loughran testified was as follows: "He [intestate] said, when I am ready, to send him my bill, and 'at any price,' he said, 'I will pay any bill; you charge what is right.'" This was the only proof as to measure of damages; and, acting upon the sum fixed by this witness as "what she charged," the court arrived at the amount of the verdict to be rendered if any contract was made, and nothing had been paid on account.

In the face of a bill of exceptions specifying this part of the charge, and error assigned thereon, I cannot ignore the principle of evidence involved.

Assuming that the case was in all other respects legally presented or withheld from the jury, the question remains whether there was any proof upon which the court could direct the jury that a certain sum was due, if anything was due. There was none, unless the testimony I have cited furnished such proof, which will not be seriously contended. In such a case the court is no more authorized to act upon such testimony than a jury would be, and the only redress of the party is by exception to the charge, since he cannot foresee that such will be the judicial action. It can scarcely be contended that the value of board and care rendered by a grandfather to a family of fatherless grandchildren is a matter of such common knowledge that no testimony need be offered; but, if that be true, it is to the common knowledge of the jury that the matter submits itself. In fine, I see no way in which the present mode of procedure can be affirmed without the inordinate relaxation of the rule of damages, and that in a class of cases in which looseness is not to be encouraged.

(61 N. J. L. 289)

BINDERHAGLE v. STATE.

(Court of Errors and Appeals of New Jersey.
Jan. 18, 1898.)

DISORDERLY HOUSE—EVIDENCE.

Dissenting opinion.

For majority opinion, see 38 Atl. 973.

GARRISON, J. (dissenting). This judgment should be reversed.

The testimony showed that gambling was carried on in two houses in Weehawken, one

situated to the north of the defendant's saloon, and the other, called the "Casino," to the south of it. There is nothing to show whether these houses were run in opposition to each other or whether they were conjointly operated. The fact that visitors from each also visited the bar kept by the defendant is of no legal significance. The same inference would attach to the ferry company that transported them. The house to the north of the defendant's saloon was owned by Mrs. Hoffman, who occupied as her residence the part not used for gambling. The Casino was owned by parties living in New York, and was occupied solely as a gambling house. With respect to the house to the north, the presumption that its owner, who resided in it, had authority over it, and was responsible for its disorderly character, was met by the testimony of that owner, who was the defendant's mother, that "her son took care of the property." The meaning of this expression was for the jury, which might have found that it did not indicate, beyond a reasonable doubt, that the defendant had authority over the use to which the property should be put, or that he ever assumed or exercised such an authority. With respect to the Casino no such question could arise. Its owners were nonresident. If the defendant was at all responsible for the uses to which this house was put, he was solely so. At the trial testimony was introduced showing that gambling was carried on in both of these houses, and the defendant was found guilty under a charge that made him equally responsible for each.

If there was no testimony that the defendant kept the Casino, he was unlawfully convicted; for it may well be that the jury found him guilty because of the disorderly character of that house alone, since it had no resident owner or occupier. There was no evidence whatsoever that connected the defendant with the Casino or with the uses to which its owners put it. The argument of counsel that whoever was guilty of maintaining the Hoffman House was ipso facto guilty of maintaining the Casino is unintelligible to me. And since the Hoffman House, by virtue of its resident ownership, presented a strong ground for exonerating the defendant with respect to it, which did not exist in the case of the Casino, this court cannot say that under the charge the verdict of the jury did not rest wholly, or at least in part, upon the testimony concerning the latter place.

The anti phrase "noninjurious error" is singularly inapplicable to such a state of facts.

It cannot be said that the defendant did not promptly object to the introduction of testimony with respect to the Casino, or that he did not oppose its submission to the jury by every legal means. The judicial history of the trial contained in the bill of exceptions shows that, when the prosecutor asked the first question tending to prove the unlawful purposes to which the Casino was put, the defendant's counsel objected upon the ground of the irrelevancy of the inquiry, and that thereupon the following colloquy and ruling occurred:

"Mr. Winfield: If I don't connect him with the room, of course it will be stricken out. I called this man because he wanted to get away. Objection overruled. To this ruling defendant prays an exception may be allowed, and it is allowed, and signed and sealed accordingly. R. S. Hudspeth, J. [L. S.]"

Notwithstanding the defendant held this bill of exception, at the close of the testimony his counsel made of the court five requests to charge, which in various forms required the court to relieve the defendant from the testimony with respect to the Casino, the last of which was in these words: "Mr. McDermott: I ask the court to charge that the jury cannot convict the defendant unless he had control of the premises or participated in their management." To all of these requests the reply of the court was: "I decline to charge other than as I have already charged." What the court had already charged was such forms as, "adjoining building or buildings," "various buildings," and "various premises"; by all of which the defendant's guilt was put to the jury as resting, indifferently, upon either the mother's house or the Casino, or both.

The judgment of a criminal court into which this error enters ought not to be affirmed. I therefore vote that the judgment be reversed, in order that the indictment may be tried de novo.

This conclusion renders it unnecessary for me to consider whether this court may affirm the judgment brought before it, by which the plaintiff in error was sentenced to unlawful imprisonment, as being a lawful judgment, excepting in that the nature of the imprisonment imposed by it was contrary to law.

(56 N. J. E. 490)

THORP v. LEIBRECHT et al.

(Court of Chancery of New Jersey. July 2, 1897.)

WITNESSES—CONTRADICTION—CREDITORS' BILL—REMEDY AT LAW—FRAUDULENT CONVEYANCES—WHO MAY COMPLAIN.

1. While a plaintiff, who calls defendants as his witnesses, cannot impeach their character for veracity generally, he may show that the whole or any part of what they have sworn to is untrue, either by their own examination and the improbability of their own story, or by other contradictory evidence material to the issue.

2. Where defendant conveyed all his property to his wife for a nominal consideration, two months after an action had been instituted against him to recover actual damages for personal injuries, but before final judgment thereon, the transfer was fraudulent.

3. A creditors' bill alleged that an execution had been issued on complainant's judgment, and delivered to the sheriff, but did not allege what was done thereunder, nor that the judgment debtor was not possessed of other property than the subject of the suit. The evidence given by defendants, however, showed that there was no other property, and that the sheriff's return was *nulla bona*. *Held*, that it was sufficiently shown that complainant had exhausted his remedy at law.

Bill in equity by Owen G. Thorp, an infant, by his next friend, against Joseph Lei-

brecht, Paulina Leibrecht, and Mina Johnsen. Heard on bill, answer, and proofs. Decree for complainant.

Linn & Speer, for complainant. J. R. Bowen and Henry Puster, for defendants.

PITNEY, V. C. The object of this bill is to set aside a conveyance made by the defendant Joseph Leibrecht, through an intermediary, to the defendant Paulina, who is his wife, of two certain pieces of real estate situate in Jersey City. The ground for this relief is alleged to be that the said conveyance was made to defraud the complainant, who, at the time of the conveyance, occupied the position of a creditor of Joseph, and has since obtained a judgment upon his claim. The suit which so resulted was based upon a tort committed on November 2, 1894, and was commenced on the 9th of February, 1895, was litigated, and resulted in a final judgment on the 4th of May, 1896, for the sum of \$5,038.57, damages and costs. The conveyance in question was made on the 12th of March, 1895, two months after suit commenced, for the nominal consideration of one dollar. This bill was filed May 7, 1896, and the answer of Leibrecht and wife, August 7, 1896. Subsequently, November 6, 1896, and while the legal title rested in Paulina Leibrecht, the defendant Mina Johnsen obtained judgment against Paulina, in the circuit court for the county of Hudson, for the sum of \$4,080.85 damages, and \$30.02 costs, and, upon petition based upon said judgment, was admitted as a defendant, and answered November 25, 1896. The bill alleges that the conveyance from the husband to the wife was made for the purpose of defrauding the complainant, and the consideration of one dollar mentioned in the deed of conveyance supports this contention, and makes out a *prima facie* case. But the defendants Joseph and Paulina, by their answer, set up a consideration in this wise [omitting statement of the pleadings and admitted facts]: The complainant, not satisfied to rest his case upon that state of facts, entered into evidence upon the subject. * * * He entered into the enemy's camp, and called as witnesses the defendants Joseph Leibrecht, and his mother-in-law, Mina Johnsen, who holds a judgment against the wife. * * * The testimony of these two witnesses, which, if credible, makes for the defendants, was unsatisfactory in the extreme, and well-nigh, if not quite, incredible, by reason of its own inherent improbability. [Statement of their evidence omitted.] No witnesses were offered by the defendants in support of the statements of Leibrecht and Mrs. Johnsen, although at one time it was said that the defendants expected to call the wife, and opportunity was given for that purpose. The husband of Mrs. Johnsen is alive, and no reason was offered why he should not have been called. The defendants, in this regard,

seem to have relied upon a rule of evidence which they assert prevails, viz. that the complainant having called these two witnesses, and made them his witnesses, is bound by their answers, and is estopped from setting up that they are either untrue or that the witnesses are incredible. I do not understand such to be the rule. My understanding of the modern rule is that a party who calls a witness, no matter how adverse, is not permitted to call witnesses to prove that he is generally unworthy of belief or to contradict him for that purpose. He cannot impeach his character for truth and veracity generally, but he may show that the whole or any part of what he swears to is untrue, either by his own examination and the improbability of his own story, or by other evidence contradictory of the evidence of the witness in question, so far as that evidence is material to the issue. The great and controlling object of the various rules adopted by the court governing the production of evidence is to elicit and establish the truth and to guard against fraud and imposition. There is no hard and fast rule which compels a jury, or a judge sitting as such, to believe any particular piece of evidence simply because it is sworn to by a living witness. The probability of the story, and the source from which it comes, must be considered, and, when it is said that a judge or a jury has no right to disregard certain evidence, its credibility is always assumed. The foundation and object of the rule forbidding a party calling a witness to offer evidence for the purpose of impeaching his general character for truth and veracity is to protect the witness against an unfair use of the process of the court; for it is manifestly unfair to compel a person to take the witness stand, and then subject him to the indignity of an attack upon his character for truth and veracity. Besides, a party has no right to put upon the witness stand a person whom he knows, or has reason to believe, is unworthy of credit. By putting him on the stand he does, ordinarily, assert him to be worthy of credit, and the interests of justice require, having done so, that he should not, under ordinary circumstances, be permitted to directly attack his character for truth and veracity. But this rule falls far short of forbidding the party to show, by any legitimate evidence, that the witness has testified to what is not true in a matter material to the issue; for it is to be observed that, while the witness is to be protected against unfair treatment by the party who compels his attendance, he is not entitled to protection against his own misconduct. The party calling a witness has the right to presume that he will swear to the truth, no matter how adverse he may be; and it does not lie in the mouth of the witness, though he is a party, to say to the party calling him: "You knew I was an adverse party, and would be tempted to prevaricate in my own favor, and you

had no right to rely upon my telling the truth against my own interests. I have falsified, and you are bound by it."

This position is illustrated by the practice of discovery in chancery. Originally it was optional with the complainant to call for an answer under oath or not. Later on it became, in this state at least, necessary for him to do so. Now the old practice has been reinstated. But in all cases, whether the answer under oath was optional with the complainant or not, it was always open to the complainant to deny and disprove its truth, either by extrinsic evidence, or by argument based upon its inherent improbability. And yet, when a complainant calls on a defendant to answer under oath as to the truth of the allegations of the bill, he makes him, to all intents and purposes, his witness in that cause. I can see no more reason why a complainant should not be at liberty to prove that the evidence given by the adverse party on the stand, although called by him, is untrue, than that given in writing in an answer to a bill called for under oath.

Now, let us, shortly, review the other evidence, and see what the result is. [Review of evidence omitted.]

Another point made by defendants is that, the complainant's cause of action at law being based upon a tort, the relation of creditor and debtor did not exist between complainant and defendant Joseph at the time of the conveyance to the wife, nor until final judgment was rendered, and that Joseph was at liberty to settle his property on his wife at any time before judgment was rendered and entered. I had occasion to examine one aspect of this question in *Bold v. Dean*, 48 N. J. Eq. 193, 21 Atl. 618, and refer to what is found at pages 203, 204, 48 N. J. Eq., and page 622, 21 Atl., for a discussion of the general question and the authorities thereon. That was a suit by a receiver appointed by a common-law court, under proceedings supplemental to judgment and execution, to set aside a voluntary conveyance of chattels by the judgment debtor, made before the cause of action arose, which was founded on a slander. I found, as a matter of fact, that the transfer was made by the debtor with the view of being able to slander the plaintiff with impunity, and held that it was void as to the judgment creditor. That case went further than it is necessary to go here in order to give complainant an equitable standing to attack the transfer here in question, in two respects: First, the transfer was made before the cause of action arose or any injury was threatened; second, the damages were unliquidated, and liable to be increased, by way of punishment of the defendant, beyond the actual loss of the plaintiff. In the case in hand the injury was inflicted, and the right of action accrued and became a vested right in complainant, before the transfer, and the damages are, presumably, confined to the actual pecuniary loss of the plaintiff. The declaration sets forth no facts warranting the giving judgment for punitive damages. The extent of the actual

damages, as in all cases of personal injuries to the person, may be somewhat speculative, and therefore quite proper for the consideration of a jury; but they are, after all, based upon actual injury, and must be so considered, precisely as if the judgment were for the destruction of a building by fire caused by actionable negligence. Now, it seems to me a startling proposition to say that my neighbor, through actionable negligence, may set fire to and destroy my dwelling, barns, outbuildings, and contents, and escape payment therefor by making a voluntary settlement on his wife of all his property before I can get judgment against him. The defendants, in support of their position, rely upon the language of Chief Justice Beasley in *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7, at page 636, 53 N. J. Eq., and page 8, 34 Atl., as follows: "When a man is in debt, especially if such debts be due, it is certainly not irrational to infer, if he give away his property, that the intention was to defeat such claims; but such deduction would seem to be most extravagant if, instead of a present indebtedness, he has incurred a mere liability as a warrantor of title, as a tortfeasor, or as surety on an administrator's bond. If such responsibilities as these latter, which may, in the long run, be transformed into debts, should have the effect of invalidating voluntary settlements of property, then such settlements would be the most uncertain of legal transactions." This classification, counsel contend, puts a tortfeasor, i. e. one who has already committed a tort upon which no judgment has been recovered, in the same category as mere sureties whose principals have not yet made default, and may never do so (and hence the principals are under no present liability), or guarantors against contingencies which may never happen. With great deference to the high authority of the distinguished jurist who used this language, I think it plainly erroneous, and feel constrained not to follow it or apply it here for several reasons. In the first place, the case of a tortfeasor, who has made himself liable for damages actually suffered, and capable of measurement in money, is clearly distinguishable from that of a surety whose principal has not made, and may never make, default. In the one the right of action is vested, and in the other it is not. In the second place, the language is a merely illustrative dictum, upon a topic not under consideration by the court, and not necessary for the decision of the cause in hand; and there is no evidence or reason, founded in our knowledge of the mode of disposing of business by the court of errors and appeals, to believe that it attracted the attention and received the approbation of a majority of that court. In the third place, it was used in the discussion of a rule of evidence, and not of law or equity. The question was as to whether a voluntary settlement was to be conclusively presumed to be fraudulent and void, as against a subsequent judgment founded on a contract of suretyship existing prior to the settlement, but where there had been, at its

date, no default by the principal debtor. The question was under consideration, and was elaborately discussed and decided in favor of the view I have adopted, by the court of appeals of Maryland, in *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.*, 34 Atl. 778, at pages 783, 784. The English authorities are in the same direction. *Barling v. Bishopp*, 29 Beav. 417, 6 Jur. (N. S.) 812; *Crossley v. Elworthy* (1871) L. R. 12 Eq. 158, 40 Law J. Ch. 480.

Another point raised by the defendants here was that it did not appear that the complainant had exhausted his remedy at law. The bill alleges that a writ of execution had been issued upon the judgment, and delivered to the sheriff of the county of Hudson to be executed, but does not allege what was done under it; nor does it allege that the judgment debtor was not possessed of other property from which the execution might be made. It abundantly appears, however, by the evidence of the judgment debtor given at the hearing, that he was possessed at the time of the issuing of execution, and at the time that he was called as a witness, of no property whatever that was liable to execution upon which anything could be realized without the aid of this court. And with regard to the return of the execution, which the bill alleges was issued, it appears, by a petition put in evidence by the defendants, made by the complainant to the judge of the circuit court in which the judgment was rendered, that an execution was issued to the sheriff of the county of Hudson, and that the sheriff has since duly returned it, "with a return that he could find neither goods, chattels, nor real estate whereof to make the said moneys, or any part thereof, according to the exigency of said writ." This satisfies the requisition of the rule invoked by the defendants, which goes no further than to say that, if it appears by the complainant's bill (as it did in the case cited of *Dunham v. Cox*, 10 N. J. Eq. 437) that the complainant has an execution upon which he may make the amount of the debt without the aid of this court, such state of facts is a bar to his proceeding in this court. The objection is a technical one, and, in this case, has no substance whatever.

This disposes of the case as against Leibrecht and wife, and also as against the defendant Mina Johnsen, as it is proven that a *lis pendens* was duly filed in the clerk's office of the county of Hudson on the 8th day of May, 1896, the day after the filing of the bill. I come, therefore, not without regret, to the conclusion that the complainant is entitled to relief. No doubt it seems to the defendant Leibrecht hard that all his hard earnings should be swept away by this verdict for damages, which he feels he ought not to be liable for. But it is to be observed that the measure of justice dealt out to him by the jury in the action at law is the same that has been for years dealt out to corporations engaged in business which is attended with danger to individual citizens, and he, therefore, has no right to complain.

(57 N. J. R. 196)

MAGOWAN v. MAGOWAN.

(Court of Chancery of New Jersey. Jan. 13, 1898.)

JUDGMENT—RES JUDICATA—DIVORCE—VALIDITY OF DECREE—ACTION FOR MAINTENANCE.

1. A recital in a decree of divorce rendered by a court of another state, that the petitioner was a resident of that state for the statutory period, is conclusive in New Jersey, not only as to the period of citizenship, but as to the fact of petitioner's domicile in the other state.

2. In an action by a wife to declare a decree of divorce rendered against her in another state void, and for maintenance, the bill charged that there was an agreement for separation obtained from her by duress and fraud, and that she was induced to withdraw her defense by duress and false representations. The evidence showed no agreement to withdraw such defense. After the execution of the agreement for separation, the wife allowed a decree to go against her by default, and there was no duress that prevented her from continuing her defense. *Held*, that the decree was valid.

3. A divorced wife cannot maintain an action for maintenance against her former husband.

Bill by Mary E. Magowan against Frank A. Magowan. Dismissed.

Francis C. Lowthorp and Linton S. Satterthwait, for complainant. Edwin B. Walker, for defendant.

REED, V. C. This bill is filed by a wife against her husband for maintenance under the statute. The bill, to prepare the way for the relief thus asked, prays that a decree divorcing these parties, granted to the defendant by a court in the territory of Oklahoma, may be declared void. The ground upon which the last relief is invoked is that the husband was never a resident of the territory in which the decree was made, and that, therefore, the court who made it had no jurisdiction in the matter. The doctrine seems to be established that one of the parties to the marital relation must be domiciled in the state whose court attempts to adjudicate upon the marital status of the parties, else the action of the court is extrajudicial, and will receive no countenance elsewhere. 5 Am. & Eng. Enc. Law, 757, 758; 2 Black, Judgm. par. 927.

The facts proven in this case show that the wife never resided elsewhere than in this state. They also show, with equal conclusiveness, that the husband never had a domicile in the territory of Oklahoma. He visited that territory, but it is transparent that his visits were for the single purpose of procuring a divorce. His visits were hurried, brief, and attended with every circumstance which could advertise that purpose. The pretense of an intention to reside in that territory is, under the testimony, too flimsy for patient consideration. But the husband has put in evidence the record of the decree made by the Oklahoma court, and this decree contains a finding that the plaintiff in that suit had been an actual resident in good faith of the territory for 90 days next preceding the filing of the petition therein. Whether a court, by its finding that it has jurisdiction, can conclude all other courts in other states

from determining that question anew, is a point upon which there is contrariety of authority. The weight of authority elsewhere is that a court of one state cannot, by a recital that it has jurisdiction over a person as a domiciled citizen of its state, preclude the court of another state from inquiring whether the person was in fact a citizen of the latter state, over whose marital status alone its court had jurisdiction. 5 Am. & Eng. Enc. Law, 763; Sewall v. Sewall, 122 Mass. 156-158; People v. Dawell, 25 Mich. 247-256; Reed v. Reed, 52 Mich. 117, 17 N. W. 720; Gregory v. Gregory, 76 Me. 535. Jurisdiction, in respect to the point now spoken of, depends entirely upon citizenship, not upon the length of time that the citizenship has continued. If a court of one state makes a decree concerning the status of a person who is actually a citizen of the state, although the person may not have been domiciled for the length of time required by the statute of the state, nevertheless the decree is unassailable for the want of jurisdiction in the court which made it. This obvious distinction is recognized by the supreme court of Minnesota in the cases of State v. Armington, 25 Minn. 29, and Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017. In the former case there was no domicile at all of either party in the state the court of which had made a decree of divorce, and the decree was held void by the Minnesota court for want of jurisdiction. In the latter case, where the complainant was domiciled in the foreign state, although not domiciled for the statutory period, the decree was held to be unassailable on jurisdictional grounds. But, whatever may be the condition of judicial settlement elsewhere, I understand that the point is settled in this state to the effect that a recital in a decree for divorce made by the court of another state, that the petitioner was a resident of that state for the statutory period, is conclusive here of the truth of the fact thus recited. I understand that it is not only conclusive as to the period of citizenship, but as to the fact of the petitioner's domicile in the other state. Nichols v. Nichols, 25 N. J. Eq. 60; Fairchild v. Fairchild, 53 N. J. Eq. 678, 34 Atl. 10. The attack upon the Oklahoma decree, therefore, grounded upon the want of jurisdiction in the court which made it, fails.

The element of fraud in obtaining that decree, which element figures in the case of Doughty v. Doughty, 27 N. J. Eq. 815, Id., 28 N. J. Eq. 581, and in other cases there cited, is not so presented in this case as to be fully considered. The attack upon the decree is made upon the ground that the husband was not a bona fide resident of the territory, and so the territorial court was without jurisdiction. It is not charged that the Oklahoma court was imposed upon by the fraudulent device of the husband. The only charge in the bill which has any relevancy to such a defense is that a certain agreement for separation, made between the husband and wife, was obtained from the wife by duress and fraud, and another charge that the wife

was induced to withdraw her defense to the Oklahoma suit by duress and false representations. The evidence upon the first of these charges is that there was no agreement entered into between the parties to withdraw the defense to the divorce suit. After the execution of that agreement for separation, the defendant in the suit allowed a decree to go against her by default, she knowing that the case of the complainant was a pure fabrication. There was no duress which prevented her from continuing her defense, even if the agreement for separation had been induced by fraud. I am constrained to the conclusion that the decree of the Oklahoma court must, in this suit, be regarded as a valid judgment. This being so, there can be no decree for the allowance of a sum for maintenance, inasmuch as such a decree is dependent upon the existence of the marital relations between the parties. *Freeman v. Freeman*, 49 N. J. Eq. 102, 23 Atl. 113; *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641. Nor can I discover any excuse in this suit for decreeing the payment by the husband to the wife of any sum by virtue of the agreement for separation. That instrument, although its execution is set up in, and a copy is annexed to, the bill, is only referred to as a part of the history of the transaction attending the divorce proceedings. There is no ground laid for a decree for the specific performance of that agreement, nor for the recovery of damages for its breach, even if such incongruous ground for relief could be introduced in the bill for maintenance. The allusion to the agreement in the prayer for relief is that, in fixing the amount to be allowed for support, the court should either fix it according to the situation in life of the parties, or in accordance with the provisions for maintenance contained in that agreement. The sum to be fixed by either standard was to be a sum awarded by way of maintenance under the statute. I am constrained to advise a decree dismissing the bill.

(56 N. J. E. 357)

SALTER v. ELY et al.

(Prerogative Court of New Jersey. Feb. 1, 1898.)

WILLS — CONTEST — UNDUE INFLUENCE — SUFFICIENCY OF EVIDENCE.

1. Testator left two sons and two daughters and an estate of about \$30,000. He gave the daughters only about 5 per cent. of what he gave the sons, but he had before his death given each daughter about \$8,000, which, by his will, he provided should not be charged against them. Testator had lived most of the time with his sons during the last 20 years of his life. He was a lawyer, of strong mind, and about 80 years old. His will and the codicils thereto were complicated, but carefully drawn in his own handwriting. At different times he had quarreled with his son S., and at times they were friendly. He went alone at the time the will and codicils were executed. The brother of S. received the larger share of the estate. *Held* insufficient to show that the will was made through undue influence on the part of S.

2. The mere fact that a favored legatee and devisee denounces those who are discriminated

against to a testator who is well in body and strong in mind, and surrounded by friends, and within reach of the protection of those who are denounced, is not sufficient to create a presumption against the instrument.

3. A party alleging undue influence in the execution of a will must prove it either directly or by proving such circumstances as will warrant a presumption against it.

Appeal from orphans' court, Monmouth county; Conover, Judge.

Proceeding by Catharine Ann Salter against Stephen D. Ely and Joseph Addison Ely to contest the will of Joseph J. Ely, deceased. From a decree admitting the will to probate, plaintiff appeals. Affirmed.

Robert Adrain and Clarence Linn, for appellant. Woodbridge Strong and John J. Ely, for respondents.

McGILL, Ordinary. The disputed paper writings consist of a will, dated and executed on the 10th day of November, 1893, and a codicil thereto, dated and executed on the 15th day of August, 1896. Both instruments are in the handwriting of Joseph J. Ely. The will contains eight paragraphs, in addition to an attestation clause, which exhibits compliance with all statutory requirements in the execution of a will. The will provides that the debts and funeral expenses of Mr. Ely shall be paid; that his body shall be buried beside the grave of his first wife; that a plain monument shall be placed at the grave; that five grandsons, named, shall each have \$100, and that two granddaughters and a daughter-in-law, named, shall have certain furniture, silverware, and china, divided among them as the will designates; that a safe, a surveyor's compass, and \$2,000 is bequeathed to Joseph Addison Ely, a son of the testator; that the testator's library is bequeathed to the same son and the children of that son; that a wood lot of four acres is devised to the testator's son Stephen; that a house and lot in Hightstown is devised to the testator's daughter Catharine; that two houses and two lots in Hightstown are devised to the testator's daughter Matilda, and that another wood lot is devised to the testator's son Addison; that there shall be no charge for gifts theretofore made or thereafter to be made by the testator to his children; that the testator devises and bequeaths the residue of his estate to his two sons, Stephen and Addison, and appoints those sons the executors of the will, authorizing them to sell land not specifically devised, and to employ counsel to advise them, and gives them three years for the performance of their duties. The will also revokes all former wills. The codicil, a shorter instrument, ratifies and confirms the will, except so far as it changes it, and then proceeds to take from the son Stephen the wood lot which was devised by the will to him, and give it to the son Addison, and to give the testator's library exclusively to his son Addison, and to bequeath to the same son

some surveyor's field books and two writing desks, and to bid him to take good care of the testator's law docket.

The validity of the will and codicil is assailed, upon the insistence that Mr. Ely lacked capacity to make them, and that they were the product of undue influence exerted over him. Mr. Ely was a lawyer and surveyor, who found occupation in those pursuits, for the greater part of his life, in the counties of Mercer and Monmouth, which was sufficiently remunerative to enable him, with frugal habit, to make considerable gifts to his children, and leave at his death, which occurred on the 13th of September, 1895, at the age of 82 years, an estate valued at about \$30,000. He was an eccentric man, possessed of much more than ordinary ability. He was high-tempered, easily provoked, and became bitter and vindictive towards those who offended him. His first wife, the mother of his four children, died in 1872. After her death, to economize, he took up his residence with his son Stephen, with whom and his son Addison he continued to live for 23 years, until his death, in 1895, with the exception of a few months in 1886, during the life of his second wife, who survived their marriage a short time, with whom he lived at her house, in Hightstown. His son Stephen lived in Hightstown until after 1880. His daughter Catharine married a man named Salter, and lived in Hudson county. His daughter Matilda married a man named Perrine, and lived in the county, some eight or nine miles from Hightstown. And his son Addison lived on a farm in Monmouth county, four or five miles from Hightstown. In February, 1880, Mr. Ely fell at a railway station, and cut his head, upon which ensued blood poison, which subjected him to a long, dangerous, and painful illness at the house of Stephen at Hightstown, from the effect of which illness he never completely recovered. While it is shown that Mr. Ely was physically feeble after his illness, in 1880, and that at times thereafter he exhibited a mental lassitude, it clearly appears that he possessed more than ordinary intelligence and abundant testamentary capacity when he executed both the will and the codicil. It is not shown that he was ever without testamentary capacity. As has been stated, both the will and the codicil are in his handwriting; and, as appears upon the inspection of those instruments, the former is long and to some extent complicated. Its contents evince that the draftsman had a knowledge of Mr. Ely's property and the natural objects of his bounty, and also a consideration of those who immediately surrounded him and daily ministered to his comfort, of his burial, of gifts he had made and might make to his children, and the appointment of executors, and their equipment for the performance of their duty. By the codicil, prepared two years later, the draftsman evinces that he

had a thorough knowledge of the provisions of the will, which, after trivial alteration, were ratified and confirmed, as constituting a maturely considered testamentary act.

Competency is not only shown by the instruments themselves, but also in the circumstances which attended their execution and preservation. When the will was executed, Mr. Ely resided with his son Addison, some nine miles from the county court house; yet he took the precaution and trouble to drive to the court house, and there see the surrogate, whom he had known for 25 years, at that gentleman's office, and request him to be one of the witnesses to the will, and then to consult with the surrogate as to the other witness to the will, stating that if there were any of his old friends about, who would act as such witness, he would like to secure the service of one of them, and, at the suggestion of the surrogate, to go alone to the county clerk's office, and see Holmes Murphy, the deputy county clerk, whom he had known for 30 years, and request him to be the other witness, then to return to the surrogate's office, and bring the surrogate to the county clerk's office, where the will was executed. At Mr. Murphy's suggestion, because of Murphy's advanced years, he asked Mr. White, a younger man there, to act also as one of the witnesses. These three gentlemen so narrate the circumstances attending the execution of the will as to satisfy me beyond all doubt that Mr. Ely fully realized and comprehended the business in which he was engaged. Their testimony shows that he intelligently directed every detail in the proceeding. This was on the 10th of November, 1893. When Mr. Ely left the county clerk's office, he took the will with him, and apparently retained it till the 12th of the next month, when he drove to the Allentown Bank, in which he had a deposit, and delivered it, in an envelope, to the cashier, at the suggestion of the cashier writing upon the envelope his instructions as to its disposition. He took the precaution then to take from the cashier a receipt for it. Previously he had made a copy of it with his own hand, which was found in his safe, at his son Addison's, after his death. The codicil was executed about a month before Mr. Ely died, at the house of Addison, in the presence of the physician in attendance upon Mr. Ely and a neighboring farmer, for whom the testator had sent to act as a witness. He had not previously communicated with the farmer, but, two days before the execution of the codicil, he told his physician that he wished to execute a codicil to his will, and he would like the physician to be a witness to it. When the codicil was executed, he was feeble physically, but clear in his mind. He sat at a small table which the farmer, Mr. Jobes, placed before him, and directed every step in the proceeding in strict conformity with the statute's requirements. He explained to the witnesses that the paper he produced was called a codicil to his will; that it made a change in the will; and that he would like to have the fact of his

executing it kept quiet. It appears that he put this instrument in his safe, where it was found after his death with the copy of the will. The testimony of the subscribing witnesses to the codicil satisfies me that the testator was fully competent to make that instrument.

Passing to the second ground of contest,—the contention that the will and codicil were the product of undue influence. The position of the contestants is that such influence was exerted over Mr. Ely by his son Stephen. It is almost needless to say that undue influence is the destruction of free agency. It is that which constrains a person to do what is against his will, and what he would not do if left to himself, no matter by what means the control is exercised. There is no direct proof that Stephen procured or was instrumental in making either the will or the codicil. As I understand the contestants, their contention is that Stephen entertained a vindictive hatred of his sisters; that he had repeatedly declared that they should not participate in his father's estate; and that, through his high temper and violence towards his father, he so dominated the father as to induce the making of a will which practically disinherits the daughters, it appearing that the property devised to them is scarcely 5 per cent. of the value of that which was bequeathed and devised to the sons. Apparently, the will is an inofficious instrument, but the proofs do not disclose that Stephen intermeddled in any way with the preparation of it. At best, they show that he visited his father more or less frequently during the latter years of his father's life, and that occasionally the high and somewhat intemperate tones in the voices of the father and son would indicate that they were quarrelling. They show also that he and his father would drive about the country together, while the father was able to do so, and that Stephen was cognizant of investments offered to his father, and made by him; but at the same time they disclose that in the last year or two of the old man's life, as he became more feeble physically, and less able to go about, Stephen's visits became so infrequent that at one time months elapsed between them, and the father sent for him. When it is remembered that the testator lived at his son Addison's house, and had lived there from 1881 till he died, in 1895, and that the brothers Stephen and Addison had quarreled, and had not spoken to each other for many years, it is not perceived that much opportunity offered for the exertion of a continuous coercion on Stephen's part, which could induce the making of two instruments, 21 months apart, both of which adhered to the same testamentary purpose.

It can scarcely be doubted that Stephen was selfish, jealous, parsimonious, high-tempered, and viciously vindictive, partaking to some extent of the mental characteristics of his father, and that it was habitual with him to inveigh with bitterness against his sisters, not only to his father, but to others also, and that, although he was the recipient of frequent gifts from

his father, he was jealously disturbed when like gifts were made to his sisters, and would tell his father that they had had enough; that they had husbands, and did not need more. I am impressed that the father understood and pitied his son's weakness; but I fail to find that he feared him. It is shown that Mr. Ely and Stephen were at times the best of friends, and that at other times they would quarrel and keep aloof from each other. Mrs. Salter testifies that her father told her that Stephen was high-strung and unevenly balanced, and could not avoid the violent conduct of which she complained. During Mr. Ely's illness, in 1880, Mrs. Salter and Stephen were assiduous in their attentions to him. At the same time each resented the presence of the other, regarding each other with suspicion and distrust. As the father convalesced, their strained relations culminated in Stephen's ejection of his sister and a nurse from his house. Later in that illness, Stephen quarreled with his father, and left the house himself, and Mrs. Salter returned to it. It is quite evident from the letters of the father to his daughter immediately thereafter that she had won his confidence and gratitude, and that Stephen was under his condemnation. The proofs make it evident that for two or more years after that time there was an estrangement between Mr. Ely and Stephen, during which Stephen exhibited a vicious vindictiveness against his father; and it appears that during this time Mr. Ely made a will which, he declared to the attesting witnesses, left Stephen "very little." But the proofs show also that after 1883 the father and Stephen became reconciled, and that thereafter their intimacy and friendship varied, as has been stated. There is some evidence that once, about the time of the execution of the will, Stephen drove with his father to Freehold, but that evidence is entirely too vague to justify more than a suspicion that it was on the day the will was executed. One witness says that he saw some one apparently attend Mr. Ely to the door of the surrogate's office; but he does not identify that person, nor is he able to say that the person was in fact in attendance upon Mr. Ely. There is not a particle of evidence to show that, in the time intervening between the execution of the will and the deposit of it by Mr. Ely in the Allentown Bank, Stephen even saw his father, or that Mr. Ely was not entirely free to destroy the will if he had wished to do so. When he went to the Allentown Bank, he drove alone with a young grandson, and intelligently, and in apparent freedom from all restraint, deposited the will there. A fact that militates against the theory that the will was Stephen's production is that although, when the will was made, Stephen was quarrelling with his brother Addison, and had not spoken to him for years, it gives to Addison and his family the largest share of the father's estate, and associates the brothers in the executorship. It does not appear to be probable that Stephen would coerce such provisions.

I do not deem that, because the will is inofficious, a duty is imposed upon the court to find a reason for the inofficiousness before it can declare in favor of the will. Nor is that duty cast on those who are to take under the will if they did not partake in its production. A man may dispose of his property as he pleases. He may do injustice if he has testamentary capacity and acts freely. *Smith v. Smith*, 48 N. J. Eq. 568, 590, 25 Atl. 11. However, it is insisted that the proofs will warrant the inference that, prior to the making of the will, Mr. Ely presented \$8,000 to each of his daughters, which in the will he protected from the rapacity of Stephen by provision that no charges should be made for past or future gifts to his children, or will justify the belief that the daughters may have been discriminated against because of their opposition to his second marriage, and their participation in the circulation of or belief in stories derogatory to his moral character. I do not mean to say that either of these explanations has been proved to my satisfaction. They serve to illustrate that reasons may have existed, independently of unlawful influence, to induce the testator to make the disposition of his property he made. Another possible reason is presented when it is considered that for more than 20 years Mr. Ely lived with one or the other of his sons, free of expense, with the avowed object of an economy in his expenditures, which enabled him to accumulate at least a large part of that which the will gives to them.

Much importance has been attached to the failure of the proponents to examine Stephen as a witness in the case. I do not think that such failure can be fatal to this will. The indicia of undue influence in this case are not strong enough to shift the burden of proof. The mere fact that a favored legatee and devisee denounces those who are discriminated against to a testator who is well in body and strong in mind, and surrounded by friends, and within reach of the protection of those who are denounced, is not sufficient to create a presumption against the instrument. *Dumont v. Dumont*, 46 N. J. Eq. 235, 19 Atl. 467. The party alleging undue influence must prove it either directly or by proving such circumstances as will warrant a presumption against it. *Id.*, 46 N. J. Eq. 230, 19 Atl. 470. Here, not only has the proof failed to show such circumstances, but, on the contrary, by the testimony of five subscribing witnesses and a bank cashier, it has pointed to an intelligent, competent, and self-controlled testator. I will affirm the decree appealed from.

(56 N. J. E. 507)

DUNN et al. v. CORY et al.

(Court of Chancery of New Jersey. Jan. 31, 1898.)

WILLS — CONSTRUCTION — DESIGNATION OF LEGATEES.

1. Testator gave (1) to the child of J. \$1,000, (2) to the children of P. \$1,000, (3) to the child of S. \$1,000, and declared that, "in case of the

death of any of the above legatees before me, the legacy shall not lapse, but shall go to their lawful issue, if they leave such issue." J. left several children. *Held*, that the word "child," in clause 1, should be construed "children," and the legacy should be divided among all the children of J.

2. P. had had twelve children, seven of whom were living at the date of the will. Only three of the five who had died before that time left children; and one died between the date of the will and the date of the testator's death, leaving children. Six survived testator. *Held*, that the children of those who died before the date of the will were not entitled to share with the children of the one who died after the date of the will, and with those who survived testator.

3. S. had but one child, who died a few months before the will was made, leaving children. *Held*, that the word "child," in the gift to the child of S., means "grandchildren."

Bill by one Dunn and others, executors of the estate of Pemberton Brittin, deceased, against Sarah Cory and others, for directions as to the distribution of the estate.

F. J. Swayze, for complainants. Robert Carey, for defendants.

PITNEY, V. C. This bill is filed by the executors of Pemberton Brittin for directions as to the distribution of his estate, and involves the construction of several clauses in his will. By the second paragraph he gives several pecuniary legacies; among others, three as follows: (1) "To the child of John Primrose, one thousand dollars;" (2) "to the children of Pettit B. Primrose, one thousand dollars;" (3) "to the child of Sarah Roy, one thousand dollars." Further on, in the same paragraph, he says: "In case of the death of any of the above legatees before me, the legacy shall not lapse, but shall go to their lawful issue, if they leave such issue."

1. In the case of the bequest to "the child of John Primrose": In point of fact, John Primrose, who was the cousin of the testator, left several children; and the question is whether the word "child" should be construed "children," and the legacy should be divided among all the children. I am of the opinion that it should.

2. The next case is that of a bequest "to the children of Pettit B. Primrose, one thousand dollars." Pettit B. Primrose had had twelve children, seven of whom were living at the date of the will, five had died prior to the date of the will, only three, however, leaving children, and one died between the date of the will and the date of the testator's death, leaving children, and six survived the testator. The question is whether the children of those who died prior to the date of the will are entitled to come in with the children of the one who died after the date of the will, and with those who survived the testator. Of course, we are to ascertain the intention of the testator by considering the language used as applied to all the circumstances; and, in the absence of the use of technical language which has attained a settled meaning, prior decisions are of use only to show what meaning different judges have put upon similar language. The general rule undoubtedly is that no person can come

under the description of a "legatee" unless he is alive at the date of the will. And the general rule also is that the word "child" does not mean "grandchild," or "children" "grandchildren." An exception to this rule, presently to be stated, is founded in necessity, in order to prevent the entire failure of the provision. There were children of Pettit B. Primrose living at the date of the will, and the bequest will take effect without including the descendants of those who died before the making of the will. So that the argument from necessity does not apply. Nor, in this instance, does the testator's express command that "the legacy shall not lapse" apply. The question, then, is whether or not those children of Pettit who died in testator's lifetime can be properly classed as "legatees," under the so-called substitutionary clause above recited. If the language of that clause had been, "In case of the death of any of the above-named children before me, the legacy shall not lapse, but shall go to their lawful issue," I should have thought, on the authority of the case of *Outcalt v. Outcalt*, 42 N. J. Eq. 500, 8 Atl. 532, that the descendants of those dying before the date of the will would have taken, on the ground that the gift would have been an independent gift, and not substitutionary. I have looked at a large number of cases, and, notwithstanding the great apparent conflict of authority in England and also in this country, I am constrained to adopt the view that the construction adopted by Sir Richard Malins in *Re Potter's Trust* (1869) L. R. 8 Eq. 52, followed by him in subsequent cases, the latest being *In re Lucas' Will* (1880) 17 Ch. Div. 788, was the correct one, and was more likely to fulfill the expressed wishes of the testator than that adopted by the judges in the opposite line of cases. The authorities up to that date are all collected in the last-stated case. The distinction in what may be called the "substitutionary clause" between naming the persons who originally were the direct object of the gift, describing them by their names or classes, and the word "legatee," was pointed out and acted upon by the same judge in *Hunter v. Cheshire*, 8 Ch. App. 751, and his decision was affirmed on appeal. Upon the whole, I think the use of the word "legatees" prevents the operation in this case of the so-called "substitutionary clause" in favor of the descendants of those children who died before the making of the will.

3. Next is the case of the legacy "to the child of Sarah Roy, \$1,000." Sarah Roy had but one child, which died a few months before the will was made, leaving children; and the question is whether or not the word "child," in that case, can be construed as meaning "grandchildren." It is but a truism to say that the word "child" does not ordinarily include grandchildren; and since, for the reasons stated in the case of the "children of Pettit B. Primrose," the use of the word "legatee" in the substitutionary clause forbids the application of that clause in this case as well as in the other, the ques-

tion remains whether there is anything in the circumstances which shows that the testator, by the use of the word "child" in that connection, referred to the descendants generally of Sarah Roy. An examination of the will shows that the word "grandchildren" nowhere appears in it, although a large sum is given in trust for four certain beneficiaries severally for life, and at their death to their children or next of kin, and that in the same paragraph with the bequest under consideration there are no less than thirteen bequests to the "children" of a person named. So that the circumstance relied on in some of the cases that the testator did mention and provide for children in one part of his will, and for grandchildren in the same connection or in another part, and hence could not have intended by the word "child" to include "grandchildren," does not apply here. It further appears that many of the beneficiaries were cousins, and lived at a distance, and were much scattered; and it did not appear that the testator was acquainted with the situation of their families, and the number or names of their children. The inference would be the contrary.

In almost all the cases in which judges have held that the word "child" cannot be construed to mean "grandchildren," an exception has been noted as possible to arise out of the necessity of the case. It is thus stated by Chancellor Green in *Brokaw v. Peterson*, 15 N. J. Eq. 194, at page 198: "The word 'children' does not, ordinarily and properly speaking, comprehend grandchildren or issue generally. Their being included in that term is only permitted in two cases, namely, from necessity, which occurs when the will would remain inoperative unless the sense of the word 'children' were extended beyond its natural import, and where the testator has clearly shown by other words that he did not intend to use the term 'children' in its proper actual meaning, but in a more extensive sense." And the same thought is expressed by Chancellor Runyon in *Felt's Ex'rs v. Vanatta*, 21 N. J. Eq. 84, at page 85, where he says: "The settled rule in the construction of wills is that it [the word 'children'] will not be construed to include grandchildren unless there is something in the context to show that the testator intended that it should include grandchildren, or unless the provision will be inoperative without such construction." In using this language, these jurists simply followed that of other judges. In *Crooke v. Brookeing*, 2 Vern. 106, at page 108, before the lord commissioners of the great seal, while it was held that "children" did not ordinarily mean "grandchildren," all admitted that, if there had been no child, the grandchildren might have taken by the devise to the children of the testator. Again, Lord Alvanley, in *Reeves v. Brymer*, 4 Ves. 692, said: "'Children' may mean 'grandchildren' where there can be no other construction,

but not otherwise." And Sir William Grant, in *Radcliffe v. Buckley*, 10 Ves. 195, at page 200, says: "The proposition that 'children' may mean 'grandchildren' where there can be no other construction, but not otherwise, is consistent with and founded upon previous cases. There are two cases in which that word has received another construction: First, the case of necessity, where the will would remain inoperative unless the sense is extended; next, where the testator has clearly shown by other words that he does not use the word 'children' in the proper sense, but means it in the more extensive signification." The same judge, in the case of *Earl of Oxford v. Churchill*, 3 Ves. & B. 59, at page 69, said: "Where there is a total want of children, grandchildren have been let in, under a liberal construction of the word 'children.'" This exception was practically applied in the case of *Gale v. Bennet* (1768) Amb. 681, by Lord Camden. Lord Romilly, in *Fenn v. Death*, 23 Beav. 73 (better reported in 2 Jur. [N. S.] 700), held the same thing. The bequest there was: "In trust for the children of my late mother's half-brother, Thomas Death, and which children shall, or to such one or more of them as shall, be living at my decease, if more than one such child, to be equally divided between them as tenants in common." None of the children of Thomas Death were living at the date of the will, and it was held that the grandchildren were entitled. And Sir John Stuart, V. C., in *Berry v. Berry*, 3 Giff. 124, 7 Jur. (N. S.) 752, applied the doctrine of necessity, and held the word "children" to mean grandchildren. And finally, in the more recent case of *In re Smith* (Lord v. Hayward, 1887) 35 Ch. Div. 558, Kay, J. (afterwards lord justice of appeal), applied the rule, following *Berry v. Berry* and *Fenn v. Death*. The case was that a testator gave his residuary estate to trustees, to divide the proceeds into six shares, and to pay one of such shares to the children of his deceased sister; and he gave the other five-sixths, by similar terms, to the children of five deceased persons. At the date of the will, there were no children of the sister living, but there were two grandchildren, who both survived the testator. Held, that the two grandchildren took the one-sixth given to the children of the deceased sister. In giving judgment, the learned judge uses this language: "If the testator, on the face of his will, gives a legacy to the children of a deceased person, mentioning that person as being dead, and at the date of the will there are no children of that person, but there are grandchildren, then the court, on the principle, 'Ut res magis valeat,' holds that the gift takes effect in favor of the grandchildren." The doctrine of these cases is stated to be settled law by Mr. Williams (2 Wms. Ex'rs [Rand. & T. Ed.] p. 359, and Mr. Randolph's note on page 362, where American cases are cited). My conclusion, therefore, is that the grandchildren of Sarah

Roy will take. None of the cases in New Jersey are inconsistent with this view. The bequest in *Felt's Ex'rs v. Vanatta* took effect during the lifetime of the first taker; so that Chancellor Runyon felt that there was no necessity to apply the rule in that case. So the rule that I have adopted has no application to the circumstances in *Brokaw v. Peterson*, 15 N. J. Eq. 194. The question was not raised or discussed, and was not necessarily involved, in the case of *Van Gleson v. Howard*, 7 N. J. Eq. 462.

(56 N. J. E. 538)

LAUCH v. DE SOCARRAS et al.

(Court of Chancery of New Jersey. Feb. 5, 1898.)

FRAUDULENT CONVEYANCES—TRUST SETTLEMENTS—VALIDITY AS AGAINST CREDITORS.

1. In a suit to set aside a conveyance of real estate as in fraud of creditors, the fact that, though the debt sued on was an honest one, complainant had not expended money or altered his situation on the strength of defendant having any ownership in the property, is not of itself sufficient to defeat complainant's right to relief.

2. A written declaration of trust, made a long time after the title had vested, but in good faith, and in strict accordance with the parol trust made at the time the title did vest, is valid as against a creditor of declarant.

3. Nor is the validity of such trust affected by the fact that declarant was pressed by creditors at the time it was created.

Bill in equity by Louis C. Lauch against Pauline De Socarras and another. Heard on bill, the joint answer of the two defendants, the cross bill of Pauline De Socarras, and the replication of the complainant thereto. Bill and cross bill dismissed.

Helsley & Morris, for complainant. Thomas P. McKenna and Frank P. McDermott, for defendants.

PITNEY, V. C. The bill is filed by a judgment creditor of Pauline De Socarras, and its object is to set aside a settlement made by her in favor of her son, Rudolfo De Socarras, Jr., the other defendant, of certain real estate (a house and lot in Long Branch) in Monmouth county, and subject that real estate to the lien of the judgment. The complainant, by his bill, alleges, and the defendants, by their answer, admit, that judgment was recovered by him in the supreme court of this state on the 6th of February, 1896, for the sum of \$2,986.68, against Mrs. De Socarras, based upon an indebtedness which arose in the month of November, 1888. The defendants admit that Mrs. De Socarras was the owner of the premises from the 13th of July, 1891, up to November 8, 1895, on which day she joined with her husband, Rudolfo De Socarras, Sr., in a deed of the same to Mr. McKenna, who, by a contemporaneous conveyance, reconveyed the premises to Mrs. De Socarras in trust for the benefit of her son, Rudolfo De Socarras, Jr., she to hold the title for his benefit, support, and edu-

cation during his minority, and at his majority the title to be vested in him, but, if he should die before arriving at the age of 21 years, then the premises to vest absolutely and forever in the said Pauline De Socarras, her heirs and assigns. Upon the case so made, the complainant's right to relief is clear. But the defendants set up a defense, which will be best understood by stating the facts upon which it is based.

Mrs. De Socarras' husband, the father of the infant defendant, is a Cuban by birth, and a physician by profession, but has not practiced his profession to any great extent. At and prior to the month of November, 1888, he was engaged in the business of a caterer in the city of New York, and was financially unsuccessful, and unable to support his family. Mrs. De Socarras had a sister, who had married a wealthy gentleman, by the name of Ballin, who lived in New York City; and she thought that as her husband was improvident and inefficient, and not to be trusted to any extent with the handling of money, if she had control of the business she could so manage it as to make a living for herself and family, and applied to her brother-in-law, Mr. Ballin, for assistance. He advanced her \$2,000, and took therefor her sealed obligation, which provided that the money was to be used by her in the catering business, but that her husband should have no participation in or control of it, and that she should have therein the assistance of her father, Mr. Lauch, who was an experienced caterer and hotel keeper. Mrs. De Socarras carried on the business for a while, with the result that the investment was lost. She, however, paid three months' interest on the debt to Mr. Ballin. Shortly after this, about the year 1890, her husband's mother, a wealthy Cuban, died; and at her death Dr. De Socarras received a fortune of about \$13,000, as I interpret the evidence. About \$9,000 of that he invested, May, 1891, in the house and lot at Long Branch, which is the subject of the present litigation, and furniture to furnish it, moved into it with his family, and commenced the practice of medicine. His concurrent declarations were that he intended the property for the benefit of his son, the defendant Rudolfo De Socarras, Jr. A few days or weeks after Dr. and Mrs. De Socarras were comfortably settled in the house, they were visited socially by a friend, a Mr. Agramonte, when he learned the situation. In view of Dr. De Socarras' notoriously improvident habits and reckless disposition, Mr. Agramonte urged him to settle the property at once upon his son; and, after considerable discussion between the doctor and his wife and Mr. Agramonte, it was agreed that the property should be conveyed to the wife, to hold for the son. The reason why it was not put in the son's name at once was that he was an infant, and it might become important to sell the property and change the investment. The conveyance was made through a third party to the wife, and, as she swears,—and she is therein supported by Mr. Agra-

monte,—upon the express verbal understanding that she was to hold it for the benefit of the son, and in trust for him, until he became of age. The husband and wife lived together until the latter part of 1894, when his habits and conduct became such that cohabitation became undesirable; and he left her, and has since spent part of the time in Cuba, and part of the time in the neighborhood of New York, and she has not seen him since. Before leaving, he had incurred some bills for the painting of the house and some other repairs; and Mrs. De Socarras was sued upon those bills, and judgment went against her. She was also sued in a justice's court for some little sums, and judgment recovered and levy made upon the furniture in the house. Litigations resulted therefrom; but, before any judgment was docketed against her, she entered into communication with her husband, through a third party, with the result that he consented to join her in a deed, which created the settlement of November, 1895. About that time some difficulty arose between her and the complainant, who is her brother, which perhaps extended to her brother-in-law, Mr. Ballin. The particulars of the family difficulty were not developed, and are of no consequence here; but the result was that Mr. Ballin, who had never since 1889 demanded a dollar of Mrs. De Socarras on her obligation of November, 1888, made a gift of it, by assignment, to the complainant, and he brought suit upon it in the supreme court, and recovered the judgment upon which this suit is founded.

The defense of the infant set up in his answer is that the settlement upon him was made strictly in pursuance of the verbal understanding at the time that the property was conveyed to his mother by his father. And the defense of Mrs. De Socarras, as manifested in her cross bill, is that the \$2,000 advanced to her by her brother-in-law in November, 1888, was a gift to her, and that the sealed obligation which she gave was a mere formality. This defense of Mrs. De Socarras was substantially abandoned by her counsel at the hearing, when it appeared that she had made a payment of interest on account of it; and I may say, further, that the clear weight of the evidence is that it was a loan, and not a gift, although it is palpable that Mr. Ballin never intended to enforce, and, but for the family difficulty, never would have enforced, it. The only reason for referring to it here is that counsel for the complainant argued with some force that Mrs. De Socarras is so thoroughly contradicted in her evidence with regard to the particulars of the transaction of that loan that her general credit as a witness in the cause is shaken. I think it sufficient to say on that topic that I was able at the hearing, and upon a reading of the evidence am still able, to see that it was a simple mistake on her part, which seems also to have been concurred in by the mutual counsel of the parties, Mr. Olcott, as to the true interpretation of the different conversations that

occurred between her and Mr. Ballin on the subject. In point of fact, there is really no conflict in their evidence, but simply in the interpretation which each put upon it, and their several recollections of it.

An attempt is made to directly contradict Mrs. De Socarras by showing that she made declarations inconsistent with her evidence in this cause as to the parol trust on an occasion when she was examined as a witness at Freehold, in one of the litigations that arose out of suits brought against her for her husband's debts. The pencil notes of her examination taken by one of the counsel seem to show that she swore positively that she did not hold the house and lot in trust for her son. But as this examination took place after the settlement in question was made, and as all the circumstances show beyond all peradventure that Mrs. De Socarras thoroughly understood the affair, it being made at her own instance, my conclusion is either that she misunderstood the question, or that the counsel who took the notes misunderstood her answer, or inadvertently inserted the word "not" in making his notes. I find it impossible to believe that she intentionally said what is attributed to her by the counsel and other witnesses.

It is admitted that Mrs. De Socarras never invested any money in the premises, and that they were purchased by her husband with his funds; and I find the fact to be that when they were conveyed by her husband, through an intermediary, to her, it was upon the express verbal understanding that she should hold the premises for the benefit of their son, Rudolfo De Socarras, Jr. Mr. Agramonte swears, and the other evidence indicates, that she and her husband never had lived happily together, and that their relations never were such as to render it probable that her husband would make her an absolute present of this valuable house and lot, comprising nearly his whole fortune, to do with as she chose. The simple question of law upon this state of facts is whether or not, in the absence of a written declaration of trust made at the time of the gift, the subsequent declaration is sufficient to validate it as against a creditor.

Counsel for the defendants made one other point, which he argued is sufficient of itself to defeat the complainant's claim, but, if not, certainly supports the other and main point which I have above stated. The point so taken is that the complainant is a mere volunteer, without any merit whatever; that neither he nor his assignor has expended a cent of money or altered their situation in the least upon the strength of her having any beneficial ownership in this property. There is great force in that position. Certainly there is nothing in the complainant's position before the court to incline the court to look upon his case with any great favor. But I cannot say that that point is of itself sufficient to defeat his right in this court. He represents a just and honest debt. But it is further to be observed that that debt arose long before the purchase of

this property, and when both the doctor and Mrs. De Socarras were poor, and hence was not contracted upon the strength of any apparent ownership of the defendant Mrs. De Socarras. And, in my judgment, that is, after all, the real equitable ground upon which settlements of this kind are set aside. People do give credit, and have a right to give credit, to others upon the strength of their apparent ownership of property; and if this debt had been contracted to an outside person, who had no notice of the secret trust, and while the title to these premises rested in her, the position of the complainant would be much stronger than it is.

But, taking the case as it is, the question now to be determined is whether or not a written declaration of trust, made a long time after the title has vested, but in good faith, and in strict accordance with the parol trust made at the time the title did vest, is valid against a creditor of the declarant. I think it is. It was so held, in effect, by the court of appeals in the case of Jamison v. Miller, 27 N. J. Eq. 586. It is not necessary to state the facts of that case, which are not precisely like those here involved; and I simply refer to the language of Mr. Justice Dixon, found on page 592: "The fact that these later writings were signed after the complainant's claims intervened does not rob them of their efficacy under the statute. The writings are but evidence. The trust is anterior and independent; and the rights which the court regards are those that spring from the creation, not the mere proof of the trust. There is no inequity in permitting the trustee of an express trust to make evidence upon which the courts can recognize and effectuate it, in order that the expectations of his creditors, who attempt to enforce their remedies against the trust estate, may be disappointed." In support of his position, he cites Gardner v. Rowe, 2 Sim. & S. 346, decided by Vice Chancellor Leach, and affirmed, on appeal, by Lord Eldon, in 5 Russ. 258. The very question was decided by Vice Chancellor Green in Silvers v. Potter, 48 N. J. Eq. 539, 22 Atl. 584, where he collects all the authorities and discusses the question in a thoroughly satisfactory manner. In the same direction is the case of Davis v. Graves, 29 Barb. 480, cited by me in the case of Pitney v. Bolton, 45 N. J. Eq. 639, at page 643, 18 Atl. 211, at page 212. The rule established by Davis v. Graves is this: That if A., being indebted, makes a conveyance to B. for the purpose of defrauding his creditors, upon a secret trust that B. will reconvey the property to A., and afterwards B. becomes indebted also, and, being pressed by his creditors, reconveys the property to A., in execution of the original parol trust, the creditors of B. will not be aided by the court in disturbing the last conveyance.

I think the case is not altered by the fact, proven at the hearing, that Mrs. De Socarras was somewhat pressed by other creditors besides the complainant at the time the settlement was made. The complete answer to any

argument from that situation is that the fact that Mrs. De Socarras held the title to the property in trust, provable only by parol, for her son, rendered it her clear duty to give that son written evidence of that trust as soon as any danger arose that her creditors might intervene and appropriate it to the payment of their debts. In short, her duty to her son impelled her to take efficient means to "hinder and delay" her creditors in reaching this property, since, in conscience, it was not her own, and her creditors in that forum had no right to have it applied to the payment of their debts. For these reasons, I must conclude that the complainant's bill must be dismissed, with costs to be recovered by the defendants on their joint answer; and that Mrs. De Socarras' cross bill must be dismissed, with costs to the complainant on his replication to her cross bill, to be recovered against her individually.

HAYDAY v. HAYDAY et al.

(Court of Chancery of New Jersey. Jan. 20, 1898.)

WILLS—NATURE OF ESTATE DEVISED—BILL FOR CONSTRUCTION—WHEN LIES.

1. A devise to testator's son of a house and lot; "also, the use of the adjoining lot, * * * to be used and enjoyed by him during the term of his natural life; and from and immediately after his death I give, bequeath, and devise the same to grandchildren,"—passes a purely legal estate, as to both lots.

2. The claimant under a devise of a purely legal title to lands, who seeks to establish his title, as against the heir at law of another devisee, by the construction of the will, must assert his rights at law.

Bill by William Hayday against George Hayday and others for the construction of a will. Dismissed.

The complainant is a devisee of one George Hayday, who died in 1896, seised of lands in Atlantic county. By his will, he gave several money legacies, and devised several different tracts of land, to his children and grandchildren. One devise was in favor of the complainant, who was a son of the testator. The devise to the complainant is in these words: "Item. I give, bequeath, and devise the house and lot on Atlantic avenue, said Atlantic City, twenty-six feet in width, and eighty feet in depth, southeastwardly; also, the use of the adjoining lot on the southwesterly side, about twenty feet wide on Atlantic avenue, extending of that width about sixty feet southeastwardly, to an open yard, to my son William Hayday, to be used and enjoyed by him during the term of his natural life; and from and immediately after his death I give, bequeath, and devise the same to grandchildren, in equal shares; and, in case my said grandchildren dying before me, her, his, or their shares shall be divided equally among their lawful issue, per stirpes." The executor proved the will in May, 1896, before the surrogate of Atlantic county. The complainant files this bill against the other devisees named in the will, alleging that by

virtue of the above-recited devise "he became seised in fee simple of the house and lot first mentioned and designated in said item, being twenty-six feet in width, and eighty feet in depth, southeastwardly," and, in another paragraph, that he is by the devise entitled, during his natural life, to the use and enjoyment, and the rent, issues, and profits, of the building erected by the testator on the adjoining lot. He alleges that he files his bill in order that his interest in the two lots may be judicially ascertained and determined. To this end, he requests directions especially upon three formulated questions: "First. What right, title, and interest in the estate of the said George Hayday does your orator take under and by virtue of the premises, and by his last will and testament? Second. Has he an absolute and unqualified estate in the house and lot on Atlantic avenue, in said Atlantic City, twenty-six feet in width, and eighty feet in depth, southeastwardly, or has he only an estate for life therein? Third. Has he the use of the adjoining lot on the southwestwardly side, being twenty feet wide on Atlantic avenue, and extending of that width about sixty feet southeastwardly, to an open yard, together with the three-story building erected on said lot after the making of the said will, and before the death of the said testator?" He prays that his rights and interests in the estate may be defined and declared, and to have due effect given the same, and that testator's intention, as expressed by the will, may be ascertained and construed. The defendants file a joint and several answer, substantially admitting all the facts, but denying the complainant's claim that he has an absolute estate in the 26 feet front lot, and alleging that, by the true intent of the will, the complainant has no more than a life estate in either of the lots. No testimony was taken. The cause was argued on briefs, solely on the dispute as to the true construction of the will.

A. B. Endicott, for complainant. Stephany & Son, for defendants.

GREY, V. C. This bill is filed by the complainant, in his own right as devisee, for the purpose of obtaining a construction of the effect of the devise in his father's will, under which he claims title. He makes defendants the other devisees,—the grandchildren who are referred to in the will as devisees over of the two lots in question. The sole question in doubt or dispute is whether the complainant, by the terms of the will, takes a fee in the 26 feet front lot, and a life estate in the adjoining lot, or only a life interest in both. There is no trust created by the will, touching either of these properties. Nor is there any power given for their disposition which any trustee is charged to exercise. No relation of a fiduciary character appears to be in any way connected with the devise. No equitable estate is created which needs to be defined or protected. The devise to the complainant, whether it be in fee as to the first lot referred to, or for life as to

both, passes a purely legal estate. Under circumstances such as these, this court will not assume jurisdiction to determine the title to lands, nor to construe a will, to declare whether it passes one legal title, or another of greater extent. The claimant under a devise of a purely legal title to lands, who seeks to establish his title, as against the heir at law of another devisee, by the construction of the will, must assert his rights at law. The whole question was considered in the recent case of *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084, where a collation of decisions may be found.

NASH v. HALL et al.

(Court of Chancery of New Jersey. Jan. 13, 1898.)

BILL OF SALE—AS CHATTEL MORTGAGE—AFFIDAVIT OF CONSIDERATION.

1. A bill of sale intended as a mortgage is within Chattel Mortgage Act, § 4 (Laws 1885, p. 319), making "every mortgage or conveyance intended to operate as a mortgage of goods and chattels" void as against subsequent judgment creditors of the mortgagor, unless accompanied by an affidavit of the true consideration.

2. Chattel Mortgage Act, § 4 (Laws 1885, p. 319), requiring an affidavit of consideration to accompany a mortgage of goods and chattels, does not apply to a mortgage of book accounts.

Bill by James Nash against Samuel Hall and others. Decree for complainant.

Otto Crouse, for complainant, John W. Beekman and James S. Wight, for defendants.

PITNEY, V. C. This is a bill by a judgment creditor to set aside a transfer of personal property made by one of the judgment debtors to a third party, pending the suit, and before judgment, on the ground that it was fraudulent and void as against his judgment. The judgment was recovered by the complainant against Isaac and Tunis G. B. Cortelyou and Walter C. Bunn, composing the firm of Cortelyou Bros. & Co., on the 9th day of April, 1896; and the bill in this cause was filed on the next day, the 10th of April. The property consisted of a feed and grain store, a building standing on leased premises, a stock of grain, feed, hay, etc., in it, and also the movable plant, consisting of furniture, implements, wagons, and horses. These, together with outstanding debts due on the books of the concern, were seized by a receiver of this court, and converted into cash under its direction; and the contest is over the proceeds. The facts in the case are complicated, but must be fully understood in order to be properly dealt with.

The complainant, Nash, and the defendant Isaac Cortelyou were engaged in business as partners, in Perth Amboy, some time prior to the year 1893, when the complainant went out of the business; and the same was continued by Isaac Cortelyou in partnership with his brother-in-law Walter C. Bunn, who

was and is a practicing lawyer in New York City. Bunn put some capital into the concern, but gave it no personal attention. Subsequently (December 1, 1894), Tunis G. B. Cortelyou, another brother of Isaac Cortelyou, and also a resident of New York, became a partner in the concern, and made a contribution to the capital. Prior to December 1, 1894, Nash had loaned the firm considerable sums of money, which were finally consolidated into a promissory note, made by Cortelyou Bros. & Co. dated December 1, 1894, for \$1,800, payable in one year, with interest, the interest upon which was paid to the 1st of August, 1895. Bunn, on May 1, 1895, dropped out of the firm, leaving in and sinking his money contribution to the capital, but taking a written agreement from the remaining partners to protect him against the debts of the firm, including Nash's note. Isaac and Tunis Cortelyou continued the business until November 16, 1895, when Tunis retired, leaving Isaac the sole owner. Isaac, in his turn, guaranteed Tunis against his liabilities as a member of the firm. This left Isaac primarily liable as between him and Tunis Cortelyou and Bunn, to pay this note, and Tunis primarily liable as between him and Bunn.

Mr. Nash's note maturing on December 1, 1895, he pressed for its payment. In the meantime the firm, while composed of the two brothers, became indebted to Bunn for money borrowed, to the extent of \$1,200. Then Isaac, being pressed by Nash, set about making arrangements to pay Nash's note, and save his brother and brother-in-law in New York from further trouble. The assets of the business consisted (1) of the storehouse, standing on leased ground, worth about \$1,500, upon which was a chattel mortgage, held by the defendant Hall, for \$500; (2) of a delivery truck, with horses and harness, weigh scales, bales, bags, and office furniture; (3) grain, feed, flour, and hay in the store; and (4) book accounts and bills receivable. On the last day of December, 1895, Isaac Cortelyou executed three chattel mortgages on the premises,—one to Mr. Nash, upon the store building, for \$1,000, payable in one year after date; another to Mr. Bunn, on the horses, truck, harness, and office furniture and other implements, together with 3,000 bushels of oats, to secure \$2,000; and the other to Tunis Cortelyou, to secure \$3,000, covering corn, bran, meal ground feed, hay, straw, rock salt, wheat, buckwheat, and other stock in trade, also all books of account and outstanding balances due Cortelyou. The storehouse had been purchased from the defendant Hall in January, 1894; and Isaac Cortelyou had given to him a chattel mortgage on it for \$500, which was uncanceled of record. Isaac Cortelyou's avowed plan in making the mortgages to Bunn and Cortelyou was to induce Bunn to indorse his notes, having a long time to run, for \$800, and to induce Nash to

take those on account of his \$1,800 note, and to induce Hall to pay Nash \$1,000, and take an assignment of Nash's \$1,000 mortgage, and thus get clear of Nash's claim. These three chattel mortgages were all executed on the 30th of December, 1896, before Isaac Cortelyou's personal counsel, Mr. Terhune, and retained in Cortelyou's possession; and the two to Tunis Cortelyou and Bunn were taken by Isaac to New York, and the two mortgagees made the necessary affidavits to the consideration money on the 31st of December, and handed the instruments to Isaac for record. They were put on record by Isaac on January 7, 1896. The mortgage to Nash appears not to have been delivered to him until the 7th of January, 1896, when he made the affidavit as to its consideration, and it was lodged for record on the 8th of January. It appears that Mr. Bunn came to Perth Amboy to close the transaction, but that it fell through. Mr. Nash refused to accept the settlement unless he either had the cash for the \$1,000 mortgage, or that a previous mortgage which Hall held, for \$500, on the building, should be discharged. In addition to this note of \$1,800, Isaac Cortelyou was individually indebted to Nash, as Nash claims, for money lent, in a sum something less than \$100. He had all the time been, and was still, employed by Isaac as a salesman. Shortly after the proposed settlement fell through, he made a collection on Cortelyou's account of a considerable sum of money, and insisted upon Cortelyou turning a portion of that collection against his item of borrowed money. To this Cortelyou consented, but became angry, and declared that he would prevent Nash from getting a dollar on his large note. Nash thereupon left Isaac's employment, and appears to have commenced a suit upon his note in the city of New York, against Tunis and Isaac Cortelyou and Bunn, and shortly afterwards, on the 16th of January, 1896, commenced a like suit in the supreme court of New Jersey, resulting in a service upon Isaac alone.

Isaac had been in negotiation with Mr. Hall to advance the money to Nash on the \$1,000 mortgage, and Hall was cognizant of the situation between Nash and Isaac, the giving of the three chattel mortgages, and the commencement of the suit in New York, but, as he swears, not of that in New Jersey. On January 24, 1896, Hall took with him a check in blank, signed by Mr. English, who was co-executor with him of an estate, and went with Isaac Cortelyou to Long Branch, to the office of Isaac's counsel, Mr. Henry S. Terhune; and there the bill of sale which is here attacked was made and executed. The consideration named is \$1,800, and it purports to grant to Hall all his right, title, and interest in his flour, feed, hay, and straw business at Perth Amboy, including horses, trucks, fixtures, office furniture, safe, stock in trade, books of account, good will, and everything, of whatsoever name or description, appertain-

ing to or in any connected with it; also, the frame building and storehouse, with a covenant of warranty of the title. It contains no defeasance, and no affidavit is attached,—simply an acknowledgment before Mr. Terhune, as master in chancery. This instrument was recorded on the next day, in the Middlesex county clerk's office. The executors' check was filled up by Mr. Terhune for \$1,000, and paid to Isaac. At the time of the execution and delivery of the instrument, however, Mr. Hall gave back to Isaac a paper signed by himself, reciting that Isaac had that day conveyed to him (Hall) all his right, title, and interest in the flour and feed business located at Perth Amboy, by bill of sale of even date therewith, and was about to take possession and control of the business, retaining Isaac Cortelyou as his managing clerk. The agreement witnesseth "that, so long as the said Cortelyou shall give his undivided attention and services to the management of said business, I do hereby agree to pay him at the rate of twenty-five dollars per week, which said sum he is permitted to deduct each week from the proceeds of said business." The \$1,800 named as consideration was supposed to be made up of the \$1,000 in cash paid by the executors' check, and \$500 due on Hall's chattel mortgage, with some arrears of interest, and the balance in cash advanced within a short time previously by Hall. On the same day (January 25th) Isaac made an affidavit of merits in the suit of Nash, and later on, in time, put in a plea of the general issue. That plea was filed in behalf of all the defendants, including Tunis Cortelyou and Bunn, although the latter were not served with process. The declaration was founded not only on the \$1,800 note, but on a claim of \$80 for rent. The defenses, specified on demand, were (1) that there was no rent due, and (2) that the plaintiff had accepted a chattel mortgage for \$1,000 in part payment of the note. When the case came on for trial, at the April term of the Middlesex circuit, the defendant's attorney gave a relicta for the amount due on the note, the claim for rent being stricken out. There was proof also tending to show that there was an understanding at the time between the attorneys of the parties that the chattel mortgage should be delivered up, but it never was delivered up.

The first question is as to the true character of the bill of sale of January 24th. Was it a bill of sale, or was it a mortgage? I am entirely satisfied from the evidence that it was intended, as between the parties, to operate simply as a mortgage. Isaac Cortelyou swears distinctly that there was an understanding that he was to have an interest in the business, was to manage it, and that it was to be conveyed to him or to his wife. Then, the paper employing him at the extravagant salary of \$25 a week to conduct what all the time was a losing business, to be paid without regard to the profits of the business or the actual value of his services, indicates the same thing. Mr. Hall himself hardly denies it.

In the next place, the conduct of the business afterwards is very significant. No change whatever was made in the mode of conducting it. The \$1,000 received was put to the credit in bank of Cortelyou Bros. & Co., and all of the subsequent collections and payments up to the time of the appointment of the receiver in this case, on the 16th of April, were so deposited; and the funds resulting from such deposits were used indiscriminately to pay the debts of the old concern, and to buy new goods. There was absolutely no stop or rest made in the business, or any serious attempt made to separate the affairs of the old and new concern. A set of books was started about the 1st of February in the name of the Perth Amboy Feed Company, under which name the business was nominally conducted; and a bank account was opened in the name of the Perth Amboy Feed Company in the same bank (the People's Bank of Keyport) in which Mr. Cortelyou had previously kept his account, and still continued to keep it. But the great bulk of the banking business was done in the name of Cortelyou Bros. & Co., and the transactions in the bank in the name of the Perth Amboy Feed Company were but few in number, and consisted almost wholly of cashing checks for individuals who wished to exchange currency for a check on a bank, and currency was deposited to the credit of the Perth Amboy Feed Company to meet the check when it came in. Most of the business transactions were entered in the account books of Cortelyou Bros. & Co. Hall gave no personal attention to the business. His name nowhere appeared. It was conducted by Isaac with the same assistants as before, and without the least apparent change.

Then, again, it is quite apparent that, when Mr. Hall started with Isaac for Long Branch to see Isaac's counsel, he did not contemplate making an absolute purchase of the plant, but had in mind only a chattel mortgage; for no inventory was taken, no statement either of the chattels or book accounts was made up, nor was any careful statement made of the amount due from Isaac to Hall over and above the \$1,000. The use of an absolute bill of sale, instead of a mortgage, was undoubtedly an afterthought, and in point of fact, was suggested, as both swear, by Isaac's counsel, Mr. Terhune; and it is a significant circumstance that that gentleman was not called to prove what were the circumstances attending the transaction.

Then, again, we have the question of the value of the property assigned. This was placed by Isaac at over \$5,000, and was shown to be worth that much by an inventory taken on the 1st of February. Then, we have the circumstance that Hall knew that three chattel mortgages on the premises had been executed on the last of December or the early part of January, to Nash, the complainant, to Bunn, Isaac's brother-in-law, and to Tunis, his brother. The mortgages to

Tunis Cortelyou and Bunn were in Isaac's possession, and were, as both swear, exhibited to Hall at the time the bill of sale was executed. Hall swore positively that there was no indorsement showing that they were recorded, but in this he was mistaken, for they both had such indorsements at that time. But Isaac did not have in his possession Nash's mortgage, and Hall swears that he contented himself with the promise of Isaac to have all three mortgages canceled. He swore that Isaac told him that he had an arrangement by which Nash was to take notes indorsed by Bunn. But this evidently relates to what Hall had previously heard was the arrangement; and, while he might have supposed that the two chattel mortgages to Bunn and Tunis Cortelyou which were in Isaac's possession might be canceled of record, he must have known that Nash's mortgage could not be disposed of in that way, or his debt settled, especially if the mortgages to Bunn and Tunis were canceled, one of which was given to secure Bunn for indorsing the very notes which Nash was to take. Now, it is difficult to believe that a business man would buy out and out a plant, and pay the money for it, with the expectation of getting a clear title, with so many chattel mortgages outstanding against it. It is possible to believe, however, that Hall credited Isaac's statement of the value of the plant and the book accounts, and that he was willing to advance upon that security \$1,000 over and above his own debt, which he put at about \$900, and the \$1,000 mortgage held by Nash. If he asked advice, he must have been informed that the chattel mortgages did not cover the book accounts, and Isaac's estimate of those accounts showed them to be a good security for the advance. Then, Isaac's book account against Hall had been running for a year or two, and a considerable balance appeared on the books against Hall, which, of course, passed to Hall by the bill of sale, if in fact it was what it appeared on its face to be. And yet in February, 1896, Hall paid to Cortelyou, first, \$150 on account, and, later, \$46.05 in full of this account, and took his receipt for it. I consider this a very significant circumstance.

These considerations lead me to the conclusion that the instrument was intended, as between the parties, to operate as a mortgage, and is within the strict letter of the language of the fourth section of the chattel mortgage act, which declares "that every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made," etc. Laws 1885, p. 319. And hence, in the absence of any affidavit, it must be held to be void as against a subsequent judgment creditor, like the complainant. To hold otherwise would be to substantially repeal the wholesome provision of the chattel mortgage act, requiring an affidavit to be made of the true consideration,

to accompany every mortgage, and would have the effect of giving an absolute bill of sale the force of a chattel mortgage, without an affidavit. This leaves Hall's instrument effective only as to the book accounts which were in existence on the 24th of January, 1896. To a mortgage of book accounts I do not understand that the chattel mortgage act applies.

The money in the receiver's hands consists of the following items, as he reports:

Cash sales by receiver at retail.....	\$ 262 13
Sale of building.....	1,225 00
Sale of fixtures.....	395 58
Sale of stock.....	241 00
	<u>\$2,123 69</u>
Less auctioneer's fees, etc. \$ 98 58	
" other expenses.....	206 36
	<u>304 94</u>
Net proceeds of sale by the receiver	\$1,818 75
Further receipts collected from accounts made after January 24, 1896	611 80
	<u>\$2,430 55</u>
Paid to receiver by Hall, as proceeds of sale by Cortelyou after restraining order served, and before receiver appointed	245 35
Collected by receiver on book accounts made before January 24, 1896	186 66
Interest received	60 45
	<u>\$2,923 01</u>

This, however, is subject to whatever was due, if anything, upon Hall's first mortgage of \$500 on the building. The circumstances of that were these: Hall sold the building in January, 1894, to Cortelyou, for \$800, and took a chattel mortgage upon it for \$500. Hall was a constant purchaser of goods—grain, hay, feed, etc.—from Cortelyou Bros. & Co. On the 8th of February, 1894, Mr. Cortelyou gave credit on his books to Hall for the whole purchase price of \$800; and on the 28th of February, after giving that credit, and deducting charges for merchandise up to that time, there was due to Hall a balance of \$556.64. This was carried forward to the 31st of December, 1894, further charges for goods sold to Hall being made from time to time, and credits given for cash paid on account. On that day (December 31, 1894) there was a balance due Hall of \$87.64, which, for some unexplained reason, probably through oversight, was never carried forward. The account for goods sold proceeded against Hall, and he made payments from time to time, sometimes cash in full, until the 4th of March, 1896, when, as we have seen, by a payment made shortly before of \$100, and another of \$150, and a final payment of \$46.05, on that day the account is fully balanced. But that did not include the \$87.64, which was not carried forward, as we have seen, from the 31st of December, 1894. There is another entry after that of \$475 credited to Hall, which the book-keeper admitted was an error; and it was palpably so, for there was no cash or other thing received by Cortelyou to warrant it. In order, however, to reduce Hall's balance to \$87.64, on

the 31st of December, 1894, a charge is made in the ledger against him of the date of November 30, 1894, of \$245.86. By a reference to the journal from which that item is posted, it appears to be made up in this wise: "Samuel Hall, Dr., to Merchandise, Amount from Old Books, \$245.86." Then is interlined, first in pencil, and then written over in ink, and I think in a different handwriting, four items,—\$136.87, \$28.45, \$75.54, \$5,—making \$245.86. The origin of these four items was not, and, as I presume, cannot be, pointed out, excepting as to that of \$136.87; and that is the precise amount of a balance against Hall on the ledger on the 1st of February, 1894, viz. \$136.87, which was carried forward and forms a part of the debit against Hall at the time the \$800 for the building was credited to him. That makes the amount of error in that charge of \$245.86 the sum of \$136.87, which, together with the balance of \$87.64 not carried forward, makes a total of \$224.51 due, according to the ledger, on the \$500 mortgage on the 1st of January, 1896.

This result, as we have seen, is arrived at by a proper balancing of the books of Cortelyou Bros. & Co. As against it, divers bills of merchandise and receipts and checks on account thereof are produced by Hall. For all of these payments, except one, credit is given on the books of Cortelyou Bros. & Co., and no discrepancy is raised thereby, with a single exception. Among the papers produced by Hall is a statement of account (made out on a printed blank) of Mr. Hall with Isaac Cortelyou, dated March 22, 1895, and he is there charged as follows: "1894, Nov. 30. Mdse. as per bills, \$519.73; credit by building, \$300; check, \$175,—total, \$475; leaving a balance of \$44.73,"—under which is written: "Received payment. Cortelyou Bros. & Co." The \$44.73 is regularly credited to Hall on the ledger of Cortelyou Bros. & Co. as of the 29th of March, 1895. To support the credit of "check, \$175," in that statement, a check is produced drawn by Hall in favor of I. Cortelyou & Co., dated February 17, 1894 (more than a year before the date of the statement), for \$175, on the Middlesex County Bank. That is indorsed by I. Cortelyou & Co., and is stamped "Paid" by the Middlesex County Bank on the same day, February 17, 1894. It appears that I. Cortelyou & Co. kept their account in a bank at Keyport, and that, by the usual course of business, that check, if used by I. Cortelyou & Co., should have been deposited to their credit in the Keyport bank, and sent from that bank through intermediaries to the Perth Amboy bank; but in this case it appears to have been paid over the counter on the day it was drawn. I can find no entry whatever on any of the books of Cortelyou of that check. As we have seen, it was drawn and paid more than a year before the statement of account is made up and credit given for it; and subsequently, as we have seen, the account was continued against Hall without giving credit for that check, and he paid a balance on March 4, 1896, of \$46.05. Hall swears with re-

gard to this check that it was an exchange of checks between him and Cortelyou; that he held Cortelyou's check a long time, at his request, and finally tore it up, and took this bill and receipt in its place. The statement of March 22, 1896, was made up apparently by Cortelyou's bookkeeper; but he was not called to explain this rather puzzling transaction, or to show why Hall should be, and was, credited with the payment of \$44.73, and not with the check for \$175. Nor was any explanation given of the circumstance that Mr. Hall paid subsequent bills, and finally settled his account, as we have seen, in March, 1896, without having credit for this check for \$175. Upon the evidence and such examination of the documentary evidence as I have been able to give, I am not entirely satisfied that Mr. Hall is entitled to a credit for this item of \$175 in such a way as to increase his chattel mortgage beyond the sum that I have already fixed. However, if it becomes important in the end to determine definitively whether or not he is entitled to such credit, I will give an opportunity for further evidence to be offered on that subject, or for a reference to a master to determine it.

If you add interest, on the sum of \$224.51, above arrived at, to the 15th of April, 1896, which amounts to \$17.36, we have \$241.87 as the amount due on the \$500 mortgage on the 16th of April, 1896, when the complainant's bill was filed. Deducting that from the sum of \$2,430.55, proceeds of sale in the receiver's hands, we have the sum of \$2,188.68 subject to the complainant's equitable lien, without taking into account the amount of \$245.36 paid into court by Hall as the proceeds of sales of goods made by Cortelyou after the restraining order was served upon him, and before the receiver took possession, such payment being made to stop contempt proceedings, and without taking into account the sum of \$186.66, which was collected by the receiver on book accounts made prior to January 24, 1896, or \$60.45 for interest received. This amount is sufficient to pay the complainant's claim in full.

I include in the amount subject to the equitable lien of complainant's judgment the sum of \$611.80, collected from accounts made after January 24, 1896, for the following reasons: The bill of sale of January 24, 1896, which, as between the parties, I have held to be a mere mortgage, not only had the vital defect of having no affidavit annexed to it, but there was no actual or visible change of possession of the property conveyed. Such possession, as well as the actual control, remained in Cortelyou, and the business, as we have seen, was conducted precisely as it had been before. The only visible change was in using the name of the Perth Amboy Feed Company, and this, I think, the facts compel me to hold was a mere cover and makeshift. It is perfectly plain that Cortelyou's object was to defeat Nash's claim. He was the actual and substantial owner, and he never delivered any actual pos-

session to Hall. This feature distinguishes the case from that of *Bank v. August*, 54 N. J. Eq. 182, 33 Atl. 803, affirmed on appeal in 55 N. J. Eq. 590. There it was held that the mortgagors in an unrecorded bill of sale, which was void as to creditors, might sell the goods, and actually pay the money to one of their creditors, and that such payment would be good as against the judgment creditors who had failed to make a levy. Had Mr. Cortelyou collected these moneys for the goods which he sold after January 24, 1896, and paid the money to Hall on account of what he owed him, a different question would arise; but, as I have held, the relation of Hall to Cortelyou's business was that of a creditor, and not of an owner, and the amounts due for goods sold after January 24, 1896, remained the property of Cortelyou. He put in a plea, which had no merit whatever, to the complainant's suit at law, and thereby deferred judgment until April 9th. These accounts are the proceeds of sales of goods which, as between him and his creditors, belonged to him during the time that he succeeded in postponing Nash's judgment. They are therefore equitable assets, to which Nash, under his judgment, is justly and in equity entitled.

This result renders it unnecessary to consider a very strong argument addressed to me by the complainant to show that the whole transaction between Hall and Isaac Cortelyou was a fraud as to Nash; and the further argument that, under all the circumstances, the complainant was entitled, not only to the benefit of the \$1,000 chattel mortgage delivered to him on the 7th of January, 1896, but also to the benefit of the two chattel mortgages which preceded it in registry, given by Isaac to his brother Tunis and his brother-in-law Bunn, who were both defendants in the judgment; the argument being that the mortgages were, in part at least, given for a good and valuable consideration, especially that of Bunn, and that the complainant, as a judgment creditor, is entitled to be subrogated to their rights as mortgagees against Cortelyou. I will advise a decree in accordance with the foregoing views.

(56 N. J. E. 199)

TARBOX v. GRANT et al.

(Court of Chancery of New Jersey. Jan. 18, 1896.)

DEED OF TRUST—DELIVERY—FAMILY SETTLEMENT —VALIDITY—GIFT OF CHATTELS—ESTOPPEL—CONSTRUCTION.

1. Where a deed executed by a father to convey his equitable interest in his deceased wife's personal estate to a trustee, for the benefit of his heirs, is shown to have been intended to operate as a voluntary family settlement from the time it was executed, it is valid, and creates the trust intended, although not delivered in grantor's lifetime.

2. A transfer by a husband of his interest in his deceased wife's personal estate, to a trustee, before the estate is administered, is a transfer of an equitable interest, rather than a legal title.

3. A valid trust may be created by executing

and delivering an assignment of an equitable interest to a trustee.

4. A father transferred his equitable interest in his deceased wife's personal estate, before an administrator was appointed, to a trustee, who afterwards became administrator, as previously agreed upon. The personal estate consisted of choses in action, evidence of which was not delivered to the trustee in grantor's life. *Held*, that the trustee, on taking out letters as administrator, became vested with the legal title to the choses in action, subject to the trust declared in the deed, which conveyed the equitable interest therein to him, without delivery of the evidence thereof.

5. A gift of chattels or choses in action by deed is made complete and valid by delivery of the deed alone, without an actual delivery of the chattels or evidence of the choses in action.

6. Where a chattel or chose in action is assigned by deed, the grantor is estopped to deny that possession of the thing granted had not been transferred.

7. A father transferred his equitable interest in his deceased wife's personal estate to a trustee, for the benefit of certain heirs, by deed which recited that "in consideration of the natural love and affection which grantor has unto G. and heirs of T., B., and W., deceased," the estate is conveyed in trust, to be "paid over by T., administrator, to my said children and heirs of my said children, aforesaid, share and share alike," etc. *Held*, that the deed was a direction to pay over equally, share and share alike, per stirpes, between the children and the heirs of deceased children.

Bill filed by Louis P. Tarbox, administrator of Eliza Grant, deceased, against George C. Grant and others, for directions as to the distribution of the estate.

Woodbridge Strong, for complainant. J. W. Beekman, for defendant John B. Grant. Mr. Van Winkle, for defendants George C. Grant and wife.

EMERY, V. C. The bill in this case is filed for directions as to the distribution of the estate of Eliza Grant, deceased, in the hands of complainant, as her administrator; and I will state briefly the conclusions I have reached on the questions submitted.

The first question relates to the validity of a deed executed by George C. Grant, the husband of Eliza Grant, on March 5, 1894, more than a year after her death. By this deed, the husband, who was then entitled to the beneficial interest in his wife's estate, upon which estate letters of administration had not then been taken out, conveys to the complainant (who was to take out such letters, and who is described in the deed as administrator of Eliza Grant) all the personal property and estate of his wife, to hold upon certain trusts. One of these trusts is the division thereof among his children and heirs of children deceased, except testator's son John D. Grant. It appears by the evidence that a conveyance of real estate had been made by George C. Grant and his wife, during their lives, to the son John D. Grant, and that the object of the deed now in question was to divide the personal property of the wife among the other children and their heirs. The validity of this deed is now questioned by the two sons, John D. Grant and George C. Grant, Jr., and by the wife of the

latter, as his assignee, upon two grounds. The first is that it was not delivered by the grantor, but remained in his custody until after his death. The proof as to the custody of the deed after its execution by the father, in the presence of his sons, is incomplete. The son George, who gave the paper to the complainant after his father's death, now swears that he never had the paper before his father's death, but his evidence is not satisfactory. He delivered the paper to the complainant after his father's death, but he now denies any recollection of this, and, of course, altogether fails to account for his possession of the paper. The defendants rely altogether upon the failure of the complainant to prove delivery of the paper; but, upon the entire transaction relating to the execution of the deed, the case is one where the deed is valid, even though it had been proved to have been retained by the grantor in his possession until his death. The deed was in the nature of a voluntary settlement by the father of his interest in his wife's personal estate, and was so intended or supposed to be by the father and the two sons who now contest it. Deeds of this character, fairly made, are always held binding in equity upon the grantor, unless there be clear and decisive proof that the grantor never parted or intended to part with the possession of the deed; and, even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances besides the mere fact of his retaining it to show that it was not intended to be absolute. This is the rule as stated by Chancellor Kent after a full examination of the cases. *Souverbye v. Arden* (1814) 1 Johns. Ch. 240, 256. He reaffirmed the doctrine in *Bunn v. Winthrop*, Id. 329, 336, upon this point. This rule was followed in *Scrugham v. Wood* (1836) 15 Wend. 545, in a case where a deed conveying lands was intended as a family settlement, and was found, after the grantor's death, among his private papers. Nelson, J., says (page 546): "No one can doubt from the account of the execution of the deed given by the commissioner, in connection with the previous preparation of it at the instance of S. [the grantor], that it was the understanding and intent of all parties, at the time of the execution and acknowledgment, that it was delivered, or, in other words, that the family settlement was complete." This rule also seems to be recognized generally. 1 Perry, Trusts, § 103, and cases cited. The special doctrine relating to delivery of deeds in cases which are such family settlements is recognized in *Ruckman v. Ruckman*, 33 N. J. Eq. 354 (Green, J., page 358); but I have not been referred to any case in our own courts in which the question of their validity, when retained by the grantor, has been directly involved and adjudicated. The cases in our courts relied on by the counsel for defendants, as to the necessity of delivery, or the effect of retention by the grantor, were cases where this question as to the nature of the deed or declaration of trust, as a family settlement, was not discussed or passed

upon. *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. 627; *Cannon v. Cannon*, 26 N. J. Eq. 316, and cases cited. The evidence relating to the circumstances of the preparation, execution, and acknowledgment of the deed by the grantor, in the presence of his children, shows that it was intended to operate as a voluntary family settlement of the personal estate of the grantor's wife, from the time of its execution and formal acknowledgment; and the subsequent retention of the deed by the grantor, if in fact he did retain it, did not prevent its operation as a deed executed and delivered. And, in accordance with the rule settled by the cases above referred to, I hold, therefore, that the deed was valid, even if retained by the grantor.

The second objection to the deed relates to its operation upon the personal estate of the grantor's wife, Eliza Grant. At the time of its execution, March 9, 1894, which was more than a year after Eliza Grant's death, no administration had been taken out upon her personal estate. The husband and children had, however, previously signed a renunciation of their right to administration in favor of the complainant, a son-in-law of George C. and Eliza Grant. The assets of Eliza Grant's personal estate consisted principally of a deposit in her name in a savings bank, and a bond and mortgage also given to her. No change in the legal title to these assets had been made up to the time of the execution of this agreement; nor was any made thereafter until the complainant took out letters of administration, in August, 1894, after the death of George C. Grant, Sr., April 22, 1894. The savings bank book and the bond and mortgage were not delivered to the complainant, the grantee named in the deed, at the time of the execution of the deed, nor during the lifetime of the grantor, George C. Grant; but the complainant, as administrator, collected the sums due on these securities, and they are the source of the principal portion of the estate in his hands for distribution, amounting to about \$3,100. The point made is that the deed in question, even supposing it to have been delivered by the grantor, was not operative to pass these choses in action, the deposit in the savings bank, and the bond and mortgages, for the reason that there was no delivery of the evidences of these choses in action, and that, the delivery of these being essential, the deed in question did not operate as a completed conveyance. The case of *Ruckman v. Ruckman* (1890) 33 N. J. Eq. 354, is relied on upon this point, but it does not reach this case. In that case one of the questions was whether a bond and mortgage had been assigned to the wife of the husband. An assignment of the bond and mortgage had been drawn, and the real question was whether this deed of assignment itself, which had remained among the assignor's papers, and along with the bond and mortgage, had been delivered. The court held that the assignment itself had not been delivered by

the grantor, and that the gift was therefore never carried into effect. The case did not decide that, if the assignment had been in fact delivered, the gift would not have been perfected without the delivery of the bond and mortgage.

The deed in this case, under the seal of the grantor, in consideration of natural love and affection to the grantor's children and grandchildren, and of one dollar paid, conveyed to the complainant, administrator of Eliza Grant, deceased, "all personal property and estate of my deceased wife, Eliza Grant, as hereinafter mentioned, to hold in trust for the said George C. Grant, Jr., and the children or heirs of my deceased children aforesaid. To this end, that upon the settlement of the estate of my said wife, deceased, by the said Louis P. Tarbox, administrator, all money or property in his hands, after paying the debts and expenses of said estate and settlement thereof, whether derived from moneys now deposited in bank, or mortgages, or from any source whatever, and wherever found, as being part of the property of my said wife, Eliza Grant, deceased, consisting of money on deposit in Emigrant Industrial Savings Bank and Citizens' Savings Bank, with interest, amounting to about twenty-nine hundred dollars, also mortgages and debts due the estate of my deceased wife, shall be paid over by the said Louis P. Tarbox, administrator, to my said children or heirs of my said children, aforementioned, share and share alike; and I do by these presents release and quitclaim all my right, title, and interest in the same, or whatever rights I may have to the end and purpose aforesaid." At the time of the execution of this deed, the husband was entitled to the entire beneficial interest in his wife's personal estate; and, upon his death before full administration thereof, his representatives, but for this deed, would be entitled. 2 Kent, Comm. § 136; *Donnington v. Mitchell* (1839) 2 N. J. Eq. 243; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 580, 12 Atl. 689, affirmed 45 N. J. Eq. 890, 19 Atl. 622; *Nelson v. Nelson* (N. J. Ch.) 36 Atl. 280. The deed was a transfer of the equitable estate or interest of the grantor in his wife's estate, rather than a transfer of the legal title. Strictly, therefore, the case would seem to come within the rule that a valid trust may be fully created merely by executing and delivering the assignment of the equitable interest to a trustee, for the reason that, after this assignment, no act is necessary to be performed by the settlor. 1 Perry, Trusts, § 102, and cases cited. *Sloane v. Cadogan* (1808) 2 Sugd. Vend. *617, *624.

The administrator, when appointed, became vested with the legal title to the choses in action of Eliza Grant, by operation of law, upon taking out letters; and it required no further act upon the part of the husband to invest the administrator with such legal title, even against the husband. This legal title the administrator held for the purposes of ad-

ministration and distribution, either according to the statute or the settlor's deed. It would seem, therefore, that a delivery of the assignment in this case would have been sufficient to convey to the complainant the settlor's equitable interest in his wife's estate, upon the trusts specified, and that the delivery, in addition, of the bank book, and of the bond and mortgage, was not essential to complete the trust declared of the husband's equitable interest therein. But treating the case as an intended gift of the legal title to choses in action, by deed of assignment, the authorities hold that a gift of chattels or choses in action, by deed, is complete and valid, as an executed gift, by the deed alone, and without an actual delivery of the chattel or security itself. 2 Kent, Comm. 488, citing *Flower's Case*, Noy, 67; *Hooper v. Goodwin* (1818) 1 Swanst. 485, and cases cited; 8 Am. & Eng. Enc. Law, 1331; *Carr v. Bardiss*, 1 Crompt. M. & R. 782, 788. In *Irons v. Smallpiece*, 2 Barn. & Ald. 551, Chief Justice Abbot says (page 552): "I am of opinion that by the law of England, in order to transfer property by gift, there must be either a deed or instrument of gift, or there must be an actual delivery of the thing to the donee." And in *Morgan v. Malleson*, L. R. 10 Eq. 475, it was held by Lord Romilly, M. R., that a written memorandum of gift of a bond delivered to a donee was sufficient, without handing over the bond. The principle that an assignment by writing is sufficient to convey title to a chose in action seems to be recognized in several cases in our own courts, but the precise point now raised was not decided in any of the cases. *Dilts v. Stevenson* (1864) 17 N. J. Eq. 407 (Green, Ch. p. 413); *Egerton's Ex'rs v. Egerton*, Id. 419, 421. Where the assignment of the chattel or chose in action is by deed, an estoppel arises against denying that the possession of the thing granted has been transferred, and the gift is therefore considered as perfected. Notes to *Ward v. Turner*, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) pt. 2, pp. 1237, 1238, and cases cited. The delivery of the securities themselves was not necessary, therefore, to perfect the gift or settlement made by the deed; and as the retention of this deed by the settlor would not, for the reasons above given, impair its effect as a deed actually creating the trust, the trusts declared in the deed of settlement were completed, and must be carried out, even if the securities as well as the deed itself were retained by the settlor.

The third question raised relates to the construction of the deed, and the question is whether, under the deed, the division of the mother's estate is to be made per stirpes, between the children of the grantor and the heirs of the deceased children, or whether the division is to be equally per capita between the children and the grandchildren. The instrument which is set out in full in the bill, after reciting that "in consideration of the natural love and affection which the grantor has unto

George C. Grant, Jr., and heirs of Ann Eliza Tarbox, Mary Burroughs, and Josephine Wright, deceased, who were children of George C. Grant, Senior," conveys the estate of his wife in trust, after payment of debts, etc., to be "paid over by the said Louis P. Tarbox, administrator, to my said children and heirs of my said children, aforesaid, share and share alike," etc. While the question is not altogether free from doubt, I construe this to be a direction to pay over equally, or share and share alike, per stirpes, between the children and the heirs of children, if any children are dead. As I construe the deed, the estate is to be paid "to my said children, share and share alike," and the gifts to the heirs of the children are made substitutional to those thus made to the children. If this be the true interpretation, then the division is clearly to be made per stirpes, and I will so advise.

(56 N. J. E. 534)

IAUCH v. DE SOCARRAS et al.

(Court of Chancery of New Jersey. Jan. 21, 1898.)

CREDITORS' BILL.—PARTIES COMPLAINANT.

After a judgment creditor has filed a bill, for the benefit of himself alone, to set aside a fraudulent conveyance, and establish the lien of the judgment, other judgment creditors are not entitled to join as parties complainant, against the protest of defendants, though complainant consents.

Bill by Louis C. Iauch against Pauline De Socarras and another. Defendants move to vacate an order admitting Mulligan & Brazo as parties complainant. Sustained.

Thomas P. McKenna and Frank P. McDermott, for the motion. Thomas P. Fay, opposed.

PITNEY, V. C. The original bill in this cause was filed on the 8th of February, 1896. It was based upon a judgment recovered by the complainant, Iauch, against Mrs. Pauline De Socarras on the 6th of February (two days before the filing of the bill) in the supreme court of this state, and an execution, issued forthwith thereon, levied by the sheriff of Monmouth county upon certain lands described in the bill. It then sets forth that Mrs. De Socarras was seized of the premises in her own right prior to the recovery of the judgment, and after incurring the indebtedness which was its foundation, and that on the 8th of November, 1895, she conveyed the lands to a third person, and on the same day that third person reconveyed them to her in trust for the benefit of her son, Rudolfo. The charge of the bill is that this family settlement was void as against the complainant, and it prays that the deed of settlement from the third party to herself, as trustee for her son, may be declared to be void as against the complainant, and that the title of the premises may be decreed to be reinvested in her, so that they may be sold under

the execution for the satisfaction of the judgment, and a good and clear title given therefor to the purchaser thereof. There is no prayer that they may be sold for the benefit of creditors generally. This bill, as originally framed, did not make the son, Rudolfo De Socarras, Jr., a party defendant, and was met with a demurrer for want of parties, and that demurrer was sustained. The bill was then amended by adding Rudolfo as a party. Another general demurrer was then interposed, which was overruled. An appeal was taken from the order overruling the demurrer, which was dismissed, and the cause remitted. In September, 1897, the defendants filed a joint and several answer and cross bill. By the first they alleged a consideration for the settlement, and by the last set up what was claimed to be an equitable defense to the complainant's judgment, and prayed that it be declared not binding in equity against them. A replication was filed to this cross bill, and the cause was at issue, and came on for hearing and trial before me as vice chancellor. On the second day of the hearing, counsel appeared for the petitioners above named (Mulligan & Brazo), and asked permission to cross-examine the witnesses. It then appeared that on the 26th of June, 1897, more than a year after the filing of the bill, the petitioners had made an *ex parte* application to the court, by a petition which set forth that they had recovered judgment on the 30th of June, 1896, against Mrs. De Socarras, in the circuit court of the county of Monmouth, but not stating the date of the accrual of the debt upon which it was founded, and that the bill in this cause was a creditors' bill filed by Iauch "for the benefit of himself and all other creditors of said Pauline De Socarras who shall in due time come in and contribute to the expenses of the suit." On the strength of that allegation in the petition, and without any notice to either of the parties, an advisory master advised the order now brought in question, which directed that "the said petitioners be, and they are hereby, admitted as a party complainant of this suit." That order was made on the 6th of July, 1897. Neither of the parties to the original suit had any notice of it, and the appearance of counsel for petitioners was a surprise to them. After some discussion the counsel for complainant agreed in open court that the petitioners might be admitted as parties complainant, provided they did not thereby gain any priority over the complainant's judgment, but should come in, if at all, subject to his judgment. These terms were consented to by the counsel of the petitioners, but not by the counsel of the defendants; and the latter gave notice of a motion to vacate the order of July 6, 1897, admitting the petitioners as complainants in the cause, upon the grounds—First, that said order was improperly, unadvisedly, and inadvertently made; and, second, that the order is illegal,

and contrary to the practice of the court in such cases.

The facts as above set forth raise a nice and important question of practice, which was elaborately argued, and has received careful consideration. The complainant's bill contained no statement or admission that it was filed for the benefit, not only of himself, but of all those creditors who might choose to come in and contribute to the expense of the suit. The allegation of the petition in that regard was untrue, and misled the advisory master into making an order, without notice to any of the parties, which cannot stand for a moment, unless the character of the suit is such as that the petitioners had an absolute right to be admitted as parties complainant, without regard to the allegations of the bill. The consent given at the hearing by the counsel for the complainant removes a part of the difficulty. But the question still remains whether the order can stand against the protest of the defendants. I had occasion to consider the question, in some of its aspects, in the recent case of *Mallory v. Kirkpatrick*, 54 N. J. Eq. 50, 33 Atl. 205, at page 56, 54 N. J. Eq., and page 207, 33 Atl. and have since taken the trouble to look at most of the authorities, with the following result:

That class of creditors' bills in which the suit can properly be said to be necessarily brought for the benefit of other creditors besides the complainant are those which seek to reach, establish, and administer assets in the hands of a trustee, who holds them either voluntarily, or, by force of circumstances, involuntarily, for the benefit of all the creditors. They may be classed as follows: First. Suits to administer the estate of a decedent, held by an executor or administrator, and apply the same to the payment of his debts. Second. Where a living creditor voluntarily assigns property to a trustee for the benefit of his creditors, and a creditor seeks to have that trust administered. Third. Where there is an assignment by operation of law for the equal benefit of the creditors, such as occurred in all instances of attachments against foreign or absconding debtors under our statute, until the recent change in that respect. Fourth. Cases where a creditor of a corporation seeks to reach unpaid subscriptions of stock, as in *Wetherbee v. Baker*, 35 N. J. Eq. 501. And see *Mallory v. Kirkpatrick*, 54 N. J. Eq. 50, 33 Atl. 205. Fifth. A creditors' bill under our chancery act (sections 88-94), in which equitable assets are reached by a receiver, and are all subject to the debts of the defendant, but are not distributed *pari passu*, and the complainant is first paid. As to this class of cases, see *Whitney v. Robbins*, 17 N. J. Eq. 360. In all these cases the property reached becomes assets in the hands of the court, to be distributed among the creditors, either equally, or with certain priorities. A sixth class is that now before the court, where a single judgment creditor of a living debtor obtains a lien upon real estate, or, by execution, on leviable chattels, and

asks the aid of the court, either to perfect an equitable title already in the defendant in execution, or to set aside a fraudulent conveyance made by him to a third party. Here the prayer and remedy are simply to establish the lien of his judgment, or, in case of leviable chattels, of his execution. This last class of cases, and the rights and remedies of the parties, are in marked contrast with those under the other classes above enumerated. In this last class the complainant, if he has the first judgment, has, of course, the first lien; and the result of my research is that, in this country, at least, the surplus, if any, of the proceeds of the sale of real estate, does not necessarily become assets in the hands of the court, to be marshaled and distributed among the other creditors without regard to the date of the accrual of their debts. And here, it seems to me, is found the true test as to whether a suit is or is not brought for the benefit of other creditors besides the complainant. Are its object, scope, and natural result to recover and establish a fund which shall or may be administered by the court for the benefit of all creditors of a certain debtor? In the last class of cases above referred to, it is to be observed, in the first place, that no creditor can obtain any part of the proceeds of the sale of real estate of a living defendant, unless he has a judgment; or, of leviable chattels, unless he has an execution. In the next place, it is to be observed that, where a conveyance by the debtor is attacked as fraudulent and void as against a judgment creditor, an adjudication that the conveyance is void as to the complainant judgment creditor is not necessarily an adjudication that it is void as to all other judgment creditors, since it may be void as to one, and not as to another. By the well-settled rule in this state, a voluntary conveyance is held to be conclusively fraudulent, as to existing creditors, without regard to any actual intent of the grantor to hinder, delay, or defraud such creditors; but, as to subsequent creditors, it can be attacked only on the ground of such actual intent. Hence a conveyance may be held void as to one creditor, and valid as to others. And if there are several successive judgments, founded on debts accruing at different times, some of which accrued prior to the voluntary settlement, and others after the voluntary settlement, and the proceeds of the sale of real estate of a living debtor are brought into court, so much as is necessary for that purpose may be applied to the payment of those judgments founded upon debts which accrued prior to the settlement, and the remainder be held to be free and clear of any lien on the part of those judgments which are founded upon debts which accrued after the date of the voluntary conveyance, although the latter may be prior in date of recovery to the others. In the present instance, the case, as so far developed, indicates that the settlement in question may be properly held valid as to one of these creditors, and invalid as to the other.

An examination of the cases seems to me

to show that some confusion has arisen in the minds of the profession from the circumstance that a rule different from what I have just stated prevailed for many years, and possibly still prevails, in England. There, by a long line of decisions, it was held, for many years, at least, that where a settlement of real estate was made, which was fraudulent under St. 13 Eliz., as to a then existing creditor, and was set aside, at the suit of that or any other creditor, as fraudulent on that account, the whole proceeds of the sale of such property became at once assets to be divided among all the creditors, both prior and subsequent, and whether judgment creditors or creditors at large, and whether there was any actual fraud or not. The fund once seized by the court, and turned into money, was treated precisely like that of the estate of a decedent or of an insolvent, and distributed among the creditors. It so happened that in many, if not most, of the instances where family settlements were set aside as void against creditors, such action and decree was not had until after the death of the settlor and debtor, because the real estate during his lifetime was not ordinarily liable to sale for debt, and only became subject to sale for that purpose after his death; and in such case the suit at once assumed the aspect of an ordinary suit to administer the estate of a decedent, such as I have above referred to. But the same remedy was in a few instances applied in cases where the debtor was still living. *Spirett v. Willows*, 3 De Gex, J. & S. 292, is an instance of that kind. The doctrine of the earlier cases in England was somewhat modified by the later cases, and has never been adopted in this state. The English cases will be found reviewed by Mr. May in his book on *Fraudulent Conveyances* (pages 45-50, and again at pages 515-522), and by Prof. Bigelow in his treatise on *Frauds* (page 80 et seq.); and see *Wait, Fraud. Conv.* § 104 et seq. They are too numerous to be cited at length, but perhaps the length to which the judges there went in the direction indicated is approximately shown by what was said by Vice Chancellor Shadwell in *Scarf v. Soulbey*, as reported in 16 Sim. 344: "It is stated in the bill that the settlor was embarrassed and insolvent when he made the settlement, but that is superfluous. It appears from what Lord Hardwicke says in *Lord Townsend v. Windham*, 2 Ves. Sr. 1, that it is quite enough to prove that he was indebted at the time. Lord Hardwicke says, 'I know no case, on the 13th Eliz., where a man, indebted at the time, makes a mere voluntary conveyance to a child, without consideration, and dies indebted, but that it shall be considered as part of his estate, for the benefit of his creditors.'" But that statement of the rule was not concurred in by Lord Cottenham on appeal, as reported in 1 Macn. & G. 364, at page 374, where he declares that a single debt, without regard to

insolvency or embarrassment, is not sufficient, and that the decree of the vice chancellor could not be supported; there being no proof of any indebtedness at the time of the settlement, or that sufficient property was not left after the settlement to pay his debts, but he referred it to a master to inquire on that subject. In all those cases in which the fund sought to be reached becomes assets in the hands of the court, to be divided among the creditors at large, it is proper for the complainant to declare that he brings the suit in behalf of himself, as well as of all the other creditors who may come in. But a careful reading of the cases shows that it is not at all necessary for him so to do, and that it makes no difference whether he does so declare or not; and, unless he is settled with before the case goes to a decree, other creditors may come in,—not, indeed, as complainants or co-complainants, but as claimants of the fund, when once it is in the hands of the court. And this practice has been applied in England, as I have observed, to cases of suits brought in the lifetime of the debtor to set aside conveyances of real estate made by him. But I think it has no application in this state, and that a suit brought by one judgment creditor to set aside a conveyance of real estate, or to perfect an equitable title in real estate in his judgment debtor, is not a suit brought for the benefit of all other creditors besides himself.

This very question seems to have been stirred, and, I think, substantially decided, in the case of *Voorhees v. Reford*, 14 N. J. Eq. 155. There creditor No. 1 (Cramer) obtained judgment, and filed a bill against Reford to set aside a conveyance made by him to his wife, precisely as was done here; after the filing of that bill, creditor No. 2 (Corwin) recovered a judgment against Reford; and, after him, creditor No. 3 (Voorhees) recovered a judgment. Creditor No. 2 (Corwin) filed a bill precisely like that of Cramer, but did not make Voorhees, who had obtained a judgment before Corwin's bill was filed, a party defendant. In that state of things, Voorhees filed a supplemental bill, in the nature of a cross bill, to be permitted to participate with the complainants, and enforce the lien of his judgment against the property in controversy in those suits. Demurrer to this was filed, and the demurrer was overruled. In the argument of counsel for complainant, as reported, the position was distinctly taken that the third creditor could not get the benefit of the previous suits by a mere petition, but must file a bill in which he recognized the existence of the other suits. Chancellor Green, in delivering judgment, declared that the first bill was not a creditors' bill which inured to the benefit of all the creditors of Reford equally, nor was it a bill having the avowed purpose of having the conveyance from Reford and wife declared fraudulent as against all creditors. He did, however, say that such a bill

might inure for the benefit, not only of all subsequent incumbrancers, but of all other creditors. But he says further that if the conveyance was set aside, and the property sold, it would inure to the benefit of Cramer alone, and the residue of the property would remain under the control of the alienee. And then he declares that, as Voorhees' judgment was recovered after the bill of Cramer was filed, his claim must be brought before the court either by an original bill or by a supplemental bill; sustaining the position in the brief of counsel, that it could not be done by petition. That suit went to hearing, and relief was granted to all the judgment creditors, as reported in 17 N. J. Eq. 367.

The objection taken by defendants at the hearing to the admission of the petitioners as complainants in this case was that defendants are entitled to a pleading from the petitioners, and an opportunity to answer it, and contest their claim by itself, in the ordinary way, and that, without that pleading, the defendants, in case they succeed in sustaining their defense as against the complainant, and obtain a decree, will not be able to set up that decree as an estoppel against the petitioners, who will not be bound thereby; and, further, that the issues are not the same, and that the original suit has progressed so far as that the intervention of these petitioners is too late, and will disturb the progress of the suit. In effect, the jurisdiction of the court to compel the defendants to defend petitioners' claim, except by bill and subpoena, is denied. The question presented is quite different from that which would arise if the complainant and the petitioners had originally joined in one bill on their several judgments. In that case the objection of multifariousness would have been met—whether successfully or not, it is not necessary for me now to decide—by what was said by Chancellor Kent in the famous case of *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, at pages 151 and 156. At page 151 he says: "It is an ordinary case in this court for creditors to unite, or for one or more, on behalf of themselves and the rest, to sue the representative of their debtor, in possession of the assets, and to seek an account of the estate." And he continues: "There is no sound reason for requiring the judgment creditors to separate in their suits, when they have one common object in view, which in fact governs the whole case. There is no particular matter in litigation, peculiar to each plaintiff; and, if they were obliged to sue separately, it may be pertinently asked, 'Cui bono?'" Then comes, at page 157, his famous and familiar statement of the rule as to multifariousness. But the doctrine of that case must be confined, when it is used for settling principles, to the circumstances. There was in that case, as in *Wetherbee v. Baker*, 35 N. J. Eq. 501, a corporation, or a quasi corporation, in which the stockholders were charged in the bill with being liable for unpaid subscriptions of stock, and that the affairs were being wound up by trustees who had the estate of the quasi

corporation in their hands, and that those trustees were stockholders, "and that they ought, under the circumstances, to be regarded by the creditors as the bona fide holders of stock not subscribed for," etc.; and the bill prayed for a discovery of the names of the stockholders, the amount of their subscriptions, how much had been paid thereon, and the balance due from each, the names of the stockholders at the time the company was dissolved, and the number of shares owned by them, and that the defendants be decreed to pay for the stock subscribed, and to sell the property of the company, and apply the proceeds to pay the plaintiffs. So that in point of fact an examination of the bill in that case shows that it was a bill to wind up a corporation, and to divide the assets among its creditors; and the prayer for relief against certain fraudulent conveyances, etc., was a mere incident to the general purpose of the bill. Such, also, was the case in *Strike's Case*, much relied upon by the counsel for petitioners, reported in 1 Bland, 57 (and see, particularly, pages 59, 71, 84, and 93), also reported, on appeal, in 2 Har. & G. 191, sub nomine "*Strike v. McDonald*," where the doctrine as contended for by the petitioners' counsel is stated at page 233. The report in Bland, however, is the better one, and a close examination of it shows that there the debtor, Rogers, made certain conveyances, alleged to be fraudulent, to Strike, and afterwards applied to the court for the benefit of the insolvent laws, and procured Strike, the fraudulent grantee, to be named as his trustee, so that Strike became an assignee in insolvency; and the object of the bill was not only to set aside the prior fraudulent conveyances to Strike, but to compel him to execute the trust resulting from his appointment as trustee under the insolvent proceedings. This aspect of the case brings it within the classes of pure creditors' bills to which I have above referred, and destroys its value as a precedent in the present instance. The learned chancellor cites in his footnotes several unreported cases decided in the Maryland courts, which upon examination prove to be of the same character. *Hammond v. Hammond*, 2 Bland, 806, decided by the same judge, was a suit against the heirs, devisees, and personal representatives of a decedent, to administer the estate; and in his opinion he gives a valuable treatise upon the subject of creditors' bills to settle estates.

The cases in this state relied upon by the petitioners are as follows: *Hazen v. Durling*, 2 N. J. Eq. 133, at pages 137 and 138. That was a suit by one joint surety on an administrator's bond against the personal representatives of the co-surety, and the original surviving administrator, and the administrator of the administrator. It is clearly a case of proceeding against an estate in the hands of personal representatives, and is an example of an original creditors' bill to administer an estate. Next is *Bullock v. Zilley*, 5 N. J. Eq. 77, which was the simple case of a legatee suing for his share of the residue of an estate in the

hands of the executor. Next is the case of *Lore v. Getsinger*, 7 N. J. Eq. 191. There a suit by three small judgment creditors uniting in one bill, filed under the sections of the chancery act, was sustained. But the case was reversed on appeal (7 N. J. Eq. 639), the opinion not being reported. The next case in order of time is *Hunt v. Field*, 9 N. J. Eq. 36. That was a case of foreign attachment, where one creditor issued an attachment, and levied and attached certain goods and chattels which were claimed by a third party; and then the creditor, on the strength of his attachment, filed a bill to set aside the conveyance as fraudulent. Chancellor Williamson, at page 42, says: "The bill ought to have been framed for the benefit of the complainant and such other creditors of the defendant as shall come in and seek relief, and contribute to the expense of the suit." Of course, under the statute regulating attachments, as it then stood, all the creditors under the attachment stood on an equal footing, and the criticism of the chancellor was just. An attachment operates as an involuntary assignment in bankruptcy or insolvency, and places the whole estate of the debtor in the custody of the court. The next case is *Williams v. Mitchenor*, 11 N. J. Eq. 520, which was a precisely similar case. It was there held that several persons issuing successive attachments might unite in one suit for the purpose of setting aside fraudulent conveyances. Next is cited *Romaine v. Hendrickson's Ex'rs*, 24 N. J. Eq. 231. That was a bill, by one of several heirs and devisees of the testator of a will which gave his executors power of sale, to set aside conveyances made by them under that power, and in its character is similar to that of one of several legatees standing in equal position, who sues, in behalf of himself and the other legatees, for a discovery from the executor of the estate, and for a settlement thereof. Next petitioners rely upon what was said by Chancellor Runyon in *Kuhl v. Martin*, 26 N. J. Eq. 60, at page 65, bottom. The circumstances there were extremely complicated, and the chancellor, in order to prevent a sacrifice, ordered all the property to be sold by a receiver, free of incumbrances, and the proceeds brought into court; thus establishing a fund in the custody of the court, to be distributed among the several parties equitably entitled as their several rights should subsequently appear. What was said as to subsequent judgment creditors coming in must be construed in view of the peculiar situation of affairs to be dealt with by the chancellor. Next we have *Thompson v. Fidler*, 33 N. J. Eq. 480. The bill, as filed, was declared to be for the benefit of the complainant and all other creditors who may come in, etc.; but whether relief was prayed as to real estate, or only as to equitable assets, does not appear, except so far as it may be inferred that land was involved, from the circumstance that other judgment creditors were made defendants. The complainant failing to prosecute the suit, one of the judgment creditors pre-

cured an order changing his position in the cause to that of a complainant, and then moved for leave to prosecute the suit in that character, and his motion was granted. It is to be inferred from some of the language used by the chancellor that he overlooked for the moment the distinction between a creditors' bill, proper, and a suit to subject lands to the lien of the judgment. Next is the case of *Wetherbee v. Baker*, 35 N. J. Eq. 501, which was a bill by creditors of the corporation to compel the stockholders to pay their debts out of unpaid subscriptions for stock; and it was held that all the creditors must come in equally, and that all their debts be ascertained, and the total indebtedness and deficiency of other assets be ascertained, as a necessary basis for ascertaining the amount of the unpaid subscriptions to be collected for the purpose of liquidating the debts. In some of its aspects, it resembles *Brinkerhoff v. Brown*, 6 Johns. Ch. 189. Next we have *Ooddington v. Bishpham*, 36 N. J. Eq. 578, which was, in effect, a suit by legatees to administer the estate of a decedent for the benefit of creditors and legatees, and is of the same character as a suit by creditors for that purpose. Next we have the case of *Jones' Ex'rs v. Fayerweather*, 46 N. J. Eq. 237, 19 Atl. 22, in the court of appeals, and, in connection with it, the several cases there cited in the printed argument of the counsel of the appellants. These latter were all creditors' suits under the New York statute, which corresponds to sections 88 et seq. of our chancery practice act, and each sought to reach equitable assets. The principal case—*Jones v. Fayerweather*—involved three separate suits, brought by three separate sets of creditors against an executrix of their deceased debtor, to compel her to account for property of the decedent, which had been assigned or conveyed to her in the debtor's lifetime in fraud of his creditors; and each was avowedly brought, and properly brought, for the benefit of all the creditors. Lastly, in *Mallory v. Kirkpatrick*, 54 N. J. Eq. 50, 33 Atl. 205, suit was brought by a judgment creditor of a corporation, which had not been put in the hands of a receiver, to recover money which was alleged to be in the hands of one of its officers, who held it in equity in trust for the creditors; and it was held that such a suit must be brought for the benefit of all the creditors of the corporation, and it was suggested that a receiver would be necessary. This review of the authorities in this state fails to produce a single precedent for the practice adopted by the petitioners in this cause; and those authorities, as well as those in other states, are all, with the single exception of *Thompson v. Fidler*, properly ranged under one or the other of the first five classes above stated. I think the practice adopted in *Voorhees v. Reford*, 14 N. J. Eq. 155, is the safer one, and I am unwilling to sanction that here proposed to be introduced. In coming to this conclusion, I am not unmindful of the disposition of the court to adopt all reasonable rules

of practice which will prevent multiplicity of suits, by the consolidation of litigation; but I cannot see my way to override the clear right of the defendants in this cause to be brought into court, as against the petitioners, in the regular way, by bill and subpoena, and I think the proposed practice would lead to confusion and inconvenience. I will advise an order vacating the order admitting the petitioners as complainants, with costs.

(56 N. J. E. 206)

MINZESHEIMER et al. v. DOOLITTLE et ux.
(Court of Chancery of New Jersey. Jan. 31, 1898.)

ESTOPPEL BY PLEADING—SUBSEQUENT CREDITORS—EVIDENCE.

1. Where, in a suit to set aside a conveyance to a wife as fraudulent, she admits in her answer that complainant's judgment was rendered upon a note given for a debt due from the husband, the question as to whether the debt arose upon an illegal gambling transaction cannot be considered upon the argument.

2. Uncontradicted testimony of a wife was to the effect that she had \$11,000, which, at different times, she had loaned to her husband, for which he had given her certain notes, which were produced in evidence. The notes were in the handwriting of the husband, and appeared to have been written at the same time and were otherwise suspicious, and his explanations as to what he did with the money were unsatisfactory. *Held* sufficient to establish the claim of the wife as to the loan.

3. A husband, in 1878, executed to his wife a note of \$5,000 for money that he had borrowed from her. They testified that after 1878 she loaned him \$4,000, and out of her own money had paid him \$5,000 to reimburse him for money that he had advanced to pay charges against her land; that he conveyed the land which complainant sought to subject to his judgment against him to the wife to pay the note and interest; but they did not show that she had any money after the note was given, or that she received more than \$100, after 1878, from any one other than her husband. An erasure had been made on the back of the note so carefully as to show design to conceal the fact of erasure. *Held*, that the conveyance was not made to pay an indebtedness to the wife.

4. A wife accepted a voluntary conveyance from her husband of all his property available for the payment of his debts, when she knew he was losing heavily from speculations, and that he contemplated withdrawing from the firm from which he derived his income. Shortly thereafter he sold his interest in the firm to protect it from his creditors. When he made the deed in November, he had large purchases of cotton outstanding on margins, and he was closed out in the following March. *Held*, that the conveyance was void against subsequent creditors, as it was made with intent to defraud them.

Bill by Charles Minzesheimer and others against Elmer G. Doolittle and wife. Decree for complainants.

Mahlon Pitney and James G. Chandler, for complainants. Frank Bergen, for defendants.

EMERY, V. C. This is a bill by a judgment and execution creditor to set aside an alleged fraudulent conveyance of lands made by the judgment debtor to his wife through an intermediary. The debt upon which the complainants' judgment was founded was cre-

ated subsequent to the deed, and the claim to set the deed aside is based on charges of actual intent to defraud subsequent creditors. This fraud, as substantially charged in the bill, is based upon the following facts: Doolittle, the judgment debtor, was at the date of the deed, November 15, 1887, a member of a New York dry-goods commission house, Porter Bros. & Co., the current term of which partnership expired December 31, 1887. He had been a member of the firm for 18 years, but in November, 1887, determined to retire. He had speculated heavily during the summer and fall of 1887, losing in one series of transactions over \$15,000, and in November, 1887, his speculative purchases and sales then outstanding amounted to over \$350,000, and were extremely hazardous. His resources were moderate, not exceeding \$20,000, and the nature and extent of his speculations were such that a moderate adverse fluctuation in the market would imperil all his resources. With a view of recouping his previous losses, he determined to continue the pending speculations, and to further extend them, and made the conveyances in question with the intention of placing the tract of land conveyed beyond the reach of any of the creditors to whom he was then indebted, or to whom he would become indebted in the course of his contemplated speculations. Elmer G. Doolittle, the defendant debtor, conveyed the premises in question to his wife by a deed dated November 15, 1887, made to his brother, Dana E. Doolittle, who immediately conveyed them to the defendant Ellen J. Doolittle, the wife of the debtor. The consideration named in each of the deeds is one dollar, and it is charged that they were without any consideration whatever. The deeds were actually acknowledged on November 21, 1887, and recorded on the following day. It is further charged that after the execution and recording of the deeds Doolittle enlarged his speculations, so that during the winter of 1887 and 1888 he about doubled the extent of his transactions, and in the month of March, 1888, when he failed, was carrying upon margins not less than 15,000 bales of cotton, costing in the aggregate \$750,000, while his resources, excluding the land in question, did not amount to \$10,000; and that finally, in March, 1888, his entire transactions were closed out at a loss to him of over \$30,000, which is still unpaid, the complainant's own claim for such losses being about \$3,300. The defense made by the joint answer of the judgment debtor and his wife to this attack upon the conveyances is that the deeds were made upon a full consideration paid to the debtor by his wife, and that at the time of the conveyances the husband was neither indebted nor insolvent, but was in affluent circumstances. The answer denies specifically (following its language) the allegations of the bill as to the speculative dealings of Doolittle in the summer of 1887, and at the time of the deed or afterwards, and especially that at the time of

the making of the deed Doolittle was carrying purchases of cotton on margin to the extent alleged in the bill. As to the consideration of the conveyances, the answer alleges that they were made in good faith, and in payment of a loan of \$5,000, secured by a promissory note, made in the year 1878, by the husband to his wife, upon which interest was due from its date to the execution of the conveyance. As to the value of this land conveyed to the wife, the bill alleges that it was conveyed to Doolittle in 1875 for \$13,494, and that in November, 1887, it was worth more than \$12,000, being subject to a mortgage of \$4,000. The answer, on the other hand, alleges that \$8,000 was the price originally paid in 1875, instead of \$13,494, and that \$8,000 was its full value unincumbered. The only evidence relating to the value of the land in 1887 is that of a single witness produced by defendants, a real-estate dealer in Montclair, where the property is situate, who values it at \$25 to \$30 per front foot, making the total valuation of the 408 feet from \$10,200 to \$12,240 in November, 1887. If the note of \$5,000, with interest from January 1, 1878, to November, 1887, was in fact due, or can be treated as then due, to the wife from her husband, and the deed was made in payment therefor, the land was not worth more than the debt; and there can be no ground, in my judgment, for treating the payment as a fraud on creditors. The principal disputed question of fact in the case, therefore, is whether this debt really existed at the time of the conveyance, and whether the payment of the debt was the object of the conveyance.

At the argument a preliminary question or defense was raised by defendants' counsel challenging the right of the complainants to any relief in a court of equity upon the ground that the debt, which was the foundation of the judgment, arose upon an illegal gambling transaction. Whether this question can be now considered depends to some extent upon its being a question at issue, and upon this point the status of the record in the case is as follows:

The judgment against the husband, on which this bill is founded, was obtained in the supreme court of this state on August 20, 1888, and this judgment was based on a judgment obtained in the supreme court of the city and county of New York on June 15, 1888, this latter judgment being founded on a note for \$3,295.21, given by Elmer G. Doolittle to the complainants, dated March 27, 1888. As to the consideration of this note, the bill states "that on or about March 27, 1888, and for a considerable time prior thereto, Elmer G. Doolittle * * * was indebted to complainants in large sums of money, which amounted on that day to that sum, and in consideration thereof the note was given." As to these allegations, the joint answer of both defendants, expressly admits "that on or about March 27, 1888, the defendant Elmer G. Doolittle became in-

debted to the complainants in the sum of \$3,295.21, and gave his promissory note therefor." The answer then further admits the suit in New York on the note, and the recovery of judgment thereon, and the recovery of judgment in this state. These admissions of the answer manifestly prevent any adjudication now upon the original legality or illegality of this debt, as an adjudication upon an issue raised on the record, upon which the parties were entitled and obliged to produce proofs before adjudication. Nor, under the decisions of this court, is it clear that the wife could in this suit have attacked by her answer the validity of the judgment against the husband, on the ground now alleged. Vice Chancellor Pitney, in *McCannless v. Smith* (1893) 51 N. J. Eq. 505, 25 Atl. 211, after a full examination of the cases, reached the conclusion that a third party alleged to hold lands of a judgment debtor, in fraud of the judgment creditor, could not, in the suit to reach the property, founded on the judgment, question the judgment on account of an illegal consideration upon which it was alleged to be founded. The cases referred to by defendants' counsel, in which relief was denied on the ground of the illegality of the consideration, appear on examination to be cases where the question of illegality was directly raised and at issue upon the record, and an adjudication in favor of or against the complainant's claim necessarily passed upon the question of legality of the original transaction, or bar of relief. Such cases are *Flagg v. Baldwin*, 38 N. J. Eq. 219 (between mortgagor and mortgagee); *Watson v. Murray*, 23 N. J. Eq. 257; *Wooden v. Shotwell*, 24 N. J. Law, 789. Another line of cases was cited by counsel in support of the contention that the question of illegality will be considered by a court of equity, although not in issue on the record; but these cases are either instances where equitable relief was asked in aid of a strict legal right obtained by complainant, which legal right was on the face of it so unconscionable and inequitable, that a court of equity declined to aid him (*Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 10 Sup. Ct. 655; *Railroad Co. v. Cromwell*, 91 U. S. 643; *Rich v. Sydenham*, 1 Ch. Cas. 202), or they are cases where the complainant has been himself guilty of inequitable conduct, relating directly to or connected with the equitable relief asked, and this inequitable conduct debarred him from obtaining equitable relief (*De Grauw v. Mechan*, 48 N. J. Eq. 219; *Johns v. Norris*, 22 N. J. Eq. 102). In the present case complainants have recovered a judgment against the debtor, which is final and conclusive against him, and they now appeal to the ordinary equitable jurisdiction to reach property in a third party's hands, alleged to have been conveyed fraudulently to such third party, and to be applicable to the discharge of the judgment. Such third party charged with fraud on this application to a

court of equity admits the debt by answer on the record. The legality of the original debt was not an issue on the record; neither are there now proofs before the court upon which it could safely or properly find that the original transactions were in fact illegal in the state of New York, where they took place. Under such conditions, there is nothing inequitable or unconscionable in the complainants applying for equitable relief on aid of the judgment, as any judgment creditor might do. This preliminary objection is therefore overruled, and the case is to be considered on its merits.

As to the consideration and objects of the deeds in question, the main facts as sworn to positively and unequivocally by both Mr. and Mrs. Doolittle are that on January 1, 1878, Mr. Doolittle was indebted to his wife in the sum of \$5,000 for the par value of \$5,000 on government bonds belonging to her, and which she then gave to him, receiving in consideration therefor a note of her husband for \$5,000, dated January 1, 1878, payable on demand, with interest. They both further swear that no interest was ever paid on this note, and that on November 15, 1887, the conveyances were made in payment for the amount due for principal and interest on the note. (This amount would be about \$8,000.) At this time of payment the note was produced by Mrs. Doolittle, as they both swear, and the interest due on it was calculated separately by each, and the note was handed to her husband, who tore off his signature, and returned the note to his wife. The note was produced at the hearing by the wife, who swears that it had been continually in her possession from the time of its execution. Notwithstanding this positive evidence of both Mr. and Mrs. Doolittle as to the original consideration of the note, and its subsequent payment by the conveyances in question, the complainants' counsel contend that upon the whole evidence of the case they are entitled to claim—First, that the alleged indebtedness for the government bonds in January, 1878, never existed; and, secondly, that, if it did exist originally, it had no existence at the time of the conveyance, but had been previously satisfied, and was revived at that time for the purpose of making a fictitious consideration for a deed, which was really intended to defraud creditors. The evidence claimed to bear upon these points is voluminous, but the principal facts to which it is directed may be stated somewhat briefly. Complainants' main contention in relation to the first point—the existence of the indebtedness—is that Mrs. Doolittle did not have this \$5,000 in bonds or money to advance, in 1878, to her husband. Whether Mrs. Doolittle did have such a considerable sum in hand at that time involves a consideration of evidence relating to her property and financial transactions with her husband from the time of their marriage, in January, 1868, for both Mr. and Mrs. Doolittle now swear that there was a

previous similar loan of \$5,000 by her to him on January 1, 1873, which previous loan was still wholly unpaid, both as to principal and interest, at the time of the loan in 1878; and, inasmuch as they both also now state that between 1866 and 1878 Mrs. Doolittle paid, in addition, from her own money, a considerable sum towards the furnishing of their house, the question is fairly raised whether Mrs. Doolittle has satisfactorily shown that she possessed this fortune of at least \$11,000 in January, 1878. Her own account is that at their marriage, on January 1, 1866, her husband gave her \$3,000 in bonds, and her uncles gave her \$5,000 in bonds; that her father owed her \$1,000, which was paid from his estate; and that she received, in addition, from her father's estate during the years 1866 and 1867, sums amounting to about \$2,000. Her final statement, after full opportunity for reflection, is that her entire fortune at or shortly after her marriage was about \$11,500, of which \$10,000 was in bonds, and the balance was in money. This statement as to her original fortune is corroborated on this hearing by her husband, who also says that he gave his wife \$3,000 in bonds at the time of their marriage; that he knew exactly what the size of his wife's fortune was, and that it was about \$11,000 (one or two hundred dollars less), and that it was principally invested in government bonds. He also now says that he saw these bonds from time to time, and that within 18 months or 2 years after the marriage he knew that her fortune was about \$11,000. The credibility of the husband's testimony as to the amount of the wife's fortune, and whether it was sufficient to make the second loan of \$5,000, which is the vital point of the present inquiry, is impaired, however, by his previous statements on this point, given under oath on supplemental proceedings taken in New York, upon the judgment there obtained. On this examination, taken in September, 1892, he stated that his wife's money went into a house which they built in Montclair, N. J., about 1872; and to the question where his wife got her money he states that she got \$2,000 from her father's estate, and \$3,000 from her uncles,—one giving \$2,000 and another \$1,000. In this examination no mention was made of \$3,000 bonds as given by him, and the gift of the uncles was \$3,000, and not \$5,000. At a subsequent examination, in December, 1892, in reference to this point of the wife's fortune at the time of the marriage, his statement is: "I bought \$3,000 in bonds, which made her \$8,000, when I was married. I gave her \$3,000 in bonds when we were married." His first statement in the present suit, in answer to the direct question as to the property his wife had at the time of the marriage, is, "She had about eight or ten thousand dollars in coupon bonds on the day she was married," and that he saw the bonds, \$3,000 of which came from him, and the others he understood she got from her uncles. This evidence of the

husband, as it seems to me, cannot be fairly considered as corroborating the wife's statement as to the ownership of more than \$8,000 in bonds,—\$3,000 as gifts of her uncles, \$3,000 from himself, and \$2,000 from her father's estate. If, as he now says, he saw the bonds, and knew exactly what the size of his wife's fortune was, it is impossible to reconcile his present statement that there were \$10,000 in bonds, with his equally precise statement under oath, in December, 1892, that there were \$8,000; and, so far as the husband's corroboration on this special point is concerned, it is not satisfactory. As to the corroboration of the wife from other sources, the uncles who are said to have given the money all died as long ago as 1881. And, inasmuch as there is nothing in the account which has been given of these gifts from the uncles to indicate that any person other than the uncles themselves and Mr. and Mrs. Doolittle had knowledge of the transaction, Mrs. Doolittle's evidence, unless her credibility is shaken, must and may be fairly relied on as to the amount of these gifts. One circumstance which bears somewhat against her evidence is that at this time she kept a diary, and that, although this diary of 1866 and that of 1867 contain memoranda of the receipt at different times of the money from her father's estate (amounting to about \$2,000), it contains no memoranda of the gifts, either of her husband or uncles. This omission, however, is not, in my judgment, sufficient to discredit her statement, for, if relied on as sufficient for that purpose, the inference would be that no sum whatever beyond the \$2,000 was received from these or any other sources. Such conclusion appears to me to be inconsistent with other proofs in the cause relating to the expenditures of money about the time of building and furnishing the house in Montclair from 1871 to 1873, when the husband's means were evidently supplemented, to the extent of some thousands of dollars, by money not derived from his own sources. The husband, at the time of his marriage, was in the employ of the firm Porter Bros. & Co., dry-goods commission house, upon a salary, and had, as he says, at the time of the marriage, several thousand dollars. In January, 1868, he became a partner with a share of $2\frac{1}{2}$ per cent. of the profits, besides \$1,000 allowed for expenses. In 1869 he bought property in Montclair, upon which in 1872, he built a homestead, and in 1873 or 1874 a stable was erected; the entire cost of the property and improvements being about \$14,900,—part of the funds being supplied by a mortgage of \$8,000 placed on the property. The furnishing of the house cost, according to the wife's statement, \$2,000 or \$3,000, thus making in all an expenditure between 1869 and 1874, of about \$9,000 or \$10,000 beyond the amount received on the loan. Doolittle, during the whole of this interval, and, indeed, up to January, 1887, kept no bank account, and his payments, so far as payments were made

by check, were made through the firm's checks, which were charged to his account. The \$8,000 received on the mortgage loan went through these accounts, being credited to him in February, 1872, and a large number of the payments for the building of the house and stable were paid by the firm's checks. Now, Doolittle says that from 1871 to 1874, with his expenses for building, etc., and living expenses, that he was running behind with the firm. On January 1, 1873, according to the account of both himself and his wife, he got from her the first loan of \$5,000, for which he gave her his note, payable on demand, with interest, receiving from her government bonds, \$5,000 par value, which he sold, giving to her in cash the premium obtained on the sale. This sum of \$5,000 does not, nor does any part of it, appear to have passed immediately through the firm accounts, and Doolittle now says that he does not know whether it did or not, and that it was used by him for living expenses and for the building. I find, however, on examining the accounts, that on January 31, 1873, Mr. Doolittle did receive a cash credit on the accounts for \$2,487.81, being the only large credit of cash except the \$8,000 of February 9, 1872, which appears on the accounts. There is no evidence as to the source of this credit other than the credit itself, but, taking the accounts as they stood, it is corroboration to some extent of Doolittle's receipt of money to that considerable extent from outside sources. The state of his accounts from 1871 to 1874, inclusive, also shows that during this time he was expending yearly about \$2,500 in excess of the money he was earning with the firm, and that the balance to his credit on January 1, 1871, of over \$4,500, had been changed to a balance against him of over \$2,400 at the end of 1874. His average income from his business during this period was nearly \$6,300, his expenditures (which included building expenses to some extent) nearly \$8,800. He kept several horses, and, taking into consideration that he built the house and stable and furnished the house at a cost of about \$9,000 or \$10,000, besides paying his living expenses and interest, and drew from the firm only \$6,000 over his income for these years, I think it may be considered as satisfactorily made out that during this time the husband did receive from some source other than his business a considerable sum of money, and that this condition of things corroborates the evidence of both husband and wife as to a fortune beyond the \$2,000, and that she did make this loan of \$5,000 to him in January, 1873, or during the time when the house was being built and furnished. A question not so satisfactorily answered by the evidence is whether she made another loan of \$5,000 in January, 1878, and had the money for this purpose. The wife swears that she did, and that another lot of government bonds, \$5,000 par value, was given to the husband for a like note of the husband

for \$5,000, payable on demand, which bonds the husband also sold, giving the wife the premium. The husband's account of this transaction is similar. In reference to the possession of this large amount at that time, Doolittle has no corroboration by the books of the firm during that year, which show no credits to his account other than the usual credits for profits, salary, and interest on balances. Nor during that year or the previous year were his drafts upon the firm account equal to the amount of his usual credits, so that at the beginning of 1878 his credit balance had increased to over \$5,000. There was no apparent necessity, therefore, for the use by him of this large sum of money, and his account of its disposition is indefinite and unsatisfactory. To the inquiry as to what he did with it, he says: "I used it in my own business. I don't know exactly. I had outside business. I was speculating, and I dealt in horses. I always had money in use outside. Sometimes the money I had in use outside might have been kept in the safe of the firm, where I kept loose money I got from outside parties while I was a partner,—just any account I happened to have, up to \$5,000, sometimes. I think I have had as much as \$5,000 there at a time." Afterwards, on the question being repeated as to what he did with this money received from the sale of the bonds in 1878, he says, "I lived on it," and he again repeats this, saying that he paid household expenses and anything that came along: It is difficult to believe this latter statement as to the disposition of the money, for from 1877 on to 1887 his income from the firm materially increased, and, while his drafts on it also increased, they did not, until the year 1882, equal the amount of his profits, and his credit balance on the books was, from 1877 to 1882, increased to \$25,000. If the question as to the receipt of the \$5,000 from his wife depended on the husband's ability or willingness to give now a satisfactory account of his disposition of the money, the loan could not, I think, be considered to have been satisfactorily shown. But the main evidence upon which the making of the loan depends is the evidence of the wife with such corroborative force as may be given to the evidence of the husband. That the husband now cannot or will not give a satisfactory account of what he did with it, may affect the corroborative force of his evidence as to the loan; but is not of itself sufficient to discredit her account, about which there is nothing which is, on the face of it, incredible or improbable. The production of the original notes given for the two loans is further relied on as corroborative evidence of the statements made by Mr. and Mrs. Doolittle, and, where no fair suspicion is shown in relation to such securities, they are ordinarily, as collateral contemporaneous documents, entitled to weight as indicating a bona fide transaction. In this case the wife and husband both say that the notes were given to the wife,

and she says that they both remained in her sole custody until December, 1881, when the note of 1873 was given by her to her husband, who tore off the signature, and returned it to her, when he made to her a deed for the homestead. The same thing occurred in November, 1887, with reference to the note of 1878, on making the deed now in question; and the latter note was also returned to the wife, with the signature torn off, and she says they have both remained in her custody until produced at the trial. Upon the back of each note, when now produced, is a calculation of the interest due on each, made in lead pencil, and by Mr. Doolittle. His statement and that of his wife is that these calculations of interest were made at the time of the production of the notes. This evidence of both parties concerned as to the original making, mutilation, and indorsement of the notes, and their continuous custody, manifestly excludes any theory of the manufacture of the note for the purpose of evidence, subsequent to the alleged loans, except upon the theory of deliberate perjury upon the part of both Mr. and Mrs. Doolittle. The complainant, however, insists that both the notes are instruments of later manufacture than 1882, and that neither of them was made at their apparent date. The first ground relied on is that there is in evidence a continuous series of papers showing the signatures of Elmer G. Doolittle from 1871 to 1887, and his method of making the capital letter of his name "Elmer," which was also the capital letter of his wife's name "Ellen." These papers comprise mainly the checks indorsed or signed by Doolittle during these years, amounting in number to over 160, together with the notes and deeds in question, and a few other papers showing his signature. It is claimed that from the earliest signature produced down to about 1887 Doolittle invariably wrote the letter "E" of his name by commencing it at the right-hand side of the upper curve, and that it was not until long after these notes of 1873 and 1878 purport to have been made that he made this letter by commencing with a loop from the left-hand side of the upper curve, but that, when he once commenced making his signature in this fashion, he invariably continued it, and that this was his method of writing the letter in 1887. Both of the notes in question were written by Doolittle. Each of them contains the name of his wife, Ellen J. Doolittle, written out at length by him; and on each of the notes the upper portion of the letter "E," commencing his signature, still remains. In each of these four cases the capital letter is made with a loop commencing on the left-hand side of the upper curve. Upon the examination of all the signatures which have been produced, I find that on 16 checks indorsed by him, running from January 9, 1871, to January 1, 1873, all of them are written in the manner first described, and on none of them is the letter "E" commenced with a loop. On the next 40 checks, running

from January 9, 1873, to March 11, 1878, also indorsed by Doolittle, the letter "E" is not once written with a loop, and in several instances where these checks are specially indorsed by Doolittle payable to "Edward Sweet," the holder of the mortgage, the word "Edward" is also written always without the loop. So far as shown by his indorsements on his checks, the loop in any form first appears clearly on a check of March 11, 1879 (one of July 23, 1878, is doubtful), and from this date down to March 7, 1888, 64 checks of Porter Bros. & Co., indorsed by Doolittle, are produced, every one of which shows the loop, except possibly a check of June 26, 1877. Another series of checks, 42 in number, given by Doolittle from January, 1887, to March, 1888, upon his own account in the Tradesmen's Bank, is also produced, all of these having the loops except 4. On 3 of these 4 the commencement of the loop seems to have been scratched,—October 27, 1887, note January 12, 1888, March 8, 1888,—but this is not certain, and no evidence was given on this point. The remaining check—April 5, 1887—commences the capital letter on the right hand of the curve, and without loop, as was the custom before 1878. In the deeds both of 1881 and 1887 the signature is written with the loop. So far as the form of the signatures throws any light on the date of writing the notes in question, I think that, leaving out the note of January, 1873, it may be taken as the result of a comparison of the signatures in evidence (which is the only evidence relied on) that before 1878 Doolittle invariably wrote his signature without a loop on the capital letter "E," and commencing it on the right-hand side of the upper curve, and that after 1878 he wrote the same letter with the loop, with scarcely an exception, commencing on the left-hand side of the curve. Each of the notes in question is written with a decided flat loop, and of the flat or extended form, usually, although not invariably, appearing after 1882; so that the question is, what weight is to be given to this circumstance in relation to either of the notes as evidence, and either alone or in connection with other circumstances, which are strenuously insisted on as destroying their character as evidence of loans made at the time they respectively bear date? These further circumstances are that the notes themselves, as appears from the faces of them, were written at the same time, with the same ink, and are in all respects similar. The calculations of interest made upon their backs have also, as is claimed, the same uniformity of appearance, which could only result from their being written at the same time, by the same person; and this is further confirmed by the fact, which undoubtedly exists, that a similar mistake in the calculation of interest is made upon each note. On each the calculation is one year short,—a mistake claimed to be incredible except on the theory that the calculations were made not at an interval of seven years, but at the same time,

The genuineness of the note of 1878 as evidence is further attacked upon the ground that this note has been clearly mutilated at some time, in that an indorsement of some kind, which has evidently been upon the back of this note, has been erased by scratching; and, further, that this erasure has been made skillfully and carefully with the object of concealing the fact that there had been any erasure. The erasure is not, in fact, apparent, except on careful inspection; but on such inspection, and a careful examination, there is no question but that an erasure has been made of some indorsement upon this note, and, further, that the erasure has been, in fact, made in such manner as to conceal the fact of erasure except upon critical inspection. In reference to this erasure, Mrs. Doolittle swears that she never made it; that the note was never out of her hand; and that, if there is any erasure, she cannot account for it. Mr. Doolittle's testimony is not so positive. He says that he always kept an eraser on his desk at the store, and would not swear whether he ever used it on the back of this note or not, and he repeats this answer after looking again at the note. He then says that he does not deny that he did make an erasure of something from the back of the note; that he might have started to figure interest on the note, or something of that kind, and then rubbed it out, and that he might have started to make entries on the note. Then, being further questioned, he says that he does not recall that he did make the erasure; that he does not admit that he did, or that he ever wrote anything on the note; that he did not have it in his hand from the time he made it until he figured the interest on it; and his final statement is that he cannot account for the erasure being put there, and that it was probably an old note that he found in his desk that had been figured on. This statement was made in March, 1896, the witness having been previously examined in June, 1894. Being re-examined by his own counsel on the testimony given in March, 1895, he says that the notes had been out of his possession since June, 1894, and had been in the custody of the complainants' counsel, to whom they were delivered. He then says that he was not examined in 1894 in reference to the erasures on the note of 1878, and that those erasures did not then exist on that paper in June, 1894, to his recollection. In view of the admitted fact that Doolittle, before the production of the note in June, 1894, made on it the calculation of the interest, and that this is written after an erasure, the answer of the witness, if it was intended to refer to the time when this erasure on the back of the note was made, as having been made after June, 1894, is altogether reckless, unless, perhaps, he can be understood as intending to say that at the examination in June, 1894, he had no recollection of the erasure on the back. The circumstances above detailed, bearing upon the value of

the notes as evidence, together with others which seem to be of less importance, do, undoubtedly, in my judgment, cast suspicion upon the note of 1878 as evidence corroborating the existence of a debt of \$5,000, with interest from 1878, at the time of the conveyance in November, 1887, but they are not sufficient to justify me in finding that the note of 1878 was not given for a loan then made, as both Mrs. Doolittle and her husband swear. Such conclusion could only be reached upon evidence sufficient to satisfy the court that the note of 1878 has been actually fabricated since, and with the knowledge of both parties, and that the whole account of the original loan given by both witnesses is a deliberate fabrication and perjury. While Doolittle's credibility has been greatly shaken, there is nothing in the evidence or in her account of the making of the loan in 1878 which would justify me in discarding Mrs. Doolittle's statement in reference to the circumstances of that loan, and upon this branch of the case my conclusion upon the whole evidence is that Mrs. Doolittle has satisfactorily shown that she did, on January 1, 1878, loan her husband \$5,000 upon the note in question.

The next branch of inquiry arising on the facts of the case is one of more difficulty. This question is whether this debt was still in existence in November, 1887, and whether the deeds in question were given for the purpose of satisfying the debt due on the note for principal and interest. Both Mr. and Mrs. Doolittle, who are the sole witnesses speaking directly upon the question, say that no interest was ever paid on the note, and that the sole object of the deeds was to pay this indebtedness for principal and interest. These direct statements are overcome and destroyed, as complainants claim, by certain undoubted facts appearing in the case, and mainly or largely by the examination of these two witnesses. The main facts which appear to bear upon the question of the status of this debt as between the parties after 1878 are as follows: The amount of Mrs. Doolittle's fortune still remaining after making the second loan of \$5,000 is left in some doubt by the testimony of the two witnesses. From Mrs. Doolittle's own testimony it would appear that the interest received by her on the bonds before they were given to her husband was spent by her as she received it. This was the answer given by her in reply to the direct question as to what she did with the interest, and after she had at first declined to answer. Her entire evidence on this subject is as follows: "Q. What did you do with the money after you got it? A. I suppose I spent it, as most women do. Q. Spent it as you went along, did you? A. I don't know as it is anybody's business what I did with it. Q. By the Court: No, you will have to answer the question. A. Could I tell you what I did with the money? Q. You spent it as you went along, did you? A. For anything that I know, I did. Q. That is the best of your recollec-

tion at the present, is it? A. That is the best of my recollection." It is not possible, I think, upon her evidence, thus given, to conclude that any large or considerable portion of the interest was saved or reinvested, for it does not seem possible that she could have forgotten the fact that she did save or reinvest it to any considerable amount. The cost of furnishing the house originally was about \$3,000, as she says, and she paid part of this by agreement with her husband,—less than half of it,—and this amount, or a portion of it, may have been supplied by the interest coming due before 1873, leaving the principal of \$11,000 to \$11,500 still untouched at the time of that loan. After January 1, 1873, and up to 1878, she received no interest on the \$5,000 loaned to her husband in 1873, but she had received the premium on the bonds, the amount of which does not appear. Her own statement as to her fortune left after making the loan of \$5,000 in 1873 is that she had perhaps more than \$3,000 remaining, and she does not know but it was another \$1,000, perhaps \$2,000, but that she cannot tell whether it was \$3,000, \$4,000, or \$5,000. As to the receipts or possession of money by Mrs. Doolittle from any other source after 1878 and up to the time of the deed of 1887, the evidence of both Mr. and Mrs. Doolittle shows that there was no source of any considerable sums, other than from Mr. Doolittle himself. Mrs. Doolittle's own testimony on this point is not sufficient to establish that she afterwards received any considerable sum from any source whatever, even from her husband; for, in reply to direct inquiries on this subject, she at first says that she had some money at interest, that she thought some one in Connecticut paid her interest, but she could not tell who, and that her impression is she did lend money to somebody in Connecticut, but cannot tell exactly to whom. The only other source of receipts after 1878, suggested by her evidence, is that she had a little money given to her from time to time; and the only person who gave her money after 1873, as she says, was her mother, who gave her \$25, \$50, or \$100, she could not tell how much. Doolittle's account, however, if true, shows that from his gifts the wife might have had considerable sums of money. He says that after 1878, when she made him the last loan, she had \$4,000 or \$5,000, part of which was from money he gave her and gifts from her friends. His average annual income from the firm from 1879 to 1887 was over \$15,000, and was such that he could have given her considerable sums of money. Except in the general way above stated, he does not, however, swear that he did give her money. In December, 1881, the husband conveyed to his wife—also through his brother, the present intermediary—the homestead property, for the nominal consideration of one dollar. The value of this property at that time does not appear, and the only evidence from which it can be inferred or conjectured is that the entire property cost about \$15,000 in 1874, and was sold for \$22,500 in

March, 1888, being about \$14,000 over the \$8,000 mortgage; and also Doolittle's present statement that it was in 1881 worth about the amount of the 1873 note and interest. Mrs. Doolittle's statement and the original statement of Mr. Doolittle in reference to this transaction of the homestead is that it was made in payment of the debt due on the 1873 note for principal and interest, which then amounted (according to their erroneous calculation) to \$7,391.67. Mr. Doolittle afterwards qualifies this account somewhat by stating that he gave this homestead property to his wife out and out, and as a pure gift, without any agreement that it should be a payment of any kind, but that his wife, on the delivery of the deed to her, presented him with the 1873 note as a gift, and that he then tore off his signature, and returned it to her. During 1881 and 1882 Doolittle was engaged to some extent in speculation (as he says, he always had been); and, so far as can be judged from his accounts with the firm, paid out about \$10,000 to brokers during those years on speculative transactions. His income from the firm, however, was growing considerably larger, and was in excess of his expenditures from 1879 on to 1884, with the single exception of the year 1882, and at the time of this transfer of the homestead his credit balance with the firm was about \$30,000. It is the evidence as to payments made by Mrs. Doolittle after this transfer of the homestead, out of moneys in her hand, that gives rise to the most serious doubt in reference to the truth of the statements of Mr. and Mrs. Doolittle, as to the true consideration of the deed now in question. And, in my judgment, the decision upon this branch of the cause depends mainly upon the inferences which should be drawn from this testimony as to the subsequent payments. The testimony of both Mr. and Mrs. Doolittle is that, after this transfer, sums amounting in all to over \$9,000 were paid by Mrs. Doolittle to her husband, and all out of money in her hands. These payments are of two classes: First, Payments amounting to about \$4,250, not connected with the homestead, and which were \$1,250 in December, 1883, for the cash payment on the purchase of a lot from one Bailey, which was conveyed to Mrs. Doolittle; \$1,200 for the expenses (beyond insurance money) of rebuilding the barn on the homestead property, which was burned in 1882; \$1,500 loaned by Mrs. Doolittle to her husband in August, 1887; \$2,000 loaned by Mrs. Doolittle to her husband in 1882 (of which he paid back \$1,700 in the same year); \$1,500 loaned him in August, 1887, and never repaid. The second class of payments out of her money, as is said, were the taxes, insurance, and repairs, and interest on the mortgages (\$8,000 on the homestead, and \$3,000 on the Bailey property); this class of payments for annual charges on the property amounting altogether between 1881 and 1887 to about \$5,000,—thus making the entire payment during this time by Mrs. Doolittle out of her money, as is claimed, over \$9,000. It is proved that the taxes, interest, etc., were paid

in the first instance by the checks of Porter Bros., which were charged to Doolittle's account; but Mr. and Mrs. Doolittle now say that, immediately upon these payments being made, she reimbursed him out of her own money and by payments in cash. As to the other payments, she at first says that she cannot tell for certain whether she paid the \$1,200 for the new barn, or her husband, but afterwards says that it was paid out of her own money, and that the \$1,200 for the Bailey lot purchase was also made from her money. And in corroboration of the loans to her husband of \$2,000 in 1882 and \$1,500 in 1887 from her own money she produces her diaries for those years, which contain her memoranda of these loans. The purchase money for the Bailey lot (\$1,250) was also paid for in the first instance by the check of the firm, charged to Doolittle's account, but Doolittle swears that she paid the money to him immediately in currency. He says also that his wife paid him \$1,400 in currency for rebuilding the stable, and he corroborates his wife's statement that she loaned him \$2,000 in 1882 and \$1,500 in 1887, except that he makes them loans of money instead of bonds. These witnesses, by their evidence in reference to these payments by the wife after 1881, intend to leave no doubt that sums aggregating over \$9,000, and including the annual charges on the homestead property, were paid to the husband by the wife, without any deduction, allowance, or reference to the amount now claimed to have been due from the husband to the wife for interest or principal on the \$5,000 note given in 1878. If these payments were not in fact so made, then, in view of the positive evidence of both defendants as to the fact of payments, their evidence as to the entire transactions relating to the debt after the conveyance of the homestead in 1881, or even as to its existence at any time, is discredited, and no decree could, in my judgment, safely be founded on their statement contradicting the consideration named in the deed of 1887. Especially is this true as to the repayment of the items of taxes, insurance, and interest on the mortgages paid by the husband, without any deduction for the interest or principal due on his note, for the sole apparent object of the invention of such payments would seem to be to increase the apparent debt on the note by interest from its date.

On the other hand, if payments to the extent so positively sworn to were actually made by the wife to the husband out of the moneys in her hands, I think that upon the entire circumstances of the case the only conclusion as to the source of the principal part of this money must be that it originally came during these years from the husband himself. He had the resources from his income, as above stated, and that he had the will or inclination is apparent from the fact that after the conveyance of the homestead (which, as he says, was entirely voluntary), and before November, 1887, his wife became the owner of the furniture, horses, wagons, and all his personal property at Mont-

clair. "The horses that I sold," he says, "went to her credit, and she paid for the horses, and sold them from \$500 to \$5,000 apiece." Just how or when his wife became the owner of all his personal property does not appear. In view of the conveyance of the homestead and of the gift of all his personal property there by the husband to the wife, the repayment by the wife to the husband of the amounts paid by him for the charges on the property, without any deduction or allowance on account of the interest or principal of the \$5,000 note, would seem to be reasonably explained, if she had also received from him money sufficient to make these repayments; for, under these circumstances, the existence of the \$5,000 as a continuing debt to be acknowledged by the husband, or insisted on by the wife, would probably not have occurred. The yearly payments by the husband for charges on the property were over \$900, and more than \$600 in excess of the annual interest on the \$5,000 note, and enough to have paid from 1881 to 1887 the principal of the note, if any status of debtor and creditor on the note was considered to exist. Taking the view that their statement as to the repayment of these charges on the homestead are true, then the entire case would seem to show that, as between the husband and wife, the note of \$5,000, given in 1878, was not considered or treated by them, after 1881 or up till November, 1887, as an outstanding indebtedness of the husband, either as to the principal or interest, and was not then a valid or subsisting indebtedness which could be revived against his creditors as a consideration for the conveyance of his property. It is in view of the question of the continuance of the note as an acknowledged indebtedness after 1881, and after the gifts of the personal property and the gifts of money (if these latter were made), that the erasures on the back of the note are important, for the credits of payments would naturally appear on the back of the note; and the fact that some erasure has been carefully made, and apparently with the object of concealing the fact of erasure, is a circumstance against the defendants on this branch of the case. Taking any view of this evidence as to the repayments, and either upon the conclusion that it is false or that it is true, the defendants have failed, in my judgment, to give such a satisfactory explanation of the status of this alleged debt at the time of the conveyance, as, under the whole circumstances of the case, they were obliged to make, if the conveyance is to stand merely as the payment of a debt and the preference of a creditor, and my conclusion on this branch of the case is that the deeds in question cannot be held to have been made for the purpose of paying an outstanding debt, but were made, as they appear on their face to have been made, voluntarily, and without consideration, and as a gift by the husband to his wife.

The remaining question, therefore, is as to their validity, if regarded as purely voluntary conveyances. The debt of the complainants upon which the judgment was obtained having

been contracted subsequently to the conveyance in question, this conveyance, even if voluntary, cannot be avoided simply on that account by the subsequent creditor. The rule in such cases, as finally settled by the court of errors and appeals in *Hagerman v. Buchanan* (1889) 45 N. J. Eq. 292, 299, 17 Atl. 946, is "that an actual intent to defraud, arising from all the circumstances surrounding the transaction, must be proved before a voluntary conveyance will be decreed void at the suit of a subsequent creditor." The only question in this case arising in reference to the application of this rule as to proving actual intent to defraud is whether such actual intent to defraud is sufficiently shown by proof that the voluntary deed or settlement was made in contemplation of the debtor's engaging in trade or hazardous speculations, and with the view of placing the whole or the bulk of his property beyond the reach of those who might become creditors in the contemplated trade or speculations. That a voluntary settlement under such circumstances is fraudulent against such subsequent creditors, and may be set aside, and that such proof sufficiently established fraud on the subsequent creditor, seems to have been the rule in this state previous to the decision of *Hagerman v. Buchanan*. It was so declared by Chancellor Green in *Beeckman v. Montgomery* (1861) 14 N. J. Eq. 106, and a deed was there set aside upon the express ground that it was made in contemplation of future indebtedness, and was, therefore, fraudulent against subsequent creditors. This fraud, however, was characterized by Chancellor Green as a "constructive fraud," and was expressly distinguished from the existence of actual fraud; and in his statement of the result of his examination of the cases upon the rights of subsequent creditors he seems to conclude that the particular fraud now in question is a constructive fraud, and is to be distinguished from actual fraud. The grounds for treating conveyances made with a view to future indebtedness as "constructively," rather than "actually" fraudulent against subsequent creditors is not stated, nor does the ground for such distinction seem clear unless by constructive fraud is meant a fraud which is legally inferred from these facts alone. And the question is whether, under the rule laid down in *Hagerman v. Buchanan*, such conveyance, in view of a future indebtedness, was a "constructive," as distinguished from an "actual," fraud, and no longer subject to attack by subsequent creditors (overruling *Beeckman v. Montgomery* on this point); or whether the court in that decision ignored this particular distinction between constructive and actual fraud on subsequent creditors, and included this particular class of conveyances made with a view to future indebtedness as cases showing evidence of actual fraud. Upon the whole opinion, I think the latter view is a correct one, for Mr. Justice Reed, in the opinion of the court, so far from overruling *Beeckman v. Montgomery* on any point, expressly cites it without qualifica-

tion (page 297, 45 N. J. Eq., and page 946, 17 Atl.), and on the point now involved he says (page 302, 45 N. J. Eq., and page 948, 17 Atl.) that: "The fact that a person has entered into a hazardous business, or engaged in a speculative enterprise, at or soon after the execution of a voluntary conveyance, is strong evidence of a fraudulent intent. It evinces a desire to reap the benefit for himself, if successful, and escape responsibility, if unlucky. Nevertheless, each case must stand upon its own footing, and no legal rule can be adopted as to the quantity of proof or the particular complexity of facts which will annul a conveyance upon this ground." And he then examined the evidence, to determine whether this particular intent existed, concluding, after examination, that it did not. This shows, in my judgment, that the effect of the decision in *Hagerman v. Buchanan*, upon cases of this character, is to abolish the distinction between a constructive and actual fraud, and to consider conveyances made with a view to future indebtedness subject to attack by subsequent creditors, if actually fraudulent in intent, of which actual fraudulent intent the conveyance itself, under these circumstances, is strong evidence, but is not conclusive evidence from which fraud must, in law, be presumed. This view as to the right of the subsequent creditor to set aside conveyances made with this view to subsequent trade and speculations agrees with the general rule of other courts. *MacKay v. Douglas* (1872) L. R. 14 Eq. 106 (Vice Chancellor Mallins), is the leading English case, and was approved by Jessel, M. R., in *Ex parte Russell*, 19 Ch. Div. 588, in this language. The principle of *MacKay v. Douglas* and that line of cases is this: that "a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: If I succeed in business, I make a fortune for myself; if I fail, and leave my creditors unpaid, they will bear the loss. That is the very thing that the statute of Elizabeth was meant to protect. The object of the settlor was to put his property out of reach of future creditors. He contemplated engaging in this new trade, and he wanted to preserve his property from his future creditors. That cannot be done by voluntary settlement. That is to my mind a clear and satisfactory principle." In this country the same protection against conveyances made with a view of entering into some new or hazardous business is given to subsequent creditors whose debts arose in the contemplated business. The rule applicable in these cases is stated in *Schreyer v. Scott*, 134 U. S. 405, 410, 10 Sup. Ct. 579, and cases cited; *Neuberger v. Keim*, 134 N. Y. 35, 38, 31 N. E. 268, and cases cited. In *Carpenter v. Roe*, 10 N. Y. 227, the status of voluntary deeds made pending speculations is specially considered. 2 Bigelow, *Frauds*, 190-201; *Wait, Fraud. Conv.* (3d Ed.) § 100.

The rule laid down in *Hagerman v. Buchanan*, and to be applied in this case, is that actual intent to defraud, upon all the circum-

stances of the case, must be proved by a subsequent creditor, and that a voluntary conveyance with a view of engaging in or continuing hazardous enterprises, and with a view of escaping responsibilities for losses which may be reasonably contemplated in such enterprises, while it is no longer held to be evidence from which the legal inference of actual fraud must be conclusively drawn, is evidence of such actual fraudulent intent, and may, either alone or in connection with the other circumstances of the case, and according to the circumstances of each case, be sufficient to make out the actual intent to defraud. The main facts proved in the cause bearing upon the question of the intent in making out the deed are as follows: Doolittle had for many years been accustomed to speculate, sometimes heavily, in the cotton and other markets, and in the last articles of partnership between the members of his firm, running from 1885 to 1887, an express stipulation was made that neither of the partners should, directly or indirectly, buy or sell on speculation during the terms, and such act should be deemed sufficient cause for the others to elect to dissolve. At the time of making this agreement, Doolittle's only source of income was from the firm, and his only property was his interest in the firm, the lot now in question, and perhaps the personal property at the homestead. The business of the firm was then prosperous. Doolittle's income therefrom had for six years averaged over \$15,000 a year, and his credit balance in January, 1885, was about \$25,000. Notwithstanding this express stipulation against speculation, and the risk involved in continuing it, he commenced speculations again in 1886, and in January, 1887, for the purpose of continuing them, while concealing the transactions, opened a bank account of his own in the Tradesmen's Bank (being the first bank account he had kept), through which account a large portion of the speculative transactions were afterwards made; over \$11,000, from January to November, 1887, being made by Porter & Bros.' checks, and the entire deposits amounting to over \$30,000. His speculations during 1887 were continued on a large scale, and on June 15, 1887, a heavy speculation in wheat on margins was closed out at a loss to him of \$15,000. His speculations after this date were in cotton, and extending at times to as high as 10,000 or 15,000 bales, representing values then varying from about \$500,000 to \$750,000, and where the fluctuation of a cent per pound would make a difference of \$50,000 on 10,000 bales. Doolittle kept a memorandum or account of all his speculations during this year, and this is produced. He knew, he says, each day how he stood. During 1887, and up to the date of the deed, November 15, 1887, he had paid out to his brokers over \$24,000, receiving from them about \$7,500, and having thus about \$16,500 loss, or held for margins on current speculations. On November 15, 1887, he was thus carrying over

10,000 bales of cotton. On the 7th of November he decided to retire from the firm in the following December, and this information was communicated to his wife, who also knew, as both of them say, that he was speculating, and knew, at least in a general way, of his losses. The purchases of cotton thus outstanding being on margins, Doolittle was, at the date of the deed, obliged to continue to carry them until they were closed out, and whatever margins were then in the brokers' hands (if there were any) were, of course, hypothecated until closed out, and were not available assets for creditors. The only property Doolittle had in November, 1887, clearly available to creditors, seems to have been the Mountain avenue lot. The interest in the partnership, although standing on the books at \$25,000 in January, 1887, was not of that value for the purpose of liquidation, nor could it, or any amount near this, have been drawn for it from the firm. Doolittle had, by a special agreement with the firm, guaranteed a large account of one of the consignors for whom the firm had made advances, then exceeding over \$70,000; and in November, 1887, this account was in danger. He had drawn, up to November 15th, \$20,696.25 from the firm, leaving less than \$4,000 of the credit balance of \$24,600 at the commencement of the year, and over \$18,000 (from this or some other source) was paid to brokers beyond his receipts from them. The profits for the year 1887, as afterwards ascertained (including his allowance of \$2,500 for expenses), were \$17,217. The entire value of his interest in the firm, therefore, at the time of the deed, could not fairly have exceeded \$15,000 or \$18,000, subject to the guaranty of the Harvey account. The partners subsequently released him from his guaranty in the Harvey account, and purchased his entire interest in the firm for about \$10,000, after the expiration of the term. Doolittle's speculations were continued immediately after the execution of the deed upon the same extensive scale, with the final result that in the early part of March, 1888, his accounts were closed out at a loss of over \$25,000. Just previous to the closing out of the accounts, he transferred to the other partners his remaining interest in the firm (nominally about \$19,000) for \$10,000, about \$5,000 of which was paid to the brokers, and the balance, which he received in cash, has been expended by him. Doolittle says that this sale of his interest was for the purpose of protecting the firm against his creditors, and that his interest was to continue; and, if this be true, it perhaps throws some light on his intentions to leave his interest in the firm available to creditors at the time of making the deed in question. The voluntary settlement of this real estate upon the wife practically exhausted the settlor's property directly available for the subsequent debts contemplated, and, in his circumstances, was not a settlement reasonably made by a solvent debtor. If the conveyance was not, as I have concluded, made to pay an existing

debt, no reasonable explanation has been given of the making of this deed at this particular time, and this is a circumstance also pointing to the actual intent of the deed as intended to withdraw the property from future creditors. And, if my conclusion is correct that this debt had been treated by both the husband and wife, before 1887, as satisfied, and no longer existing, then the renewal for the purpose of affording consideration for the deed would be very strong evidence as to the existence in the minds of both parties to the deed of an actual intent to defraud the grantor's subsequent creditors. If, as complainants claim, the debt now claimed never existed, the invention of it for the purpose of giving a fictitious consideration to the deeds of course points conclusively to the existence of fraudulent intent. Upon the entire evidence of the case, I conclude that a case of actual intent to defraud subsequent creditors, in which both parties participated, has been satisfactorily made out, and I will advise a decree setting aside the deed as void against the complainants.

(56 N. J. E. 389)

STERNBERG et al. v. WOLFF et al.
(Court of Errors and Appeals of New Jersey.
Jan. 29, 1898.)

RECEIVERS—INJUNCTION.

1. Where, by reason of dissensions among the directors of a trading corporation, there is a deadlock in the management of its business by them, a receiver pendente lite should be appointed.

2. The court, in granting injunction against defendant, may impose as terms that an injunction relating to the same matter go against complainant.

3. In case of deadlock in the management of the business of a trading corporation by the directors because of dissensions, injunction restraining the officers from drawing notes or checks of the company except for ascertained debts due by it, and from discharging employes, except for cause and by permission of the court, and from employing others without permission of the court, is impracticable.

Appeal from court of chancery; Pitney, Vice Chancellor.

Bill by Lazar Sternberg and another against David Wolff and another. From a decree, all parties appeal. Reversed.

Robert H. McCarter and Louis Hood, for complainants. Riker & Riker and Charles D. Thompson, for defendants.

DEPUE, J. On the 25th of July, 1892, Sternberg, Wolff, and Misch became incorporated under the general corporation act, under the name of L. Sternberg & Co., with a capital stock of \$100,000, divided into 1,000 shares, the par value of which was \$100 each. The object for which this company was incorporated was to carry on a general merchandise business. At a meeting of the stockholders, on the 26th of August, 1897, Sternberg was the owner of 499 shares; Rosa Sternberg, his wife, of 1 share; David Wolff, 1 share; and Rosa Wolff, his wife, 499 shares,—the situation be-

ing that one-half of the capital stock was held by Sternberg and his wife, and the other half by Wolff and his wife. At this meeting the by-laws were amended so that the board of directors should consist of four members, and the whole number of directors should be necessary to a quorum, and the four persons above named were elected directors. Lazar Sternberg was elected president, David Wolff being secretary and treasurer. Among the by-laws was the provision that Lazar Sternberg and David Wolff and Henry Kern, the general superintendent, should not be subject to discharge or reduction of salary by any officer of the company or by the board of directors without the consent, in writing, of the majority in interest of the stockholders; that other employes might be discharged either by Lazar Sternberg or David Wolff, and new employes should be employed only with the concurrence of both Lazar Sternberg and David Wolff, unless otherwise ordered by the board of directors. It is unnecessary to go into particulars. It is sufficient to say that, after the meeting last referred to, Sternberg and his wife, as the one party, were the owners of one-half of the capital stock of the company, and Wolff and his wife the owners of the other half. Difficulties and dissensions arose between these four persons, in which Sternberg and his wife, the one-half in number of the board of directors, were engaged on the one side, and Wolff and his wife, the other half of the board of directors, were engaged on the other side. By reason of these dissensions, the management of the business by the board of directors was in a deadlock, although the company was largely engaged in the conduct of the business for which it was incorporated. In consequence of the disputes between these parties, in October, 1897, Sternberg and his wife filed a bill in the court of chancery against Wolff, to restrain him, among other things, from exercising the duties of treasurer, and from discharging employes or interfering with the regular business of the company for his own personal ends, with a further prayer that, if necessary, a receiver might be appointed to take charge of said company, and manage the same, pending the decision of this suit. No answer had been filed by Wolff when the hearing on this application was had before the vice chancellor; but Wolff, in his affidavit, states that he believes that the safety of the business demands the appointment of a receiver at least during the pendency of the litigation, and until an adjustment of the interests of the stockholders can be arrived at. Rosa Wolff was not a party to the bill, but she made an affidavit stating that she was the owner of half of the company's stock, and claiming that it was necessary for the protection of her interests that a receiver should be appointed for the corporation at least during the pendency of this litigation, and until the rights and powers of the officers and stockholders of the company shall have been adjusted and fixed under the order of the court.

This matter coming on for hearing before the vice chancellor on bill, affidavits, and counter affidavits, the vice chancellor advised an order dated November 6, 1897, denying the application for a receiver, but ordering that pending this suit an injunction do issue, enjoining David Wolff, the defendant herein, from drawing any promissory notes or checks of the company or on behalf thereof, except for ascertained debts due by the said company, or from drawing any check to the order of himself, except for salary due him after deducting all charges against him for rent and goods, the disputed items of \$206 and \$140 for banquet and stable account, respectively, not to be included in the ascertainment of said charges against him, the same being reserved until the final hearing of the case, and from discharging employes, except for cause, and that by the permission of the court, or from employing any new employes without the permission of the court, and from making or procuring to be made any list of the customers of said company, and from continuing to act as treasurer of the said company unless within 10 days from the date hereof he should file a bond in the penal sum of \$20,000 conditioned for the faithful performance of his duties as treasurer of the defendant corporation; and that the complainant Lazar Sternberg be likewise enjoined from drawing any promissory notes or checks of the company, or on behalf thereof, except for ascertained debts due by the said company, or from drawing any check to the order of himself except for salary due him after deducting all charges against him for rent and goods, and from discharging employes except for cause, by the permission of the court, or from employing any new employes without the permission of the court, and from making or procuring to be made any list of the customers of said company, and from inducing the employes of the company to fail to pay proper respect to the defendant and other officers of the company, and from inducing them to refuse obedience to their orders.

The vice chancellor, in granting the injunction against Sternberg, seems to have gone upon the ground that the mutuality of the injunction was necessary to protect the interests of all the stockholders in the affairs of the company *pendente lite*. It is within the power of the court of chancery, in granting to a suitor an injunction, to impose terms; and I have no doubt that the terms imposed in this case were such as it was in the power of the court to impose, enjoining a defendant on the terms that an injunction relating to the same subject-matter should go against the complainant. The business of the company, at the time these orders were made, in manufacturing and selling clothing, was very large, the company having their main place of business in the city of Newark, and 11 branches located elsewhere in the state; and it is undeniable that the pendency of these injunction orders seriously interferes with the business of the company; and, in the judgment of this court,

it is wholly impracticable for the court of chancery to take upon itself the control of the details of the business of this company in conformity with this injunction, as well as quite impossible that the business of the company should be profitably carried on without those who are engaged in the management of the business being allowed to manage and conduct the same upon business methods rather than by the methods proposed by these injunction orders. But it is apparent from the facts that appear in the bill and affidavits that some relief pending this litigation should be afforded in these proceedings. The two parties to the controversy—Sternberg and his wife, on the one side, and Wolff and his wife, on the other side—are the owners each of one-half of the capital stock. These four individuals are directors of the company, and by the by-laws the whole number is necessary to make a quorum for the transaction of business. The dissensions between these two parties—Sternberg and his wife, on one side, and Wolff and his wife, on the other side—have brought the affairs of this company to a deadlock, so far as any corporate action by the board of directors is concerned. It may be assumed that the court of chancery has no jurisdiction to dissolve a solvent corporation, and distribute its assets, on the ground that the business of the corporation is improperly conducted by its board of directors, even though such mismanagement be with the concurrence of a majority of the stockholders; but the jurisdiction of the court of chancery to control the business of a company, especially a trading company, pending a litigation over the management and conduct of its business, must necessarily exist; and we think, pending a litigation such as that which is inaugurated by the proceedings in this case, a receiver may be appointed. Corporations such as the one now before us are mere trading companies with a corporate organization, for the convenience of conducting the business for which they were incorporated. Such a corporation has not the qualities of corporations created for public purposes. No reason appears why in the matter of the control and conduct of its business the corporation and its officers should not be within the control of the court of chancery to an extent corresponding with the control of that court over the business of a mere partnership.

The cases seem to establish the power of the court in virtue of its general jurisdiction to preserve the subject of litigation *pendente lite*, though it may relate to the affairs of a trading company in form organized as a corporation. The two cases cited by the vice chancellor in his second opinion are to that effect. *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Auxiliary Co. v. Vickers*, Id. 303. In the first case the complications in the affairs of the company arose out of a division in the board of directors, which made it absolutely impossible that the affairs of the company could be conducted with advantage. Vice Chancellor Malins, in that case, says: "With

regard to private partnerships, nothing is of more frequent occurrence than the quarrels of partners. If partners quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go on with advantage, it is every day's practice for the court to interfere by injunction, and appoint a receiver if necessary. With regard to public companies, I apprehend the same principle is applicable. If a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of private partnerships, it is clearly within the rule of this court to interfere, and it will do so." The court in that case intervened by injunction and receiver simply to protect the property of the company, to continue, however, no longer than until a governing body was duly appointed. In the latter case the dissension was also in the board of directors, one set of which closed the office doors of the company's building, and the other set, with the aid of some laborers, broke open the doors with crowbars, and forced the office open. The prayer of the bill was for the appointment of a receiver until the proper board of directors was constituted. The vice chancellor placed the affairs of the company in the hands of a receiver pendente lite until a new governing body was appointed. The vice chancellor's opinion states the principle to be that the court will not interfere with the internal affairs of joint-stock companies unless they are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the court will interfere, but only for a limited time and to as small an extent as possible. Chancellor Runyon, in *Einstein v. Rosenfeld*, 38 N. J. Eq. 309, after citing the two cases already cited, did not dissent from the ruling of the vice chancellor in those cases. He denied the appointment of a receiver on the ground that the business of the company was being carried on, and that there was no need of immediate interference on the part of the court for the protection of the property or business interests of the company. In *Archer v. Waterworks*, 50 N. J. Eq. 33, 24 Atl. 508, the present chancellor, after referring to the three cases above cited, said that "if the present directors of the company continue their dissensions, so that the affairs of the company are not speedily attended to, upon a proper application I will care for the property, pending the determination of the suit, through the instrumentality of a receiver. Such action will be supported by precedents and authority. My interference, however, by injunction and receiver, will be limited to the imperative requirements of the present emergency." In an earlier case Vice Chancellor Van Fleet

said: "The power of this court to appoint a receiver of a corporation, either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be regarded as settled; but I think it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation, and protect the rights and interests of its stockholders." *Edison v. Phonograph Co.*, 52 N. J. Eq. 620, 625, 626, 29 Atl. 195. In *Fougeray v. Cord*, 50 N. J. Eq. 185-756, 24 Atl. 490, and 26 Atl. 886, this court did not deny the power of the court of chancery to appoint a receiver pendente lite for the management of the affairs of an incorporated company organized for the purpose of trade. The ruling of this court was that "the disturbance of corporate functions incident to a receivership are extreme powers, and may not be decreed by a court of equity when the specific acts complained of are capable of redress and complete restitution, and those apprehended fall within the ordinary jurisdiction by injunction." The order of the court of chancery appointing a receiver in that case was set aside by this court, not on the ground of a want of power in the court of chancery to resort to the proposed mode of relief, but on the ground that, in the judgment of this court, that power was in that instance improperly exercised.

That some redress should have been afforded under the bill filed in this case is apparent from the facts disclosed in the bill and affidavits. That the vice chancellor granted injunctions which so completely interfered with the affairs of the company as to make the conduct of its business by its officers in ordinary business methods impossible, and assumed the administration of its business affairs to such an extent as to be utterly impracticable, affords a convincing argument for such relief as is practicable through the intervention of the court of chancery under the circumstances. Such relief, we think, could be afforded only by the appointment of a receiver pendente lite. On both appeals the injunction orders should be vacated, and the record should be remitted to the court of chancery, to be proceeded with in accordance with these views.

(Jan. 31, 1898.)

COLLINS, J. While I agree with the majority of this court that the situation disclosed by the affidavits called for the appointment of a receiver on the application of either party, I also think that pending such appointment it was justifiable, under the affidavits, to order an injunction forbidding David Wolff to further act as treasurer of the cor-

poration until he should give bonds, and restraining him from making such drafts and notes as were interdicted. Such an order might justly have been made conditional upon submission by Lazar Sternberg to like interdiction. A modified injunction of this tenor seems still unobjectionable, and may be necessary.

(56 N. J. E. 513)

**AMERICAN CENT. INS. CO. et al. v.
LANDAU.**

(Court of Chancery of New Jersey. Jan. 11,
1898.)

EQUITY—MULTIFARIOUSNESS.

1. Thirty-two insurers filed a bill to enjoin separate suits against them, and alleged that some of their policies covered insured's property in one of three buildings, and some in another, and some in all the buildings; that under each policy the insurer should not be held liable for a greater proportion of any loss than the amount insured therein should bear to the whole insurance; that insurers had jointly tendered the aggregate amount of an award that had been made under insured's agreement with them to arbitrate according to the provisions of each policy. *Held* sufficient on demurrer for want of equity.

2. Such bill is not subject to demurrer as multifarious.

Bill by the American Central Insurance Company and others against Gerhardt W. I. Landau. Defendant demurs. Overruled.

E. M. Colle, for complainants. Eugene Stevenson, for demurrant.

PITNEY, V. C. The bill is filed by 9 corporations and 23 natural persons, to enjoin 9 suits already commenced against the corporation, and 23 others threatened against the individual natural persons, based on policies of insurance underwritten by the complainants to the defendant upon a silk plant, consisting of machinery, etc., in the city of Paterson. The 23 natural persons underwrote a single policy, under the name of the Traders' Fire Lloyds of New York City. The ground of the demurrer is want of general equity, and multifariousness, and that the complainants have an adequate remedy by way of defense at law.

Briefly stated, the bill sets out that the 9 corporations complainant and the 23 natural persons (constituting the Traders' Fire Lloyds of New York City) insured the property in question, and that there were also two other policies underwritten upon it, one by a corporation known as the Buffalo Insurance Company, and another by an association of underwriters known as the Manufacturers' Lloyds, consisting of 25 natural persons, making 12 policies in all; that all the policies did not cover all the property; that it was contained in three different buildings, and some of the policies covered the property in one building, and some that in another, and some covered property in all the buildings, but, as I read the schedules, it is not quite certain that any one covered all the property; that each policy contained the following provision: "That the underwriters or insurers shall not be liable under the policy

for a greater proportion of any loss on the described property, or for loss by or expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property;" and also the following clause: "That, in the event of disagreement as to the amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the insured and the insurer each selecting one, and the two so chosen shall first select a competent and disinterested umpire; that the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss." The bill further sets out an injury to the property by fire in May, 1896; that the complainants and the other underwriters, being unable to agree with the defendant as to the extent of the loss, entered into a joint or consolidated written agreement for appraisal, in accordance with the terms of the arbitration clause just cited. This document is set out in full as a schedule to the bill, of which, by proper averment, it is made a part. It consists, first, of several sheets each giving a separate description of the property found in one or more of the original policies. Then comes the agreement itself, which also contains a general description of the property and its location. The terms of the agreement will be mentioned presently. Annexed to the agreement is the oath of the appraisers and umpire, and then a detailed list of each piece or kind of property, with the number of each. This consists of eight sheets of lists of property, contained in seven rooms. Opposite each article is put down a sum of money as a sound price, and then opposite this again is the amount of damage, making two columns, one of sound price and one of damage. The total sound value is \$14,205.01, and the total damage is \$5,936.90. The document itself provides that the defendant, of the first part, and the Palatine Insurance Company, one of the complainants, and the several other insurance companies interested, of the second part, do agree "that Frank Atherton and Edward S. Winchester, they first selecting a competent and disinterested umpire, to whom they shall submit their differences in case of failure to agree, shall estimate and appraise the loss and damage by fire of May 7, 1896, to the property of G. W. I. Landau, as mentioned herein or specified in schedule annexed, stating separately sound value and damage, which estimate and appraisal by them, or two of them, in writing hereon, shall determine the amount of such loss and damage; it being understood that this agreement is of binding effect only as regards the sound value and damage of the said property, and does not in any respect waive any of the conditions of the insurance policy." Then follows a schedule and general description of the property, and then follows

this: "It is expressly understood and agreed that the said appraisers are to consider the age, condition, and location of said property previous to said fire, and shall make a proper deduction for depreciation and difference between the value of like property replaced new and the property mentioned. Dated New York, this 19th day of September, 1895." It is signed by the complainants severally, either in person or by agent, and also by the Buffalo Insurance Company, but not by the Manufacturers' Lloyds. The award is signed by two,—by Edward S. Winchester as appraiser, and Charles H. Manning as umpire, who joined in taking the oath, and estimates the damage at \$5,936.90. The bill proceeds to state that this award was accepted by the complainants, and that they immediately offered to pay the sum awarded to Mr. Landau, but that he refused to accept it, and waived a formal tender of the amount, and then commenced the suits above mentioned.

Upon the case made by the bill, the award and payment or tender under it seems to be a perfect bar to the defendant's actions at law. The agreement is one substantially in accordance with the terms of the provision for that purpose found in the several policies. It was entered into voluntarily by the defendant. The appraisers seem to have acted strictly in accordance with the terms of the submission. They chose an umpire, and all were sworn. Then the two original arbitrators were unable to agree, and they called the umpire in, and they appear to have placed a sound value upon each item, and fixed the loss and injury by the fire on each item. The complainants' case is that the award is a valid and binding award on the defendant; and it must be treated as such for present purposes. In short, it must be treated as a final determination by the several parties of the extent of the entire loss suffered by the defendant; and a payment or tender of the amount by the complainants to the defendant must be held to be a bar to an action at law against them directly and severally on their several policies.

It is to be observed that no question can be raised here as to the validity of the clause providing for this mode of ascertainment of the question of the quantum of loss. Such question can only be raised when one or the other of the parties has refused to join in a proceeding under that clause. But, if the clause were subjected to that test, its validity seems well established by authority. *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. 561. But here the parties have voluntarily submitted the question to arbitration, and the award on its face is quite valid and binding, without the aid of the contractual clause found in the policy. The only value of that clause is to show that the proceeding was an ordinary and proper one, and to explain the verbiage of the award.

The first question is whether it constitutes such a defense as can be readily availed of by the several complainants as a defense in a court of law to the several actions brought against them. It seems to me that each complainant, in order to avail himself of such defense, must either pay the whole sum awarded into court, or, at his peril, take the risk of ascertaining in advance the precise sum which is his share of the whole to pay under the terms of the several policies, and pay that sum into court. If he fails to pay into court the precise amount which a jury may find to be his share, he will be subjected to costs upon a recovery of that precise amount; and this state of facts applies to each of the 33 suits already brought or threatened to be brought.

It was suggested by the counsel for the demurrant that one payment into court would be sufficient; that the person first sued should pay the whole amount of the award into court, and then that payment will inure to the benefit of all the others; and that the court of law will not require more than one payment. The bill states that the suits were all brought in one court, to wit, the circuit court of the county of Passaic; hence, it is, perhaps, to be presumed that the circuit court might make such an order. But the question is whether it is obliged to do it or not, *ex debito justitiæ*; but I am not sure that it is.

Again, in this connection another question arises. The tender of the whole loss was made by the complainants combined. Can, then, each of the complainants avail itself or himself of such a tender to support a plea at law of tender of a smaller amount, being the share properly due from him? No doubt, these complainants (although it is not so alleged in the bill) have arranged among themselves as to how his payment shall be divided among them, under the very peculiar state of facts here existing. And they may have done this arbitrarily, and not on principle, in order to avoid expense. Or it may be that they are not agreed upon such division, but are content to make up a pool to pay the amount, and then quarrel among themselves hereafter as to the proper adjustment of contribution. It is well known that there is a class of gentlemen who are known as insurance adjusters, and who make it their business to adjust just such matters. But they may agree, or they may disagree; and the result would be a litigation, in which the defendant has no interest whatever, and should be content if he gets the precise amount which is due him. Now, it seems to me that the only safe way for the several complainants to avail themselves of their several defenses to the several actions will be by settling in advance among themselves the precise amount that shall be paid by each, and by each paying that amount into court in the particular suit against each. Having done that, however, they will be met

with the right of the plaintiff in the action at law to contend that that partition or adjutment so made between the companies is not the true one, and submit it over again in each particular case to the jury in that case. And here opens before us the real difficulty on this part of the case. If the plaintiff is to have 33 actions against the 33 parties, or, consolidating the Traders' Lloyds, if he is to have 10 different actions against 10 different parties, before 10 different juries, the finding of the jury in one case will not, in the absence of stipulation, bind the parties or the jury in another case; and the sum total of the 10 verdicts, though made upon the basis of the validity of the award and the total amount of damage, may vary from the actual amount.

In answer to this view, it is urged that the proportion which each of the underwriters should bear is fixed by the terms of the policy, so that it is only necessary to do a single sum in arithmetic to ascertain the amount chargeable against each. This would be so if each policy covered precisely the same property; but such is not the case. Some of the policies do not cover all the property, and those that do not cover all the property do not in themselves cover the same property; but there is what may be called a double or triple overlapping; and to ascertain the share of each one will require the ascertainment of the amount of other insurance upon the particular property covered by the particular policy; and then the proportions will, after all, have to be adjusted by taking into consideration the amount and value of property not covered by the particular policy included in other policies covering that property. This view presents a very complicated state of things, which, as I said, forms a problem for an experienced insurance adjuster, and is one very difficult for a jury to deal with. I am satisfied from an examination of the schedules of property covered by each policy that it will be very difficult for the complainants to maintain their several defenses at law, and that they ought not to be subjected to the expense and risk of that attempt.

The further question arises at once, *cul bono*: Of what use are these several suits at law, brought to recover a fixed sum of money, which the parties owing are willing to pay at once? Is it equitable for the defendant to bring so many suits? The case would be different if the complainants had not waived, as between themselves and the defendant, the settlement of the relative liabilities between themselves, and agreed in some way in making up the money to pay the defendant at once. Of course, it is supposable that the object of the defendant in bringing these actions at law is to ask the court to hold that the award is not valid or binding upon him, and is, for some reason or other, void. But that mere supposition cannot be taken into account in this connection, on demurrer, where, as I have said, we must proceed upon the basis that the award is binding, and fixed absolutely as between the parties the

damages to the property covered by the policies, and, as a result, fixes absolutely the measure of damages against the complainants in favor of the defendant. It is impossible at this stage of the cause to anticipate that the defendant may, by his answer and proofs, show some good reason why he should be permitted to go into a court of law, and before a jury, to contest this award. When he can show a good reason for such course, this court will, as a matter of course, permit him to pursue it, under such restrictions as will protect the complainants from unnecessary costs and litigation. In the present state of the case, however, it seems highly inequitable for the defendant to resort to his strict legal right to bring 33 suits at law to collect a sum of money which is not in dispute, and which has been tendered to him, and to compel 33 defendants to incur the risk and expense of making distinct defenses which, even if successful on the general question, may still be so far unsuccessful in the matter of tender and payment into court as to subject them to liability to pay costs. Besides, in these days the mere matter of taxable costs does not indemnify for the labor and expense of conducting a lawsuit. For all these reasons, it seems to me that the course taken by the defendant is inequitable and oppressive.

It is said, in answer to this, that it is no more so than what occurs every day in actions on policies of insurance. But it is a well-known fact that it is quite usual, where there are several policies of insurance upon a piece of property which is destroyed or injured by fire, and a dispute arises either upon the general question of liability or upon the extent of the loss, for the parties to agree among themselves that one action shall be brought to trial, and the liability and its extent on the other policies shall stand or fall by that one action. In point of experience, so far as I know, the pressing of so many actions at once is not common. Such practical consolidation was, I believe, the common practice in England under the old Lloyds policies. It does not appear in this case whether any attempt has been made to save litigation in this respect by making any offer of an arrangement of that sort, and the maxim must apply that "what does not appear, does not exist." It may be that the defendant, by his answer, will show, as I have said, that he only proposes to bring one action to trial in order to test the validity of the award, based upon some ground which does not appear in the complainants' bill.

There is still another reason that strikes me as having some force, and which intensifies the inequitable position of the defendant, or rather eliminates the objection for multifariousness which was urged by him; and that is that there has been in this case a quasi voluntary consolidation of the causes of action by the entering into the joint arbitration agreement with all the complainants. This was undoubtedly done to save the trouble and expense of 10 or 11 different arbitrations, and also the extreme difficulty and expense of as-

certaining the precise amount for which each one was liable.

Upon the whole case, I think the bill discloses equity, and that the demurrer must be overruled. This result seems to be sustained by authority. The right of several individuals interested in a single question to combine in an action in equity to establish their right, in order to save multiplicity of actions, is recognized by the text writers. Kerr, *Inj.* p. 135, where the learned author uses this language: "In cases where there is one general common right to be established against several or a number of distinct persons, whether one person claims or defends a right against many, or many claim or defend a right against one, a court of equity will interpose in order to prevent multiplicity of suits; and instead of suffering parties to be harassed by a number of separate suits, each of which only decides the particular right in question between the plaintiff and the defendant to it, it will at once determine the right by a decree, having previously, if necessary, directed an issue for its information. It is no objection to the bill that the plaintiffs may each claim a right against one defendant, or several defendants may each have a right to make a separate defense against the claim of one plaintiff, provided there be only one general question to be settled which pervades the whole. It is enough that there is one general question as between the one plaintiff and the several defendants, or the one defendant and the several plaintiffs." And in *Ad. Ej.* p. 199, the doctrine is thus stated: "Bills of peace of the first class are those where the same right is claimed by or against a numerous body; as, for example, where a parson claims tithes against his parishioners, or the parishioners allege a modus against the parson; where the lord of a manor claims a right against the tenants, or the tenants claim a common right against the lord; or where the owner of an ancient mill claims service to his mill from all the tenants of a particular district. In all these cases, the only form of procedure at common law would be that of a separate action by or against each parishioner or tenant, which would only be binding as between the immediate parties, and would leave the general right still open to litigation. In order to remedy this evil, a suit may be sustained by the court of chancery, in which all parties may be joined, either individually or as represented by an adequate number. If any question of right be really in dispute, it will be referred to the decision of a court of law; and, when the general right has been fairly ascertained, an injunction will be granted against further litigation. If particular individuals have special grounds of action, those claims will be left untouched." And Professor Pomeroy, in his treatise on Equity (section 244 et seq.), in dealing with the jurisdiction of the court to prevent multiplicity of suits, enumerates four classes of cases, the third of which he states thus: "Where a number of persons have separate and individual

claims and rights of action against the same party, A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone. The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class." An he shows by an elaborate examination of authorities (sections 264-289) that the jurisdiction of the court in such case has frequently been invoked and exercised, and is well established. Among the numerous decided cases, I refer to the following: *Roe v. Bishop of Exeter*, Bun. p. 57, a bill to establish a modus; *Powell v. Earl of Powis*, 1 Younge & J. 159, a bill by numerous freehold tenants of a lordship, having rights of common for their cattle, and of turbary and estovers, to establish their right, and to enjoin numerous actions of trespass brought against them individually; *Kensington v. White*, 8 Price, 164, a bill by numerous individual underwriters upon the same risks against the insured, for special relief; *Mills v. Campbell*, 2 Younge & C. 389, a similar bill; *Irving v. Viana, McClell. & Y.* 563, a similar bill; *Falls of Neuse Mfg. Co. v. Georgia Home Ins. Co.*, 26 Fed. 1, before two federal judges (in that case several actions at law had been brought by the plaintiff against several insurance companies in the federal court, and the insurance companies moved to consolidate the suits, and transfer them to the equity docket, and to allow the defendants to set up in equity a defense common to all, and it was so ordered); *Osborne v. Railroad Co.*, 43 Fed. 824, before Mr. Justice Harlan (Sup. Ct. U. S.) and Circuit Judge Bunn, a suit by divers landowners, owning, severally, different tracts of land, all depending upon the same title, against the railroad company, which had appropriated by one proceeding the lands of each; *Lovett v. Prentice*, 44 Fed. 459, substantially the same case as the last. In the same direction are *Fuller v. Insurance Co.*, 36 Fed. 469; *Pennefeather v. Steam-Packet Co.*, 58 Fed. 481, a case of marine insurance; *Cadigan v. Brown*, 120 Mass. 493. The disposition of this court to uphold this kind of jurisdiction is manifested by rule 132, promulgated by Chancellor Zabriske, who was incited thereto by feeling constrained to refuse a consolidation of several suits in equity to abate the same milldam. *Carlisle v. Cooper*, 18 N. J. Eq. 241 (not reported on that point).

Another ground of jurisdiction claimed by the complainants is that they are entitled to a discovery as to the amount paid in settlement of claims for damages to this property by the Buffalo Insurance Company and the Traders' Lloyds, there being an allegation that a settlement had been made with those persons, and that they had withdrawn from the syndicate. I do not find it necessary to express any opin-

ion as to whether that part of the bill strengthens the jurisdiction of this court or not. I am inclined to think that it does not.

It is urged against it by the defendant that it is no affair of the complainants whether or not the underwriters in those two policies have paid anything or not, since the liability of the complainants is confined to a certain amount against each, and, if the defendant has received from those insurers more than what their share may appear to be on a final settlement between the defendant and the complainants, the complainants will not be entitled to any credit therefor. I am inclined to think that the defendant is right in this contention, but will express no opinion upon it. But, if that position be true, it still, in my view, is not necessarily unimportant to the complainants to know that such payment has been actually made to this defendant; for it must be observed that the award made by the action of all the parties hereto ascertained the total amount of damages suffered by the defendant, and that the complainants have tendered that whole sum to the defendant, and, of course, must, in practice, stand by that tender, and, on a proper application, must pay that money into court. But such payment into court will be subject to a proper reduction for the share thereof which should be paid by the two insurance companies just named, if they have paid it. And it follows that the fact and amount of such payment is important, in order that it may be known whether it is or is not sufficient to cover their share of the obligation. I will advise that the demurrer be overruled, with costs.

(184 Pa. St. 468)

STERN v. STANTON et al.

(Supreme Court of Pennsylvania. Jan. 7, 1898.)

EXECUTION SALE—TIME OF REMOVING PROPERTY—RE-EXAMINING WITNESS—SECONDARY EVIDENCE.

1. The reasonable time which a purchaser of goods at execution sale has in which to remove them from premises leased by the execution debtor is the time required to move them with diligence, in the ordinary manner of moving such goods.

2. The allowance or disallowance of questions, on re-examination of witness, for purpose of obtaining a repetition of some part of his former testimony, is reviewable only in case of palpable abuse of discretion.

3. Neither the person writing nor the person dictating a letter can testify to its contents without proof of its loss, or of an effort and inability to produce it.

4. Goods purchased at execution sale cannot be distrained till after expiration of a reasonable time for removing them, it not being enough that part of such time has expired without removal of any of the goods.

Appeal from court of common pleas, Allegheny county.

Replevin by D. L. Stern, trustee, against William Stanton and others, for goods distrained for rent, the goods having belonged to Danziger & Co., and been sold, on execution against them, while in a store leased by

them from defendants, to plaintiff, as trustee of the execution creditors; the rent for which distraint was made, and which was payable quarterly in advance, not having become due till after levy of the execution, though sale thereunder was not completed till the fourth day of the next quarter. Judgment for plaintiff. Defendants appeal. Affirmed.

A. V. D. Watterson and A. B. Reid, for appellants. Josiah Cohen and A. Israel, for appellee.

MCCOLLUM, J. The assignments, from the first to the eighth, inclusive, complain of rulings on offers of evidence. The first and second are based on the admission of evidence, and the third, fourth, fifth, sixth, seventh, and eighth on the exclusion of it. The evidence objected to and admitted was clearly competent. It related to the dimensions and contents of the leased buildings, and to the offer of the plaintiff to pay a month's rent. It was unquestionably relevant to the issues of fact raised by the pleadings.

The objections to the evidence offered and excluded were well taken. It was competent for the defendants to show that the plaintiff had a reasonable time in which to remove the goods after the sale and before they were distrained. But the reasonable time allowed for their removal is not the time within which they might possibly be removed by extraordinary effort. It is not the shortest possible time in which they could be removed, but the time required to move them with diligence, in the ordinary and usual manner of moving such goods. Hence evidence showing what might possibly be accomplished in an emergency calling for extraordinary effort, and the employment of unusual methods, is not strictly relevant.

The allowance or disallowance of questions addressed to a witness, on a re-examination of him, for the purpose of obtaining a repetition of some part of his former testimony, is a matter within the sound discretion of the court, and therefore not subject to review, unless a palpable abuse of the discretion appears. The questions addressed to Watterson on the defendants' proposed re-examination of him were of this nature, and the disallowance of them by the court affords no reasonable ground for complaint.

It is by no means certain that a letter written and sent by Watterson & Reid to their clients on the day the goods were distrained would be competent or relevant evidence in this issue. It is clear, however, that neither the person who wrote it, nor the person who dictated it, could testify to its contents without proof of its loss, or, at least, of an effort and an inability to produce it. It is sufficient to say of the rejection of the offer to prove the contents of the letter that the

grounds for the introduction of such evidence, if relevant and competent, were not laid.

It is obvious that neither Gloninger nor Weber was qualified to define the reasonable time required for the removal of the goods in question, and that the clandestine and hurried removal by a tenant of his goods from the Marshall building in the nighttime was a circumstance not material or relevant to the issue to be determined by the jury. An extraordinary case, like a hurried removal of goods from a building on fire, furnishes no measure of the reasonable time required for the removal of the goods in this case.

For the reasons above stated, we conclude that there is nothing in the rulings complained of in the assignments referred to which requires or would justify a reversal of the judgment. The ninth and tenth assignments complain of instructions to the effect that the plaintiff was entitled to a reasonable time in which to remove the goods, and the eleventh and twelfth assignments complain of the refusal of the court to hold that the alleged inaction of the plaintiff during a part of that time authorized the defendants to distrain the goods before the expiration of it. The court, however, in the general charge and the answer to the plaintiff's second point, virtually instructed the jury that if they found from the evidence that the plaintiff, on the day before the goods were distrained, informed the defendants or their agents that he did not intend to remove the goods, and that it was his purpose to keep them where they were until he could sell them, he could not recover. It seems to us that this instruction was as favorable to the defendants as they could reasonably expect. The goods were turned over by the sheriff to the plaintiff Saturday evening, January 4th, and they were distrained by the defendants Thursday morning, January 9th. As the reasonable time allowed for their removal did not include the nighttime or Sunday, it must be held to date from the 6th of January. The plaintiff testified that on the 6th they were busy in picking out and delivering the goods bought by other parties, and that he spent all of the next day in looking for a place to put the goods purchased by him. On the 8th of January there was an interview between the parties, in which the defendants were represented by Watterson, Black, and Gloninger, and the creditors for whom the goods were purchased were represented by the plaintiff, Cohen, and Israel. The plaintiff testified, distinctly and positively, that at this interview it was agreed that he should occupy the premises, prior to April 1st, for such time as he might need them for the disposal of the goods, and that for the time he actually occupied them for that purpose he should be chargeable with and pay rent at the rate of \$2,000 per month. The testimony of Cohen and Israel was

equally distinct and positive in support of the agreement as stated by him, while their testimony and his was flatly contradicted by the testimony of Watterson, Black, and Gloninger. Of course, if the jury found the agreement as claimed by the plaintiff, that of itself entitled him to recover. On the question whether he had a reasonable time in which to remove the goods before they were distrained, there was not much conflict in the evidence. The plaintiff testified that he had an experience of 14 years in removing goods, and that it would take from 2 to 3 weeks to remove the goods in question, if proper care was exercised to prevent damage to them. Rothschild, who superintended the removal of the goods to Kaufmann's, testified that it took from 10 to 12 days to remove them, with from 5 to 10 wagons and from 20 to 30 men, and that a larger force could not "have been practically put upon the work." Purvis, who was employed at Kaufmann's, was charged with the duty of receiving and caring for the goods as they were brought there, and he testified substantially as Rothschild did as to the time taken and the force employed in removing them. Hoeveler, a witness called by the defendants, had a storage house and vans and wagons for moving goods. He had been in the business 7 years, and he testified that it would take 5 days to move the goods to his warehouse, and put them into store, so they could be removed again, and that in removing them he "would use four vans, four wagons, and the necessary horses, men, and clerks." His estimate of the time within which he could remove them did not include the time required to suitably pack and arrange them for removal. The foregoing summary of the evidence relating to the defendants' claim that the plaintiff informed them on the 8th of January that he did not intend to remove the goods, to the claim of the plaintiff of an agreement under which he was to occupy the premises until he disposed of them, and to the reasonable time required for the removal of them, sufficiently discloses the issues of fact between the parties. It is settled by the verdict that the defendants' claim that the plaintiff informed them that he did not intend to remove the goods was unfounded, and it is shown by the uncontradicted testimony in the case that the plaintiff did not have a reasonable time in which to remove the goods before they were distrained. It is practically conceded by the defendants that the plaintiff did not have sufficient time in which to pack and remove the goods before the 9th of January, but they contend that, as he did not pack and remove any of them before that time, he lost or forfeited his right to the reasonable time the law allowed for their removal. Is their contention sound? We are clearly of the opinion that it is not. If it is, it logically follows that the defendants could have distrained the

goods on the 7th of January, although the reasonable time required for their removal was 10 days. They claim that there is authority for this contention in *Gilbert v. Moody*, 17 Wend. 354. In that case the goods sold, and subsequently distrained, were in a dwelling house, and consisted of household furniture, which could readily have been removed, and no reason or excuse for delay was offered on the part of the plaintiff. The sale was made by the sheriff in the afternoon of Saturday, the 14th of July, and the goods remained on the leased premises until Tuesday morning, the 17th of July, when they were taken by the defendants under a distress warrant for rent. "The goods might have been conveniently removed on Saturday afternoon, at a trifling expense." Nelson, C. J., in delivering the opinion of the court, said: "Goods levied upon by execution are considered in custodia legis until the proper time for the sale, and a reasonable time after the sale for the purchaser to remove them. 2 Brod. & B. 362; 1 Maule & S. 711; Bradb. Dis. 84. What is a reasonable time is a question of law, when there is no dispute about the facts. It is apparent from the evidence that the removal of the goods could have been effected in a few hours; the whole of Monday was clearly a sufficient time for that purpose." It will be noted that in the case cited the goods were distrained after the reasonable time for their removal had expired, and no reason or excuse was assigned for the delay. It bears no resemblance in its facts to this case and it furnishes no support for the contention based on the defendants' second and fifth points.

Further reference to or discussion of the evidence affecting the material issues in the case is unnecessary. The excerpt from the charge on which the ninth assignment is based does not require special consideration. Whether the excerpt is considered by itself, or in connection with the rest of the charge, is unimportant, because there is no material error in it. It needs no citation of cases to prove that it is not error to express an opinion upon the weight of the evidence, if the facts be left to the jury. All the assignments are overruled. Judgment affirmed.

(184 Pa. St. 537)

SCHMIDT et al. v. BAZILEY et al.
(Supreme Court of Pennsylvania. Feb. 7, 1898.)

PAROL TRUST—SUFFICIENCY OF EVIDENCE—FINDINGS IN EQUITY.

1. In an action by O. and wife, and O.'s creditors, to establish a parol trust in land, it appeared that in March, 1893, O. and wife executed to defendant two absolute deeds of said land, to secure defendant for advances; that the transaction was an incomplete one; that in August, 1893, said deeds were destroyed, and O. and wife executed to defendant two other absolute deeds of said land; that, at the time, O., in writing, admitted an indebted-

ness to defendant of \$36,041.11, and that the deeds were executed for a consideration of \$8,000, as the agreed equity of O. in the land; that a few days later a supplement to said agreement was executed by O., setting forth that he had borrowed \$6,000 additional from defendant, and that the balance due him after crediting the \$8,000 was \$31,178.76; that there was still due from O. to defendant over \$15,500; that in 1893 and 1894 defendant executed to O. leases of the property, in which defendant's ownership was admitted; that in 1895 O. represented to the license court, in an application, under oath, for a liquor license, that defendant was the absolute owner of said property; that, in two affidavits in certain judicial proceedings, O. made averments as to the purpose for which such deeds were executed, wholly inconsistent with the claim that there was a parol trust; that O. obtained possession of the premises in 1894 under a lease; that the debts claimed to be due to said creditors were contracted after August, 1893. The existence of a trust was supported only by the testimony of O. and his wife. *Held*, that the bill was properly dismissed.

2. Though the findings in an equity case should be expressed in separate and numbered clauses, so as to present each one separately and distinctly, the omission to do so is not ground for reversal, where the findings are expressed severally, and are easily capable of separate consideration.

Appeal from court of common pleas, Philadelphia county.

Bill by Henry C. Schmidt and others against Rudolph R. Baizley and another to establish a parol trust in certain real estate conveyed by plaintiffs Alexander Obermeyer and Margaret A. Obermeyer, his wife, to defendant Rudolph R. Baizley. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Defendants requested the court to find as follows:

"Findings of Fact. (1) That the transaction in February or March, 1893, was an uncompleted one; and the arrangement, whatever it was, between the parties, was treated as such, and the transaction of August 12, 1893, took its place. (2) That the transaction of August 12, 1893, was an out and out conveyance from the plaintiff Alexander Obermeyer and Margaret Obermeyer, his wife, to the defendant Rudolph R. Baizley, for the consideration of \$8,000, which was agreed upon as the value of his equity, and for which he was given credit upon the indebtedness due from him to said Baizley. (3) That from the 12th day of August, 1893, up to the 21st day of August, 1894, defendant Rudolph R. Baizley was the owner in fee of the premises described in the bill. (4) That from the 21st day of August, 1894, up to the present time, defendant John Baizley has been the owner in fee simple of the premises described in the bill. (5) That no trust was created or existed between the said Rudolph R. Baizley and plaintiffs, or either of them, with regard to the ownership of the premises described in the bill. (6) That there is due from the plaintiff Alexander Obermeyer to defendant Rudolph R. Baizley the sum of \$14,105.62, with interest from say May 17,

1804 (in all \$15,586.70), and there is due from him to defendant John Baizley the sum of \$21,129.44, with interest (amounting in all to \$25,377.66), of which \$19,000, with interest (in all, \$23,026.80), is secured by mortgages upon the property in dispute. (7) That defendants have paid on account of the principal of prior mortgages secured upon said property, and interest thereon, taxes, water rent, insurance, etc., the sum of \$27,817.87, and that said Obermeyer has paid on account of rent the sum of \$3,455, and there has been received from the store in the corner property the sum of \$900, leaving a balance of disbursements on this account of \$23,462.87. (8) That defendant Rudolph R. Baizley is indebted to defendant John Baizley in the sum of \$70,000 and that the conveyance of said premises from said Rudolph R. Baizley to said John Baizley was in part payment of said indebtedness. (9) That plaintiff Alexander Obermeyer has not been continuously in possession and occupancy of said real estate, but obtained possession thereof on July 10, 1804, under the lease thereof of that date from said Rudolph R. Baizley to him. (10) That the debts claimed to be due from plaintiff Alexander Obermeyer to plaintiffs C. Schmidt & Son, Gallagher & Burton, and Henry B. Grauley were contracted long subsequently to the 12th day of August, 1803. (11) That the value of the premises described in the bill is not in excess of \$90,000. (12) That Margaret A. Obermeyer has no interest in the premises described in the bill.

"Findings of Law. (1) That the evidence is insufficient to establish a trust on the part of the defendants, or either of them, with relation to the plaintiffs named in this cause. (2) That the evidence is insufficient to establish any trust on the part of the defendants, or either of them, in relation to said property. (3) That, so far as said plaintiff Alexander Obermeyer is concerned, the alleged trust claimed to exist in regard to said premises, not being in writing as required by statute, is void. (4) That, so far as said plaintiff Alexander Obermeyer is concerned, the transaction, if it be conceded that it existed as set forth in the bill, amounted to a mortgage of the said premises; and the defeasance, not being reduced to writing, signed, acknowledged, and recorded, is void. (5) That so far as the plaintiffs C. Schmidt & Son, Gallagher & Burton, and Henry B. Grauley are concerned, they have an adequate remedy at law. (6) That the plaintiffs C. Schmidt & Son, Gallagher & Burton, and Henry B. Grauley have no standing to maintain this bill, and are not entitled to the benefit of the alleged trust claimed to have been created. (7) That, even if the facts alleged in the bill were conceded to be true, the defendants are entitled to hold the said property until the amount of the debts due them, respectively, from said Alexander Obermeyer, are paid."

The opinion of the court of common pleas is as follows (Gordon, J.):

"The plaintiffs are judgment creditors of Alexander Obermeyer, and sue, with him and his wife, for the purpose of having set aside, and declared null and void, certain conveyances of real estate in the city of Philadelphia executed by him to Rudolph R. Baizley, one of the defendants. The said Rudolph R. Baizley subsequently conveyed the premises to John Baizley, the other defendant. Reconveyance by these defendants to Obermeyer is also prayed for in the bill, together with injunctions restraining the defendants from exercising any rights of ownership in the premises. The plaintiffs' allegations are that the deeds executed by Obermeyer, while absolute on their face, were in fact conveyances in trust to Baizley for the purpose of being held and used only in case it should become necessary for the said Baizley to make use of the same to protect the creditors of said Obermeyer, and the interest of him and his wife therein. In substance, then, this is an effort to avoid the effect of deeds absolute on their face by alleging a parol trust in violation of which, and in fraud of the creditors' rights, the deeds are being used. The plaintiff who asserts such facts, to avoid the effect of his deliberate acts, evidenced by solemnly attested deeds, must establish his contention clearly, unequivocally, and satisfactorily. This plaintiff would have no standing in this form of proceedings, in our judgment, except for his allegation of fraud; and the proof upon this subject must not be left to uncertain inferences, or dependent upon his own testimony, but must be definitely established, and his own testimony must be substantially corroborated by other credible testimony. While the evidence taken in this case is voluminous, and dealt largely with matters of account, it related only to two or three propositions of fact, the determination of which must control the case. It appears that Obermeyer, desiring to embark in another and easier business, sought out Rudolph R. Baizley, whom he knew, and with whom he had had very friendly relations. Baizley, for the purpose of befriending Obermeyer, suggested that he should obtain a suitable place for setting up a retail liquor store, and agreed to furnish him with the necessary funds in order to obtain title to a suitable property, and, from time to time, to supply him with money necessary to carry on the business. Obermeyer obtained such a property. Baizley supplied him with the purchase money needed to secure the title, and started him in the business. Their relationship from that on, until the differences out of which this suit grew arose, was of the most intimate and friendly character. Baizley continued through years, apparently from no other motive than that of regard for Obermeyer, and a desire to benefit him, to advance him money, and in various ways enable him to prosper in business. After a time, Obermeyer became embarrassed, and was indebted to Baizley in a large sum of money. In March, 1803, for the purpose of reimbursing and securing Baizley for the ad-

vances made, he conveyed the premises, in two separate deeds. Subsequently Baizley advanced additional sums of money to Obermeyer, and in August, 1893, the deeds named were canceled or destroyed, and new deeds for the same premises again executed by Obermeyer and his wife. Contemporaneously with the execution of these deeds, Obermeyer, in writing, admitted an indebtedness to Baizley of \$38,041.11, and recited that the deeds were executed for a consideration of \$8,000, as the agreed equity of Obermeyer in the premises above the incumbrances, and that Obermeyer was to receive a credit of \$8,000 upon his indebtedness. On August 21, 1893, a supplement to this agreement was executed by Obermeyer, setting forth that he had borrowed above \$6,000 additional from Baizley, and that the balance due to Baizley above the \$8,000 credit allowed for the conveyance of the premises was \$34,178.76. Judgment notes for this balance were also executed by Obermeyer, and accompanying these written agreements was a detailed statement of the sums due, the days upon which they were advanced, the interest thereon, a credit of \$8,000 on account of the conveyance of the property, and a net balance was struck. It is to avoid the effect of these conveyances that this suit is brought.

"The testimony of Obermeyer is voluminous, involved, prolix, and uncertain. Upon one point he testifies with absolute certainty, and that is as to his allegation of the purpose for which the conveyances were made. He avers that at the time of the execution of the deeds he stated, and Baizley expressly agreed, that the conveyance was to be made only for the purpose of securing, if necessary, his creditors and his wife. His wife, as a witness on this point, testified similarly to her husband. It is impossible to read Obermeyer's testimony, as it was impossible to listen to it, without seeing that upon every point, except this material one, he vacillated, hesitated; was uncertain, involved, and indefinite. His testimony is contradicted flatly by that of Baizley, the other party to the transaction, and these three witnesses constituted all who testified directly upon this point. The remainder of the mass of testimony related to the subject-matter only collaterally, indirectly, and persuasively. Confessedly, if there was nothing more in this case than the conflicting statements of Baizley and Obermeyer, the testimony of the latter would, alone, be insufficient to set aside his solemn deed. In how much better position does the corroboration of the wife put his testimony? We would not be understood as saying that the marital relation, of itself, casts any doubt upon the credibility of the wife; but as she is a party to the deed, and as she also cannot be heard, alone, to successfully contradict her grant or conveyance, and as she is as much an interested party as her husband, her testimony must be taken with the same legal limitations, subject to the same necessity for corroboration, and open to the same question upon the score of interest, that his testimony is.

If, therefore, his testimony is incredible, doubtful, and contradictory in itself, and because of its uncertainty, her testimony, without now criticising it, cannot, then, be considered logically as more than a scintilla, and as much less than satisfactory proof. Obermeyer avers that, such was his confidence in Baizley, that he signed any papers that were brought to him, that he was a sick and infirm man, that he was not in full possession of his will power, and that he trusted Baizley to the extent of taking all his statements without inquiry. When a full-grown man sets up such a defense as this against the effect of his acts, it is always suspicious. In this case, stripped of the plaintive terms in which Obermeyer sets forth his infirmities, his testimony amounts to no more than that he is a very sick man, who for a period was obliged to seek a health resort because of his physical ills, and possibly mental depressions. That he was either insane, forgetful, incapable of thinking logically and correctly, of knowing what was communicated to him, and what was the effect of the acts he was committing, cannot possibly be concluded, upon the strongest view of his testimony. Indeed, the claim under which he sues in this case, the averments he makes as to the purpose and effects of the deeds which he executed, if true, would show that his mind was acute, logical, and alive to all the consequences of his acts. We are obliged to conclude that Obermeyer knew perfectly well his situation at the time of the execution of the deeds, and the effect of his acts, and was in full possession of his memory, will, and reason. From his own testimony, it is apparent that at the time the deeds were executed he was largely indebted to Baizley, in a sum of money which, while he was unable to state or declined to fix definitely, exceeded twenty thousand dollars; and Baizley was pressing him for some adjustment, payment, or security for the debt. While it may be true that Obermeyer trusted Baizley implicitly, as he ought to have done (for he was the sole beneficiary of their transactions), it is equally true that Baizley trusted Obermeyer as fully, and evidenced his trust by large and continuous advances of money.

"Obermeyer made an effort, on the stand, to impeach the correctness of the statements of indebtedness, and the itemized accounts which were signed by him, and affirmed to be true, contemporaneously with the execution of the deeds of August 12, 1893; but upon this point his denials were in the air. He failed at every point to corroborate his denial by any testimony, whereas he was confronted with scores of checks bearing his signatures, and evidencing his receipt of money. Though he averred that he had memoranda or accounts of his own to show indebtedness of Baizley for various small sums, by which he sought to reduce the amount of the balance which he had twice, in writing, admitted to be due him, yet he produced none of these data. Nothing could be more unsatisfactory, nothing less

worthy of credence, than his testimony upon this point; and on this point he is the sole witness. It may be true, it probably is true, and the court is inclined to believe, that an absolutely exact statement of account between Baizley and Obermeyer is now impossible. But, if this is so, it proceeds equally from the truthfulness and want of method upon both sides. Certainly, all the written evidence, all the accounts which have been produced, all the checks, all the receipted bills, all the memoranda and agreements and statements of account, are in favor of the substantial accuracy of the adjustment of indebtedness made on the 12th and 21st of August, 1893. Upon the testimony of Baizley and Obermeyer, it is impossible to come to any other conclusion, and we so find, as a matter of fact, that the settlement in writing made by Obermeyer on August 12 and August 21, 1893, with the accompanying itemized account, containing a credit to Obermeyer of \$8,000 as a consideration for the conveyance of August 12, 1893, was a settlement and adjustment, up to that date, of the accounts between these two men; and there is no satisfactory testimony to substantially contradict these writings, or to reduce the amount of the balance then declared by the plaintiff Obermeyer. On the subject of the purpose of the deeds executed by Obermeyer and his wife, there are certain other uncontradicted facts which must be controlling as to the credibility to be given to Obermeyer. Every other deliberate act, every other paper executed subsequently by Obermeyer, every other statement, outside of this case, made under oath by Obermeyer, contradicts his present testimony, and affirms the absolute character of the conveyance made by him to Baizley. Contemporaneously with the execution of the deeds he executed a lease in writing under which he became the tenant of Baizley, at a fixed rental, of the premises in question. This rental he paid, from time to time, by the discharge of certain interest upon incumbrances as it became due. Again, at a later stage, he executed another lease, with a collateral agreement, in writing, averring the ownership of Baizley, and that he held under Baizley, as a tenant. Subsequently still, upon making application to the license court for a license for these premises, in another name, he averred, under oath, that Baizley was the owner of the premises; and in two affidavits made in the course of litigation between Baizley and himself, dated March 23, 1895, and April 13, 1895, he set forth explanations of the execution of these deeds wholly inconsistent with his present contention in this suit, for he averred in those affidavits that the conveyances were to Baizley, as security for his (Baizley's) debt, and upon the agreement of Baizley to reconvey when the debt should be paid. To-day the allegation upon which he founds his present equity, and upon which his judgment creditors appear as parties, is in absolute contradiction of the contents of those affidavits. We have therefore four deeds in

writing (the two of March, 1893, and two of August, 1893); two written statements of account, in which the deeds and the considerations for them are referred to, dated August 12 and August 23, 1893, respectively; two leases from Baizley to Obermeyer (one of August 12, 1893, and one as late as July 10, 1894), in which the ownership of Baizley was admitted, and the tenancy under him created; an application to the license court in the year 1895, in which Obermeyer, under oath, represented to the court that Baizley was the sole and absolute owner of the premises; and two affidavits, filed in judicial proceedings, in which Obermeyer makes averments respecting the purpose for which the deeds were executed wholly inconsistent with the foundation of his present bill of complaint. Thus, eight times he executed writings under seal, bearing upon and acknowledging the absolute character of these conveyances, and the valuable consideration for them, once swore to an application for a license averring the same facts, and twice afterwards made other affidavits contradicting his testimony in the present case. With such a volume of testimony of the most solemn character, thus made by himself, iterating and reiterating, under oath and otherwise, the validity and integrity of his deeds and conveyances, how is it possible to treat his present testimony as otherwise than wholly unworthy of belief? As such we find it, and regard the case, as presented by him, as wholly inadequate to justify a chancellor in setting aside and annulling the deeds to the defendant Rudolph R. Baizley. With this view of Obermeyer's testimony, it is unnecessary to advert upon that of his wife; and it is sufficient to say that it likewise is dismissed as unworthy of belief, and as insufficient to entitle the complainants to the relief asked for. For these reasons the plaintiffs' bill must be dismissed.

"In response to the defendants' request for specific findings of facts, we answer that the following requests are affirmatively found: No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 9, No. 10, No. 11, No. 12. As to request No. 8, the court answers that it is impossible, upon the evidence before us, to state accurately the amount of indebtedness of Obermeyer to Baizley at this time; but we do find that the statement of accounts agreed to and signed by Obermeyer on August 12 and August 21, 1893, constitute a full statement of the accounts between them at that time, and do adjudge the balance stated therein to have been then due by Obermeyer to Baizley. It possibly ought also to be said that the evidence adduced by the defendant of experts in the value of real estate fully satisfies the court that the eight thousand dollars agreed upon by the parties in August, 1893, as a proper valuation of the equity of Obermeyer in the premises in question, was a fair, full, and ample valuation; and, independently of the agreement between the parties as to its value, the court would so find upon the testimony of these ex-

perts alone. In response to the requests of the defendant as to the findings of law, we answer affirmatively the requests Nos. 1 and 2; but the other requests for findings of law, being in the alternative, need not be treated. For the reasons above set forth, the plaintiffs' bill is dismissed, with costs."

M. J. O'Callaghan and Joseph P. McCullen, for appellants. Read & Pettit, for appellee.

PER CURIAM. An examination of the testimony in this case convinces us that the findings of fact made by the learned court below were entirely justified—indeed, required—by the evidence before the court. We do not see how any other or different findings could have been made with any propriety. The conclusions of law are so necessarily consequent upon such determinations of fact that they cannot be controverted. We are very clearly of opinion that the decree dismissing the bill was correct, and we affirm it, upon the findings of fact and conclusions of law expressed in the opinion. It would have been more suitable if the findings had been expressed in separate and numbered clauses, so as to present each one independently and distinctly, and such is the usual practice. We do not think, however, that the omission to do this is a cause of reversal, as the findings are expressed severally, and are easily capable of separate consideration. Decree affirmed, and appeal dismissed, at the costs of the plaintiffs.

(184 Pa. St. 557)

CITY OF PHILADELPHIA v. WALL et al.
(Supreme Court of Pennsylvania. Feb. 7, 1898.)

MUNICIPAL CORPORATIONS—BUILDINGS ON NARROW STREETS.

G. street, in Philadelphia, was dedicated in 1849, was laid out to the width of 21 feet, and was wholly unimproved by brick or stone building prior to April 21, 1855, and such street was still of the same width in 1894. Prior to July, 1894, the owner of a lot abutting on G. street, pursuant to a building permit, erected on said lot a brick stable, fronting on the street, but on foundations set back two feet from the building line. *Held*, that the erection of such building was not a violation of Act April 21, 1855 (P. L. 255) § 6, providing that no building shall be erected on any street hereafter to be laid out, or if laid out and wholly unimproved by brick or stone buildings before passage of this act, of a less width than 25 feet; the erection 2 feet from the line being a practical widening of the street to 25 feet.

Appeal from court of common pleas, Philadelphia county.

Bill by the city of Philadelphia against Charles F. Wall and Walter Tryday for an injunction. From a judgment dismissing exceptions to and confirming the report of a referee in favor of defendants, plaintiff appeals. Affirmed.

The report of the referee is as follows:

"The undersigned referee, to whose deci-

sion all matters in controversy in above case was submitted by agreement dated September 11, 1896, under the provisions of the act of assembly approved June 16, 1836 (said agreement, with the pleadings in the case, is hereto attached), respectfully reports:

"That, having given due notice to both parties in interest, he held the first meeting for the purposes of his appointment upon Friday, October 30, 1896, at 3 o'clock p. m., at his office, N. E. corner Broad and Arch streets, at which time and place he was attended by Norris S. Barratt, Esq., for the city of Philadelphia, and Charles H. Edmunds for Charles F. Wall and Walter Tryday, defendants. Meetings were held by the referee weekly, extending over a period of five months, and much testimony has been taken, which the referee herewith submits with this report.

"The bill of complaint in this case charges: (1) That defendant Charles F. Wall is the owner of said premises described in said bill of complaint. (2) That said defendant Charles F. Wall contracted with the defendant Walter Tryday to erect a two-story brick stable on said lot; that said defendant applied for and obtained a permit to erect a stable on premises No. 861 N. Forty-First street, a copy of which permit is annexed to said bill of complaint. (3) That said defendant Walter Tryday erected said stable on said lot, but, instead of fronting the same on Forty-First street, fronted the same on Garden street. (4) That the width of Garden street, as now opened, is 21 feet, the same having been dedicated of that width to public use. (5) That said Garden street was laid out of the width of 21 feet, and wholly unimproved by brick or stone buildings prior to the passage of the act of April 21, 1855. (6) That the erection of said stable fronting on said Garden street is in direct violation of said act. And said complainant prayed for equitable relief: (1) That said defendants be enjoined from erecting said stable fronting on said Garden street. (2) That said defendants be required to take down and remove said stable. The answer of said defendants: (1) Admits the fact stated in first paragraph of the bill. (2) Admits that a contract was entered into between defendants for the erection of a stable on the rear of said premises, and that the permit, a copy of which is annexed and marked 'Exhibit A,' was issued. (3) Admits that the stable was erected in accordance with the permit, fronting on said Garden street on the rear end of the lot mentioned. (4) Requires proof of the fourth and fifth allegations of the bill, and avers that the building was set back 2 feet, so that by the owners of the lot on the opposite side of Garden street, when building, also receding 2 feet, the said Garden street would be of a width of 25 feet. (5) Denies that the stable was erected in violation of law, but, on the contrary, avers that it was constructed strictly according to law.

"Findings of Fact.

"The referee finds from the bill, answer, and proofs: First. That said Charles F. Wall is the owner of said premises described in said bill of complaint. Second. That the said Charles F. Wall contracted with the defendant Walter Tryday to erect a two-story brick stable on said lot; that said defendant applied for and obtained a permit to erect a stable in rear of said premises, 881 N. Forty-First street, a copy of which permit is annexed to said bill of complaint. Third. That said Walter Tryday proceeded with the erection of said stable upon said lot of ground above described, fronting the same on Garden street, upon foundations set back 2 feet from the building line of said Garden street of a width of 21 feet, and the same is now finished in accordance with the permit given by the building inspectors. Fourth. That Garden street as now opened is 21 feet wide, and it was dedicated to public use by George Hutton by deed of dedication dated October 11, 1849, duly executed, acknowledged, and recorded in Deed Book G. W. C., No. 26, page 430, etc. Fifth. That said Garden street was laid out of the width of 21 feet, and wholly unimproved by brick or stone building prior to the passage of the act of assembly approved April 21, 1855.

"The evidence upon which the fourth finding of fact is based consisted principally of the deed of dedication dated October 11, 1849; the plan of Garden street prepared from the official record of the city by Joseph Johnson, surveyor and regulator of the Eleventh district, showing Garden street of the width of 21 feet; and the testimony of said Joseph Johnson, Harriet Francis, and Thomas A. Andrews, besides other old deeds, describing the premises conveyed as extending to Garden street laid out of the width of 21 feet. Mr. Johnson testified that Garden street has been used as a public thoroughfare, and has been partly paved and curbed. Mrs. Francis testified that she knew Garden street as far back as 1852, opened and used by the public. Mr. Andrews testified that he knew Garden street as it is prior to 1855, and down to the present time. Other parts of the testimony, however, support the finding.

"In support of the fifth finding the referee quotes the following testimony:

"Joseph Johnson, notes of testimony: 'Q. Your personal knowledge covers 29 years? A. Yes, sir. Q. From your first recollection, were there any improvements on Garden street between Westminster and Garden street? A. Nothing but frame stables. Q. You do not remember any stone structures on either side of the street? A. I do not remember any brick or stone structures on either side of street.'

"Mrs. Harriet Francis, whose testimony was as follows: 'Q. Do you recollect it [Garden street] and recall it prior to 1855? A. I do. Q. Do you recollect whether it was improved by any brick or stone buildings be-

tween Ogden street and Westminster avenue prior to April, 1855? A. I do not think it was.'

"George Hancock, surveyor and engineer, and who was one of the city surveyors from 1855 to 1880 in charge of the district in which Garden street is situated, whose testimony was as follows: 'Q. Do you recollect when Garden street was laid out? A. I do. Q. Who was it laid out by? A. By George Hutton.' And whose entire testimony is conclusive as to the fact that Garden street was laid out, opened of the width of 21 feet, and used by the public prior to the act of April 21, 1855, and that it was not improved by brick or stone buildings prior to April, 1855.

"Thomas A. Andrews, whose testimony was as follows: 'Q. Mr. Andrews, how long have you known Garden street? A. About fifty years. Q. You have known it then prior to April, 1855? A. Yes. Q. Was Garden street improved by any brick or stone buildings prior to April, 1855, as far as you can recollect? A. No, sir. Q. Did you live in that vicinity at the time? A. I lived at the corner of Westminster avenue and Forty-First street, then called Morrison street.'

"It has been argued that Garden street, between Ogden and Parrish streets, was built upon prior to April, 1855, and that, therefore, as some portion of Garden street was built upon, it permitted any portion of said street to be built upon, even though it was squares away from the section of Garden street upon which the stable in this case was built. While we deem such argument fallacious, if the facts were as stated, yet it is well to consider the testimony upon the question as to whether any portion of Garden street was improved by brick or stone buildings prior to the act of April 21, 1855. The testimony of Mr. Andrews on this point is clear: 'Q. Mr. Andrews, when Judge Kelly would drive from Ogden street down to his stable did he drive over his own property? A. Yes, sir. Q. He owned the property all the way to Ogden street? A. He owned the entire block. Q. Do you remember whether or not there was a fence to prohibit any one from going below Ogden street? A. The other end was closed, but when he altered his house several years afterwards he put an iron gate there through which he would drive in, but then the rear was always open.' And also: 'Q. Judge Kelly's stable was built before 1855, was it not? A. In 1851. Q. On what line did Judge Kelly build his stable? A. Well, that I do not recollect. It was further back than present stable, because he rebuilt. Q. But it was on the line of Garden street? A. It faced Garden street; it was about 25 or 30 feet back of Garden street.'

"Conclusions of Law.

"Is the erection of said stable upon said lot of ground described in said bill of complaint, fronting on Garden street, in direct

violation of the act of the general assembly approved April 21, 1855, and should said defendants be required to take down and remove the same? The act of April 21, 1855, reads as follows (P. L. 265, § 6): 'No new dwelling house, or other building within said city, shall front upon any street, alley or court, which shall be of less width than twenty feet, or without being made to recede, so that such street, alley or court shall be of that width, the buildings on each side equally receding, the damages for which widening shall be assessed and paid to the owner in the manner provided by law in case of opening new streets; every new dwelling house shall also have an open space attached to it, in the rear or at the side, equal to at least 12 feet square; and no building of any kind shall be permitted to be erected on any street, court or alley hereafter to be laid out, or if laid out and wholly unimproved by brick or stone buildings before the passage of this act, of a less width than twenty-five feet; and every builder or owner who shall hereafter build otherwise than aforesaid shall pay to the said city one hundred dollars, to be recovered with costs, as debts of that amount may by law be recovered, and shall be restrained by injunction.' By a careful reading of said act it will be seen that there was in the minds of the legislature evils which it was their purpose to remedy; that is to say, there were narrow streets within the limits of the city of Philadelphia, built upon of the width of 20 feet or less, and some not built upon of a width less than 25 feet. For those already built upon of a less width than 20 feet, the remedy was to prevent further erection of new buildings fronting on said street, unless they recede to the 20-foot line; but there was nothing to prevent new buildings having their side on the 20-foot line. As was said in the statement of Eli K. Price in *Guarantee Co. v. City*, 31 Leg. Int. 240; 'The purpose was to widen the narrower one [meaning street], where the front was on it only, leaving the entrance to it between buildings that only flanked upon it undisturbed. If more had been intended, other words would have been required.' Where the street was of less width than 25 feet, and wholly unimproved by brick or stone, the remedy was to prevent the erection of all buildings, whether they front or side upon said street, unless they recede to the 25-foot line. The effect of this was to have all new streets 25 feet wide. The former section of the act, in relation to 20 feet, refers to streets already built upon, and the latter section, in relation to 25 feet, refers to streets not built upon or not laid out. According to the plaintiff's contention, if the street was of a less width than 25 feet, and wholly unimproved by brick or stone buildings, the act absolutely prohibits the erection of any building until said street is open-

ed to the width of 25 feet; and in such case injunction would lie to prevent the erection of the building, or, if having so built after the passage of the act, from the continuance of such building contrary to the requirement of the act. In this case we have only to consider the act so far as it applies to a street less than 25 feet wide, and wholly unimproved by brick or stone buildings prior to the passage of the act.

"It has been argued with much force by the city's counsel that this apparent prohibition is absolute and that no building of any kind or description could be erected on a street less than 25 feet wide. If this was the intention of the legislature when the act was passed it would be in effect a practical confiscation of land abutting on a street less than 25 feet, and, until the street was opened to the full width of 25 feet, no building of any kind could be erected on any line with an outlet to the street. In *City v. Michener*, 30 Leg. Int. 116, Brewster, J., draws no distinction between streets of a less width than 20 feet and those of a less width than 25 feet. In referring to the act he says: 'Its plain intent and meaning were to secure a width of 20 feet for all highways then existing and 25 feet for all streets hereafter to be laid out. To accomplish this purpose, and thus to beautify the city, and to secure the health of its inhabitants, the law provides for the receding of every new building, and secures compensation to the owner.' If the contention of the city was correct, the effect would be to compel the defendant to tear down his building, wait until the street was widened, and then reconstruct it on exactly the same foundation lines. This would be an unnecessary destruction of property, never contemplated by the author of the law, Mr. Eli K. Price, or the legislature. That the act should be read as an entirety, and that the clause, 'or without being made to recede so that such street, alley or court shall be of that width, the buildings on either side equally receding,' refers to 25-foot streets as well as to 20-foot streets, is clear to your referee. The act is an entire act, the penalties for the violation of either class are the same, and no possible reason can exist for separating the two classes, and forcing a construction of the act that, in the opinion of your referee, was never contemplated. For these reasons the referee finds for defendant, and recommends that the bill be dismissed."

Joseph Savidge, Norris S. Barratt, and John L. Kinsey, for appellant. Charles H. Edmunds, for appellee.

PER CURIAM. The decree in this case is affirmed upon the findings of fact and conclusions of law contained in the report of the referee in the court below. Appeal dismissed, and decree affirmed, at the cost of the appellant.

(87 Md. 146)

JOHN C. GRAFFLIN CO. et al. v.
WOODSIDE.

(Court of Appeals of Maryland. Jan. 11, 1896.)

CORPORATIONS—EXPLANATION OF MINUTES—VALIDITY OF BY-LAW—BONA FIDE PURCHASERS.

1. A statement shown by the minute book to have been made at a directors' meeting, that the chairman stated that G. has made a satisfactory settlement of the amounts due by him to the company, and that the entries will be made upon the books of the company at once, may be shown by parol evidence to refer to the amount, and not to the payment, of the indebtedness.

2. A by-law of a corporation creating a lien on the shares of the member for debts due by him to the corporation is valid and binding against him and his assignee for the benefit of creditors, but not against innocent purchasers for value.

Appeal from circuit court of Baltimore city.

Bill by James S. Woodside, as assignee of Frederick L. Grafflin, for the benefit of his creditors, against the John C. Grafflin Company and others for the cancellation of a certificate of stock in favor of assignor in defendant's company, and for the issuance of a new certificate in favor of plaintiff. From a decree for plaintiff, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, ROBERTS, PAGE, and BOYD, JJ.

J. Alexander Preston and Rob. Lud. Preston, for appellants. F. C. Slingluff, for appellee.

BRYAN, J. Frederick L. Grafflin executed a deed of trust to James S. Woodside in December, 1894, for the benefit of his creditors. It is alleged that at the time of the execution of the deed of trust the said Frederick was entitled to a certificate for 362½ shares of stock in the John C. Grafflin Company, a corporation, and that the said certificate is now in the possession of his wife, who refuses to surrender it; and that the corporation refuses to issue a new certificate to the assignee. A bill in equity was filed by Woodside, alleging these facts, and praying that the old certificate might be surrendered and canceled, and a new certificate issued to him by the corporation. The answer of the corporation alleges that before the execution of the deed of trust Frederick L. Grafflin was indebted, and is still indebted, to the corporation; and that article 10 of the by-laws of the said John C. Grafflin Company, adopted at the time of the organization of said company in the month of September, in the year 1889, is as follows: "Transfers of stock shall only be made by the stockholders in person or by duly constituted attorney on the transfer-book at the company's office upon surrender of the certificate for stock to be transferred; and no stockholder owing the company a matured debt shall transfer his or her stock, or receive any dividend thereupon, until such debt be paid, except by consent of the board of directors." The answer of Frederick Grafflin and wife claims the stock as the wife's property. Af-

ter replication and testimony, the cause was heard, and a decree was passed for the surrender of the old certificate, and the issue of a new one to Woodside, as assignee. Appeal was prayed by the defendants.

It is shown beyond dispute that at the time of the execution of the deed of trust Frederick L. Grafflin owed the corporation more than \$45,000. It is contended, however, by the complainant, that this indebtedness had been discharged since that time by the debtor, and it is supposed that this fact is proved by the proceedings of the board of directors at a meeting held July 15, 1896. The portion of the minutes relied on is in the following words: "The chairman stated that Mr. F. L. Grafflin has made a satisfactory settlement of the amounts due by him to the John C. Grafflin Co., and that the entries will be made upon the books of the company at once." It cannot be held that this statement of the chairman established the fact conclusively, so that no evidence would be competent to contradict or explain it. We will examine the facts which preceded and followed it, and endeavor to ascertain in what way the settlement was made. The John C. Grafflin Company was incorporated after the death of Mr. Grafflin for the purpose of carrying on his business. All of the stock, with a very small exception, was divided among his children F. Dorsey Grafflin, Frederick L. Grafflin, and their two sisters, Miss Edith and Miss Emma. On the 19th day of June, 1896, an agreement was made between F. Dorsey Grafflin, Frederick L. Grafflin, Miss Emma, and Miss Edith Grafflin, in the following terms: "This agreement, made this 19th day of June, 1896, by Frank Dorsey Grafflin, Frederick L. Grafflin, Emma Clare Grafflin, and Edith Brice Grafflin, stockholders in the John C. Grafflin Company, witnesseth, that whereas, there have arisen differences between us as to the respective indebtedness and credits of said parties in and to said corporation, irrespective of their holdings of stock therein; and whereas, an examination has been made of the books of said company; and whereas, it has been agreed by and between the parties hereto, after the examination of the report of the expert, who has fully examined all the accounts of the said company, that the following amounts be, and the same are hereby, accepted by all of us as the proper and correct statement of the credits and indebtedness of the parties hereto in and to said company as of April 30th, 1896. Now, therefore, in consideration of the premises, we hereby agree that upon the books of said corporation the following entries shall be made, which shall be conclusive of all debts and credits of the parties hereto up to and inclusive of thirtieth day of April, 1896: It is agreed that \$49,523.04 is due said corporation by Frederick L. Grafflin, in addition to \$3,569.96, stipend account, with interest. It is agreed that said corporation owes to Frank Dorsey Grafflin the sum of \$3,240.96. It is agreed that said corporation owes Emma Clare

Grafflin the sum of \$14,636.40. It is agreed that said corporation owes to the said Edith Brice Grafflin the sum of \$16,226.98. And it is further agreed that the board of directors of said company shall pass a resolution ratifying this agreement." And it was signed and sealed by the parties thereto. Alexander Dodd, an expert accountant, testified that he made an adjustment of the credits and indebtedness of the Grafflin family in their relations to the John C. Grafflin Company; that Frederick Grafflin claimed that he had not been allowed any salary during the time he had been president of the company; that his brother and sisters agreed that he should be allowed a credit of \$2,000 during that time; that there were some errors in the accounts; items had been charged to him which he claimed ought to be charged to the estate; other items had been charged to Dorsey Grafflin, which ought to have been charged to Frederick; that he (Dodd) examined the accounts separately, and adjusted the differences; and was called upon to make the entries on the books of the corporation after they had all agreed on the different items. The accounts between the Grafflin brothers and sisters were adjusted up to April 30, 1896, which was the close of the corporation's fiscal year. Dodd testified that he was ordered to make the entries at a meeting of the directors, or of the company (he does not know which), and that he made the entries on the following day. It is sufficiently shown by the other testimony that this was the meeting of July 15th, already mentioned in this opinion. We think that there can be no doubt that the settlement mentioned in the proceedings of this meeting is the same as the statement of accounts by Dodd, and as the agreement contained in the paper signed and sealed by Dorsey and Frederick Grafflin and the Misses Grafflin. At the meeting of directors of July 15th the only persons present were Dorsey Grafflin and the Misses Grafflin. The object of the chairman's statement that a settlement had been made was to spread on the minutes, with the consent of the board of directors, an official declaration of the agreement which had been made by all the persons present, they and Frederick being the holders of all the stock of the corporation with the exception of 6 shares, and the whole number of shares being 1,800. The language of the chairman was careless and inaccurate, but nevertheless the facts of the transaction are clearly proved in the evidence. It is also shown positively in the testimony that Frederick had never paid what he owed to the corporation, and that he could not possibly have paid it. At the time of the execution of the deed of trust he owed the corporation more than \$45,000, and it is shown that ever since then his family have been supported by Dorsey Grafflin and Miss Edith. On the 26th of December, 1894, they addressed a letter to the president of the corporation, authorizing him to pay to Mrs. Frederick Grafflin, on account of her husband, a sum not exceeding \$50 a week,

and stating that they would be responsible for the amount if not paid by Frederick.

The appellee's counsel vigorously assailed the validity of article 10 of the corporation's by-laws already quoted. Section 55 of article 23 of the Code of Public General Laws provides that a corporation incorporated under the general laws of this state shall have power "to make by-laws not inconsistent with law for the management of its property, the regulation of its affairs, and for the transfer of its stocks, if any stock there be and for the forfeiture of stock not paid for, * * * and to provide for all other matters which may be regulated by by-laws." Section 56 prohibits the possession or exercise of any corporate powers, except such as are conferred by law, and such as shall be necessary to the exercise of the powers so acquired. The interpretation of grants of power similar to that made in section 55 has given rise to much difference of opinion in the courts. There are some circumstances in the present cause which it is important to consider in determining the operation of article 10 on the claim set up by the assignee of Frederick Grafflin. The answer states that the by-laws containing this article were adopted at the time of the organization of the corporation, in September, 1889. This allegation, of course, is not evidence of the fact stated. Testimony, however, while not specially directed to the date of the by-laws, shows that they were adopted about this time. On the 30th of September of the same year the certificate of incorporation was filed for record in the office of the clerk of the superior court of the city of Baltimore. The witness Rogers testified that he had been treasurer of the corporation ever since its formation. The by-laws prescribe the mode in which this officer shall be elected. It appears, then, that Rogers must have been elected after their adoption. Testifying in May, 1897, he stated that they had been under his charge for the last seven years, and he filed a copy of them with his testimony. He also testified that the certificate for 362½ shares of stock was delivered to Frederick Grafflin on the 18th day of April, 1891. At the time he received his certificate his title to the stock was subject to the operation of article 10 of the by-laws. He was one of the directors of the corporation, and he well knew that no stock could be issued, except under the limitations imposed by this article. With a full knowledge of this fact, he contracted a large debt to the corporation. Upon every principle of justice and fair dealing, it must be held that he pledged his stock for this debt, and that, as between him and the corporation, the pledge was as binding as if made in the most solemn form of hypothecation. When he made an assignment to Woodside for the benefit of his creditors, the assignee took the same title which he held, and no other or better. It is perfectly well settled that he is not invested with the rights of a bona fide holder for value without notice. Whatever claims, therefore, the corporation

could enforce against the stock in the hands of Frederick are available against it in the hands of Woodside, his assignee. His title must be subordinated to the prior and superior right of the corporation.

What we have said is decisive of the present controversy. But there is some public interest in the more general question whether article 10 can *proprio Marte* bind the title to the stock absolutely; that is to say, whether, under it, the corporation could acquire a right superior to the title of a bona fide purchaser for value without notice. On this point there is a difference of opinion among us. It is not proposed to discuss the subject, inasmuch as the majority of the court approve and adopt the statement of the law in 1 Thomp. Corp. § 1032. It is in these words: "According to the weight of authority, a by-law creating a lien on the shares of a member for debts due by him to the corporation is valid and binding, though not as against innocent purchasers for value." The judgment of the court is in accordance with the weight of authority as just stated. The decree must be reversed, and the bill dismissed, with costs above and below. Reversed and dismissed.

(86 Md. 633)

ROTMANSKEY et al. v. HEISS.

(Court of Appeals of Maryland. Jan. 4, 1898.)

DEEDS—CONSTRUCTION.

Where one conveys property in trust to his children, the grantor to have the income during life, "and, in case all or any of the said grantees or their issue shall survive the said grantor, then the property shall vest absolutely in the said grantees and their issue per stirpes, in equal shares, each of said grantees being a stirps," each of the surviving children will take an equal share, and, if any of them die before the grantor, leaving issue, such issue will take the share the parent would have taken.

Appeal from circuit court of Baltimore city.

Bill in equity by William S. Heiss against Sarah Rotmanskey and another. From a decree in favor of complainant, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

B. H. Hartogensis, for appellants. T. J. Schaumloeffel, for appellee.

BRYAN, J. In 1887, John M. Heiss, now deceased, executed a deed to his three children, John, Louisa, and William, which conveyed to them four leasehold lots of ground in the city of Baltimore. The conveyance was made upon the following trust: "To have and to hold the said four described parcels of ground and premises, with the rights and appurtenances aforesaid, unto the said

John C. C. Heiss, Louisa H. Heiss, and William S. Heiss, in trust that the said John M. Heiss may be allowed to collect and receive the rents, income, and profits issuing and payable out of said property, and to apply the same to his own use during the term of his natural life, and, in case all or any of the said grantees or their issue shall survive the said grantor, then the said property shall vest absolutely in the said grantees and their issue per stirpes in equal shares, each of said grantees being a stirps." William Heiss has acquired the interest of the two other grantees. He made a contract to sell three of these lots to Rotmanskey and his wife, and the only question before us is whether he has a good marketable title.

The deed was evidently the work of an unskillful draftsman. But we think that its meaning is quite evident. It was the intention of the grantor that such of his children as might survive him should each have an equal share of the property, and that, if any of them should die before him, and leave descendants surviving, the children so surviving should receive the share which the parent would have received if he had outlived the grantor. The words of the deed are: "If any of the grantees, or their issue, shall survive the said grantor, then the said property shall vest absolutely in the said grantees and their issue." That is to say, if the grantees should survive, they should have it; if the issue should survive, they shall have it. The words are not capable of being construed with literal grammatical strictness. Literally they would mean, if either the grantees or their issue should survive, the property should vest both in the grantees and their issue. Let us examine the words of the deed a little further. It is said that the property shall vest absolutely in "the grantees and their issue per stirpes, in equal shares, each of said grantees being a stirps." The inaccuracy and confusion of the language is quite remarkable. It is not conceivable how any property can be divided between persons and their issue per stirpes. The draftsman has adopted terms which are very often used in reference to real estate. A stirps is a root of inheritance; it designates the ancestor from whom the heir derives title; and it necessarily presupposes the death of the ancestor. When issue are said to take per stirpes, it is meant that the descendants of a deceased person take the property to which he was entitled, or would have been entitled if living. It is our duty to find out the meaning of the deed so far as it can be ascertained from the expressions contained in it, and we think that, in spite of the language, the meaning is clear. The court below decree *pro forma* that the title was merchantable, and we affirm the decree. Decree affirmed, with costs.

(86 Md. 681)

JARRELL et al. v. FELTON et al.

(Court of Appeals of Maryland. Jan. 5, 1898.)

EVIDENCE—ADMISSIONS AGAINST INTEREST.

In an action by creditors of a deceased resident of a foreign state to procure a sale of deceased's land in the state, admissions by an heir against his interest, are competent to establish the indebtedness to plaintiffs.

Appeal from circuit court, Queen Anne county.

Bill by William E. Jarrell and William Bolton against Martha A. Felton and others. From a decree dismissing the bill without prejudice, complainants appeal. Reversed without decision.

Argued before McSHERRY, O. J., and BRYAN, FOWLER, PAGE, BOYD, and BRISCOE, JJ.

Hope H. Barroll, for appellants. W. Scott Roberts, for appellees.

BRISCOE, J. This bill was filed in the circuit court for Queen Anne county by the appellants, William E. Jarrell and William Bolton, creditors of Jacob B. Felton, of the state of Pennsylvania, to procure a sale of Felton's real estate situate in Queen Anne county, for the payment of his debts. It alleges that Felton died seised of considerable real estate situate in Queen Anne county, which was devised by his will to the defendants; that he left no personal estate, and no letters of administration had ever been granted in Maryland; that there was an insufficiency of personal estate to pay the debts. And the prayer of the bill is for a sale of so much of the real estate as may be necessary for this purpose. The Pennsylvania executors and Felton's widow and children were made parties to the bill. The answer admits the allegations of the bill, but denies the indebtedness, and avers a sufficiency of personal estate in the state of Maryland with which the plaintiffs' claims can be paid. Subsequent to the filing of the bill, letters of administration were granted upon this estate in Maryland, but the administrator does not seem to have been made a party. The case was submitted to the court upon bill, answer, and proof, and the bill was dismissed without prejudice to the rights of the plaintiffs to bring a new suit, for the reason, as stated by the court in its opinion, that the insufficiency of the personal estate to pay the debts was not shown, and because the plaintiffs' claims, except the Jarrell note for \$336.09, were not established by the evidence in the case. There were a number of exceptions filed to the testimony taken at the trial, but we think there was ample evidence legally sufficient to establish an insufficiency of personal estate to pay the testator's debts. The witness William A. Felton testified that the indebtedness in Philadelphia amounted to \$10,000, and that the indebtedness on mortgages in Maryland amounted to \$4,000. The personal estate in Maryland is valued at about

\$600. While it is true that neither Jarrell nor Bolton, the plaintiffs, could testify, on their own offer, because Jacob B. Felton, the other party to the contract, was dead, yet admissions made by the heirs at law would be competent evidence to establish the indebtedness, against the interest of the heir at law making the admission, in the realty of the testator. We have carefully examined this case, and it does not appear to us that the substantial merits of this cause will be determined by either reversing or affirming the decree of the court below, but the purposes of justice will be served by permitting further proceedings in the case. It is clear that the proceedings should be amended by making the Maryland administrator a party to the cause, and by such further proceedings as may be deemed necessary for determining this cause upon its merits. The decree, then, will not be affirmed or reversed, but the case sent back, under the provisions of section 36, art. 5, of the Code, that the proceedings may be amended so as to conform to the views which have been expressed herein; the cost of this appeal to abide the result of the final decision of the case. Cause remanded for further proceedings.

(86 Md. 519)

SHUFELDT v. SHUFELDT.

(Court of Appeals of Maryland. Jan. 4, 1898.)

DIVORCE—GROUNDS—ADULTERY—SUFFICIENCY OF EVIDENCE.

In an action by a wife for divorce for adultery, the evidence showed that defendant was a retired army officer, and at the time of his marriage to plaintiff was a widower; that for four years prior and up to the time of the marriage a girl, then 23 years old, was housekeeper for defendant; that during the last three years of that time she and defendant occupied adjoining bedrooms, with a door between them; that early one morning a witness observed that the girl's bed had not been used, though she and defendant were both in the rooms during the night; that they were seen to kiss in the hall; that while she was sick at one time he assisted her in taking baths, and administered applications to her stomach; that she went away the day plaintiff came there as a wife; that within a month plaintiff became a burden to defendant, and within two months he forced her to leave him; that while he and plaintiff lived together he met said girl at a public square at night from 7 to 10 times, the first time within 5 days after his marriage; that he had once called at the back door of a house where she was engaged as a domestic, to see her; that he wrote her a letter showing great interest in her welfare; that she was never at his house while plaintiff was there; that soon after plaintiff left said girl was again installed as housekeeper; and that she and defendant then occupied the same rooms as before. One witness testified that she saw defendant and said girl go to a house of ill repute, while he and plaintiff lived together, three different times, but her evidence seemed improbable in some respects, and was contradicted in some particulars. Defendant and the girl denied adultery. *Held*, that plaintiff was entitled to a divorce.

Appeal from circuit court, Montgomery county, in equity.

Bill by Florence A. Shufeldt against Robert W. Shufeldt for divorce. From a decree dis-

missing the bill, complainant appeals. Reversed and remanded.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, PAGE, and BOYD, JJ.

John S. Webber, H. R. Webb, and Harris Lindsley, for appellant. Hattersly W. Talbott and C. W. Prettyman, for appellee.

BOYD, J. The original bill which was filed in this case, June 9, 1896, relied on cruelty and abandonment as the grounds for the divorce sought at that time, and prayed for an allowance of alimony. The court had passed an order requiring the appellee to pay alimony pendente lite and counsel fees, and had set the cause for hearing, when the appellant filed an amended bill, in which she charged the defendant with adultery. It is alleged that on the 11th and 13th days of September, 1895, he committed adultery with a certain woman named in the bill, whom we will speak of as the co-respondent, although not technically such, in a house on Thirteenth street, in the city of Washington; and that since the autumn of the year 1895, subsequently to the desertion of the complainant, the defendant has lived with this woman in his house in Montgomery county, Md., and in said house had on repeated occasions, the exact dates being unknown to the complainant, committed adultery with her. An answer was filed by the defendant denying the charges, and testimony was taken. The bill having been dismissed, this appeal was taken.

Under our view of the case, it will be unnecessary to refer to the charges of desertion and cruelty, excepting so far as they may reflect upon the other question. The complainant and defendant were married September 4, 1895, in the state of New York, and went at once to the home of the defendant, at Takoma, Montgomery county, in this state, arriving there the day after the marriage. She remained there until October 26th, when she went to her mother's, returning on November 5th to the house of the defendant, where she remained until the 7th inst., when she left, and has not been there since. There is some conflict between them as to the cause of her going away, but it seems apparent that she went to her mother's at the instance of the defendant, and finally left his house because she could not live there as a wife is entitled to live in her husband's home. In October, 1891, while the defendant's first wife was in an insane asylum, the co-respondent, who was then 19 years of age, went to live with the defendant as his housekeeper and a companion for his children, at the wages of \$12 per month. In April, 1892, the first wife died, leaving four children,—one son about 14 years of age, and another about 12, a daughter about 9, and another daughter not quite 2 years of age. When this young girl first went to the house of the defendant, she occupied a room in the third story, keeping the youngest child in her room, and the other daughter occupied a room on the same floor. The defendant's bedroom

was then on the second floor, adjoining his study. In the latter part of 1892 the house was altered by the addition of a tower, a kitchen, and servant's room over it. The co-respondent then moved downstairs into the room formerly occupied by the defendant as his bedroom, and he went into the front room, which he had used as his study. There is a door between these two rooms. The two girls were put in a room in rear of the co-respondent's room, but there was no door between them. The servant's room is still beyond that, being separated from it by a small hall. The plaintiff swore that the door between the rooms occupied by the defendant and the co-respondent would neither latch nor lock while she was there, and that the defendant told her it had not closed since he had put a furnace in the house, as the jambs were shrunken. He denied that, and said "the door was fixed in its jambs by the settling of the house, and, when the two rooms came to be used again, I forced the door open, and took it off its hinges, and planed it myself so it would shut. I lowered the keeper so the lock would go into it, and at present, and ever since Miss L. occupied that room, the door has been in perfect order, and locks on either side." However that may be, the fact remains that a year or so after this young girl went there she was brought downstairs, and occupied the room adjoining the defendant, with a door between them, while his two little girls were put in a room which did not communicate with either their father's or that of their "companion," as she says she was and is. The children were so small that it was deemed necessary to lock them in their room at night, but it was not thought necessary to have them with their companion, or where she could communicate with them at night, except by going out into the hall, and then to their door. The eldest son of the defendant died, the exact date of which is not given in the record, and the second son was sent away to school in 1893, when he was about 13 years of age, and remained away until July, 1895. A letter from that son to his grandfather shows that the defendant was keeping him away from home on the pretense that the woman in charge of his sisters said she would not stay if he returned. She denied on the stand that she had ever made any objection to his returning, but in point of fact, for some reason, he was kept away until the July before the marriage of the plaintiff and defendant.

These parties were so situated that it would be very difficult to establish by direct evidence many acts of intimacy or misconduct, as there was little opportunity for any one to witness them if they occurred. A servant who lived there in 1893 swore that she saw the defendant kiss this girl in the hall, and also that between 5 and 6 o'clock one Sunday morning a fire broke out in the neighborhood, and they were aroused, and all went out to see it. Afterwards she returned, went upstairs, and thus describes

what she saw: "I noticed that Dr. Shufeldt's bedroom was open, and the housekeeper's door was open, and I noticed that her bedroom had not been used that night, because she done during the day some sewing, and she put it there in the evening, and I saw it in the same place where she put it before." She said the sewing was on the bed Saturday evening, and Sunday morning it was at the same place where it had been put Saturday. Another servant, who lived there in June and July, 1894, swore she saw him kiss her one morning after coming from town. She also swore that she saw the defendant in the housekeeper's room late at night, in his nightclothes. The defendant denied that he was in there in his nightclothes, but says he had on a dressing gown; that she was very sick with typhoid fever and some complications, which lasted for several months. He is corroborated by Dr. Beeble as to the sickness, who testified that he had attended her in June and July, 1894; but the defendant, who was formerly a surgeon in the army, admits he had not practiced regularly since 1889, when he was retired from the army, and had never, during that time, attended any other case of typhoid fever. Of course, there would be no impropriety in a physician being in the bedroom of a patient, or applying remedies for her relief; but the proof in this case shows that the defendant, over and over again, gave this girl cold baths, carrying her into the bathroom for that purpose, and frequently applied cups to her abdomen, when no one else was present. If her condition required such treatment, as the testimony shows it probably did, it would seem to have been at least more delicate if he had either a nurse, or had called in the other servant when it was necessary to give her baths. It shows an intimacy that, to say the least, was very indelicate, under all the circumstances. The application of cups may have been required unexpectedly, and when no one was present that he could have called on; but there certainly could have been no necessity for him, a man then about 44 years of age, not in regular practice, to administer the baths, especially as the evidence shows that the servant woman did frequently wait on her.

What we have spoken of occurred prior to the marriage of the plaintiff, and is only relied on to show the relation between them at that time. Mrs. Shufeldt arrived at Takoma Park on September 5, 1895, and just before her arrival the co-respondent left the defendant's house. On the evening of the 9th of that month the defendant met this girl at the corner of Lafayette Square by appointment; she having, as she says, some presents for the children. On the 12th inst. he wrote her a letter, although he was suffering greatly at the time from a fall. In it were such expressions as, "Be a very good girl, and try hard to find a nice home." "As soon as I get to town again, I'll try and help

you secure a good home. You are a very, very deserving girl, and ought to have the best of one. If your pocketbook gets a little low, write the doctor, and I'll come in and help you, and try and cheer you up." "Believe me, Alphil, ever your old friend, the doctor," etc. The next day, according to his and her testimony, he went to the residence of Mr. Scharf, in Washington City, where she was then employed as a domestic, and went to the side door, and inquired for her, after asking permission of Mr. Scharf. He gave her a letter he had for her, and asked her if she could not walk up the street with him. She got permission from Mr. Scharf, whose wife was out, put on her hat, and joined him at the corner of Fourteenth and Princeton streets, and they walked about five blocks, to the junction of the car line he was to take home, where he says he left her. She says she met him again on the 20th of September, and admitted that she received six or seven letters from him, and saw him "about three times" during the month she was at Mr. Scharf's; that she always met him at the corner of Lafayette Square, opposite the Coscos Club, of which he is a member. He admitted he had seen her between seven and ten times while his wife was living with him. Thus, we find this retired officer of the army at the servant's entrance of a gentleman's house, and on a public square, meeting, generally in the evening, a girl who was then occupying the position of a domestic, and had gone to his house as such, although she became his housekeeper and a companion for his children. Not once during those two months did that girl go to her former home, where the little children she professed such devotion to were living. What possible excuse can a gentleman have for such frequent interviews with another woman, at such places, and under such circumstances, when he had a home within easy reach, where all matters of business could have been attended to? Is such conduct consistent with innocent relations between them, when we recall how they lived for the two or three years prior to that time? But although as late, as September 19, 1895, he wrote to his wife's mother that "Florence is a treasure of all treasures, and has done everything a woman could possibly do since her arrival, and I am quite sure we all appreciate her very generous efforts, her noble qualities, and, above all, her ready adaptation to her place as a true and loving mother; the children are as happy as happy can be with her,"—we find that soon their troubles began; just such troubles as must sooner or later come when a husband is unfaithful to his marriage vows, for there can be no surer means adopted to estrange husband and wife, and stifle all affections that ever existed between them, than the existence of improper relations, especially of a criminal nature, between one of them and another party. It is true they differed as to

some of the occurrences, and widely differed as to which of the two was the real cause of their separation, but there are some facts which conclusively show that this woman, whom he had married in September, was already, in October, a burden to him. That he wanted to get rid of her we cannot doubt, after reading the testimony. She left his house for her mother's on October 26, 1895, at his instance, and on October 28th he wrote her a letter, which is absolutely convincing as to his feelings and conduct towards her. Among other things, he said: "My health and mind are both slowly improving since your departure, and I feel the relief from the depression—the terrible depression—which comes over me whenever and wherever I am in your company. I cannot control it, and I am absolutely certain that I never can." And again: "So, Florence, whatever we do to rectify this fearful mistake, let it (for the sake of my tender little girls) be done quietly and swiftly. The solution, the only solution possible, of the unhappy affairs, has already been sufficiently discussed by us to obviate the necessity of writing about it." That letter, and the testimony of Mr. Tyler, lawyer and a cousin of the plaintiff, who went to Washington at her instance, after her return in November, as well as the evidence of the plaintiff herself, conclusively establish the fact that he forced the separation. She left his house, went to a friend in Washington, and within 10 days, while Mrs. Shufeldt was still in Washington, this girl, who for those 2 months had occupied the position of housemaid, etc., to others, is again the "housekeeper," practically the "lady of the house," for the defendant in place of his lawful wife. She again occupies the bedroom which communicates with that of the defendant, and from the middle of November, 1895, to the time she testified, in March, 1897, had full sway in that house which she never entered while the wife of the defendant was in it. What could have kept her from that house and the children, especially the one she says she tried to be a mother to, for those two months, but a consciousness of her own guilty relation with the husband of the woman that then presided over it? She had never seen the plaintiff. She had no reason to suppose she would not receive her kindly; in fact, she had suggested to her husband that this girl be given a home with them until she got a satisfactory one for herself. Possible it is, of course, that these people could live together and no improper relations exist, but in all human probability it could not be under such circumstances as are disclosed by the record. The presumption is against it. Although it was nothing to her discredit that she occupied the humble position of a domestic, it is a strong circumstance to be taken into the consideration of this case, when it is remembered that the defendant's social position was so different. He is ap-

parently a well-educated man, of literary attainments, and a retired officer of the army; and it would put the credulity of the most credulous to a severe test to ask them to believe that he would have placed himself in the compromising position that he occupied at Mr. Scharf's, and at other places of meeting with her, if there had not been moving him motives other than a mere desire to obtain for her a comfortable home, to deliver letters to her, or such other flimsy excuses as he has given.

The testimony of Mrs. Gladstone is sufficient to establish the charge in the bill, if it be accepted as true. She swore that she saw the defendant and this girl go into a house of ill repute in Washington on September 11th, 20th, and 22d. A good deal of testimony was taken to show that the co-respondent was not at Mrs. Scharf's on the 11th, and that she did not go there until the 13th. But that is a very immaterial error, as the evidence shows conclusively, and the defendant himself admits it, that he did call at Mrs. Scharf's on the 13th, and that this girl did join him, and go up Fourteenth street with him. We have already given his explanation of that. This witness swore that they got on a Fourteenth street car, went to Fifteenth street, where they got off, and then went to the house on Thirteenth street, which she said they entered; that she suspected her, and went, unobserved, on the same car they took, to Fifteenth street. It is true that the defendant has endeavored to show by Mrs. Scharf that this could not be, as the co-respondent was there when she returned from a drive; but it does not necessarily follow from that that she is mistaken, as Mrs. Scharf testified she was out driving between 4 and 6 o'clock on that evening, and Mrs. Gladstone and the girl both swore it was about 7 o'clock in the evening when defendant called. Mrs. Gladstone also swore that she saw them meet on the 20th inst., at an hotel,—the Raleigh, she believed it was called; that they went out, she followed them, and they again went into the same house on Thirteenth street. They admit that they met the evening of the 20th, but both indignantly deny that they went to the house on Thirteenth street then or at any other time. Some testimony was offered to impeach the character of this witness, but it falls far short of the requirements of the law, and, as offered, was totally inadmissible. It amounted to nothing more than the individual opinions of four or five persons of the veracity of Mrs. Gladstone. It is difficult to believe that a witness, without some motive being shown, would deliberately perjure herself, and make such statements, without some foundation for them. As to two of the occasions, she is corroborated to the extent that they were together, but her evidence does seem improbable in some respects, and is contradicted in some particulars. We would, therefore, hesitate to base our decision on it alone. But, if we leave it out of consideration altogether, we are still

driven to the conclusion that the relations existing between these two parties were not innocent.

It is not necessary, in cases of this character, that there be any one act proven which is conclusive of guilt, but the court must consider the opportunity for the commission of the act, the conduct of the parties, and all circumstances, and then determine, from the whole testimony, whether it should convince unprejudiced and cautious persons of the guilt of the parties. If it be true that prior to the marriage they were seen to kiss each other, as described by two witnesses, and that only one of the two beds in the communicating rooms used by them was occupied the night before the fire, those facts, together with others we have referred to, are evidence of such convincing character that there can be no escape from the conclusion that there was illicit intercourse between them at that time. If that be accepted as proven, which we must do, notwithstanding the denial of the defendant and the co-respondent, then their conduct during Mrs. Shufeldt's stay at Takoma, and this girl's return to the defendant's house, her occupancy of the bedroom adjoining his, and their conduct, so far as open to the public, must suggest what transpires in their privacy, and be conclusive of proof of a renewal of their guilty relations. It is admissible to prove the previous conduct of the parties, as reflecting upon the legal inferences that may be drawn as to what their conduct is at the time complained of, when opportunity is again offered. It is not necessary to prove the direct fact of adultery, as it is rare that parties are caught in the act. "In every case, almost, the fact is inferred from circumstances that lead to it, by fair inference, as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights." *Loveden v. Loveden*, 4 Eng. Ecc. 461. It may be that some of the acts of the parties would alone only amount to imprudence, but as Sir William Scott once said on that subject: "There may be, I must observe, imprudence of different kinds and degrees, and there are degrees of imprudence from which a court of justice will infer guilt." *Chambers v. Chambers*, Id. 448. In the same volume, in the case of *Burgess v. Burgess*, he said (on page 520): "In considering the legal effect of this evidence, I must proceed on the established doctrine of this court, as it has been laid down in various cases, that it is not necessary to prove the fact of adultery at any certain time or place, *modo et forma, loco et tempore*. It will be sufficient if the court can infer that conclusion, as it has often done between persons living in the same house, though not seen in the same bed or in any equivocal situation." In *Chambers v. Chambers*, *supra*, it was said: "Courts of justice must not be duped. They will judge of facts, as other men of discernment, exercising a sound and sober judgment on circumstances that are duly proved before them. That a young woman,

estranged from her husband, and a young officer, should be living together for months, and at different places, though under the flimsy disguise of separate beds, and that courts of justice should not put upon such intimacy the construction which everybody else would put upon it, would be monstrous." Apply those well-recognized principles to this case, and what other result than the one we have already intimated can be reached? Bear in mind the different social positions the defendant and co-respondent occupied; how ready, rather how eager, he was to obey her summons, which called him from the society of his bride; picture him, as he suffers great bodily pain while he writes to her, just one week after his wife arrives, or as he sent the woman he had promised to love just two weeks before to her country home in charge of his son, while he remains in the city to meet the then chambermaid on a public square of the city about 7 o'clock in the evening of September 20th, that being the hour testified to by her; or see him knocking at the servants' door of a gentleman's house, to see her, or, as he waits at the street corner, and escorts her five squares, according to her statement; then remember how soon he became estranged from his lawful wife, how often he avoided her society even at meals, how frequently he saw and wrote to the co-respondent; read his letter of October 28, 1895, to his wife; see her as she goes from the home it was his duty to provide her with, to make way for this servant girl, who now again occupies the place she had vacated a few weeks before; then recall the relations that existed before the marriage, and that, whatever they were, they can reasonably be presumed to still continue, as the same conditions for the most part do exist,—and what conclusion must all these facts, and the others in the record, lead us to? Is this plaintiff still required to remain the wife of the defendant because no one has proven the "direct fact of adultery," or is she to have the benefit of the presumption that arises from proof of such circumstances as are in this case? Judging from the record itself, without any knowledge of the parties, except what we find there, we are forced to the conclusion that the case of the plaintiff has been established, and she is entitled to a divorce *a vinculo matrimonii*. We cannot better conclude this opinion than by adopting the language (with only such changes as are necessary to correctly apply to the parties here) of the supreme court of Illinois in *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, that the "appellee and the co-respondent may be innocent of this serious charge, as contended by his able and faithful counsel, but courts must decide questions of fact from the evidence, and parties are only themselves to blame when, by their own conduct, they furnish the evidence of their own condemnation."

It is not necessary to discuss the exceptions to the testimony. We may say, however, that those of the defendant cannot be sustained, be-

cause they are too general. Some of the testimony of every witness excepted to was relevant and material, and therefore cannot be excluded by such general exceptions; unless it be the testimony of Mr. Munroe, which we have not taken into consideration, as we think it wholly immaterial what the entry in Mrs. Scharf's book was. What we have said as to the witnesses applies to the documentary evidence, as some of the letters are relevant and material, and hence all cannot be excluded.

The decree will be reversed, and the cause remanded, so that a decree granting a divorce a vinculo matrimonii to the complainant may be passed, and that the lower court may take such action as to alimony as the circumstances may justify. Decree reversed, and cause remanded, costs to be paid by the appellee.

(36 Md. 573.)

WEYBRIGHT v. POWELL et ux.

(Court of Appeals of Maryland. Jan. 4, 1898.)

WILLS—CONSTRUCTION—VESTED AND CONTINGENT ESTATES.

1. Testator gave his daughter certain real estate and bank stock, which he had devised to his wife for life, adding after each item "not to take effect until after the death of her mother." He also gave the daughter other property, and declared that, if she "dies without bodily heirs," said property should descend to his son and his heirs after the mother's death. *Held*, that the words "dies without bodily heirs" are within Acts 1862, c. 161 (Code, art. 93, § 817), providing that in any devise or bequest the words "die without issue" or "die without leaving issue" or similar language shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of issue, unless a contrary intention shall appear by the will; and the daughter takes a fee defeasible on her death without bodily heirs.

2. The residuary clause, declaring that after testator's debts and the legacies "are all paid," any money left should be divided between his son and daughter, did not indicate an intention on testator's part that the will and the act of 1862 should not apply to the bequest of personal property to the daughter.

Appeal from circuit court, Carroll county, in equity.

Bill by W. H. Powell and Emma S. Powell, his wife, against Samuel Weybright individually, and as executor of the estate of John Weybright, deceased. From a pro forma decree construing deceased's will, defendants appeal. Reversed in part, and affirmed in part, and the cause remanded.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

Francis N. Parke and H. M. Clabaugh, for appellants. Armstrong & Scott, John M. Roberts, Jas. A. C. Bond, D. N. Henning, and E. O. Weant, for appellees.

BOYD, J. This is an appeal from a pro forma decree construing the last will and testament of John Weybright, which was executed in 1887. The testator bequeathed to his wife \$1,000 in cash, and certain goods and

chattels absolutely, and 18 shares of stock in the First National Bank of Westminster, Md., for her use and benefit during her natural life. He also devised to her, for life, certain real estate. He left to his son, the appellant, \$4,000, subject to a deduction for money due by him; and to his daughter, the appellee, he gave the real estate and bank stock left to his wife, for life, adding after each item "not to take effect until after the death of her mother," and then gave her certain other real estate and personal property in addition to what was left to her mother for life. Following the devises and bequests to his daughter, who is now Emma S. Powell, is this clause: "Item. Nevertheless, the said Emma S. Weybright dies without bodily heirs, my will is then that said real estate and personal property thus described shall relapse to my son, Samuel Weybright, and his heirs, for their proper use and benefit, but not until her mother's death." He directed his executor, who was his son, to collect all debts due his estate, and pay his debts as soon as possible, and to sell his other property, real or personal, not disposed of by his will, to the best advantage, and apply the proceeds to the augmentation of his estate, and then added the following clause: "After my debts and expenses and all of the above legacies are all paid, should there be any money left of my estate, my will is that said money shall then be equally divided between my two children,—that is to say, Samuel Weybright and Emma S. Weybright,—share and share alike." The clause in the will that has given rise to this controversy is the one above. "Nevertheless the said Emma S. Weybright dies without bodily heirs," etc. An agreement in the record states that the widow departed this life in December, 1892, about a year after the death of the testator, and that the executor was allowed, in his first account passed in the estate, to retain the stock in the First National Bank of Westminster (which had been left to Mrs. Weybright for life, and then to Mrs. Powell), and the stock of the Westminster Saving Institution (which was left to Mrs. Powell), subject to the provisions of the will. It is admitted in the answer that Mrs. Powell had an infant child; but it is contended that the words "dies without bodily heirs" mean without bodily heirs living at the time of the death of Emma S. Powell, and that the executor is entitled to retain the property until her death. The court below, by the pro forma decree, adjudged and decreed that those words vested in Mrs. Powell an absolute fee-simple estate in the real estate left her, and that the personal property bequeathed to her was given to her absolutely, without any limitations or qualifications whatever, and that she is now entitled to the possession of the real and personal estate. Samuel Weybright, the executor, was directed to surrender and deliver to her all the personal property bequeathed to her. The question to be determined, therefore, is what effect, if any, that qualifying clause had upon the bequest and devises to

Mrs. Powell. There is nothing in the language of the devise and bequests themselves which in any wise limits or qualifies them, excepting in the first, second, and third items, which conclude with the statement "not to take effect until after the death of her mother," those items being applicable to the real estate and national bank stock given to Mrs. Weybright for life; and, but for this clause in the will now in controversy, the daughter's estate and interest in the property given her would now be absolute, her mother being dead.

It is conceded by the appellant that prior to Acts 1862, c. 161 (section 317, art. 93, Code), the words "dies without bodily heirs," without anything in the will to modify or restrict their meaning, would have meant an indefinite failure of issue, and the devise over would have depended upon too remote a contingency for the executory devise to be good; and hence Mrs. Powell would have taken a fee simple in the land devised to her, without any restriction, and an absolute estate in the personalty. But it is contended that the act of 1862 does apply and remove that difficulty. It provides that, "In any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or any other word which may import either a want or a failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will." That the words "dies without bodily heirs" are embraced within the act of 1862 would seem to no longer admit of doubt in this state. The expression "bodily heirs" means "heirs of the body." *Seeger v. Leakin*, 76 Md. 506, 25 Atl. 862. In *Mason v. Johnson*, 47 Md. 347, the term used was "shall die without an heir of the body lawfully begotten," and it was held to be covered by the act of 1862. In *Gambrill v. Forest Grove Lodge*, 66 Md. 17, 5 Atl. 548, and 10 Atl. 595, it was "die without heirs," and was held to be equivalent to "die without lineal descendants" or "issue," and covered by the statute. It is true that the expression used in that case was "die without heirs," but it was conceded that the word "heirs" was not used in its technical sense, but was equivalent to "lineal descendants" or "children." The dissenting opinion in that case proceeded on the theory that the word "heirs" was, in the connection in which it was used, equivalent to "heirs of the body" (as, indeed, the opinion of the majority practically did); and it was argued that, such being the case, the act of 1862 did not apply. But the majority of the court expressly held that it did, and that decision has not only not been disturbed, but it has been expressly recognized in later cases. *Lednum v. Cecil*, 76 Md. 149, 24 Atl. 452;

Hutchins v. Pearce, 80 Md. 434, 31 Atl. 501. In *Combs v. Combs*, 67 Md. 11, 8 Atl. 757, it was said the words "die without issue of his body lawfully begotten" must be construed, by virtue of the act of 1862, to mean a definite failure of issue, and to support the limitation over if other words in the will do not prevent that result. In *Gable v. Ellender*, 53 Md. 311, this court held that the word "heirs" meant "heirs of the body," or "issue of the body," in the connection in which it was there used. It is true, that case was decided independent of the act of 1862, as the will was executed prior to its passage, and that it only affected personal property; but it is an authority to show that, in determining whether there is a definite or indefinite failure of issue, there may be a good devise over, although the word "heirs" is used in the sense of "heirs of the body." There is much force in the argument that, if the limitation over had been upon Mrs. Powell's dying "without issue," it would in fact have only meant her dying without "heirs of her body," and therefore the words in the will are within the act of 1862, independent of adjudicated cases. To adopt that view, it is not necessary to say that the terms "issue" and "heirs of the body" are always interchangeable, for, of course, they are not; but "issue," when a word of limitation, means lineal descendants indefinitely, and hence heirs of the body. 11 Am. & Eng. Enc. Law, 869. And the question is whether "bodily heirs," as used in this will, are not "words which may import either a want or a failure of issue of any person in his lifetime, or at the time of his death." But it is useless to discuss this farther, for, as we have already said, we are of the opinion the question is settled in this state. If this will had used the term "dies without heirs," instead of "bodily heirs," then it would have been construed to mean "heirs of the body," because the devise over is to her brother and his heirs; and it would have been within the letter of the decision in 66 Md., and 5 Atl., supra, and would, under that decision, have been held a good devise over, because it was within the act of 1862; and hence it would seem to be idle to contend that there is a distinction between the two cases. We are therefore of opinion that the will must be construed to mean a want or failure of bodily heirs in the lifetime or at the death of Mrs. Powell, and not an indefinite failure. Under the authorities, she therefore takes a fee in the land, and the entire interest in the personalty, defeasible on the contingency of her dying without bodily heirs, and, upon the happening of that contingency, the ultimate devisee and legatee would take by way of executory devise and bequest. Courts have always been more ready to construe a limitation over upon dying without heirs or without issue to mean a dying without heirs or issue living at the death of the first legatee, in order to support a bequest of personal property over, than in the case of a devise of real estate. This will and the act of 1862, in terms, apply to both real and personal

property; and, as we are of the opinion they are sufficient to support the devise of the real property, they are necessarily so as to the bequest of the personal property.

We do not find anything in the will which indicates a contrary intention on the part of the testator. Great stress has been laid on the residuary clause above quoted. It is argued that, as the division cannot be made until after all legacies are paid, the testator evidently intended that the legacies to the daughter should be paid to her in her lifetime. But the answer to that is that Mrs. Powell takes an estate in fee in the realty, and the entire interest in the personalty, defeasible as to both realty and personalty upon the happening of the contingency specified,—her dying without bodily heirs. Placing the construction we do upon the language of the will, it is very similar in its effect to the case of *Devecmon v. Shaw*, 70 Md. 219, 16 Atl. 645. There the opinion of Judge Alvey, who sat below, was adopted by this court. The testator had devised real estate to his daughter generally, without words of limitation, and had also given her money, stocks, and bonds by general words of gift, without restriction or limitation; but he added this provision: "But, in case my said daughter should die without leaving any child or children at the time of her death, * * * then all the real estate and personal estate devised to my said daughter shall go to my sister," etc.; and the court held that the daughter took an estate in fee in the realty, and the entire interest in the personalty defeasible as to both, upon the happening of the contingencies provided for in the will.

Nor do we find anything in the will that would justify us in reaching the conclusion, contended for by the appellees, that the testator intended that the limitation over to the son should only take effect in the event of his daughter dying without heirs of her body, during the life estate of her mother. The words "but not until her mother's death" may have been intended to give, for life, to the mother, the benefit of all property given the daughter, in the event of the latter dying before her mother; or it may only have been intended to apply to the property given to the daughter, in which the mother had a life estate. It is not necessary for us to determine what it did mean, as the mother is now dead, further than to say we do not think it reflects upon the question before us.

Mrs. Powell is entitled to the possession of the property, both real and personal, and the executor therefore should have paid over to her the stock retained by him. The case of *Kuykendall v. Devecmon*, 78 Md. 537, 28 Atl. 412, shows under what circumstances a court of equity will interfere to protect the contingent interest. It is only upon application for security for its protection, and upon proof that the contingent interest will be put in jeopardy, that the court will interfere. The executor has no right to hold the property. It follows from what we have said that the *pro forma* decree

must be reversed in part, and affirmed in part, and the cause will be remanded, that a decree may be passed in accordance with this opinion. Decree reversed in part, and affirmed in part, and cause remanded; the costs to be paid out of the estate

(36 Md. 628)

McDANIEL v. McDANIEL.

(Court of Appeals of Maryland. Jan. 4, 1898.)

JUDGMENT—RES JUDICATA.

Since Code, art. 93, § 330, gives orphans' courts jurisdiction to decide caveats to wills, when issues involving the validity of a will have been passed upon by such a court its decision, unless reversed on appeal, is conclusive on all persons, whether actual parties or not.

Appeals from orphans' court of Baltimore city.

Petition and caveat by Jane E. McDaniel to the will of Mary E. McDaniel, deceased, to which Mary C. McDaniel filed an answer. From orders dismissing the petition and caveat, Jane E. McDaniel brings separate appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, PAGE, BOYD, and BRISCOE, JJ.

George G. Hooper, for appellant. H. H. Rouzer and Robert Biggs, for appellee.

BRISCOE, J. The record in this case contains two appeals, but, as they present the identical question, we will consider them together. It appears that on the 26th of April, 1897, Thomas A. McDaniel filed a petition and caveat to the will of his sister Mary E. McDaniel in the orphans' court of Baltimore city, asking that her will should not be admitted to probate—First, because at the time of the signing of the paper the deceased had not the requisite testamentary capacity; secondly, because the execution of the alleged will was procured by the undue influence and control of one Mary C. McDaniel; thirdly, because said will was not attested and executed according to law. On the 4th of May, 1897, Mary C. McDaniel, a sister, filed her answer to the petition and caveat, alleging that the will was executed in due form of law, and denying that the execution was procured by any undue influence exercised or practiced by her or any one else upon her sister, and that at the time of its execution the testatrix was of sound and disposing mind, memory, and understanding, and capable of executing a valid deed or contract. On the 9th of June, 1897, the case was submitted to the orphans' court, and, after a hearing of the evidence and an argument, decided in favor of the caveatees, and dismissed the petition and caveat. There was no appeal from the order thus passed, but on the same day Jane E. McDaniel, another sister of the testatrix, filed a petition and caveat to the same will; alleging practically the same grounds for caveat as had been passed upon by the court in the previous case, and asking that these issues be sent to a court of law for trial. This petition was duly answered by the appellee, and upon

hearing was dismissed; and from these two orders (one dismissing the petition and caveat, and the other admitting the will to probate) these appeals have been taken.

The question thus presented seems to us to be a narrow one, and one which has been substantially disposed of by previous decisions of this court. There can be no question that by section 330 of article 93 of the Code the orphans' courts of this state are given jurisdiction to decide caveats to wills; and when issues involving the validity of a will have been properly submitted, and fairly passed upon, the decision of the court as to those issues must be final and binding, unless reversed on appeal. It is true that either party to a caveat has the right to have issues sent to a court of law for trial; but when they submit to have the issues tried by the orphans' court, as was done in this case, the decision of that court upon the issues thus presented is binding and conclusive upon all persons, whether actual parties or not. In the case of *Warford v. Colvin*, 14 Md. 557, this court said that a case heard and determined by submission to the court is as effective as an estoppel as if passed upon by a jury. And to the like effect are the more recent cases of *Worthington v. Ridgely*, 52 Md. 335; *Worthington v. Gittings*, 56 Md. 545; *Tabler v. Tabler*, 62 Md. 613. It therefore follows that the orphans' court of Baltimore city committed no error in passing the orders appealed from, and they will be affirmed, with costs. Orders affirmed, with costs.

(87 Md. 141)

STERLING et al., Supervisors, v. BONES et al.
(Court of Appeals of Maryland. Jan. 5, 1898.)

ELECTIONS—NOMINATION BY CERTIFICATE—WITHDRAWAL—BALLOTS—DUTIES OF SUPERVISORS—MANDAMUS—PARTIES.

1. Where a regular certificate of nomination for county offices, signed by more than 200 voters, is presented to the supervisors of election of that county, it is their duty, under Acts 1896, c. 202, § 38, to place the names of the nominees on the ballot, and a so-called "withdrawal paper," thereafter presented, signed by the signers of the original certificate, should not be considered, as there is no provision in the election laws authorizing the supervisors to receive any withdrawal except one by a nominee.

2. That an order to show cause why a writ of mandamus should not be issued was directed against the supervisors of election individually, and not as a board, is not error, where they were proceeded against in their official capacity, and in that capacity appeared and filed their answers in court.

3. That a petition to compel the county supervisors of election to place certain persons' names on the official ballot as candidates does not show the qualification of such persons for their respective offices is immaterial, since the supervisors are not judges of the qualifications of candidates.

Appeal from circuit court, Somerset county.

On petition of Horatio W. Bones and others a writ of mandamus was issued, commanding John E. Sterling and S. Frank Whittington, as supervisors of election in Somers-

set county, to place the names of certain persons on the official ballot. From this order the supervisors appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, FOWLER, and ROBERTS, JJ.

T. S. Hodson, for appellants. Jos. E. Ellegood, for appellees.

McSHERRY, C. J. This case was argued on October 30, 1897, just five days prior to the election held on the 3d of last November. As the issue involved demanded an immediate decision, a per curiam opinion was filed the same day. Upon further reflection, we do not perceive that any useful purpose could be served by elaborating that opinion, and we accordingly, with a few unimportant verbal changes, confine ourselves to it as the final opinion in the case.

An order was signed by the circuit court for Somerset county directing a writ of mandamus to issue commanding the supervisors of election of that county to place the names of certain persons on the official ballot for various local offices. From that order this appeal was taken by the supervisors. We entertain no doubt about the correctness of the order. Under the pleadings there is but a single question involved. Certain persons were nominated for office in Somerset county by a certificate of nomination signed by more than 200 voters of that county. There is, and there can be, no dispute about the regularity of the certificate. It was presented in due time to the supervisors of election of Somerset county, and under section 38, c. 202, Acts 1896, the duty was at once imposed upon the supervisors to place the names of the candidates so nominated under such a certificate upon the official ballot. Instead of doing this, they permitted what is called a "withdrawal paper," signed by some 70-odd of the persons who had previously subscribed the nomination certificate, to be presented, and, upon discovering that this withdrawal paper had not been verified by affidavit, they allowed it to be taken away, and they themselves adjourned until the 22d of October,—the last day upon which nomination papers could be filed. When that day arrived, they again met, and a majority then determined that the candidates nominated by the certificate should not go on the official ballot, though the nomination certificate was in all respects regular, and conformed in every particular to the law. The sole ground upon which this action—this refusal—was based is given in the answer of the two supervisors who constitute the majority, and it is this: That because some 90 of the persons who had originally signed the certificate had subsequently requested the supervisors to erase their names therefrom, the nomination certificate was left without 200 signatures, and was, consequently, no nomination certificate at all; and that it

was no nomination certificate if there were less than 200 names upon it, because a nomination by certificate cannot be made, under the statute, by less than 200 signatures. The question thus presented is one of law, and not one of fact. In law the defense thus set up is wholly untenable. The act of 1896 contemplates no such proceeding as is here relied on. When the nomination certificate is filed, if it conforms to the requirements of the statute, the plain and obvious duty of the supervisors, under sections 49 and 50 of the same act of 1896, is "to cause to be printed on the ballot the name of every candidate whose name has been certified to or filed with" them; and there is no provision whatever authorizing them to receive, consider, or act on any withdrawal paper, except a withdrawal by a candidate who has been actually nominated. Certainly there is no authority for the supervisors, at the request of any one, to erase names from such a certificate. The practice followed in this case, if tolerated by the statute, or by any fair construction of the statute, would open the way to flagrant frauds upon the rights of candidates, and would convert the supervisors into a tribunal clothed with judicial functions, and this the act of assembly never designed to make them. If they have the right to withhold from the ballot the names of candidates selected by nomination certificates because some of the signers, subsequent to the filing of the paper with the supervisors, voluntarily withdraw, or are induced or prevailed on to withdraw their names from the certificate, there is no reason why they should not also have the authority to refuse to place on the ballot the names of candidates nominated by a convention or a primary, if, after the convention or the primary had been held, a majority of its members demand the withdrawal of the nominee. We find no more warrant in the statute for the position taken in the respondents' answer than we find for the other alternative just suggested. The contention is at war with the whole policy of the law, which intrusts to these ministerial officers no discretion, but imposes upon them an imperative duty to place on the ballot the names of the persons nominated in any one of the three modes designated in the act of 1896. There is no provision in the statute permitting a voter who has signed a nominating certificate to erase or withdraw his name therefrom after that certificate has been filed with the supervisors. If the legislature had intended that such an authority should be retained by the voter, it would undoubtedly have been stated in terms sufficiently clear to admit of no debate. The withdrawal paper was, consequently, a mere nullity. It should not have been received or considered. It in no way affected the right of the candidates nominated in and by the certificate to have their names go on the ballot.

But it was urged that the supervisors were not properly brought into court under the petition, because it is alleged the order to show cause went out against them individually, and not as a board. They were proceeded against in their official capacity. In that capacity they appeared and filed their answers, making defense, and the defense upon which they relied is the one we have already considered, and not the purely technical one now being discussed. They were actually in court, and cannot be heard to complain that they were not brought there properly.

Nor is there any force in the objection that the petition does not set forth the facts requisite under the constitution and the laws to qualify the candidates to hold the several offices for which they were nominated. The supervisors are not made judges of the qualifications of candidates. There are other tribunals established to pass upon those questions. The answers to the petition do not pretend to rely upon any want of qualifications as a reason for refusing to place the names of the candidates on the ballot.

The remaining technical objections interposed at the argument need not be considered, as they have all been substantially settled in former decisions by this court in other cases. Order affirmed, with costs.

(38 Md. 616)

SALISBURY PERMANENT BUILDING & LOAN ASS'N v. COMMISSIONERS OF WICOMICO COUNTY et al.

(Court of Appeals of Maryland, Jan. 4, 1898.)

BUILDING AND LOAN ASSOCIATIONS—TAXATION—RELIEF AT LAW.

1. A building and loan corporation formed under the general law, whose shares were exempt from taxation to the extent of its investment in mortgages, afterwards accepted an amendment to its charter by Acts 1892, c. 171, whereby its powers were greatly increased, and its field for investment more widely extended. *Held*, that shares invested in mortgages under such additional powers are subject to the laws regulating corporations formed by special act, and are not exempt from taxation.

2. The courts have power to give relief where exempt property is erroneously assessed for taxation.

Appeal from circuit court, Wicomico county.

Bill by the Salisbury Permanent Building & Loan Association against the county commissioners of Wicomico county and another. From a decree for defendants, complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

James E. Ellegood, for appellant. F. J. Rider, for appellees.

BRYAN, J. The Salisbury Permanent Building & Loan Association filed a bill in equity against the county commissioners of Wicomico

county and John W. Farlow, collector of taxes. The object of the suit was to obtain an injunction forbidding the collector to collect certain taxes according to the assessment and valuation made by the state board of appeals. A preliminary injunction was granted, but on the filing of the answer, it was dissolved and the bill dismissed. The complainant has appealed.

The corporation was duly formed and organized under the general laws of Maryland as a building and loan association in the year 1887. It is located in the town of Salisbury. The legislature, by the act of 1892 (chapter 171), amended its charter, and greatly enlarged its powers and corporate capacities. It was enacted by the fifth section, among other things, that its capital stock and accumulated funds should be invested in fee-simple real estate and leaseholds, mortgages, bonds, etc., or in such other property as the corporation might deem profitable. Other additional powers will be noticed hereafter. It is alleged in the bill of complaint, and not denied in the answer, that almost the entire amount of capital stock which has been subscribed has been invested in mortgages on real estate and leasehold property. It is contended that in assessing the taxable property of the corporation the amounts invested in these mortgages should be exempted. The state board of appeals valued the shares of stock of the corporation, and deducted from the aggregate sum so ascertained the value of its real estate, and also investments in mortgages to the amount of \$41,309.68. The assessment was made for the taxes due in 1895, and is, of course, not affected by the tax law passed at the last session of the legislature. The duties of the state tax commissioner are prescribed in section 132 of article 81, of the Code, and the sections immediately following. By section 132 he is required to assess for state purposes the shares of capital stock in all banks whose shares of capital stock are liable to assessment and taxation by the laws of the state. By section 141 he is required to deduct from the aggregate value of all the shares of capital stock of a corporation the assessed value of its real estate, and to divide the remainder by the number of shares of its capital stock. The quotient is declared to be the taxable value of each share for state purposes. By section 144 the commissioner's valuation and assessment are made final, unless an appeal shall be taken to the state board of appeals; and, if an appeal be taken, and both of the members of the board of appeals are of opinion that the decision of the commissioner is erroneous, they are required to change it, and then their decision is final. By section 133 it is made the duty of the corporation to pay to the public treasurer the state tax on the shares of stock. Nothing is said in these sections relating in any way to the mortgage debts which were deducted from the assessed value of the stock. But the question of their liability to taxation depends on other portions of the statute law. It is not affected by the fourth section of article 81,

which enumerates the exemptions from taxation, and comprises among them mortgages when the real or leasehold estate mortgaged is subject to taxation under the laws of this state, and also mortgages on property wholly within this state, and the mortgage debts thereby secured. This question was decided in *Emory v. State*, 41 Md. 38. The act of 1870 (chapter 394) contained a provision in these words: "Nor shall any tax of any kind be assessed, levied or collected on any mortgages of any kind, or on any mortgage [or] bill of sale, upon any property in this state." In construing this language it was said: "We think in passing this act the legislature designed only to exempt from assessment and taxation the mortgage debt as such. The words refer to the instrument,—the mortgage itself,—and declare that it shall not be subject to taxation. The effort here is to give such a construction to this law as will exempt from taxation the capital stock of all corporations to the extent that their loans may be secured by mortgage. The law subjecting the capital stock to taxation makes no such exemption, and, in our opinion, the act of 1870 does not apply to the case." 41 Md. 58. But section 99 of article 23 of the Code, amended by Act 1894, c. 321, does, in express terms, exempt from taxation the shares of building associations and of all corporations for the loan of money on mortgages of real or leasehold estate to the extent of their investments in such mortgages. The 103d section of the same article enacts that the eight sections immediately preceding shall apply to corporations which had already been formed or might thereafter be formed under the provisions of the article for the purpose of loaning money on real or personal property, etc. This court, in *Emory v. State*, above mentioned, decided that the original enactment of which this section is a reprint with slight changes (Laws 1868, c. 471, § 92) had reference only to corporations formed under the general corporation act, and excluded those incorporated by special acts of assembly. The shares of stock of this latter class of corporations are not, therefore, exempted from taxation by this section. The appellant, by virtue of its original charter, had the right to purchase or redeem shares of stock from its members, and to take from them mortgages to secure the payment of unpaid installments on the shares redeemed or purchased. The ninety-eighth and ninety-ninth sections of article 23 gave this right. Let us consider the effect of the act of 1892 upon the legal status of the appellant. An examination of the powers conferred by it will show that they are as essentially distinct from those originally possessed as if they had been conferred on another corporation. Besides the power to invest in mortgages which is given by the fifth section, many others were granted by the sixth section,—such as powers to receive personal property on storage or safe deposit; to purchase, invest in, and sell any kind of property, real, personal, or mixed; to

receive deposits of money, securities, and other property, and to accumulate the same, and to issue certificates of deposit therefor, allowing interest thereon; to loan money on promissory and negotiable notes, etc., and to borrow money, and to issue therefor the obligations of the association, with or without coupons attached. The mortgages in which the fifth section of the act authorized the appellant to invest its capital stock and accumulated funds were of an entirely different nature from those in which the appellant was authorized to make investments by the ninety-ninth section of article 23, and which are there declared to be exempt from taxation. The difference between these two descriptions of securities is well known to the profession. It is clearly stated in *Robertson's Case*, in 10 Md. 397, and has been considered in many subsequent cases. The appellant acquired a new character by the amendment of its charter. It takes its new powers as if it were another and different corporation. Its new character was conferred by a special act of assembly, and it must enjoy and exercise the powers thus acquired under the limitations which belong to corporations created in this way. It acquired rights, immunities, and exemptions by its incorporation under the general law. These are in no wise impaired or diminished. But they cannot, by any known mode of construction, be extended to embrace transactions of a dissimilar character which are not authorized by the law from which it derives its origin. In so far as this appellant derived its corporate powers and capacities under the amendment, it must be regarded as a corporation formed under a special act of assembly, and in respect to transactions authorized only by special act it is not entitled to be regarded as if formed under the general law. It was organized under the general law. It afterwards accepted the amendment, and reorganized under the charter thus changed. It certainly cannot be said that the body corporate thus created was formed under the general law. Its capacities are conferred partly by the general law and partly by a special act of assembly, and therefore it may more correctly be said to be formed partly under one law and partly under the other. Its powers, privileges, and exemptions must depend on the particular law which conferred them, and must be governed by its provisions. Each corporate privilege must be referred distinctly to the source from which it was derived, and its extent and character be thereby determined. For instance, the capacities granted by the act of 1892 are not limited or controlled by anything enacted in the general incorporation law; and therefore, in exercising and enjoying these capacities, this appellant must be adjudged by the rules applicable to corporations formed under a special statute. Neither can it in these particulars be entitled to the rights or subjected to the responsibilities of a corporation formed under the general law.

The result of what we have said is that, inasmuch as the investments in mortgages of the

description mentioned in sections 98 and 99 are not taxable, the amount represented by them in the stock of the corporation must be deducted from the assessed value of the stock, but that mortgages not of this character ought not to be deducted. It would be more satisfactory if the board, in its assessment and valuation, had stated more specifically the nature of the mortgages which it has deducted from the assessed value of the stock. It does not appear, however, that it has failed to deduct any of the mortgages which we have said are exempt; nor does the bill of complaint allege that it made any such omission. We cannot assume, in the absence of allegation and proof, that it has committed an error in this particular. The law confides to the state board of appeals the duty of ascertaining the taxable value of the stock in question. It cannot make this computation without determining the value of the exempt mortgages. The statute makes the decision of the board final on the question of valuation. We could not, therefore, revise its judgment in this particular, even if there were proof that a mistake had been made. But it is in our power to give relief in any case where the board should erroneously assess for taxation property which is exempt by law, because the statute has not made their decision final on this question. The rule on this question is well summarized in *U. S. v. Arredondo*, 6 Pet. 729. It was there said: "It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (*Marbury v. Madison*, 1 Cranch, 170, 171), legislative (*McCulloch v. Maryland*, 4 Wheat. 423; *Satterlee v. Matthewson*, 2 Pet. 412; *Bank v. Billings*, 4 Pet. 563), judicial (*Perkins v. Fairfield*, 11 Mass. 227; *McPherson v. Cunniff*, 11 Serg. & R. 429, adopted in *Thompson v. Toltie*, 2 Pet. 107, 168), or special (*Roger v. Bradshaw*, 20 Johns. 739, 740; 2 Dow. 521), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law." We have in this state always agreed with the principles here stated, and we are not aware that they have ever been seriously questioned in any court. The decision in *Consumers' Ice Co. v. State* (Md.) 33 Atl. 427, in no way conflicts with anything which we have said. It will be seen that the assessment and valuation must stand. The decree below is affirmed, with costs. Decree affirmed, with costs.

(87 Md. 196)

O'KEEFE v. IRVINGTON REAL-ESTATE CO. OF BALTIMORE CITY.

(Court of Appeals of Maryland. Feb. 10, 1898.)

EQUITY—DECREE—RES JUDICATA—MISTAKE—REFORMATION OF INSTRUMENTS—ABATEMENT.

1. A decree dismissing a bill without prejudice does not render the matters therein decided res judicata.

2. In a proper case, equity will, in the same proceeding, reform and specifically enforce a contract.

3. The fact that an experimental plat had fixed the grade of a street does not show that such grade had been established.

4. A bill to reform and specifically enforce a contract, and an action for damages for breach thereof up to the time the bill was filed, may be maintained at the same time.

Appeal from circuit court of Baltimore city.

Action by the Irvington Real-Estate Company of Baltimore City against Edward V. O'Keefe to reform and specifically enforce a contract. Decree for plaintiff. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PEARCE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Richard Bernard & Son, for appellant. Gans & Haman and Benzinger & Calwell, for appellee.

PEARCE, J. The bill in this case was filed by the appellee for the purpose of having a contract for the sale of land reformed, and, when so reformed, of having it specifically enforced, which was accordingly decreed. In addition to a mass of testimony taken after answer filed, there is incorporated in this record the entire proceedings in a previous case between these same parties, covering 58 pages, in which specific performance of the same contract, without asking reformation thereof, was sought, and in which the bill was dismissed without prejudice. The substantial question presented in this case is one of fact, to be determined by the testimony; but the fifth paragraph of appellant's answer sets up the former decree, under the plea of res adjudicata, and this defense must be considered at the outset. If the decree in the former case had not contained the qualifying words "without prejudice," the question presented would have been whether an absolute decree dismissing a bill for specific performance only, as the contract then appeared on its face, would be a bar to the present bill, asking that the contract be reformed, and, when so reformed, be specifically enforced; but upon that question, which is not presented here, we intimate no opinion. We think, however, it is clear that not only the effect, but the purpose, of the words "without prejudice," in a decree, is to prevent defendants from availing themselves of the defense of res adjudicata in any subsequent proceeding by the same plaintiffs on the same subject-matter. This is the doctrine of Story, Eq. Pl. § 793; of 1 Daniel, Ch.

Prac. p. 659; and of Beach, Eq. Prac. §§ 643, 644. In *Stewart v. Stone*, 3 Gill & J. 514, the court said: "The complainant ought not to be precluded, if he has equity, from again presenting himself before the court; and, to afford him that opportunity, we think it necessary to reverse the decree, which should have been without prejudice." And in *McDowell v. Goldsmith*, 24 Md. 229, in treating of a former decree, it was said: "If the chancellor intended to leave the complainant's rights and claims unaffected by the decree, he should have dismissed the bill without prejudice." This is the law laid down in decisions from other states and tribunals. *Lang v. Waring*, 25 Ala. 625; *Fish v. Parker*, 14 La. Ann. 491; *Thurston v. Thurston*, 99 Mass. 89; *English v. English*, 27 N. J. Eq. 579; *Wanzer v. Self*, 80 Ohio St. 378; *Magill v. Trust Co.*, 81 Ky. 130; *Gunn v. Peakes* (Minn.) 30 N. W. 466; *Northern Pac. R. Co. v. St. Paul R. Co.*, 47 Fed. 536; *Durant v. Essex Co.*, 7 Wall. 107; *Lyon v. Manufacturing Co.*, 125 U. S. 698, 8 Sup. Ct. 1024. In some of the cases cited above, the reasons for so holding are stated with much force and clearness. In *Wanzer v. Self*, supra, it was said: "To give it the effect of a judgment on the merits would not only create that which does not exist, but might work a great wrong to the plaintiff, by finally determining a just cause of action, which the court did not adjudge against him, and by misleading him to acquiesce in a judgment from which he would have appealed, had it been regarded as conclusive." In *Northern Pac. R. Co. v. St. Paul R. Co.*, supra, it was held that "a decree without prejudice is like a nonsuit in a common-law action," and that "when the qualifying words 'without prejudice' are used, although the relief sought in a new bill, and the matter therein, is precisely the same as in the original bill, the parties will be permitted to litigate their claims as if no previous suit had been instituted." The latest Maryland case upon this question is that of *Martin v. Evans*, 85 Md. 8, 36 Atl. 258, where the decree dismissing a former bill was absolute, and where counsel sought to seize upon certain expressions in the opinion of the court in the former case to show that the decree was based upon want of jurisdiction, and was therefore no bar to a subsequent suit; but the court held that the decree, and not the opinion, was the instrument through which the court acts, and must be taken (as expressed in *Gunn v. Peakes*, supra) "for what it is, and not for what it ought to have been." The question in *Martin v. Evans* was in fact the converse of the case before us, but the principle is the same, and the court cited with approval several of the cases cited above. Both upon reason and authority, we think it is clear the former decree cannot be effectively pleaded in this case.

This contention being determined, we come to the main question in the case. Where a

contract respecting real estate is in writing, and is in its nature and circumstances unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it. *Brewer v. Herbert*, 30 Md. 302; *Popplein v. Foley*, 61 Md. 381. And it is well settled that equity will in the same proceeding reform and specifically enforce a contract. *Moale v. Buchanan*, 11 Gill & J. 314; *Popplein v. Foley*, supra. It only remains, therefore, for us to determine whether mutual mistake has intervened, as alleged, and, if so, whether the contract, when reformed, is such as equity will enforce. While the governing rule is one of great strictness, and is never applied except where the case is made out to the entire satisfaction of the court, yet, where the proof meets this requirement fully, the power invoked is one of the most salutary exercised by a court of equity. *Stiles v. Willis*, 66 Md. 557, 8 Atl. 353.

We agree with the court below in the opinion expressed by it, that "the weight of evidence is overwhelming that no grade whatever had been established at the time of the signing of the contract, on the 16th of October"; and, if this be true, the language of the contract, "and as to grades established by Mr. Mavin, surveyor," read in the light of surrounding circumstances, and of the condition of the property which was the subject of the contract at that date, would be intelligible only by assuming that the words "to-be," or the word "hereafter," was inadvertently omitted before the word "established." That this must, under all the proof in the case, have been the true understanding of both parties, would seem to be conclusive, when it is remembered that the same clause of the contract shows that the sale was made "subject to the opening of streets and alleys as contemplated by the company,"—not as determined or established, but as contemplated; that is, as hereafter to be determined or established. The testimony shows that at the date of the contract only Augusta and Euclid avenues were located, on which the lot in question abutted; and, as to streets and alleys not then located, the grade must necessarily depend upon the character of the ground where the location was made. The meaning of the phrase "to establish," in this connection, is not obscure or uncertain. *Bouvier* defines it, "To settle firmly." In *Smith v. Forrest*, 49 N. H. 237, where the question was as to the establishment of a corner boundary, the court said it meant "to settle certainly and fix permanently." In *Succession of Weigel*, 18 La. Ann. 49, the word "established," as used in the Civil Code, was defined as "permanently settled and confirmed." In regard to the mutual understanding of the parties as to whether any grade was established at the date of the contract, there are but two witnesses,—John F. Williams, the president of the appellee, and the appellant, Edward V. O'Keefe. Williams testifies: That Augusta avenue had been located

and opened by a former owner, Mr. Ditty, and that Euclid avenue, or Avenue A, and an avenue north of that, were determined on, but that, beyond this, nothing was determined as to the development of the property. That he and O'Keefe discussed the matter. That he told O'Keefe the grades were not established; that the surveyor, Mr. Mavin, was then engaged in the work; and that, in making the contract of sale, the company was to be left in control, with power to open streets and establish grades as it saw fit, consistent with the general scope of the ground. That O'Keefe clearly understood and agreed to this. And that as to all these facts the recollection of the witness was clear and distinct, and, if the contract did not express this agreement, it was the fault of witness in its preparation. This testimony was not shaken upon cross-examination. O'Keefe, upon his examination in chief, said it was not stated or agreed, in his conversation with Williams, that no grades were established; that he was referred, as to grades, to Mr. Mavin, by Mr. Cone, the general manager; that he understood from Mr. Mavin that the deepest cut would be six or seven feet, in front of his house; and that he would not have bought the property if he had known what the grade would be. Upon cross-examination, however, it was plain that the plat shown him by Mr. Mavin was an experimental plat only, not establishing any grade. O'Keefe says, if there was conversation between Williams and himself as to the company being left in control of the grades, that he did not hear it; that "he paid no attention to that." He admits that Mr. Mavin never told him he had established a grade, and that he would have signed any contract they might have drawn. Both Mr. Cone and Mr. Mavin flatly contradict Mr. O'Keefe. Mr. Cone testifies emphatically that no grade had been established on October 16th; that Mr. Mavin had made an experimental plat, showing a grade of about seven or eight feet, which he (Cone) hoped would answer, but which Mr. Mavin, from the beginning, contended would not do, and which was never established. Mr. Mavin testifies that but one grade was ever established on Euclid avenue, and that not until some time in November, and all the testimony tends to substantiate this fact. We think the proof of mutual mistake, as alleged in the bill, is clear and conclusive, and that the duty to reform the contract is equally clear. When so reformed, the contract lacks none of the elements of certainty, reasonableness, and mutuality. The appellee has done all that devolves upon it thereunder, but the appellant has not complied with its terms, and its enforcement against him must follow as a matter of course. But the appellant suggests that, as there was a pending suit to recover a portion of the interest embraced in the decree in this cause, the bill cannot be maintained, on the ground that the appellee cannot prosecute this claim in two courts at the same time; and for this position he relies upon *Hall v. Claggett*, 2 Md. Ch. 156. In that case the bill was filed

to reform and correct a settlement closed by a note upon which suit had been brought at law, judgment rendered, and fieri facias was outstanding. The chancellor, in the course of his opinion, said: "I hardly think he can be allowed to prosecute the claim in two courts at the same time, recovering one portion thereof at law, and one in equity; but my opinion against the relief sought rests upon the ground that the mistake is neither admitted nor proved." The bill in the present case was filed May 29, 1897; and the pending suit at law, which was for \$204 only, and which is alleged, but not shown, to be for interest, was commenced October 28, 1895. It may well be conceded that upon breach of a contract to convey land the person injured may sue either for specific performance or damages, and that if he proceed for both, on the whole case, the court will, on application, compel him to elect. But one may nevertheless be entitled to damages for violation of the contract up to the time of beginning the suit, with specific performance for the future. Wat. Spec. Perf. § 6. And interest is given by way of damages. In *Fennings v. Humphery*, 4 Beav. 1, defendant agreed to grant a lease of a vault to plaintiff, and also to erect a crane, etc., within a given time; and, defendant having made default, plaintiff sued for specific performance, and pending that suit also commenced an action at law for damages for nonperformance of the agreement. Defendant obtained an order requiring plaintiff to elect in which court he would proceed, and the case was heard on motion to discharge this order. The master of the rolls said: "As by the bill she asks for a specific performance of the agreement, if in the action at law she sought compensation for its entire nonperformance, the two proceedings would be inconsistent with each other. The plaintiff would in one court be suing for the thing itself, and in the other for compensation in lieu of the thing itself." But the action is brought only for such damages as were sustained up to the time when the action was brought. Under these circumstances, I think the action and the suit are not prosecuted for one and the same thing, and I am therefore of opinion that the order requiring election should not have been made. But in this case the appellant has not asked that the appellee be put to its election, and, not having done so, the question is not before the court. Should any effort be made to further prosecute the suit at law, the decree in this case, when affirmed, can be pleaded in bar. We can see no ground upon which the relief granted the appellee below can be denied, and we shall therefore affirm the decree. Decree affirmed.

(30 R. I. 380)

In re *PIERCE et al.*

(Supreme Court of Rhode Island. Feb. 2, 1898.)

WILLS—AFTER-ACQUIRED REALTY.

Under Gen. St. c. 171, § 1, providing that a testator's intention to devise land acquired after

the execution of his will must appear by the express terms thereof, after-acquired land will not pass under a devise of the residue of testator's estate, after payment of his debts and funeral expenses.

Petition by Caroline F. Pierce and others for an opinion concerning her rights as devisee under the will of Albert C. Pierce, deceased.

Geo. T. Brown and David S. Baker, for petitioners.

MATTESON, C. J. We do not see that this case can be distinguished from *Church v. Manufacturing Co.*, 14 R. I. 539. The statute in force at the date of the execution of the will of Albert C. Pierce, February 10, 1877, was Gen. St. R. I. c. 171, § 1. It provided that a testator might devise land acquired subsequent to the execution of his will, but that his intention to devise it must appear by the express terms of the will. As the intention must appear by express terms, it is not enough that it may appear by implication or inference. It is contended in behalf of Caroline F. Pierce that, because the will directs the payment of the testator's debts and funeral expenses, and these could not be paid until after his decease, and the gift was of the residue of the estate, it was clearly his intention that his widow should take the after-acquired real estate. Perhaps it may have been the testator's intention. Such intention, however, if it appears, does not appear in express terms, but merely by implication or inference. The will of Irene Butler, considered in *Church v. Manufacturing Co.*, contained the same direction as to payment of debts and funeral expenses and a residuary gift; but it was held, nevertheless, that, as the intention did not appear in express terms, it did not pass after-acquired realty. In this case, as in that, the residuary clause is merely that which the testator would have used had his intention been to pass only the real estate which he owned at the execution of the will. And see *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824. Our opinion is that Caroline F. Pierce, the widow of the testator, did not take any title to the two parcels of land mentioned in the petition, acquired by the testator subsequent to the execution of the will, under the devise to her in the will.

(68 N. H. 478)

HART v. HART.

(Supreme Court of New Hampshire. Belknap. July 31, 1896.)

DIVORCE—EXTREME CRUELTY—WHAT CONSTITUTES.

A libel by a husband for divorce for alleged cruelty, where no evidence of personal violence was shown, and there was no allegation or evidence that the wife's conduct injured his health or endangered his reason, or that he had any fear of injury by her, will be dismissed.

Exceptions from Belknap county.

Libel by William Hart against Emma L. Hart for divorce. There was a judgment dis-

missing the libel, and libelant excepts. Exceptions overruled.

Facts found by the court: The libel alleges personal violence; but, so far as this charge was sustained by the libelant's evidence, it appeared to have been condoned. The libel also alleged, and the libelant's evidence tended to prove, that the libelee has so conducted and behaved herself towards the libelant as wholly to destroy his marital peace and happiness; that on divers occasions she has addressed him in language both offensive and vexatious, and the use of such language towards him has been her customary and habitual practice; that at different times she has accused him of marital infidelity, and of having contracted and imparted to her a certain venereal disease, which accusations she knew were false and without foundation; that she has told him she hated him, that she wished he was dead, that she would poison him, and that she would take his life. There was no allegation or evidence that the conduct complained of injured the libelant's health or endangered his reason, or that he had any fear of injury from the libelee. At the close of the libelant's evidence, the court, on motion of the libelee, dismissed the libel on the ground that the facts proved did not, as matter of law, constitute extreme cruelty, and the libelant excepted.

Jewell, Stone, Owen & Martin, for libelant. Jewett & Plummer, for libelee.

BLODGETT, J. To constitute extreme cruelty, as a cause of divorce, there must be, as matter of law, direct bodily injury, either actual, or threatened and reasonably to be apprehended. *Robinson v. Robinson*, 68 N. H. 600, 607, 608, 23 Atl. 362. In the present case these essentials are wholly lacking. The only act of personal violence alleged is found to have been condoned, and there is no reasonable apprehension of its repetition, or of any other bodily harm. In a word, giving the most favorable construction for the plaintiff, such of the acts and conduct complained of as are open to consideration fall far short of establishing legal cruelty, within the statutory meaning as construed in this jurisdiction. *Robinson v. Robinson*, 68 N. H. 607, 608, 23 Atl. 362; *Jenness v. Jenness*, 60 N. H. 211. Exceptions overruled.

PARSONS, J., did not sit. The others concurred.

(68 N. H. 433)

BRYANT et al. v. TOWN OF TAMWORTH.
(Supreme Court of New Hampshire. Carroll.
July 31, 1896.)

HIGHWAYS—LAYING OUT—IMPEACHMENT—USER—REMEDY FOR OBSTRUCTION.

1. A highway, though the laying out thereof subject to gates be illegal, may become a legal

one by user; Pub. St. c. 67, § 1, recognizing as legal highways those used as such for 20 years.

2. Though the maintenance of gates on a highway be illegal, the remedy is not by petition for their removal, but by indictment; Pub. St. c. 77, § 8, declaring that, if any structure is erected or continued on a highway so as to obstruct it, it shall be deemed a public nuisance, and the person erecting or continuing it shall be fined.

3. The laying out of a highway by the selectmen, in the exercise of a judicial power conferred on them by the statute of highways, cannot be impeached or set aside in a collateral proceeding, like a petition to the county commissioners.

Exceptions from Carroll county.

Petition by Edward E. Bryant and others to the county commissioners for the removal of gates and bars across a highway in Tamworth, laid out by the selectmen, subject to gates, June 5, 1852. The petition alleges that the gates and bars have become unnecessary and inexpedient, and that the selectmen, upon petition to remove the gates, have refused to remove them, and requests the commissioners to lay out the road as an open highway. Upon due notice and hearing, the commissioners reported that they are of the opinion that there is no occasion to remove the gates, and that the prayer of the petition should not be granted. The plaintiffs introduced a copy of the record of the laying out, in 1852, and claimed that it was illegal as to the laying out of the highway subject to gates, and that the commissioners should order them removed. The court ordered judgment on the report of the commissioners, and the plaintiffs excepted. Exceptions overruled.

J. H. Hobbs, for plaintiffs. S. W. Abbott, for defendant.

BLODGETT, J. The plaintiffs have no case. If the laying out of the highway in 1852, subject to gates, was legal, no error appears in the finding of the commissioners that there is no occasion to remove the gates; and, if the laying out was illegal, the finding is in no wise affected, because the highway long since became a legal one by user. Pub. St. c. 67, § 1. But, suppose it did not, the plaintiffs stand no better; for if it be assumed, in accordance with their contention, that the imposition of the gates was illegal, and that their maintenance has since been and now is an unlawful obstruction to the travel on the highway, their remedy is by indictment. Pub. St. c. 77, § 8. Then, again, it is beyond doubt or dispute that the laying out of the highway by the selectmen, in the exercise of a judicial power conferred on them by the statute of highways, cannot be impeached or set aside in this collateral proceeding. *Spaulding v. Groton*, 68 N. H. 77, 44 Atl. 88, and authorities cited. Exceptions overruled.

CLARK, J., did not sit. The others concurred.

(68 N. H. 407)

WALKER v. WALKER.

(Supreme Court of New Hampshire. Merrimack. March 13, 1896.)

CONSTRUCTION OF WILL—STOCK DIVIDEND—PRINCIPAL—INCOME—REMAINDER-MAN—LIFE TENANT—PRESUMPTIONS.

1. Where an executor held stock in a corporation which increased its shares, and became thereby entitled to subscribe for shares of the new stock, which right he sold, *held*, that the proceeds of the sale were principal, and belong to the remainder-man of the estate; the income only was payable to the life tenant.

2. Money derived from a sale of a portion of corporate property of a gas company, in which the executor held shares, was not a division of the earnings of such company, and belongs to the remainder-man of the estate, and not to life-tenant, entitled to income.

3. Dividends received by the executor from a railroad corporation are presumed to be dividends from the earnings, income, and profits of the capital invested, and therefore belong to the life tenant of the estate.

Bill in equity by the executor of the will of William Walker against Mary E. Walker, praying the direction of the court as to the construction of the will. By the will the use and income of all the testator's property was given to the defendant for life. After the payment of certain legacies, the residue was given to the plaintiff. Among the assets of the estate were shares in several corporations which have increased their stock, giving their shareholders the right to subscribe for shares of the new stock in proportion to their holdings. The executor has sold these rights and received payment therefor. The Concord Gas-light Company sold its electric plant, and out of the proceeds paid a dividend to its stockholders, the executor receiving \$200 on shares belonging to the estate. The Manchester & Lawrence Railroad paid an extra dividend of 50 per cent. to its stockholders out of money received in settlement of a suit against another railroad, the executor receiving \$3,500 on shares belonging to the estate. The defendant claims that these amounts are income, and belong to her as tenant for life. Case discharged.

Sargent & Hollis, for plaintiff. W. L. Foster, for defendant.

BLODGETT, J. 1. The rights to take stock in the several corporations belong to the plaintiff as remainder-man (Pierce v. Burroughs, 58 N. H. 302, 303; Law v. Alley, 67 N. H. 93, 29 Atl. 636), and the income only is payable to the defendant as life tenant.

2. The \$200 received from the gaslight company, May 4, 1893, and derived from a sale of a portion of its corporate property which was purchased and represented by the issue of capital stock, was not, either in form or in substance, a division of earnings, but a division of so much of the capital of the corporation, and as such goes to the remainder-man (Wheeler v. Perry, 18 N. H. 306, 314), subject to the payment of interest thereon to the tenant for life.

3. Dividends being rightfully payable only

from the profits of a corporation, the 50 per cent. dividend upon the 70 shares of M. & L. R. R. stock is, in the absence of evidence to the contrary, presumptively to be regarded as a dividend from the earnings, income, and profits of the capital invested in the M. & L. road, and therefore as belonging to the defendant as life tenant. Lord v. Brooks, 52 N. H. 72, 78, 79; 2 Perry, Trusts, (3d Ed.) §§ 544, 545, and notes; 5 Am. & Eng. Enc. Law, 725-727, 729. Case discharged. All concurred.

(68 N. H. 563)

MARTIN v. LIVINGSTON.

(Supreme Court of New Hampshire. Hillsboro. July 31, 1896.)

APPEAL—QUESTIONS OF FACT.

Whether defendant had assumed a personal liability, as claimed by plaintiff, and whether the circumstances were such as should have put plaintiff on inquiry, as contended by the defendant, are questions of fact, to be determined by the decision of the trial term.

Assumpsit by Van Buren Martin against Daniel Livingston. Case discharged.

Assumpsit for beef, apples, and veal sold and delivered. Facts found by the court: The goods were brought from Goffstown, and sold by the plaintiff at a store in Manchester carried on by the defendant's wife, for whom the defendant was a clerk, without pecuniary interest in the stock. The defendant was in the store, and made the bargain with the plaintiff for the goods; the plaintiff supposing that the defendant was carrying on the business of the store. There was no sign up, or anything to indicate who was the proprietor. The plaintiff had some talk with the defendant about his property, and knew that he was building a house, and trusted him for the goods sold, supposing him to be solvent. The defendant made no representation, by words or actions, designed or intended to indicate ownership of the store; but the plaintiff supposed he was the owner, and traded with him as such. The plaintiff testified that he asked the defendant to pay for the goods, and he promised to do so; but the defendant denied any such conversation, and there was no preponderance of evidence either way. There was no evidence that the plaintiff called on any one else to pay for them. Since this action was brought, the defendant's wife has been declared insolvent, and an assignee of her estate appointed, who received from the sheriff \$117 from the sale of the goods in the store. If the plaintiff can maintain this action, he is entitled to a verdict for \$71.87, with interest from the date of his writ. Otherwise the defendant is entitled to a verdict.

Burnham, Brown & Warren, for plaintiff. A. C. Osgood, for defendant.

BLODGETT, J. This case is not properly here. The facts reported simply afford competent evidence tending to prove or disprove the issue between the parties, and which might

justify a verdict either way. In such a case "the court will not assume to pronounce upon the weight of evidence." *Pray v. Burbank*, 11 N. H. 290; *Howard v. Farr*, 18 N. H. 457, 459; *Jones v. Proprietors*, 62 N. H. 489; *Whitcher v. Dexter*, 61 N. H. 91, 92. Whether the defendant assumed a personal liability, as claimed by the plaintiff, and whether the circumstances attending the transaction were such as should have put the plaintiff on inquiry, as contended by the defendant, are questions of fact, which must be settled at the trial term. *Kaulback v. Churchill*, 59 N. H. 296, 297; *Janvrin v. Janvrin*, 60 N. H. 169, 172, 173; *Preston v. Cutter*, 64 N. H. 468, 469, 13 Atl. 874. Case discharged.

CLARK, J., did not sit. The others concurred.

(67 N. H. 532)

DANE v. DANE.

(Supreme Court of New Hampshire. Hillsboro. March 16, 1894.)

APPEAL BOND—SUFFICIENCY.

A bond with one sufficient surety is a compliance with Pub. St. c. 200, § 3, requiring one who appeals from a decree of a judge of probate to give bond "with sufficient sureties" to prosecute his appeal.

Action by George P. Dane against William P. Dane, executor. From the decree of the judge of probate, plaintiff appealed. Defendant moves to dismiss the appeal because the appeal bond has but one surety. Motion denied.

H. B. Atherton, for plaintiff. G. B. French, for defendant.

WALLACE, J. The statute requires that a person appealing from a decree of a judge of probate "shall give bond with sufficient sureties to prosecute his appeal with effect, and to pay all such costs as shall be awarded against him by the supreme court." Pub. St. c. 200, § 3. The Provincial Statutes of 1718 required a person appealing from a decree of a judge of probate to give "bond in a reasonable sum with sufficient security to prosecute his appeal with effect," and the word "security" was continued in the statutes till 1789. *Prov. Laws* (Ed. 1726) pp. 101, 103; *Prov. Laws* (Ed. 1761) pp. 20, 22. The act of February 3, 1797, required a "bond in a reasonable sum with sufficient sureties to prosecute said appeal with effect"; and the words "with sufficient sureties" were used in the statute in this connection until the general statute of probate appeals, approved July 2, 1822. *Laws* 1822, c. 83, § 1; *Laws* (Ed. 1789) p. 76; *Laws* (Ed. 1792) p. 215; *Laws* (Ed. 1805) p. 166; *Laws* (Ed. 1815) p. 202. This act required a bond "with sufficient surety," and this language continued to be used until 1867, when the General Statutes went into effect. *Laws* (Ed. 1830) p. 373; *Rev. St. c. 170*, § 3; *Gen. St. c. 188*, § 3. In the General Statutes the words "with

sufficient surety" were changed to "with sufficient sureties," and have remained in the statutes in that form ever since. The report of the commissioners who compiled the General Statutes shows that this change was regarded by them as a merely verbal one. *Gen. St. c. 188*, § 3; *Com'r's' Rep* 1867, c. 189, § 3; *Gen. Laws*, c. 207, § 3; *Pub. St. c. 200*, § 3. These changes are verbal, made at the different revisions of the statute laws, and do not indicate any intention on the part of the legislature to alter the meaning. The purpose of the statute is to compel the appellant to furnish sufficient security for the payment of such costs as may be awarded against him. This purpose may as well be accomplished by a bond with one surety who is sufficient, as with more. And, in the light of the rule provided in our statutes for their construction (*Pub. St. c. 2*, § 3), that "words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular," and in view of the history of the legislation on this subject, it is plain that furnishing a bond with one sufficient surety is a compliance with the statute. *Farnam v. Davis*, 32 N. H. 302, 308. If the bond is insufficient, the court will at any time, upon application, order the appellant to furnish additional security. *Holt v. Rice*, 51 N. H. 370. It need not now be considered whether, consistently with this result, the decision in *Gilman v. Bartlett*, 20 N. H. 168, can be sustained. Motion denied.

CHASE, J., did not sit. The others concurred.

(68 N. H. 598)

HALLETT et al. v. PARKER.

(Supreme Court of New Hampshire. Grafton. July 31, 1896.)

EQUITY — SPECIFIC PERFORMANCE — RESULTING TRUSTS — EASEMENTS — PAROL LICENSE — TENANCY IN COMMON.

1. Under a bond for a deed, on certain terms therein expressed, the obligees were entitled, on compliance with the conditions thereof, to a specific performance of such contract on the part of the obligor, though the buildings thereon had been in the meantime destroyed by fire.

2. Where the vendor and vendees of certain real estate, under a bond for a deed, effected an exchange of a portion thereof for certain other real estate which was conveyed to the vendor in consideration thereof, in pursuance of a parol agreement that it should be subject to the same terms as the land described in such bond, such transfer created a resulting trust in favor of the vendees.

3. A parol license for an easement in land belonging to tenants in common, by one of the cotenants, did not bind the other, who had no knowledge thereof.

4. A parol license for an easement was revoked by the death of the licensor.

Bill in equity by H. K. Hallett, administrator of the estate of George Farr, and Eliza C. Farr, praying that the defendant be required to convey to the plaintiffs the Oak Hill House. February 7, 1894, the property, consisting of an hotel and land, subject to

incumbrances, belonged to George Farr and the estate of John B. Jarvis, deceased. On that day it was sold at public auction, and bought by the defendant, to whom a deed was delivered. On the same day (March 7th) he delivered to George Farr and Eliza C. Farr, his wife, his bond, in which he agreed to convey the property to them, by a good and sufficient deed, upon the payment by them within two years from February 7th of the amount of the incumbrances and interest, and permit them to occupy the premises for their own use in the meanwhile. In the spring of 1894, and after March 7th, Parker and Farr and wife conveyed to the Littleton village district a small portion of the land described in the bond, and the district, in consideration thereof, conveyed land to Parker by Farr's direction. It was verbally agreed by Parker and Farr that the last-named land should be held by Parker subject to the same terms as the land described in the bond. In the fall of 1894, before any of the incumbrances were paid, Parker put down an aqueduct from his springs on the hill back of the Oak Hill House to his greenhouse. A tap was inserted in the aqueduct on the premises, by means of which a pipe could be attached and water conducted to the hotel. He laid the aqueduct, with the verbal assent of George Farr, across a portion of the Oak Hill House estate and the land conveyed to him by the Littleton village district. To the laying of the aqueduct on this estate Eliza C. Farr did not assent, and she had no knowledge of it until long afterwards. March 10, 1895, George Farr died. March 25, 1895, the Oak Hill House was burned, and afterwards the personal property was sold by the administrator. With the avails and the insurance money on the house, all incumbrances were fully paid within the two years. No part of the premiums for the insurance was paid by Mrs. Farr. The personal property belonging to George Farr's estate is not sufficient to pay the debts. The defendant is willing and offers to convey the property to the plaintiffs, subject to a right on his part to maintain upon it his aqueduct. The plaintiffs decline to accept such a conveyance, and claim that they are entitled to the land free from the incumbrance of the aqueduct. The defendant sets up the statute of frauds against the plaintiffs' claim to a conveyance of the land derived from the Littleton village district. The plaintiffs had leave to amend their bill by setting up a title to that land under a resulting trust.

Bingham, Mitchell & Batchellor and Drew, Jordan & Buckley, for plaintiffs. George H. Bingham, for defendant.

WALLACE, J. The defendant claims (1) that the plaintiffs are not entitled to the specific performance of the agreement to convey the land in question; and (2) that, if the

plaintiffs are entitled to a conveyance of the land, they must take it subject to a right on his part to maintain upon it his aqueduct. It is urged by the defendant that, by the loss of the buildings by fire, which falls on him (Wilson v. Clark, 60 N. H. 352), he is released from the performance of his contract. But if the plaintiffs perform the condition of the bond, and pay the defendant all they agreed to pay him, the loss falls on them, and not on the defendant. To the facts in this case Wilson v. Clark has no application. The plaintiffs do not ask to be relieved from the contract because the buildings are destroyed, but they are willing to take the premises as they are, and have fully performed their part of the contract. It is not equitable that the defendant should be relieved from the contract on this account, after he has received and retained the benefits of it. When the vendor is unable to fully perform his contract on account of "any deficiency in the title, quantity, quality, description, or other matters touching the estate," although his inability may be a good ground for relieving the vendee from the performance of his contract, it furnishes no reason for relieving the vendor, where the vendee elects to proceed with the purchase. He has the right to the specific enforcement of the contract, so far as it can be performed. 1 Story, Eq. Jur. (12th Ed.) § 779; 3 Pom. Eq. Jur. (2d Ed.) § 1405, note. Both parties have waived all objection on this ground to the carrying out of the contract, the plaintiffs by paying the full amount due, and the defendant by accepting the same. By the acceptance of the price of the premises according to the contract, the defendant is estopped from raising this objection to the specific performance of the contract. If the plaintiffs cannot compel the specific performance of the defendant's agreement to hold the land received in exchange from the district subject to the same terms as the bond, because it was not in writing, yet the land received from the district being purchased by land of the plaintiffs given in exchange for it,—in other words, being paid for by them,—a resulting trust arises in their favor, and the defendant holds the land in trust for them. Page v. Page, 8 N. H. 187; Tebbetts v. Tilton, 31 N. H. 273, 283; Osgood v. Eaton, 62 N. H. 512; Converse v. Noyes, 66 N. H. 571, 22 Atl. 556. The plaintiffs are entitled, under the agreement, to a conveyance from the defendant of the land described in the bond, and, under the resulting trust, to a conveyance of the land received in exchange from the district.

The defendant claims that his conveyance should be subject to a right to maintain his aqueduct. The fact that the title of the land was in the defendant when the aqueduct was laid does not give him a legal right to maintain it there as against the plaintiffs. His title was subject to the plaintiffs' right to a conveyance of the premises without restriction or incumbrance. He could not sub-

ject the estate to any servitude or incumbrance in favor of himself or others against the plaintiffs. George and Eliza Farr were tenants in common of the interest in the land arising from the defendant's agreement to convey to them upon the payment of the stipulated sum within a certain time. George verbally assented to the laying of the aqueduct by the defendant over the premises, but Eliza did not assent or in fact know of the aqueduct until after it was laid. This amounted to a parol license to lay the aqueduct on the premises so far as George was concerned, but not as regards the interest of Eliza. The license was revocable at any time by the licensor, and was in fact revoked by George's death. *Blaisdell v. Railroad Co.*, 51 N. H. 483. Such a license has not the force of a conveyance of a permanent easement in real estate, as it must necessarily have if the defendant's position is upheld. *Houston v. Laffee*, 46 N. H. 505; *Batchelder v. Hibbard*, 58 N. H. 289. The plaintiffs are entitled to a conveyance free from the incumbrance of the aqueduct. Case discharged.

CARPENTER, J., did not sit. The others concurred.

(68 N. H. 173)

McKEEN v. CONVERSE et al.

(Supreme Court of New Hampshire. Coos.
July 27, 1894.)

TROVER—IMPOUNDING PROCEEDINGS—BURDEN OF PROOF—COLLATERAL ATTACK.

1. One in lawful possession, as agister, of cattle when impounded, may sue for their conversion.

2. Cattle may be impounded, though, when taken for that purpose, they are trespassing on one's grass land, while, when first discovered, they were in his outfield.

3. One who has the burden of proving the illegality of an impounding fails so far as concerns the showing that notice was not given the owners within 24 hours, the finding being merely that the referee is unable to find affirmatively that it was within 24 hours.

4. A justice of the peace having jurisdiction of the subject-matter of impounding proceedings, the judgment therein cannot be collaterally attacked, though the order of sale has been made without the required notice to the owners of the animals, and though the justice, in violation of Gen. St. c. 214, § 13, acted as counsel for the defendants.

Trover by James W. McKeen against Asaph Converse and another for five cows, with a count in case, alleging that the plaintiff, as agister, had in his custody five cows, which the defendants wrongfully took from him under pretense of impounding. Plea, general issue, and a special plea of justification under impounding proceedings. Facts found by a referee.

In 1890 the plaintiff owned a pasture and the defendants tillage land, in Northumberland, between which was a lot owned by S. The fence between the pasture and the S. lot was defective, and there was none between that

lot and the tillage. The plaintiff pastured five cows, belonging one each to Atkinson and four others, who were to drive them to and from the pasture each morning and night. About two acres of the defendants' land was cultivated in oats. September 18, 1890, the defendants found the cows doing damage in their oat field (one of which, before being taken, strayed into their adjoining grass land), and thereupon took them for the purpose of impounding them, and early in the forenoon drove them to and put them in the barnyard of A. A. Potter, in Northumberland, who, they understood, was the poundkeeper. April 5, 1890, the selectmen of Northumberland, in writing, appointed Potter poundkeeper, and in the appointment declared that his barnyard should be "the pound for said town." He took the oath of office, and his appointment, with the certificate of the oath thereon, was recorded by the town clerk on the same day, but "he received no papers or commission from the selectmen," nor did it appear that he furnished any bond as poundkeeper. A sufficient notice of the impounding, signed by the defendants, was left with Potter the same evening. A copy of this paper was, on the same day, delivered to or left at the abode of each cow owner except Atkinson, to whom it was read on that day, and at whose abode it was left in the forenoon of the next day; but the referee is unable, on the conflicting evidence, to find affirmatively that it was so left within 24 hours from the time of impounding. September 30th, after the appraisers' report of damages was made, the defendants presented to E. F. Bucknam, a justice of the peace, a petition praying "for an order for the sale or appraisal of said five cows." On the same day, without notice to the cattle owners or the plaintiff, Bucknam issued an order addressed to the defendants, directing them to sell the cows at public auction, "giving notice and selling as sheriffs may do upon execution." By virtue of this order, and upon due notice, the defendants sold the cows October 3d at public auction, to the plaintiff. The application for the sale was made September 30, 1890. In the order of sale, made the same day, the justice states that "upon the foregoing application I notified the parties to appear at the dwelling house of Asaph Converse on Friday, the 26th day of September, instant, at ten o'clock in the forenoon, then and there to be heard upon said application." The justice acted as adviser and counsel for the defendants in all the proceedings, made for them all the writings, and attended the sale in their interest.

Ladd & Fletcher, for plaintiff. H. Heywood, for defendants.

WALLACE, J. The plaintiff, being in the lawful possession of the cattle when impounded, as agister, had a special or qualified property in them, which entitled him to maintain an action for any injury to his possession, or any conversion of the property. 2 Bl. Comm. 453;

2 Kent, Comm. 585; Story, Ballm. § 443; Woodman v. Nottingham, 49 N. H. 387, 393. It does not follow that one of the cows was not damage feasant, within the meaning of the statute, because although, when discovered by the landowner, she was in the oat field, yet, at the precise moment of time when taken by the defendants for the purpose of impounding, she had strayed from the oatfield, and was then in the adjoining grass land of the defendants. According to the somewhat strict construction that has been put upon the matter of damage feasant, a person cannot impound animals for damages done to his land on any other occasion than the particular one on which they were taken by him to be impounded, and he cannot impound them for this damage after they have left the land. When, however, at the precise moment when taken, they are trespassing on a different part of the land from what they were when first discovered, both reason and the authorities warrant the holding that they are damage feasant, and liable to be impounded for the trespass. Holden v. Torrey, 31 Vt. 690; Clement v. Milner, 3 Esp. 95; Co. Litt. 161a; 12 Moore, 160, 161.

In regard to the question of whether the defendants gave due notice of the impounding within 24 hours to the owners or person having these cows in charge, in accordance with section 4 of chapter 143 of the General Laws, although no notice was given to the plaintiff, who had the animals in charge, yet it was claimed that notice was given to the owners. The referee finds that written notice was delivered to or left at the abode of each of the owners of the cows, except Atkinson, on the day of impounding, and was read to Atkinson on that day, and that on the forenoon of the next day it was left at Atkinson's house; but he is unable to find affirmatively that it was within 24 hours of the time of the impounding. The plaintiff alleges his right of possession of the property, and asks for damages on account of the wrongful detention and conversion of the cattle by the defendants. The burden is on the plaintiff to prove affirmatively his case, and to show that the taking and detention of the cattle by the defendants was not lawful, and the burden does not shift from the plaintiff to the defendants, but remains on the plaintiff throughout the case. Hovey v. Grant, 55 N. H. 497; Bank v. Getchell, 59 N. H. 281; Tenney v. Knowlton, 60 N. H. 572; Tabor v. Judd, 62 N. H. 288; Eastman v. Gould, 63 N. H. 89. Although the referee was unable to find that this notice of the impounding was given to the owners within 24 hours, he has not found that it was not so given, and therefore the plaintiff has failed to make out this particular objection to the legality of the impounding proceedings. The justice, in the order of sale made on the application of the parties impounding, recited that he made the order after notice to the owners of the cows. But it appears from the records that the notice which the justice says he gave to the owners of the cattle could not have been given, be-

cause the order of sale, which was dated September 30th,—on the same date as that of the application,—recites that the parties were notified to appear on the 26th of September, four days before the application was made. It further appears from the report of the referee that the justice acted as adviser and counsel of the defendants in all the proceedings. A justice is prohibited by statute from acting as counsel, and from aiding or assisting either party in a cause pending, or which may come before him. Gen. Laws, c. 214, § 13. Although the justice could not lawfully act, and the order of sale was improperly granted, because no notice was served on the owners of the animals, yet his judgment is not, for these reasons, void. A judgment rendered in this state against a citizen of this state by a court or by any tribunal, for the revision of whose proceedings a direct process by appeal or otherwise is provided, cannot be impeached collaterally by a party except for want of jurisdiction of the subject-matter. Kimball v. Fish, 39 N. H. 110, 117; Moses v. Julian, 45 N. H. 52; State v. Shattuck, Id. 205; Stearns v. Wright, 51 N. H. 600; Horn v. Rochester, 62 N. H. 347; Blanchard v. Webster, Id. 467; Eastman v. Dearborn, 63 N. H. 364; Fowler v. Brooks, 64 N. H. 423, 13 Atl. 417; State v. Kennedy, 65 N. H. 247, 23 Atl. 431; Hendrick v. Whittemore, 105 Mass. 23; McCormick v. Fiske, 138 Mass. 379; Kittredge v. Martin, 141 Mass. 410, 6 N. E. 95. "If the validity of a judgment could be contested collaterally, a second judgment, avoiding the effect of the first without a direct and express annulment of it, would be subject to a like attack, and there would be no termination of litigation by a final decision." State v. Kennedy, 65 N. H. 247, 23 Atl. 431. The plaintiff had a complete remedy by certiorari or other process to review these proceedings. The justice having jurisdiction of the subject-matter, neither his improper conduct by reason of his acting as counsel for the defendants, nor the want of notice, renders the judgment void, so that it can be attacked collaterally. Judgment for the defendants.

CARPENTER, J., did not sit. The others concurred.

(63 N. H. 400)

ISABELLE v. LE BLANC et al.

(Supreme Court of New Hampshire. Merri-
mack. March 13, 1896.)

TRUSTEE PROCESS—PROPERTY SUBJECT.

Under Pub. St. c. 245, § 19, making credits of defendant subject to trustee process, subject to certain exemptions, which do not include judgments, and also independent of statute, a judgment debt may be the subject of trustee process, where it is possible to protect the trustee from double liability.

Foreign attachment by Edmund Isabelle against one Le Blanc and another and Charles Clements, trustee. Defendants recovered judgment against the trustee, upon

which execution issued and remains unsatisfied. Shortly after such judgment and execution, the present suit was commenced. On motion to discharge trustee. Denied.

N. B. Hale and Albin, Martin & Howe, for plaintiff. W. D. Hardy, for defendant Charles Clements.

BLODGETT, J. Subject to certain exemptions enumerated in the statute, "if * * * it appears that the trustee had in his possession at the time of the service of the writ upon him, or at any time after, any money, goods, chattels, rights or credits of the defendant, * * * he shall be chargeable therefor." Pub. St. c. 245, § 19. Within the statutory intention, credit is the correlative of debt, so that the existence of a debt on the one part constitutes a credit on the other (Cush. Trustee Process, § 58); and, the general rule in the construction of "credits" therefore being that where one person is indebted to another he may be charged as the trustee of his creditor (Id. § 146), the nature of the indebtedness, barring exemptions, is immaterial (*Trombly v. Clark*, 13 Vt. 118, 123), and the statute is applicable to judgment debts as well as others, both in reason and equity. Indeed, such debts, being liquidated and certain, with ordinarily nothing remaining for controversy as to their existence, character, or amount, would seem to be peculiarly within the operation of the statute. But, however this may be, it was obviously the intention of the legislature, by not including them in the list of exemptions, to subject judgment debts to trustee process. Not only must this be so held upon familiar principles of statutory construction, but it is equally in accordance with the policy of our laws in respect to debtors and creditors, which have "ever required that all the property of a debtor, not exempted by law from execution, should be subject to the just claims of his creditors, and that every facility consistent with the reasonable immunities of debtors should be afforded to subject such property to legal process." And, furthermore, the very decided weight of American authority is that a judgment debt may be trusted. *Gager v. Watson*, 11 Conn. 168; *Trombly v. Clark*, 13 Vt. 118, 123; *Luton v. Hopkn*, 72 Ill. 81; *Osborn v. Cloud*, 23 Iowa, 104; *Phillips v. Germon*, 43 Iowa, 101; *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17; *Calhoun v. Whittle*, 56 Ala. 138; *Halbert v. Stinson*, 6 Blackf. 398; *Keith v. Harris*, 9 Kan. 386; *Belcher v. Grubb*, 4 Har. (Del.) 461; *Webster v. McDaniel*, 2 Del. Ch. 297. It is true that the contrary was held in *Thayer v. Pratt*, 47 N. H. 470 (decided in 1867), as well as in some preceding cases there cited, upon the ground "that, as the statute provided for the discharge of the trustee for so much money as may be taken from him under this process, and empowers him to give the matter in evidence in a suit by the prin-

cipal debtor, it must have been contemplated that he would be charged as trustee only in cases where an opportunity remained to set up such matter in discharge; otherwise he might be twice charged for the same debt, which could not have been intended." But if, under the statutes and the practice then existing, this conclusion may have been warranted, it has no place under the present statute (first enacted in 1876), which expressly authorizes the supreme court to make and establish such rules and orders as may be necessary and convenient to carry into effect the various provisions of the chapter relating to trustee process. Pub. St. c. 245, § 44. And no more has it any place under the expansive and more liberal practice which now obtains, and which is constantly developing with new ideas of right and justice, in accordance with the progress of society and the correspondingly enlarged conception of the common law of this state "for ascertaining, establishing, and vindicating contested rights in civil cases," which is now, but was not formerly, held to entitle each party "to such remedy, including form, method, and order of procedure, as justice and convenience require." *Owen v. Weston*, 63 N. H. 599, 4 Atl. 801. Both under the statute and the practice now existing there can be no doubt that the trustee may be charged in the present action by a judgment that will not subject him to double liability, or infringe the rights of anybody; and so, the basis of the decision in *Thayer v. Pratt*, supra, having been removed, the decision itself has ceased to be an authority upon the issue now raised. Unless in the meantime the attachment shall be released by the giving of a bond agreeably to section 39, c. 245, at the coming trial term, upon the plaintiff's motion, and upon proper cause shown, the action of *Le Blanc & Dailey* against the trustee may be brought forward from the April term, 1895, at which judgment was rendered against him, the execution in that case against the trustee recalled and rescinded, the judgment in that case against the trustee be suspended until further order, together with such other proceedings, orders, and process necessary for equitably charging the trustee in this action. *Blake v. Adams*, 64 N. H. 86, 87, 6 Atl. 482. If there are exceptional cases in which a judgment debt may not be the subject of trustee process, the present case is not one of that class. Motion to discharge trustee denied. All concurred.

(68 N. H. 561)

HUNT v. LACONIA & L. ST. RY.

(Supreme Court of New Hampshire. Hillsboro. July 31, 1896.)

CORPORATION STOCK—PAYMENT OF DIVIDENDS TO PLEDGOR.

A corporation paying dividends on its stock to one known to be a pledgor thereof, believing she had a right thereto, but without the pledgee's

consent, is liable to him, though he had given no instructions respecting the payment.

Assumpsit by N. P. Hunt, receiver of the People's Fire Insurance Company, against the Laconia & Lakeport Street Railway. Judgment for plaintiff.

Assumpsit for dividends declared by the defendant on 30 shares of its stock. Facts agreed. The plaintiff brings the action as receiver of the People's Fire Insurance Company. He holds, and has held since its issue, a certificate for 30 shares of the defendant's stock, which reads on its face, "To People's Fire Insurance Company, as collateral for Cora L. Brookhouse, note of \$2,500, dated Nov. 20, 1892." The defendant's stock ledger has the following record in relation to 30 shares of stock:

People's Fire Insurance Company as coll.

1893		Trans.	Certif.	Share.
Dec.	30.	Cora L. Brookhouse.	7	30

The plaintiff holds the certificate as collateral security for a note of \$2,500, due from said Brookhouse to the plaintiff. The par value of the stock is \$50 a share, and the market value does not exceed that sum. The dividends sued for were declared during the time the plaintiff held the certificate, and the defendant paid them to Mrs. Brookhouse, believing she was entitled to receive them, but without the order or consent of the plaintiff. The plaintiff never gave any instructions respecting the payment of dividends, and did not demand payment of dividends until after the payment to Mrs. Brookhouse.

David Cross, for plaintiff. C. F. Stone, for defendant.

BLODGETT, J. The pledge of the stock was a pledge of the dividends accruing on it during the continuance of the pledge, and gave the pledgee the legal title to both alike. *Bank v. Marshall* (Merrimack; Dec., 1895) 40 Atl. —,¹ and authorities cited. Upon the facts appearing in the case, the payment of the dividends to the pledgor was without legal justification, and affords no bar to the plaintiff's recovery. Judgment for the plaintiff. All concurred.

(68 N. H. 560)

WASON v. MARTELL.

(Supreme Court of New Hampshire. Hillsboro. July 31, 1896.)

ATTACHMENT—DESCRIPTION OF PROPERTY—AMENDMENT—OFFICER'S RETURN—PRESUMPTION.

1. A mandate to attach "one million brick, of the goods or estate of M., of B., in the county of R.," does not identify the property to be charged as definitely as the nature of the case will reasonably admit, and hence is insufficient.

2. Where an attachment precept does not sufficiently describe the property to be attached, it cannot be amended to the prejudice of the subsequent attaching lien creditors or other third

persons having rights in the property. Pub. St. c. 222, § 8.

3. Where a writ was made returnable to the third Tuesday in the month, instead of the first Tuesday, when the term began, it will be presumed that the officer followed the mandate in his return.

Assumpsit by Melvin A. Wason against A. Martell to enforce a lien on a lot of brick for wood furnished to burn the same. The writ was made returnable on the "third Tuesday of January next." Plaintiff asked leave to enter the case in court, and to amend the writ by making it returnable on the first Tuesday in January, when the term of court began, instead of the third Tuesday. Heard on facts agreed. Requests denied.

Facts agreed. The precept in the writ was as follows: "We command you to attach one million brick, of the goods or estate of A. Martell, of Brentwood, in the county of Rockingham, for the purpose and in order to secure and perpetuate a lien thereon for the plaintiff for wood furnished to the defendant with which said brick were burned." The attachment was regularly made, by leaving an attested copy of the writ with the town clerk of Brentwood, November 5, 1896. The writ was dated October 30, 1895, and was made returnable "on the third Tuesday of January next." The term began on the first Tuesday of January, 1896, and in the second week of the term counsel for the plaintiff asked leave to enter the case in court, and also asked leave to amend the writ by making it returnable on the first Tuesday of January instead of the third. The defendant had no brick except in Brentwood. Subsequent attaching lien creditors and a mortgagee appeared and opposed the motion.

Sulloway & Topliff, for plaintiff. Drury & Peaslee and E. H. Tardivel, for defendant and others.

BLODGETT, J. Irrespective of other objections, which it is unnecessary to consider, it is enough to say that, if the plaintiff's requests should be granted, it would not avail him. The attachment precept is fatally defective, as against the opposing creditors. In order to preserve a lien, it is necessary that the precept should clearly identify or describe the property intended to be charged, or, at least, as definitely as the nature of the case will reasonably admit. *Hill v. Callahan*, 58 N. H. 497, 499; *Mundy v. Munson*, 40 Hun, 304, 308; *Drake v. Taylor*, 6 Blatchf. 14, Fed. Cas. No. 4,067; *Kennedy v. House*, 41 Pa. St. 39; *Stevens v. Osman*, 1 Mich. 92. It is hardly necessary to say that a mandate to attach "one million brick, of the goods or estate of A. Martell, of Brentwood, in the county of Rockingham," is not such a description. Nor can such a mandate be amended to the prejudice of subsequent attaching lien creditors or other third persons having rights in the property. Pub. St. c. 222, § 8. In short, the

¹ Opinion not yet filed.

case presented is one of a suit in rem which does not describe the res, or, at most, gives only an attempted description, which does not describe. But, in addition to this, in the absence of any evidence to the contrary, it must presumptively be taken that the officer followed the mandate in his return of the attachment. The plaintiff's requests should be denied. All concurred.

(67 N. H. 506)

CURTIS et al. v. CITY OF PORTSMOUTH.

(Supreme Court of New Hampshire. Rockingham. March 16, 1894.)

MUNICIPAL CORPORATIONS — CONTRACT — ASSIGNMENT OF LEASE — CONSTRUCTION — STATUTE OF FRAUDS — POWERS OF CITY — BREACH OF CONTRACT — SPECIFIC PERFORMANCE.

1. An ordinance providing that "the city does hereby assume and become responsible for the faithful performance of all and every portion of the lease now held by" another, followed by a delivery of a copy thereof to the lessee, and an assignment by the lessee to the city, and a delivery of the assignment to the city clerk, constitutes a completed contract between the parties.

2. An ordinance providing that "the city does hereby assume and becomes responsible for the faithful performance of all and every portion of the lease now held by" the lessee, and appointing a committee to remodel and improve "the upper hall * * * and for the use of" the lessee, confers on said lessee, on assignment of said lease pursuant to the provisions of the ordinance, the right to the free use of the upper hall.

3. The city records of the adoption of an ordinance, whereby a city agrees to perform certain acts, constitute a memorandum in writing sufficient to take the case out of the statute of frauds.

4. On procuring the assignment of a building lease for the purpose of providing a memorial hall and library, the agreement of a city to assume performance thereof, and to remodel and improve the upper hall for the use of a grand-army post, without charge, is not void, as being in excess of the powers granted by Pub. St. c. 40, § 4, giving to cities the power to provide a public library and reading room and a memorial building.

5. Where a city undertakes to provide a library or a memorial building, under the authority of Pub. St. c. 40, § 4, the court cannot revise or control the decision of the city council as to the kind of building or its location.

6. Where pecuniary compensation will furnish an adequate remedy for a breach of contract to repair and remodel a building, specific performance will not be enforced.

Bill in equity by Joseph R. Curtis and others against the city of Portsmouth to enforce specific performance of a contract. Case discharged.

The Portsmouth Academy, a corporation located at Portsmouth, on the 28th day of March, 1891, leased the property known as the "Portsmouth Academy," situate in Portsmouth, to the Storer Post, for the term of 15 years from the 1st day of April, 1891, for the rent of \$500 per year, in gold coin. The lease provided, among other things, that the Storer Post should make all necessary repairs, and should have the right to make, at their own expense, any interior alterations and repairs which would not lessen the strength of the edifices, and any additions upon the exterior which

would not alter or injure the main building; that the lessee should pay all taxes assessed on the premises, and should keep the property insured in the sum of \$5,000 for the benefit of the lessor. There were also provisions that the lessee would not underlet the premises or assign the lease without the consent in writing of the lessor, and that at the expiration of the lease the lessor would sell, and the lessee would purchase, the premises for the sum of \$9,827, in gold, upon condition said buildings, when so purchased, should be used as a memorial hall and public library, and for no other purpose whatever. In May, 1891, negotiations were begun between the city and the Storer Post relative to an assignment of the lease by the post to the city, and resulted in the adoption, July 24, 1891, of the following ordinance, viz.: "Joint resolution authorizing the city to assume the lease of the Portsmouth Academy now held by Storer Post, No. 1, G. A. R. Be it ordained by the city councils of the city of Portsmouth, that by this ordinance the city does hereby assume and become responsible for the faithful performance of all and every portion of the lease now held by Storer Post, No. 1, G. A. R., of this city, of the building and land of the Portsmouth Academy, from its proprietors, executed March 28, 1891, said lease having been duly and legally assigned by said post to the city; and be it also ordained, that a joint committee, consisting of three members from each branch of the city councils, with three members from the board of trustees of the public library, be and hereby are constituted a committee for the purpose of remodeling and improving the said academy building for the following purposes: The upper hall as a memorial hall and for the use of said Storer Post, No. 1, G. A. R., and the lower hall for the use of the public library. The committee on finance are hereby authorized to create a loan for such sum as may be required for the purpose of carrying out the provisions of this ordinance." This ordinance was recorded in the city records, and a copy thereof presented to the Storer Post, which on the 29th day of July, 1891, voted that certain members thereof be granted full power to assign to the city the lease of the Portsmouth Academy held by the post. On the 30th day of July, 1891, the following assignment was made and duly executed: "Storer Post, No. 1, Department of New Hampshire. Grand Army of the Republic, an unincorporated organization, of Portsmouth, N. H., by its duly-authorized committee, Joseph R. Curtis, Charles H. Besselièvre, Matthew T. Betton, Marcus N. Collis, Joseph Foster, and Henry S. Paul, for and in consideration of receiving from the city of Portsmouth the exclusive right to use and control, without rent, of the upper floor or upper hall of the Academy building, in said Portsmouth, with the right of access to the same, for itself and its auxiliary organizations, now enjoyed by said post under its lease of the building and land of the said Portsmouth Academy from its proprietors, executed March 28, 1891, during the term of said lease, or dur-

ing the ownership of said building, if purchased under the privileges of the lease by the city of Portsmouth, does hereby assign said lease to the said city of Portsmouth under the provisions of the joint resolution passed by the common council of the city of Portsmouth, May 28, 1891, and by the board of mayor and aldermen, July 24, 1891." Storer Post obtained the written assent of the lessors to the assignment, and delivered the assignment to the city clerk, who sent it to the Rockingham registry of deeds, and had it recorded, and the recorder's fees therefor were paid from the city treasury. The committee for the city appointed under the ordinance of July 24, 1891, adopted an architect's plans for the work to be done on the upper and lower floors, and sent by mail to several carpenters and builders specifications for the work, and invited proposals or bids. The city has never taken physical possession of the building, and refuses to perform any part of the alleged contract.

Samuel W. Emery and J. S. H. Frink, for plaintiffs. Calvin Page and E. L. Guphill, for defendant.

WALLACE, J. The first question that arises is, was there a contract completed between the Storer Post and the city of Portsmouth? Although the ordinance passed by the city councils erroneously recited that the lease had been assigned to the city, yet by its terms the city offered to "assume and become responsible for the faithful performance of all and every portion of the lease." A presentation of a copy to Storer Post was a proposition of a contract on the part of the city. When the post accepted this offer, as they did by their vote to assign the lease to the city, and by assigning it and delivering the assignment to the city clerk, it became a completed contract between the parties. *Hunnehan v. Inhabitants of Grafton*, 10 Metc. (Mass.) 454.

The defendant insists that the ordinance contains no offer for the use by the plaintiffs of the upper hall free of rent. But this position is not sustained by a reasonable construction of the ordinance. It was an offer to "assume and become responsible for the faithful performance of all and every portion of the lease," to remodel and improve "the upper hall as a memorial hall, and for the use of Storer Post," and to pay the rent reserved by the lease. There is nothing in the language of the ordinance from which it can be inferred that the proposition did not contain every stipulation which the city intended to require. In the absence of any provision for the payment of rent by the plaintiffs to the city for the use of the upper hall, it is plain that the city did not intend to require the payment of rent. The right of the post to the use and control, without rent, of the upper floor of the academy building, was a sufficient consideration for the contract. The post had a property interest in the lease, and they parted with it by the assignment, in consideration of receiving the

free use of the upper hall instead of a sum of money. The one is as good a consideration as the other.

The contract is not within the statute of frauds, because the records of the city, containing a copy of the ordinance, and the subsequent assignment, taken together, make it in writing. The city records of the adoption of the ordinance constitute a note or memorandum in writing sufficient to take the case out of the statute of frauds. *Dill. Mun. Corp.* 449; *Argus Co. v. Mayor, etc., of City of Albany*, 55 N. Y. 495; *Chase v. City of Lowell*, 7 Gray, 33; *Johnson v. Society*, 11 Allen, 123, 127; *Tufts v. Mining Co.*, 14 Allen, 407, 412.

The contract was not ultra vires. The city had the power, under the statute, to provide a public library and reading room and a memorial building. *Pub. St. c. 40, § 4*. A contract for that purpose, made by the city, would be within the scope of its powers. The fact that a part of the building is to be occupied by the Storer Post does not make the contract ultra vires. The city made the contract in good faith, for the purpose of providing a memorial building and a suitable place for a library, and the occupation of the post is incident and subordinate to this general purpose. The case is similar to that of a municipality leasing parts of the town or city hall, not needed for municipal purposes, for stores or offices. *Spaulding v. City of Lowell*, 23 Pick. 71; *French v. Inhabitants of Quincy*, 3 Allen, 9.

The court cannot revise or control the decision of the city councils as to the propriety of selecting any particular lot for a library site or memorial building, or in regard to what kind of a building they shall have, or whether they shall have any, as those matters are within the discretion of the city officials, and are to be determined by them. *Kelley v. Kennard*, 60 N. H. 1. When they have decided these questions, and entered into a valid contract in regard to the matter, the court will enforce it the same as any other contract. The plaintiffs are interested to have the contract enforced to the extent that the city shall be required to take the lease of the building, perform the covenants of the lease, and give the free use of the upper hall of the academy building during the term of the lease to the post, and have the academy building remodeled and improved, so far as the improvements relate to and affect the upper hall. So far as the contract relates to the lower part of the building and its use for a library, the plaintiffs are not interested more than the rest of the public. They appear for the purpose of protecting their own interests, and not those of the general public. It does not concern them what kind of repairs are made on the lower part of the building.

The defendant claims that equity will not enforce a contract to repair or rebuild, and that the contract in reference to remodeling and repairing the building is too indefinite to be specifically enforced. Without deciding whether the contract in regard to repacking or remodel-

ing the building can or should be specifically enforced against the city, we think a pecuniary compensation to Storer Post for a breach of that portion of the contract relating to the changes and improvements in the upper hall will furnish them an adequate remedy. Case discharged.

CARPENTER, J., did not sit. The others concurred.

(87 N. H. 582)

WHITCHER v. GRAFTON COUNTY.

(Supreme Court of New Hampshire. Grafton. March 16, 1894.)

COUNTY CONVENTION—COUNTY BUILDINGS.

Under Pub. St. c. 24, § 4, giving the county convention power to authorize the erection, enlargement, or repair of county buildings, such convention may adopt and ratify an expenditure for the erection of a county court house in excess of the sum already appropriated therefor.

Petition, by Ira Whitcher, one of the building committee appointed by the county convention of 1889 of Grafton county to construct the court house at Woodsville, for the allowance and payment of \$2,995.20 expended in the erection of the court house. Facts found by the court. The county commissioners denied the petition, and the plaintiff's claim is submitted to the court for decision, under Pub. St. c. 27, § 13. Judgment for plaintiff.

The county convention of 1889 appropriated \$20,000 "for the purpose of building a new court house and offices at Woodsville, to be erected in accordance with plans and specifications to be approved by the county commissioners, and to be finished in a thorough, workmanlike manner, at a cost not to exceed" that sum; "said appropriation to be expended and said building to be erected under the direction of the county commissioners" and the plaintiff and others, "who are hereby constituted a committee for said purpose." It was found impossible to construct the building according to the plans adopted without exceeding the appropriation of \$20,000. Several citizens of Woodsville tendered the bond of E. F. Mann and others, in the sum of \$5,000, to the county, to indemnify it to that extent against any expenditure in excess of the appropriation in building upon the plans adopted. The bond was accepted, and the building constructed accordingly. A change from the original plan of heating the building was made by the committee, at the request of the plaintiff and others, by substituting hot water for steam in certain portions of the building, involving an additional outlay, and the personal bond of the plaintiff in the sum of \$500 was taken by the county to indemnify it against the cost of making the change. February 15, 1893, the county convention, having had the matter brought before them by the building committee, adopted the follow-

ing resolution: "Resolved, that the county of Grafton appropriate the sum of two thousand nine hundred and ninety-five dollars and twenty cents (\$2,995.20) to pay Ira Whitcher (that being the amount expended by him as chairman of the sub building committee in excess of the appropriation made by the county for the building of the Woodsville court house), and that the sum of two thousand nine hundred and ninety-five dollars and twenty cents (\$2,995.20) be raised for that purpose." The convention also adopted a resolution as follows: "Resolved, that the obligors on the bond of E. F. Mann and others relative to the construction of the court house at Woodsville be released and discharged." No question is made but that the expenditures were reasonable and beneficial to the county.

Bingham, Mitchell & Batchellor, for plaintiff. Bingham & Bingham, for defendant.

WALLACE, J. By the statute, the power to authorize the erection, enlargement, or repair of county buildings, exceeding an expense of \$1,000, is vested in the county convention. Pub. St. c. 24, § 4. The action of the county convention in adopting and ratifying the expenditure in excess of the appropriation and voting to reimburse the plaintiff for this outlay was within the scope of its powers, and created a legal liability on the part of the county to the plaintiff for the amount of money paid by him for the construction of the court house above the appropriation. The power which the statute vests in the county convention "to authorize * * * the erection, enlargement or repair" of county buildings also includes the power to adopt and ratify any similar act done without its previous authorization. The ratification and acceptance and vote to pay for work done of which the defendant has the benefit, although done with an agreement that the defendant should not pay for it, is conclusive. The power to build a building at an expense of what this cost, including money advanced by the plaintiff, is power to accept the building and pay the same sum by a subsequent vote. None of the objections made by the defendant affect the result of the exercise of the legislative power of voting to pay for the accepted building. It is true that it is the duty of the county commissioners (Pub. St. c. 27, § 10) to audit and allow all claims against the county, but they have passed upon the plaintiff's claim, and disallowed it, and it is now submitted to the court for their determination under the statute (Pub. St. c. 27, § 13). The question whether the county convention has the power to appoint a building committee, consisting of the county commissioners and others, to expend this appropriation in the erection of this court house, for the reason that authority to do this is conferred by statute (Pub. St. c. 27, § 5) upon the county com-

missioners alone, does not arise. Whether the law would have interfered, if seasonably asked, to prevent work being done by the committee, is a question that need not be considered. It not being questioned that the expenditures in excess of the original appropriation were reasonable, there must be judgment for the plaintiff.

CARPENTER, J., did not sit. The others concurred.

(87 N. H. 581)

ASH v. ALDRICH.

(Supreme Court of New Hampshire. Grafton. March 16, 1894.)

STATUTE OF FRAUDS—EXCHANGE OF PROPERTY—DELIVERY ON SUNDAY.

1. A contract for an exchange of horses is within the statute of frauds, requiring delivery, part payment, or a written memorandum.

2. A contract void under the statute of frauds, requiring delivery, part payment, or a written memorandum, is not made valid by delivery on Sunday.

Replevin by Hiram Ash against Mose Aldrich for a colt. Judgment for defendant.

Saturday, November 19, 1892, the plaintiff owned a vicious horse, called the "Blaine Mare," whose characteristics were known to the defendant. The defendant owned a colt which was nine miles distant, in the keeping of Haines, his agent, and which the plaintiff had never seen. On that day the plaintiff and the defendant entered into a verbal contract for the exchange of the horses. But there was no delivery of the property, nor was there anything paid; nor was there any memorandum or note of the trade, in writing, made or signed by the parties. It was agreed that the defendant should change the horses, but no time was fixed when this was to be done. The next day (Sunday) the defendant, for the purpose of exchanging the horses, took the Blaine mare to the Haines place, put her into the barn, led out the colt, and hitched it outside the barn. Haines refused to keep the Blaine mare, on account of her vicious habits, and the defendant left the colt in his keeping, expressing the purpose to try and get the plaintiff to swap back. He returned the mare to the plaintiff's stable that evening, and never had her in his possession afterwards. On Monday following, the defendant informed the plaintiff that he should not change the horses, and that he repudiated the trade made Saturday night. The plaintiff denied his right to do it, and on the same day, without the defendant's knowledge or consent, took the colt from the Haines barn, and put it in his stable, and kept it till Wednesday, when the defendant took the colt away by force, and kept it till it was replevied.

Smith & Sloane and George F. Morris, for plaintiff. Bingham, Mitchell & Batchellor, for defendant.

WALLACE, J. The question is whether the contract of exchange of horses made by the parties is within the statute of frauds in regard to the sale of goods (Pub. St. c. 215, § 3), and, if so, whether the requirements of that statute were complied with so far as to make the contract valid, and give the plaintiff the title to, and the right to possession of, the horse for which he bargained. The statute applies to a contract of exchange as well as to a contract of sale. *Kuhns v. Gates*, 92 Ind. 66; *Rutan v. Hinchman*, 30 N. J. Law, 255; *Browne, St. Frauds* (4th Ed.) § 293. The agreement on Saturday was a complete verbal contract for the exchange of horses, but there was no delivery and receipt of the property, no note or memorandum or payment, to take the case out of the operation of the statute of frauds, and the contract was not valid. On the next day (Sunday) the defendant received possession, as owner, of the horse for which he had bargained; and there was then an acceptance and receipt of the horse by him, which met the requirements of the statute, so as to make the contract binding and capable of being enforced, provided the fact that this was done on Sunday does not render it void on that ground. The delivery and receipt of one of the horses, at least, were essential to the validity of the contract of exchange. The performance of these vital elements of the bargain on Sunday is prohibited by the statute (Pub. St. c. 271, § 3) and void. It cannot make an otherwise invalid contract valid. *Smith v. Foster*, 41 N. H. 215. Judgment for the defendant.

CARPENTER, J., did not sit. The others concurred.

(87 N. H. 498)

BENTON et al. v. COLLINS et al.

(Supreme Court of New Hampshire. Coos. July 28, 1893.)

WRIT OF ENTRY—PLEADING.

In a writ of entry by administrators, a declaration in the common form, alleging seisin in plaintiffs as administrators, and disseisin of defendants, is sufficient.

Exceptions from Coos county.

Writ of entry by Benjamin B. Benton and others, administrators of the estate of Jacob Benton, deceased, against Minnie A. Collins and others. The defendants' demurrer to the declaration was overruled, and they excepted. Exceptions overruled.

Drew, Jordan & Buckley and Edmund Sullivan, for plaintiffs. Ladd & Fletcher, for defendants.

WALLACE, J. The declaration alleges seisin in the plaintiffs, as administrators of the estate of the deceased, and disseisin by the defendants. These facts are admitted by the demurrer. If the plaintiffs are entitled to judgment upon any state of facts prov-

able under it, the demurrer must be overruled. *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159, 161. An administrator can maintain a writ of entry to foreclose a mortgage (*Bickford v. Daniels*, 2 N. H. 71); and, if the estate is insolvent, to recover the possession of lands belonging to the estate (Pub. St. c. 191, § 15; *Goodwin v. Milton*, 25 N. H. 458, 473, 474; *Bergin v. McFarland*, 26 N. H. 533, 536, 537; *Lane v. Thompson*, 43 N. H. 320, 325, 327, 328; *Carter v. Jackson*, 56 N. H. 364, 373, 374). In each case, alike, a declaration in common form is sufficient. *Bickford v. Daniels*, 2 N. H. 71; *Briggs v. Sholes*, 14 N. H. 262; *McDaniel v. Cater*, 21 N. H. 227, 229; *Alken v. Gale*, 37 N. H. 501, 507. If the action is not brought to foreclose a mortgage, the averment that the plaintiffs were seised of the land in question, in their capacity as administrators, is, in legal effect, an allegation that the estate is insolvent, or administered as such, and, to entitle them to recover, must be proved. Exceptions overruled.

CARPENTER, J., did not sit. The others concurred.

(70 Conn. 326)

WHEELER et al. v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Errors of Connecticut. Feb. 8, 1898.)

APPEAL—STRIKING CAUSE FROM DOCKET.

A motion in the superior court to strike from the docket an appeal from a decision of the railroad commissioners in respect to grade crossings will not lie, the court having been given jurisdiction thereof by Gen. St. §§ 3425, 3491, on the ground that the proceedings were under authority of a special act, providing that the decision of the railroad commissioners should be final, where the record does not disclose such fact.

Appeal from superior court, Fairfield county; William T. Elmer, Judge.

Action by John M. Wheeler and others against the New York, New Haven & Hartford Railroad Company. From an order of the superior court, erasing the case from the docket upon motion of the defendant, plaintiffs appeal. Reversed, and the case restored to docket.

This was an appeal from certain doings of the railroad commissioners. The material facts of the complaint are as follows: "(1) The petitioners own a valuable piece of property situated in said Bridgeport, bounded southwest by Bridgeport Harbor, northwest by the tracks of the New York, New Haven & Hartford Railroad Company, north by Sterling street, east by Noble avenue, and south by land of Frank Miller and others. * * * (6) On December 21, 1895, said company, and the directors thereof, whose road then did and ever since has crossed, and was and is crossed, by numerous highways at grade, in said Bridgeport, brought their petition in writing to the railroad commis-

sioners of this state, therein alleging that public safety required an alteration in said crossings, their respective approaches, the method of crossing the same, the location of the same, the closing of said highway crossings, and the substitution of certain other crossings thereof not at grade; and, as a part of the method proposed by them for accomplishing said results, they presented plans, one detail of which involved the taking of a strip of land seventy feet wide through the middle of your petitioners' said property, and the construction of an elevated railroad structure thereon; and they prayed that said work might be ordered according to the plans so presented. * * * (10) On May 17, 1897, said company, and the directors thereof, brought their supplemental petition in writing to the railroad commissioners, alleging by reference the same facts as in their original petition, and also then alleging for the first time that your petitioners had an interest in land needed for certain of said crossings. * * * (13) On June 30, 1897, said railroad commissioners determined and decided that said changes, alterations, and removals should be made by said company, including that part thereof that involved the taking of your petitioners' property, and the destruction thereof and of their said business." The complaint was duly served and returned to the superior court in and for the county of Fairfield on the first Tuesday of September, 1897, and was duly entered upon the docket of said court. On the 21st day of October the said railroad company moved the court that said "cause be erased from the docket of the superior court, on the ground that said court had no jurisdiction of the subject-matter contained therein." The court granted that motion, and the plaintiffs appealed.

Robert E. De Forest and Allan W. Paige, for appellants. Goodwin Stoddard and William D. Bishop, Jr., for appellee.

ANDREWS, C. J. A cause is not to be erased from the docket unless the want of jurisdiction appears plainly on the face of the record. *James v. Morgan*, 36 Conn. 348, 351; *Wickwire v. State*, 19 Conn. 477, 484; *Saunders v. Denison*, 20 Conn. 521, 525; *Camp v. Stevens*, 45 Conn. 92, 95. The superior court has jurisdiction generally of appeals from the doings of the railroad commissioners in respect to grade crossings. Gen. St. §§ 3425, 3491; Pub. Acts 1889, c. 213; Id. c. 220, § 6. The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be within the jurisdiction of an inferior court but that which is expressly so alleged. *Peacock v. Bell*, 1 Saund. 74b; *Winford v. Powell*, 2 Ld. Raym. 1310; *Stanian v. Davies*, Id. 795. There is nothing on the face of the record, so far as we are able to

discover, that discloses any want of jurisdiction in the superior court to act upon the matter set forth in the complaint. Indeed, the brief of the appellee in this court does not make any such claim. The brief says that the petitions referred to in paragraphs 6 and 10 in the appellants' complaint were brought under the authority of a special act passed in 1895, being "An act providing for the abolition of grade crossings in Bridgeport," which provided that the "decision of the railroad commissioners upon all questions of the plans or methods of abolishing such grade crossings shall be final and conclusive on all parties concerned," and claims that, therefore, the superior court had no jurisdiction over the subject-matter alleged in the record. The fatal defect in this argument is that the matters which it relies on to show the want of jurisdiction do not appear in the record. It is new matter, which could only be brought upon the record by some issuable averment. For the purpose of a motion to erase from the docket, the court could not have any knowledge of this matter, as the record then stood. There is error. The cause should be restored to the docket. In this opinion the other judges concurred.

(70 Conn. 332)

VINCENT v. McNAMARA.

(Supreme Court of Errors of Connecticut. Feb. 8, 1898.)

APPEAL—ABATEMENT—FINAL JUDGMENT—CONSENT DECREE—WRONGFUL ATTACHMENT—RES JUDICATA—RELEASE.

1. Acts 1866-68, c. 75, § 4, provides that the clerks of the superior court in the several counties shall be clerks of the supreme court of errors for their respective counties in the judicial districts to which such counties belong. Pub. Acts 1889, c. 141, names two counties as comprising one judicial district, and provides that the court shall sit twice a year in each county, and that the clerk of each superior court shall keep a docket on which shall be entered all appeals from both counties to be heard by the supreme court of errors when sitting in their respective counties. *Held* that, after an appeal had been perfected from a judgment rendered in one county, a plea in abatement of the appeal might be filed either with the clerk of the superior court in that county, or in the other county, where the appellate court was to sit.

2. Under General Rules of Practice No. 21 (26 Atl. xvi.), providing that the judgment shall be formally written out, under appropriate caption, entitled as of the day on which it is entered, and signed by the clerk or judge, an entry, by order of court, of "Demurrer sustained, Elmer J.," is not such a final judgment as is required to be appealed from within 10 days, where the records show a judgment in form, based upon such a ruling, and rendered a month later.

3. That plaintiff, to whose complaint a demurrer had been sustained, moves for a final judgment thereon, does not convert such judgment into a consent decree, from which he cannot appeal.

4. Where one whose goods were wrongfully attached replevies them from the officer, and obtains judgment, he is not thereby barred from a subsequent action for wrongful attachment against plaintiff in the writ.

5. The liability of an officer who wrongfully attaches goods, and of the party who directed

such act, being joint and several, an unsatisfied judgment against the one in an action of replevin is no bar to a later suit for the same damages against the other.

Appeal from superior court, Fairfield county; William T. Elmer, Judge.

Action by Silas A. Vincent against Michael McNamara to recover damages for a malicious attachment of the plaintiff's property, and the consequent injury to his business. The court sustained a demurrer to the complaint, and rendered judgment for the defendant, and the plaintiff appealed. Reversed. In the supreme court the appellee filed a plea in abatement. Overruled.

The complaint alleged that on October 16, 1894, the defendant owned the only feed store and grist mill in a certain quarter of the town of Brookfield, and that on that day the plaintiff opened another such store and mill there for business, and at once became a competitor of the defendant in the feed and grain business; that in November the defendant caused a writ of attachment to be issued against a third party, and then maliciously attached thereon the stock in trade of the plaintiff, for the purpose of breaking up his business, thereby closing up his mill and store for several days, hindering his business, and keeping him out of possession until December, when he replevied the goods from the attaching officer; that, when replevied, they were damaged, and in part spoiled; that in February, 1897, he obtained final judgment against the officer in his replevin suit; that the defendant knew, or ought to have known, at the time of the attachment, that the plaintiff owned the goods, but nevertheless ordered the officer to attach them, and close up the store and mill, for the purpose of annoying and harassing him and driving him out of business, and to get rid of a competitor in said business; and that but for the attachment the plaintiff would have made a profit of \$200 from his business between the date of the attachment and that of his writ of replevin. The causes of demurrer were that the judgment in replevin against the attaching officer was a bar to this suit; that the damage to the goods while attached gave no cause of action against the defendant; and that the claim for relief (which was for damages) was not supported by the facts alleged. The record of the cause showed an entry of "Demurrer sustained, Elmer, J.," on November 30, 1897. The judgment was dated December 31, 1897, and, after stating that the court found the issue for the defendant on November 30th, set forth that "said action came thence to the present time, whereupon it is adjudged by this court that the defendant recover of the plaintiff his costs, taxed at \$——." The defendant pleaded in abatement of the appeal that the decision of the superior court sustaining the demurrer was duly made and filed on November 30th, and that afterwards the plaintiff, on December

31, 1897, upon his own motion, caused said court to enter up a judgment of said date; and that the appeal was not taken within 10 days from November 30th, but only within 10 days from the judgment of December 31st. The plaintiff moved orally in this court that the plea in abatement be not entertained, because it was filed with the clerk of the supreme court of errors for New Haven county, when the appeal was from a judgment rendered in Fairfield county, and therefore the plea should have been filed with the clerk of the court for Fairfield county, and also because the allegations of the plea contradicted the record and judgment of the superior court. This motion was denied, and a demurrer was then filed to the plea in abatement, which demurrer was sustained, and the appeal then heard on its merits.

Henry A. Purdy, for appellant. James H. McMahon, for appellee.

BALDWIN, J. The appellee filed a plea in abatement with the clerk of the supreme court of errors for New Haven county, on the Friday preceding the first day of the January term of the court to be held at New Haven, in the Third judicial district, to which term the appeal had been taken. The appellant moved that the appeal be stricken from the files, because it was not filed with the clerk of the court for Fairfield county. This motion was denied, and the point of practice thus decided is of such importance that the court deems it proper to state the reasons which led to that result, particularly as in another appeal from Fairfield county, at the same term, a similar plea was entertained against the objection of the appellant, which had been filed with the clerk of the court for Fairfield county.

The secretary of the state was the sole clerk of this court from its original institution, in 1784, until 1819. During this period it sat only at the capitol of the state. In 1819 a law was passed that one term should be held annually in each county, and that "the clerks of the superior courts in the several counties shall be clerks of the supreme court of errors in their respective counties." Rev. St. 1821, p. 137, § 2. In 1866, "to facilitate the trial of causes before the supreme court of errors," the state was divided into four judicial districts, each containing two counties, and in each of which the court was to hold two terms a year; and it was provided that the court "shall have and exercise the same powers, authority, and jurisdiction in each judicial district, which it has hitherto had and exercised in the counties of which such district is constituted." This statute also declared that "the clerks of the superior court in the several counties shall be clerks of the supreme court of errors for their respective counties in the judicial districts to which such counties belong." Pub. Acts 1866-68, p. 43, c. 75, § 4. In 1889, the third judicial district was reconstituted so as to

be "composed of the counties of New Haven and Fairfield," the court to sit twice a year at New Haven, and twice a year at Bridgeport; and it was further enacted that "the clerk of the superior court for New Haven county shall keep a docket upon which all appeals to be heard by the supreme court of errors in New Haven shall be entered in the following order: First, appeals from Fairfield county; second, appeals from New Haven county. The clerk of the superior court for Fairfield county shall keep a docket upon which all appeals to be heard by the supreme court of errors in Bridgeport shall be entered in the following order: First, appeals from New Haven county; second, appeals from Fairfield county." Pub. Acts 1889, p. 77, c. 141. The supreme court of errors is a court whose jurisdiction is co-extensive with the state. Each of its eight clerks (that is, the clerk for each county) is, as such, a state officer; and the court could require his attendance, in case of necessity, at any of its sessions, whether held within or without the particular county in which its files and records are regularly in his keeping. It being made by law the duty of the clerk for New Haven county to prepare the entire docket for those terms of the court for the Third judicial district which are held at New Haven, it has not been our custom to require the attendance at those terms of the clerk for Fairfield county. The clerk for New Haven county is, for the purposes of that term, the clerk of the court for the entire district. Causes may be heard at such a term, transferred by consent from counties belonging to other districts. It is the duty of the clerk in attendance to note such orders as the court may make in any causes upon its docket, without regard to the county from which they come. It is also his duty to communicate to the clerk of this court in each county whatever judgments may be rendered in causes originating there; for it is there that the final record of the cause is completed and preserved. The clerk who has charge of the docket of a district at any term is placed in that position to facilitate the disposition of the causes entered. He is the only clerk of the court with whom to file original papers presented during the term for the consideration of this court.

By a recent statute, it is required that pleas in abatement, which heretofore have been filed on the first day of the term, shall be filed on or before the Friday preceding such day. Pub. Acts 1897, p. 895, § 30. Under the previous practice, such pleas were filed with the clerk of the court in and for the district within which the cause was pending for consideration. His functions as clerk of the court for the district commence before the opening of the term, for the docket must be prepared in advance. If, before it is made up, a plea in abatement or other original paper is filed in any of the causes to be entered, that fact should be noted on the

docket as printed, and the paper immediately printed also. It is therefore proper to file it with him, although the cause may come up from a county in which he is not acting as the clerk of the court; for it is thus brought soonest to his notice. But it does not follow that to file it with the clerk of the court for such other county would be improper. Each of these clerks is equally a clerk of this court, and each has certain clerical duties to perform with reference to the cause. One prepares it for entry upon the docket; the other makes the entry, and retains charge of it until it becomes the subject of a final adjudication, or is continued to another term. As soon as an appeal in ordinary course is perfected, the cause passes under the control of this court, and is pending here. *Huntington v. McMahon*, 48 Conn. 174, 195. Until the opening of the term to which the appeal is taken, any original papers, entitled in this court, may be filed either with the clerk for the county in which the judgment appealed from was rendered, or with the clerk for the county in which the term is to be held. Each is a clerk of the court having cognizance of the cause; one acting as the permanent custodian of its files and records for the county whence the appeal is brought, and the other as the temporary custodian of such of these files and records as relate to this appeal, and come into his hands in his capacity as, for the time being, the acting clerk for the district, to facilitate the preparations for the hearing, or the proceedings incident to the hearing itself.

The plea in abatement in the case at bar set up that the appeal was not taken within the 10 days allowed by statute after the rendition of the final judgment. This contention rests upon the ground that an entry, by order of court, that a demurrer to the complaint is sustained, is such a judgment; notwithstanding the record shows a judgment in form, based upon such a ruling, which was rendered a month later, and upon which the appeal is predicated. The general rules of practice provide that in all actions the judgment shall be formally written out, under an appropriate caption, entitled as of the day on which it is entered, and signed by the clerk or judge, as the case may be. 58 Conn. 586, 587, 26 Atl. xvi. The date of its entry is often subsequent to that of the decision from which it results. Such was the case in the present instance, and the fact that it was the losing party on whose motion the entry was formally made did not convert it into a consent decree. The defendant having neglected to prepare the judgment file, or to ask the clerk to do so, the plaintiff was under the necessity of making the motion, in order to found the appeal which he desired to take. He was not bound to avail himself of his statutory right to plead over, if he preferred to stand on his original complaint. *O'Donnell v. Sargent*, 69 Conn. 476, 38 Atl. 216. For these reasons, the plea in abatement is insufficient, and was overruled.

We now come to the consideration of the appeal upon its merits. The single question presented is whether, if a man whose goods are maliciously attached upon a writ against a third party replevies them from the officer, and subsequently recovers judgment against him in the replevin suit, that judgment necessarily bars any subsequent action against the original plaintiff, who wrongfully directed such attachment, for damages resulting from that act. In case of a wrongful attachment, replevin, under our statutes, may be brought either against the officer or the plaintiff in the attachment suit, or both, to recover the goods, together with the damages from their wrongful detention. Gen. St. p. 308, §§ 1323, 1325, 1327. The plaintiff in this case elected to sue the officer alone, and presumably recovered from him full damages for the wrongful detention of the goods replevied. But such detention was not the only wrong of which he could complain. The original taking by attachment was, on the part of the present defendant, a malicious abuse of legal process, designed to drive a competitor in business from the field, and achieving a temporary success. Against the officer no malice or improper motive is charged. He could therefore be held to answer in damages only to the extent required to compensate the plaintiff in replevin for the actual pecuniary loss necessarily involved. *Oviatt v. Pond*, 29 Conn. 479; *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. 127. The plaintiff in the attachment, on the other hand, may be liable for consequential and perhaps for vindictive damages. *Watson v. Sutherland*, 5 Wall. 74, 79; *Merrills v. Manufacturing Co.*, 10 Conn. 384. The causes of action were different and distinct.

Nor does it appear from the complaint that whatever damages may have been awarded in the replevin suit were collected by the plaintiff. The officer and the party under whose directions he acted were joint trespassers. Their liability was joint and several, and an unsatisfied judgment against one for the damages resulting from the trespass would be no bar to a later suit for the same damages against the other. *Sheldon v. Kibbe*, 3 Conn. 214; *Lovejoy v. Murray*, 3 Wall. 1. The complaint was therefore sufficient on its face, and the demurrer should not have been sustained. There is error in the judgment appealed from. The other judges concurred.

(70 Conn. 329)

In re SHELTON ST. RY. CO.

(Supreme Court of Errors of Connecticut. Feb. 8, 1898.)

APPEAL—GENERAL APPEARANCE—WAIVER OF DEFECTS.

1. A general appearance in the supreme court is not a waiver of a defect in the appeal.
2. An appeal taken under Pub. Acts 1897, c. 194, § 22, providing that an appeal from the decision of a judge of the superior court shall be taken "to the supreme court of errors next to be held in the judicial district or county where the

parties or any of them reside," must, under section 13, state the time and place of holding the court to which the appeal is taken.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Application by the Shelton Street-Railway Company to the Hon. George W. Wheeler, a judge of the superior court, for a finding that public convenience and necessity require the construction of a parallel street railway. Judgment was rendered for the applicants, and the Nagatuck Railroad Company, who appeared in opposition to the application, appealed. The appellees filed a plea in abatement. Plea sustained, and appeal dismissed.

The appellants moved to reject the plea in abatement, claiming that it was not filed with the proper clerk. This motion was denied, for reasons stated in *Vincent v. McNamara*, 39 Atl. 444. The appeal to this court, filed by the appellants on January 6, 1898, states that the parties appeal "to the supreme court of errors," and does not state an appeal to any specific term, nor state any time or place for holding the court, and the plea alleges these defects as ground of abatement. The appellants demur for the reasons: (1) The plea does not show that the appellees did not have actual knowledge from the proceedings below that appeal was taken to this term of court; (2) that the "notice of appeal" filed in court below states the term to which appeal will be taken; (3) that the record does not show the appeal to be taken to any term other than the present term of this court. The appellants also read in court an answer alleging in bar a general appearance by the appellees, and other facts appearing in the record, and stated that they wished to file this answer in case their demurrer should be overruled. The appellees stated they should demur to the answer if filed. By agreement of parties, the sufficiency of the plea was argued as if the questions had been raised by the appellants' answer to the plea, as well as by their demurrer.

Goodwin Stoddard and William D. Bishop, Jr., for appellants. Allan W. Paige and George P. Carroll, for appellees.

HAMERSLEY, J. A general appearance is not of itself a waiver of the right to object to a defect in the process. *Payne v. Bank*, 29 Conn. 415, 416; *Hotchkiss' Appeal*, 32 Conn. 353-355. The other facts stated in the answer set forth the same matters of record referred to in the demurrer to the plea; and their allegation is, in substance, a claim that, upon the face of the record, the plea in abatement is insufficient. The appeal to this court is a process whose form and requirements are fixed by statute. These provisions must be strictly complied with in order to properly perfect an appeal. *White v. Howd*, 66 Conn. 264, 266, 33 Atl. 915. The statute says that the appeal must state the time and place of holding the court to which the appeal is taken. Pub. Acts 1897, c. 194, § 13. This appeal

states neither time nor place. It is taken to "the supreme court of errors," without any specification of a term. The appellants, however, claim that this requirement of the statute is a mere matter of form; that it is apparent from the record that the present term of this court is the only one to which the appeal could by law be taken, and therefore it must be regarded as in fact taken to this term; and that the defect is cured by section 1000 of the General Statutes. This claim rests on the assumption that the term of court to which this appeal should have been taken is determined by section 2 of the act, and not by section 22. The provisions of these sections are distinct and different. The former affects appeals from judgment rendered at a regular session of the superior court, and requires the appeal to be taken to the term to be held next after the filing of the appeal in the judicial district or county where the judgment was rendered; while the latter affects appeals from judgments rendered by a judge exercising the power of that court in chambers, and requires the appeal to be taken to the term "next to be held in the judicial district or county where the parties or any of them reside." This appeal is controlled by the provisions of section 22. No other act authorized it. The parties resided in different counties. The statute is so phrased as to give, at least, some ground for the claim that the appeal might have been taken to the next term held in New Haven county, or to the next term held in Fairfield county. The appellee in a case of this description is not bound to construe the statute at his peril; that duty rests on the appellant. No appeal could be taken in this cause until the appellants designated the term to which they appealed. The failure to state the time and place of holding the court in this appeal is therefore a substantial defect. That a defect of this nature may be taken advantage of by a plea in abatement is not an open question. *Phelps v. Norton*, 35 Conn. 327; *Redfield v. Buck*, Id. 328, 333; *Comstock's Appeal*, 54 Conn. 116, 6 Atl. 196; *Pitkin v. Railroad Co.*, 67 Conn. 19, 34 Atl. 704; *Montville St. Ry. Co. v. New London N. R. Co.*, 68 Conn. 418, 36 Atl. 811. See, also, *Chipman v. City of Waterbury*, 59 Conn. 496, 22 Atl. 239. Section 31 of the act and chapter 194 of the Public Acts of 1897 relate to the manner of perfecting appeals taken under section 22, but do not control the term to which such appeals shall be taken. The plea in abatement is sustained, and the appeal dismissed. The other judges concurred.

(70 Vt. 1)

STATE v. TAYLOR et al.

(Supreme Court of Vermont. Windsor. Feb. 4, 1898.)

ASSAULT WITH INTENT TO MURDER—MITIGATION—JOINT WRONGDOERS—ARREST—RESISTANCE—JUSTIFICATION—OFFICERS—EVIDENCE.

1. Where one charged with the commission of a felony in one state escapes to another state,

an officer has a right to arrest him without a warrant, on a reasonable cause for suspicion.

2. Where one pointed out by his assistant as an officer has no warrant, but states to suspected persons that he arrests them by the authority of the state, there is such a disclosure of his authority as to make resistance to arrest unjustifiable, and he is not obliged to state the conditions which authorized him to arrest without a warrant.

3. That an officer known to be acting in his official capacity in making an arrest without a warrant, when asked for his papers, pulled a revolver from his pocket, saying that was all the papers he needed, and at once put it back in his pocket, and that thereupon defendant stated that he could not be taken without papers, does not show anything that could lawfully mitigate the assault, subsequently made on the officer, from an assault with intent to murder to assault with intent to kill.

4. An assault with a deadly weapon, made in resisting arrest, if not fatal, cannot subject the offender to a conviction of an assault with intent to kill or an assault with intent to murder, unless the intent to take life actually existed at the time of the assault.

5. Where four persons, without any common understanding that they would do whatever might be necessary to avoid arrest, resisted an officer, and one of their number shot him, but not fatally, all of them were not guilty of an assault with intent to murder, even though the one who fired the shot did so with intent to kill.

6. The official character of a person can be proven by his own testimony, a resort to the record being unnecessary.

7. Testimony of witnesses that they were called by an officer to help arrest some burglars is admissible in a prosecution for an assault on the officer by the supposed burglars.

8. It is not error to permit a United States marshal to testify that he had transferred to another jurisdiction two of the four persons arrested together for the crime charged against defendants.

9. Evidence of one that he had informed the officer that a burglary had been committed in another state, and that defendants were fleeing in his direction, immediately after its occurrence, and of statements as to identity of defendants, is admissible in a prosecution for assault on the officer in making the arrest, for the purpose of showing a reasonable cause to arrest defendants, and their knowledge of the reason for their arrest.

10. The facts that one of the defendants, on trial for an assault while resisting arrest, ran off and hid in the bushes near the close of the affray, and that he was afterwards brought in by the officers, may be shown as incidents of the affray, and of the general transaction of which the affray was a part.

11. The fact that defendant, who was shot while resisting arrest, refused to give his name, age, or residence to the physician who dressed his wounds, was subsequent conduct indicative of guilt.

Start and Thompson, JJ., dissenting.

Exceptions from Windsor county court; Taft, Judge.

Indictment of G. O. Taylor and John O'Donald for an assault with intent to kill and murder. Verdict and judgment of guilty, and sentence imposed at the respondents' request. The respondents excepted. Exceptions sustained.

W. E. Johnson and Butler & Maloney, for respondents. J. C. Enright, State's Atty., and W. W. Stickney, for the State.

MUNSON, J. The alleged assault was committed upon Paul Tinkham, constable of

Rochester, and three persons acting under him, while they were effecting an arrest of the respondents and two others, without a warrant, on suspicion of felony. The officer acted upon information received from Brandon by telephone, to the effect that the post office at Ticonderoga, N. Y., had been burglarized the night before, and that four persons suspected of the crime had left Forestdale, going in the direction of Rochester. When met by the officer and his assistants, the suspected party were coming along the highway in a wagon, driven by a liveryman from Forestdale. The jury have found, under the charge of the court, that when Tinkham met the respondents' party he said to them that he arrested them by the authority of the state of Vermont, and that, upon inquiry being made as to which was the officer, Tinkham was designated as such by one of his party. The remainder of the transaction must be taken to have been in accordance with the testimony most favorable to the respondents' claim. The purport of this was that one of the respondents' party then asked Tinkham if he had any papers, and that Tinkham thereupon pulled a revolver from his pocket, saying that was all the papers he needed, at once returning the revolver to his pocket; and that respondent Taylor then said, with an oath, "You can't take this party without papers;" and that upon this all four of the suspected persons commenced to get out of the wagon, some of them firing at the constable's party as they did so.

The jury were instructed, in substance, that, if Tinkham had reasonable cause to suspect that the respondents had committed a burglary, he could arrest them without a warrant; and that if he told them that he arrested them by the authority of the state of Vermont, and if they knew he was an officer, it was their duty to submit; and that, if they shot the officer under these circumstances, they were guilty of an assault with intent to murder. The respondents insist that the officer had no right to arrest without a warrant for a felony committed in another state; and that, if he had that right, there was a failure to disclose his authority, which justified their resistance; and that, in any event, the manner of the arrest was such that the grade of the offense should have been left to the determination of the jury. It has been held in most of the states that, when one charged with the commission of a felony in one state escapes to another, he may be there arrested and detained before a demand for his return has been made by the governor of the state from which he has fled. In most of the cases where this doctrine has been enunciated the arrest was made upon the warrant of a magistrate. But in *State v. Anderson*, 1 Hill (S. C.) 327, it was held that an arrest by a private person, without a warrant, could be justified by showing prima facie that a felony had been committed in another state, and that the party

arrested was the perpetrator. It is clearly the tenor of the decisions that the machinery provided for the arrest of local offenders is available for the arrest of fugitives from another jurisdiction; and it must follow that, when the arrest without warrant is made by an officer, it will be sufficient for his justification if it appear that he had reasonable cause to believe that the person arrested had committed a felony in another state, although more than this may be required for his detention, when brought before a magistrate. So, in *Ex parte Henry*, 20 How. Prac. 185, it was said that the officers were undoubtedly authorized to arrest the prisoner upon reasonable ground of suspicion, although there was no proof on the hearing that the suspicion was well founded. It is well settled that the person whose arrest is attempted must have notice of the authority and purpose of the person who undertakes to arrest him. The first case in which this matter is elaborately treated is that of *Mackaley*, reported in *Crô. Jac.* 279, and more fully in 9 *Coke*, 61. The arrest was in London, by a sergeant of the mace. The officer, having his mace at his back, but without showing it, clasped the prisoner about the body, saying, "I arrest you in the king's name," at the suit of such a person, for such a debt; whereupon the officer was attacked, and mortally wounded. The prisoner having been convicted of murder, the questions presented were considered by all the judges of England. It was argued that the arrest was illegal, because made in the darkness of night, when the prisoner could not know the officer. To this the court said: "Although he cannot see the officer, yet when he hears him say, 'I arrest you in the king's name,' etc., he ought to obey him, and, if the officer has not a lawful warrant, he shall have the action of false imprisonment." It was further objected that the statement made by the officer at the moment of the arrest did not contain all the particulars held essential in *Countess of Rutland's Case*, 6 *Coke*, 52; but it was said that the requirement in that case was to be applied when the party submits himself to the arrest, and not when he resists the officer, and interrupts him, before he can speak all his words. As to the necessity of producing the mace in connection with the words of arrest, it was said to be beyond question that the sergeant had not to show his mace, and that, if an officer were required to show his mace, it would be a warning for the party to fly. So, upon the whole case, it was unanimously held that if an officer, who hath execution of process, be slain in doing his duty, it is murder in him who kills him, and that there need not be any inquiry of malice. In *Rex v. Woolmer*, 1 *Moody*, 334, decided two centuries later, the judges went even further in sustaining a conviction, although not with entire unanimity. This case grew out of an arrest without warrant on information of an attempt to

rob. The arrest was made in the night, by a watchman, dressed in a watchman's coat, and carrying a lantern. The jury found that the prisoner knew him to be a watchman. All he said to the prisoner was, "You must go back, and come along with me." He did not explain why, nor was any charge against the prisoner stated. Here it might be urged with some force that, in view of the failure to use any formal words of arrest, there should have been a statement of the charge for which the prisoner was wanted, in order that he might clearly understand that the watchman was acting in his official capacity. But it was resolved, by 9 of the 13 judges who considered the case, that "the watchman could legally arrest the prisoner without saying that he had a charge of robbery against him, though the prisoner had in fact done nothing to warrant the arrest," and that, had death ensued, it would have been murder. This case is ample authority to sustain the sufficiency of the words of arrest employed on this occasion, unless it be considered that a more explicit statement was required by the fact that inquiry was made regarding the possession of papers.

It is frequently said in the text-books and in judicial discussions that an officer must show his warrant, or state the grounds of the arrest, if demanded. But an examination of the authorities will show conclusively that this is not a part of the arrest, but a duty which immediately follows it. Upon submitting to the officer, the arrested party is entitled to this information; but he cannot put off the arrest, and increase his chances of escape, by requiring an explanation in advance. In *Bellows v. Shannon*, 2 *Hill*, 86, where it is said that either before or at the moment of the arrest the officer ought to say enough to show the party that he is not dealing with a trespasser, but with a minister of justice, it is further remarked: "I do not say that the officer is bound to disclose the particulars of his authority before he makes the arrest, or that it may not sometimes be proper to lay hands on the party before a word is spoken." In *Com. v. Cooley*, 6 *Gray*, 350, where the respective duties of the officer and the arrested party are considered, it is said that the accused is required to submit to the arrest, to yield himself immediately and peaceably into the custody of the officer, and that the officer can have no opportunity to make the accused acquainted with the cause of his arrest until he has brought his prisoner into safe custody. Continuing, it is said: "These are obviously successive steps. They cannot all occur at the same instant of time. The explanation must follow the arrest, and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged." It is evident from the adjudged cases that in the rule above stated, as to what is essential in making an arrest, notice of the officer's authority means notice

of his official character, and not of the exact circumstances which authorize the arrest; and that notice of his purpose relates to the purpose to arrest, and not to the purpose of the arrest. It is beyond question that, in making an arrest by virtue of a warrant, the officer cannot be required to show the warrant, or state the substance of it, until the arrest is accomplished. In this case there was no warrant, and the officer could arrest without one only in certain classes of cases. But we think the officer was no more obliged to state the conditions which authorized him to arrest without a warrant than he would have been to produce his warrant, or state the substance of it, in case of an arrest on warrant. All that the respondents could require, in the first instance, was a statement sufficient to show that the person who demanded their arrest was an officer, acting in his official capacity. This was clearly covered by the designation of Tinkham as the officer, and by his statement that he arrested them by the authority of the state of Vermont.

It appears, then, that the words of arrest employed by the officer were such as entitled him to an immediate submission to his authority, without answering the question regarding papers. But it is contended that the manner in which that question was answered, and the demonstration which accompanied the answer, were such as might have reduced the offense to manslaughter, if death had resulted from the resistance made; and that consequently the jury should have been permitted to return a verdict of assault with intent to kill, even though the words of arrest were sufficient. The charge did not permit a consideration of the circumstances referred to in mitigation of the offense. It is doubtless true that an officer declaring himself to be such, and having full authority to make the arrest, may conduct himself in such a manner as to lower the penalty of resistance. But, when the case is void of evidence tending to show anything that could lawfully mitigate the assault made, it is not error to confine the jury to the graver offense. *Boyd v. State*, 17 Ga. 194; *State v. Green*, 66 Mo. 631, 651. A majority of the court think there was nothing in this case that called for a submission of the question stated. The incident of the revolver had been preceded by a formal declaration of arrest, on inquiry as to which was the officer, the designation of Tinkham in response to this inquiry, and a further inquiry regarding the possession of papers. The revolver was shown by being drawn from the pocket, and was then immediately returned to the pocket. The act, as a whole, completely negatived any intention to use it unless its use was made necessary by resistance. We are aware that in such moments men sometimes act upon the preliminary threatening movement, before the mind has taken cognizance of the concluding move-

ment of opposite import, and that in the consideration of such a question as the one presented it will not do to rely too much upon a recital of events in the order of their initiation. But in this case the acts were connected with remarks which determined their relation to each other with certainty. Tinkham's production of the revolver was accompanied by a statement that that was all the papers he needed. The shooting was preceded by a statement that the party could not be taken without papers. This remark, made prior to the shooting, in response to the statement which accompanied the exhibition of the revolver, separated the transactions, and characterized the act of resistance. When the evidence is considered together, it discloses nothing tending to show that the shooting was done under any misapprehension as to the officer's intention, or for any other purpose than to escape arrest.

It is also objected that the respondents could not be convicted of more than a common assault without the finding of an actual intent to take life, and that the charge permitted the jury to return their verdict without finding this. It has been repeatedly held, in cases not involving the matter of arrest, that proof of a specific intent to kill is requisite. The intent is the body of the aggravated offense. If death results from an unlawful act, the offender may be guilty of murder, even though he did not intend to take life; but if the assault, however dangerous, is not fatal, the offender cannot be convicted of an assault with intent to kill, unless the intent existed. An intent to take life may sometimes be presumed from the fact of killing, but when the fact does not exist the intent must be otherwise established. Any inference that may be drawn from the nature of the weapon and the manner of its use is an influence of fact, to be drawn by the jury upon a consideration of these with other circumstances of the case. 2 Bish. Cr. Law, § 741; *Roberts v. People*, 19 Mich. 401; *Patterson v. State*, 85 Ga. 131, 11 S. E. 620.

Nor do we find any ground for holding otherwise when the assault is made in resisting arrest. Under an indictment framed like this, a respondent may be convicted of an assault with intent to kill or an assault with intent to murder. *State v. Reed*, 40 Vt. 603. The grade of the assault will depend upon whether the crime would have been manslaughter or murder, if death had ensued. But if the death had resulted from resisting an authorized arrest, properly made, the crime would have been murder, regardless of the question of malice. So, if the assault charged was committed in resisting such an arrest, and was found to have been made with intent to kill, it would have been an assault with intent to murder. But, in the case of either assault, there must have been the intent to take life. The elimination from the inquiry of malice as the distinguishing test between murder and manslaughter,

and so between the two grades of assault, does not eliminate the question of specific intent, which is an essential element, even of the lower offense. The malice which the law infers from resistance to lawful arrest does not cover the intent to do a particular injury, and the question of intent must stand the same as in other cases.

So it becomes necessary to consider whether the matter of intent was properly submitted to the jury. The question was not entirely ignored by the court, but it was omitted from the general propositions submitted, and we think the charge, as a whole, could not fail to leave upon the minds of the jury an impression that, if the circumstances of the arrest were such that the killing of the officer would have been murder, the assault was an assault with intent to murder. The attention of the jury was directed almost exclusively to the question of guilt, as depending upon the legality of the arrest. They were nowhere distinctly told that, unless the respondents were found to have made the assault with an intent to take life, they could be convicted of nothing but a common assault.

We think there was also error in the instruction given as to the liability of all for the act of one. The court charged, in substance, that if the four persons whom the officers were attempting to arrest were acting together with a common purpose of resisting arrest, and any one of the four shot an officer in the execution of that design and with an intent to kill, and the other three were present assisting in the assault, all would be guilty of an assault with that intent. Assuming that the charge as a whole was sufficient to require the finding of an actual intent to take life on the part of one, it will be seen that the liability of the others for an assault with intent to take life is made to depend solely upon the illegality of the resistance. It is doubtless true that if all were combined for an unlawful resistance to the officers, and an officer had been killed by one of their number, all would have been guilty of the killing. But no one was killed, and the liability of the actual assailant, other than for a simple assault, depended upon the existence of a specific intent to kill. We think the jury could not be permitted to return a verdict of guilty of an assault with intent to murder against all, on the mere finding of a common purpose to resist arrest. It would doubtless be different if it were found that they acted upon a common understanding that they would do whatever might be necessary to avoid arrest.

The testimony of Paul Tinkham, that he was constable of Rochester, and was acting as such at the time of the arrest, was properly received. It was not necessary to prove his official character by the record. *Com. v. McCue*, 18 Gray, 226.

The testimony of Hoyt and Martin, who assisted the constable in making the arrest, that they were called upon by Tinkham to help him arrest some burglars, was properly received. The requisition of the officer was their author-

ization, and it was proper to show what the officer called upon them to do.

Four men having been arrested, it was not error to permit the witness Harris, the United States marshal, to state that he had transferred two of them to another jurisdiction. The statement contained nothing prejudicial to the respondents.

It being necessary for the state to show that the officer had reasonable cause to believe that the respondents had committed a felony, it was proper for the state to show by the witness Hall whatever was communicated by him to the officer as to the information the witness had received and its source. But the state was at liberty to show that a felony had in fact been committed; and there was evidence, as to which no question is now made, concerning what had taken place in the post office at Ticonderoga. In this connection, and upon this ground, the entire testimony of Hall, and the testimony of Holbrook and Fletcher, were admissible as tending to trace and identify the respondents in their flight from the place of the burglary to the place of their arrest. Proof that a burglary had been committed, and that these men were fleeing from the scene of it immediately after its occurrence, bore upon the question whether they fully apprehended the character and purpose of the persons they assaulted, and the question whether they had a motive to fire upon them with intent to kill. *People v. Pool*, 27 Cal. 57.

The state was permitted to show that about the close of the affray the respondent O'Donald ran off, and hid in the bushes, and that he was afterwards brought in by two of the officer's assistants, and that when the physician came to dress his wounds, and inquired as to his name, age, and residence, he remained silent. The first was admissible as an incident of the affray; the second, as an incident of the general transaction of which the affray was a part; and the third, in the view of a majority, as subsequent conduct indicative of guilt. The alleged offense was one which involved the respondent's connection with a prior transaction. The question put to him was such as might properly be asked by a physician when called to attend a stranger. The respondent's failure to give his name and residence, upon such an inquiry, was evidence of a purpose to conceal his identity. Exceptions sustained, sentence vacated, and cause remanded.

START and THOMPSON, JJ., dissent on the points announced as majority holdings.

(1 Pen. 8)

VAIL v. STATE.

(Court of General Sessions of Delaware. New-castle. Sept. 29, 1897.)

APPEAL IN BASTARDY—JURY—CHALLENGES—EVIDENCE—REASONABLE DOUBT.

1. A defendant in an appeal in bastardy is entitled to six challenges.

2. In an appeal in bastardy on the trial of an issue as to whether defendant is the father of the child, the state must prove its case beyond a reasonable doubt, such issue by statute being triable only in a court of criminal jurisdiction.

Proceeding to determine whether Clarence C. Vall was the father of a bastard. Verdict of guilty.

W. J. Willis and R. O. White, Atty. Gen., for the State. T. Bayard Helsel and Walter H. Hayes, for defendant.

PENNEWILL, J. This is a quasi criminal proceeding, triable in the court of general sessions, and we think it has been dealt with by our courts as a criminal proceeding. We will therefore allow the defendant six challenges.

At the conclusion of the testimony on both sides, Mr. Willis asked the court to instruct the jury that they should find their verdict according to the preponderance of the testimony, and that it was not necessary for the state to establish its case beyond a reasonable doubt. *People v. Christman*, 66 Ill. 162; *Allison v. People*, 45 Ill. 37; *Knowles v. Scribner*, 57 Me. 495.

Mr. Hayes contended that it was a criminal proceeding, so recognized in the unreported Delaware case of *State v. Springer*; also, in *Baker v. State*, 47 Wis. 111, 2 N. W. 110. He therefore asked the court to charge that if the jury have a reasonable doubt, growing out of all the testimony, that Clarence C. Vall is the father of the said child, their verdict should be not guilty.

PENNEWILL, J. (charging jury). This is an appeal in bastardy, taken to this court by Clarence C. Vall, and it comes to you as an issue by an order of this court. The sole question you are to try is whether Clarence C. Vall is or is not the father of the child of Anna M. Wolf. The counsel for the state have asked us to charge you that, in order to find that Clarence C. Vall is the father of this child, it is not necessary that you should be satisfied of that fact, from the testimony, beyond a reasonable doubt, but that it is sufficient if the preponderance of the testimony establishes it. We will say to you that in criminal cases the law requires that the jury should be satisfied beyond a reasonable doubt of the guilt of the accused before they can find a verdict against him, but in civil cases a different rule prevails, and a preponderance of testimony is sufficient. The legislature of this state has made this issue triable only in this court, a court of criminal jurisdiction; and it is difficult, therefore, to see why it should not be governed by the same principles as obtain in the trial of other criminal cases. And, besides, such a proceeding as this has been declared by this court, in several cases, to be a criminal action, and governed by the rules of criminal trials. In the case of *Smith v. State*, 1 Houst. Cr. Cas. 103, which

was an appeal in bastardy like the case at bar, the court said: "This is a quasi criminal proceeding, and solely cognizable in this, a court of criminal jurisdiction, in which the state is the party complainant, and not a civil suit between the individuals concerned in it, and for which reason the father was a competent witness for the state." He was competent, because, although a quasi criminal proceeding, it was triable in a criminal court. This court having heretofore taken such a position, we are not disposed to hold a different one, or one which would be inconsistent therewith, and we shall adhere to the principle established in that case until it is overruled. We say to you, therefore, that if in this case you are satisfied from the testimony, beyond a reasonable doubt, that Clarence C. Vall is the father of this child, your verdict should be that he is the father. If, on the other hand, you are not satisfied beyond a reasonable doubt, after a careful consideration of all the testimony, that he is the father, you should find that he is not the father of the child. With these instructions, we leave the case in your hands.

Verdict: "We find him to be the father of the child."

(1 Pen. 10)

In re JACKSON.

(Court of General Sessions of Delaware. Newcastle. Oct. 2, 1897.)

PRIVATE ROAD—TIME TO MAKE OBJECTION.

The proper time to interpose legal objections to the laying out of a private road is after the return of the freeholders, where there is no objection to the sufficiency of the papers.

A petition, in the usual form, of William B. Jackson, for a private road in Mill Creek hundred, having been filed by agreement, Mr. Hayes appeared in court, October 2d, and asked for the appointment of the freeholders.

Mr. Hoffecker: I ask that we be allowed a hearing before the freeholders are appointed. Our objection is that the petitioner is not the owner of the land for which he seeks an outlet through another's land. The question as to whether or not he is the legal owner is not such a question as the commission can pass upon, but is a question for the court.

Walter H. Hayes, for petitioner. Frank H. Hoffecker, for defendant.

LORE, C. J. We understand there is no objection as to the sufficiency or regularity of any of the papers. On the face of this paper, the petitioner is clearly entitled to this commission. The time to object, it occurs to the court, is when the return is made by the freeholders. You take your commission subject to the right of the other parties to except at that time.

The freeholders were then appointed by the court.

(1 Pen. 1)

SWAYNE v. REMLEY.(Superior Court of Delaware. Newcastle.
Sept. 21, 1897.)**JUDGMENT—ALLOWANCE AT FIRST TERM.**

A contract for construction of building, the consideration being payable on condition of the completion of the contract, is not an obligation for unconditional payment of money, in action on which Rev. Code, c. 106, § 4, allows judgment at first term on affidavit of demand.

Action of debt by Calvin I. Swayne against Nancy E. Remley, founded on a contract entered into between the plaintiff and the defendant, by which the plaintiff was to well and sufficiently erect and finish in a workmanlike manner all the different branches of work, of every kind and nature, as required in the erection and completion of a brick dwelling house, according to plans and specifications, for the sum of \$5,000, to be paid in installments as set out in the contract. The action was brought for the recovery of the price. The contract contained numerous conditions, and described how the work was to be done. An affidavit of demand was filed in the usual form.

Mr. Ward moved that judgment be refused, notwithstanding the affidavit of demand, on the ground that the cause of action sued upon was not such an instrument as is contemplated by the statute (section 4, c. 106, Rev. Code) allowing judgment at the first term upon affidavit of demand filed.

John P. Nields, for plaintiff. Herbert H. Ward, for defendant.

LORE, C. J. This being a contract for the erection and completion of a building, and the money being payable upon the condition of the completion of the contract, it is not an obligation for the unconditional payment of money, and does not come within the statute allowing judgment at the first term upon affidavit of demand. We therefore refuse judgment.

(1 Pen. 11)

STATE v. PHILLIPS.

(Court of General Sessions of Delaware. Newcastle. Oct. 2, 1897.)

DIVORCE—SUPPORT OF CHILD.

Where either parent is fit to have the custody of a child which is not of tender years, the divorced wife cannot sustain an action against the father for its support when she refuses him the custody thereof.

Action by the state, in behalf of a divorced wife, against George W. Phillips, for the support of his child. Dismissed.

R. O. White, Atty. Gen., for the State. Walter H. Hayes, for defendant.

LORE, C. J. Phillips and his wife were divorced by act of the general assembly of this state, which act is silent as to custody

of their only child, a boy 14 years of age. The wife has retained and insists on his custody. There is no objection to the fitness of either parent to have such custody. The father has tendered himself ready to support the child if allowed the custody of him. The mother refuses such custody, and yet claims from the father separate maintenance. At common law, the duty of maintenance of children by parents was based on the right to custody, society, and services of the child. As this child is not an infant of tender years, and the father is shown to be a fit person to have him in charge, there seems to be no just reason why he should support the child, whose custody, society, and services are enjoyed by the mother. We therefore order the case dismissed.

(1 Pen. 18)

SCHREITZ v. STATE.(Superior Court of Delaware. Newcastle.
Oct. 2, 1897.)**PENAL STATUTES—CONSTRUCTION.**

Under Rev. Code, c. 128, § 21, providing that the justice finding a person guilty of trespass shall impose a fine of not more than "five dollars and costs," a fine of the costs alone is error.

Leslie F. Schreitz was convicted of trespass, and he brings a writ of certiorari to Charles H. Salmon, a justice of the peace in and for Newcastle county. The record sent up by the justice was in part as follows: "And now, to wit, this 12th day of April, A. D. 1897, after hearing the allegations and proofs of T. H. Gilpin, plaintiff, C. F. Crockett, and Benjamin Wilson, witnesses, I, the said justice, do adjudge the said Leslie F. Schreitz, defendant, guilty of trespass, and do fine said Leslie F. Schreitz the costs of suit, and place him under one hundred dollars bail for one year to keep the peace. Costs, \$4.80."

Mr. Burris filed a number of exceptions to the above record, the one relied upon being as follows: "First. The record below, as returned, shows a judgment entered against Leslie F. Schreitz, adjudging him 'guilty of trespass,' and imposing upon him a fine of 'costs of suit'; whereas, the statute upon which this action below was brought, being a penal statute, and must be followed strictly, provides that the justice, finding a person thereunder charged guilty, 'shall for each offense impose a fine of not more than five dollars and costs.'"

Mr. Cooper contended that the judgment of the justice was within the statute; that he was authorized thereby to fine the defendant five dollars, also to fine him, in addition thereto, the costs, whether they be \$5 or \$500; and that he could either fine him the "five dollars and costs" or the costs alone.

P. L. Cooper, Jr., Dep. Atty. Gen., and John H. Rodney, for the State. Martin B. Burris, for defendant.

LORE, C. J. We cannot construe that clause of the statute (section 21, c. 128, Rev. Code) in the disjunctive; it is clearly in the conjunctive. The justice must impose a fine, not exceeding five dollars, and costs. Let the judgment be reversed.

(1 Pen. 2)

STATE v. McDOWELL.

(Court of General Sessions of Delaware. Newcastle. Sept. 23, 1897.)

LOTTERY POLICY WRITING—INDICTMENT—EVIDENCE.

1. An indictment charging that defendant, at a given time and place, unlawfully was concerned in interest in lottery policy writing, against the form of the statute, though following the language of Rev. Code, p. 969, under which it was found, is not sufficient, the elements of the offense not being set out.

2. For the purpose of identifying the day on which a certain policy writer's place was raided, for which there was an attempt to prove an alibi, it may be shown that it was the day on which certain other like places were raided.

John McDowell was indicted for being concerned in interest in lottery policy writing. The indictment contained four counts, the first of which was as follows: "That John McDowell, late of Wilmington Hundred, in the county aforesaid, on the 30th day of November, in the year of our Lord 1896, with force and arms, at Wilmington Hundred, in the county aforesaid, unlawfully was concerned in interest in lottery policy writing, against the form of an act of the general assembly in such case made and provided, and against the peace and dignity of the state."

R. C. White, Atty. Gen., for the State. Herbert H. Ward, for defendant.

Mr. Ward moved the court that the above count be stricken out as not being sufficiently specific to inform the accused of the nature and character of the offense charged; contending that it followed the language of the statute under which the indictment was found (Rev. Code, p. 969), but did not enumerate the elements constituting the misdemeanor charged; that it did not aver any substantive offense, but embodied only a description of the offense.

Mr. White contended that the indictment was in the usual form; that the count sufficiently informed the accused of the nature of the accusation, in that it set out the business of lottery policy writing, and that it was analogous to following any business without a license where license was required.

LORE, C. J. This is an offense which embraces a number of elements. In the first count there are no elements of the offense set out, such as are required to be specified in order to advise the defendant specifically of what he is to meet. It has been decided in this court again and again that where the crime embraces a number of elements, those

elements must be specified. We therefore order that the first count be stricken out.

At the trial, it having been testified by some of the witnesses for the defense that on the morning of November 30, 1896, the defendant was seen by them at a different place from that where the alleged offense was committed, and that on that day a raid was made on several policy writers' places by the police—

Mr. Ward asked the witness John F. Dolan the following question: "Upon the 30th day of November, 1896,—the day it has been testified that a raid was made on 1110 French street,—were there not other policy writers' places raided by the police?"

Mr. White objected to the question as irrelevant.

Mr. Ward: I offer this testimony to identify the day for which I have proved an alibi for the defendant.

LORE, C. J. A majority of the court (consisting of GRUBB and PENNEWILL, JJ.) think it is admissible.

GRUBB, J. It is admitted on the ground that it is relevant to the establishment of the defense of alibi.

(1 Pen. 4)

MITCHELL v. GUTHRIE et al.

(Superior Court of Delaware. Newcastle. Sept. 29, 1897.)

OBSCURE PLEADING—MOTION TO STRIKE.

A defendant's fifth plea to a petition on a mechanic's lien was as follows: "Note under hand of G. for \$150 on account of the claim of plaintiff extending under mechanic's lien statutes, the time of filing lien in above-stated case until July 16, 1897." Held, that it should be stricken, as it did not clearly state an issuable fact.

Action by Frank A. Mitchell against Richard J. Guthrie and another. Plaintiff moves to strike out defendants' last plea. Granted.

William S. Hilles, for plaintiff. Liburne Chandler, for defendants.

This was a mechanic's lien. The petition set out the usual facts, and claimed \$1,100 balance due. The defendants filed the usual pleas of payment, set-off, releases, accord and satisfaction, and in addition thereto the following plea: "Note under hand of William C. Guthrie for \$150 on account of the claim of plaintiff extending under mechanic's lien statutes, the time of filing lien in above-stated case until July 16, 1897."

Mr. Hilles moved to strike out the last plea on the ground that the same tendered no issue; that it was irrelevant and absolutely meaningless, and therefore could not be replied to or demurred to.

LORE, C. J. The defendants have not distinctly and clearly stated in their fifth plea any issuable fact. There are what are generally known as "short pleas"; but the defend-

ants' plea is not good as a short plea. In the judgment of the court, it does not set out any defense. We therefore make the order that the fifth plea be stricken out.

On motion of Mr. Chandler, leave to amend pleas generally was granted.

(1 Pen. 22)

TRUITT v. LAMB et al.

(Superior Court of Delaware. Sussex. Oct. 7, 1897.)

APPEAL—EXCEPTIONS—JUDGMENT.

Where two judgments are taken at the same time, in separate actions between the same parties, for different amounts, and exceptions contemplating a reversal of but one do not refer specifically to either, the court may be guided by the amount of the recognizance shown by the record, in determining to which judgment the exceptions refer.

Certiorari directed to Jesse W. Robinson, a justice of the peace in and for Sussex county, to reverse and vacate a judgment for plaintiffs in an action by G. M. Lamb & Bro. against Henry V. Truitt, trading as Truitt & Co. Reversed.

Record and proceedings sent up, showing two summonses,—one for \$138 and costs, on a protested check; the other for \$28.76, on book account,—and both issued same day, to same constable, returnable forthwith, and also showing two judgments by default against the said defendant, bearing date the same day, for \$140.08 and \$28.76, respectively. Execution issued on each of said judgments. The defendant filed the following exceptions to the record, viz.: "First. For that the said G. M. Lamb & Bro., a partnership, sued by their firm name, and not by the individual members composing the said firm, as by law required, which is error. For this and many other errors and imperfections in the record contained, the plaintiff prays that the judgment below may be vacated, reversed, set aside, and held for naught."

Mr. Martin contended: That, although the error referred to (it being the same in both judgments) was fatal, yet the exceptions, contemplating the reversal of but one of the judgments, and not specifying which one of them, were vague and uncertain, and not in conformity with the uniform ruling of the court in certiorari cases. *Deputy v. Betts*, 4 Har. (Del.) 352. The exceptant had prayed that the judgment below be reversed, etc., without referring specifically to either of them, and it was not in the province of the court to determine definitely from the record which one was meant, and therefore the writ should be dismissed. That, as the amount of the recognizance required before issuing the writ was wholly in the discretion of the prothonotary, therefore the court could not be guided by that amount in determining to which of said judgments the exceptions referred. Rev. Code. c. 106, § 15.

Woodburn Martin, for plaintiff. Edward D. Hearne, for defendant.

LORE, C. J. It appearing to the court, from the appearance docket, that the recognizance was taken in the sum of \$80, the exceptions have reference to the judgment for \$28.76. The exceptions cannot be taken to refer to the judgment for \$140.08, and are not to be considered in that regard. We therefore order that the judgment for \$28.76 be reversed.

(1 Pen. 12)

BAILEY v. ENGLAND.

(Superior Court of Delaware. Newcastle. Oct. 2, 1897.)

ARBITRATION—SETTING ASIDE AWARD.

An award of a referee will not be set aside because, when his decision was given, he did not understand certain material facts, unless there is something like a willful disregard of the law or the evidence, or both, in reaching his decision.

Action by Sarah S. England against William F. Bailey. Appeal from a decision of a justice of the peace to the superior court, in which the matters in controversy were referred, under a rule of court, by agreement of parties, to a referee to settle and determine same. The report of the referee was in favor of the plaintiff below, and defendant moves to set it aside. Denied.

Howell S. England, for plaintiff. Horace Greeley Knowles, for defendant.

Mr. Knowles filed the following exceptions to the award, viz.: "(1) That the award was contrary to the law and facts involved in the case; (2) that the award was made under a misapprehension of the facts,"—and stated that the referee, who was out of the state, but could be produced at the next term of court, had admitted to him that when he gave his decision he did not understand certain material facts connected with the case. Mr. Knowles admitted, however, that the merits of the case, the law, and the facts were distinctly before the referee.

Mr. England: The weight of authority in the United States leans towards making absolute the certain and simple rule that the award of the arbitrators, when made in good faith, is final, and that it cannot be questioned or set aside for a mistake, either of law or of fact. Rev. St. Del. c. 128, §§ 5, 6; *Kleine v. Catara*, 2 Gall. 61, Fed. Cas. No. 7,869; *Burchell v. Marsh*, 17 How. 394; *Stewart v. Grier*, 7 Houst. 378, 380, 381, 32 Atl. 328; *Orumlish v. Railroad Co.*, 5 Del. Ch. 270, 275-280; *Beeson's Adm'r v. Elliott's Ex'r*, 1 Del. Ch. 368, note 381-387; *Stille v. Layton*, 2 Har. (Del.) 149, 150; *Allen v. Smith's Adm'r*, 4 Har. (Del.) 234, 236; *Fooks v. Lawson*, 1 Hardesty, 115, 119, 120, 40 Atl. —.

LORE, C. J. Our courts have drawn the line distinctly. There must be something like a willful disregard of the law or the evidence,

or both, to warrant the court in setting aside an award of referees. This is the correct rule. So defined, you have a clean-cut principle, easily understood. Any other rule would tend to prolong litigation. It would be like a game of battledore and shuttlecock,—referring cases to arbitrators, and, if the award is unsatisfactory, ask to set it aside and try the case over again. The award of referees should stand unless it is so willful or grossly wrong as to shock the court, or, if it were the verdict of any jury, would warrant the granting of a new trial. Let the award be approved and confirmed.

GRUBB, J. In *Allen's Case*, 4 Har. (Del.) 234, it was held that it must be a clear mistake, that is so manifest that it shocks the common sense and judgment of the court to such an extent that we would reasonably have to infer and say it was impossible for an intelligent referee to have considered the material fact in question before he rendered that particular award. We cannot go into that kind of a question when one intelligent referee, with an ordinarily good judgment, could arrive at a conclusion, and another referee, with a similarly good judgment, could arrive at a different one. If we did, we might with equal reason have to set aside any verdict rendered by a jury. This is a case in which first thoughts will have to be best. Referees' second thoughts after rendering their award will not do.

(1 Pen. 19)

STATE v. COSTEN.

(Court of General Sessions of Delaware. New-castle. Sept. Term, 1897.)

CARRYING CONCEALED WEAPONS.

1. One who is found to have a deadly weapon other than an ordinary pocketknife concealed on his person is prima facie guilty of a violation of 16 Laws Del. c. 548, § 1, providing "that if any person shall carry concealed a deadly weapon on or about his person, other than an ordinary pocketknife," he shall, upon conviction, be punished, etc.

2. Where one is shown to have had a deadly weapon concealed upon his person, the presumption that he was violating 16 Laws Del. c. 548, § 1, prohibiting the carrying of concealed weapons, may be rebutted by proof that he was carrying the weapon for a lawful purpose.

Prosecution by the state against Samuel Costen for carrying concealed weapons.

The defendant was indicted at this term for carrying concealed a deadly weapon. At the trial the state proved that he was found by a police officer with a deadly weapon, to wit, a revolver, concealed upon his person. The defendant testified that he had purchased said revolver, and was carrying the same home at the time of his arrest by the police officer.

R. C. White, Atty. Gen., for the State.

GRUBB, J. (charging jury). The prisoner, Samuel Costen, is charged in this indictment

with the offense of "carrying concealed a deadly weapon upon or about his person, other than an ordinary pocketknife." You are the sole judges of the facts in this case, for under the present constitution the court may not give its opinion to you with respect to any fact in the case, or to what weight or effect it is to have upon you. While you are the judges of the facts, it is our duty, however, to state to you the law applicable to the facts, and it is yours to find your verdict upon the facts in accordance with the law as we state it to you. The act of assembly (Act 1881, p. 716) under which this indictment is found reads as follows: "That if any person shall carry concealed a deadly weapon upon or about his person other than an ordinary pocketknife," he shall then, upon conviction, receive punishment as provided by law. This court has held that, where a jury is satisfied beyond a reasonable doubt, from the facts before them, that the accused has upon or about his person a deadly weapon other than an ordinary pocketknife, put there by him out of view, he is prima facie guilty, under the law, of carrying concealed a deadly weapon upon or about his person. But we have also held, and instructed juries, that, although the accused is to be presumed guilty from the mere fact of having upon his person a deadly weapon out of sight, yet that he may nevertheless show to the jury that he has put that weapon there and carried it there for a lawful purpose. So that, although you may find that he had a deadly weapon upon his person, out of sight, you should not find him guilty if you are satisfied that he had it there for a lawful purpose. If you are satisfied, however, that he had it there out of sight upon his person, and not for a lawful purpose, then it would be your duty to find him guilty. We may as well explain to you that this act was passed in 1881; that prior to and up to that time the carrying of concealed deadly weapons at gatherings of various kinds, and upon other occasions, had become a menace to the public peace, and a peril to the public safety. It had reached such a state as to call for legislation on the ground of public policy and for public protection. Therefore this law was passed, to prevent this habit, which had become a dangerous one to the public. The law provides that no one shall carry concealed about his person a deadly weapon, because the temptation and tendency to use it under excitement upon the said various occasions were so great that such temptation and tendency had to be removed as far as possible. We have attempted to carry out this law in the spirit in which it was enacted, and for the wise public purpose for which it was designed. Therefore we have given the construction which I have stated to you.

In the first place, you must be satisfied that the prisoner had a deadly weapon, other than an ordinary pocketknife, upon his person, out of view. You have heard the

testimony. It is not for us to comment upon that. Did he have upon his person this pistol, out of sight? That fact is for you to determine. If you determine that he had, then you must find him guilty of carrying concealed the weapon, within the legal meaning of "concealed," unless he proves, or it otherwise appears from the evidence, that he had it there for a lawful purpose. Did he so have it for a lawful purpose? If he did, then he is not guilty. If he did not so have it for a lawful purpose, then you should find him guilty. We think it unnecessary to say more to you upon this subject, and we therefore commit the case to the jury for their verdict.

Verdict, "Not guilty."

(1 Pen. 24)

FAIT & SLAGLE CO. v. TRUXTON et al.
(Superior Court of Delaware. Sussex. Oct. 12, 1897.)

DISQUALIFICATION OF JUROR—FRAUDULENT PURCHASES—RESCISSON—RIGHTS OF JUDGMENT CREDITOR.

1. The nephew of one of the counsel engaged in the trial of the case is not thereby disqualified to act as a juror.

2. In showing fraud of the vendees in obtaining a purchase of goods, proof of false representations made to a third party, who also sold them goods about the same time, is admissible.

3. The act of suing out a writ of replevin by the vendor to obtain possession of goods sold under false representations, is a rescission of such sale.

4. A sale of goods procured by the vendee through false representations as to his solvency passes no title which will prevent the vendor, who rescinds, from recovering them or their value from a bona fide judgment creditor of the vendee, who seizes them under execution.

Action by the Fait & Slagle Company against Joseph Truxton and others. Judgment for plaintiff.

A. F. Polk and Lewis C. Vandegrift, for plaintiff. C. W. Cullen, C. M. Cullen, and C. F. Richards, for defendants.

Action of replevin, to recover from defendants \$2,016.00, being the alleged value of 96,000 tin cans, with interest, which cans plaintiff claimed were its property, and which were unlawfully seized and sold by said defendants, as the property of Morrow & Coulbourn, a canning firm, doing business at Seaford, in this state.

At the trial, while impaneling the jury, a juror called to the box proved to be a nephew of one of the counsel for the defendants. Mr. Vandegrift raised the point that the fact of relationship to one of the counsel in the case was sufficient ground for disqualification of a person to serve as a juror, and that the plaintiff should not be required to exercise a challenge.

LORE, C. J. It is not a sufficient ground for disqualification. You may challenge him; but we do not think that he has such

an interest in the case as would exclude him from serving as a juror.

The witness Edgar F. Kirwan, after having testified as to certain admissions made to him by one of the vendees as to the fraudulent nature of the purchase of the goods replevied in the above case, was asked the following question by Mr. Vandegrift: "Did you sell goods to Messrs. Morrow & Coulbourn at or about the same time that Fait & Slagle sold to them?" After answering the above question in the affirmative, the following question was asked, viz.: "With respect to the sale you made to them, did they make similar representations to you as to their solvency that they had made when purchasing the goods of Fait & Slagle?" This question was objected to by counsel for defendants as irrelevant. Plaintiff's counsel contended it was pertinent to the issue in a case where fraud is alleged, and cited *Carey v. Hotelling*, 1 Hill, 811; also, *Rowley v. Bigelow*, 12 Pick. 30d.

LORE, C. J. We think, under the authority of *Carey v. Hotelling*, 1 Hill, 811, that this question is admissible. In the case of *Rowley v. Bigelow*, 12 Pick. 307, Chief Justice Shaw lays it down very distinctly. The syllabus in the latter case is as follows: "In trover for goods sold by the plaintiff to a vendee under whom the defendant derived his title, it was held that the testimony of persons who had sold goods to the same vendee about the same time, showing that he was then insolvent, and that he knew it, and that he had no reasonable expectation of paying for the goods purchased by him, is competent evidence to prove that his purchase from the plaintiff was fraudulent." The chief justice elaborates the syllabus, and gives his reasons. It was held that the testimony was admissible.

At the conclusion of plaintiff's testimony, the defendants moved for a nonsuit, upon two grounds, viz.: "(1) Because the evidence did not show that the contract between the plaintiff and Morrow & Coulbourn (the vendees) was ever rescinded; (2) because, no proof was introduced to show that the execution creditors of Morrow & Coulbourn were cognizant of the fraud practiced by said firm upon the plaintiff, and consequently said execution creditors occupied the same position as purchasers for value without notice."

LORE, C. J. A majority of the court think that this nonsuit ought not to be granted. While perhaps we are not able now to clearly distinguish between the case at bar and the case of *England v. Forbes*, 7 Hust. 808, 81 Atl. 805, we should like to say that the case of *England v. Forbes* seems to stand by itself. Counsel on neither side, apparently, have been able to produce any authority for that decision. The doctrine of this court (which seems to be absolutely in line with the cases hereto-

fore decided) is so clearly and tersely laid down by Judge Gilpin in the case of *Mears v. Waples*, 3 Houst. 581, designating, as it were, the class of people who may be termed "innocent parties," and in that respect having a right to be discriminated either for or against, according to their position, that it seems to us it could not be more clearly expressed. In that case it is confined to this class of persons, viz.: "A purchaser for a valuable consideration, without knowledge or notice of fraud, takes a valid title from the fraudulent buyer, which cannot be defeated by the original vendor. And a consignee of goods who in good faith makes advances upon them stands precisely in the same position as a purchaser for value"; that is, somebody who has an interest in the goods for which he has parted with value. In the case of *England v. Forbes*, before referred to, this announcement is made by the court: "Where, after possession has been obtained by a party who purchases under a fraudulent representation as to his solvency, they be levied upon by an execution issued at the suit of a bona fide judgment creditor, having no notice or knowledge of any such representation, his execution lien cannot be disturbed by, but will hold good against, the defrauded seller." And immediately after that the learned judge in that case distinctly indorses the doctrine previously laid down in *Mears v. Waples*. Now, if the principle laid down in the latter case is correct, then this decision in *England v. Forbes* is incorrect, and we are compelled now to elect between two decisions of this court. It is not simply that the case of *England v. Forbes* goes beyond the other, holding that a judgment creditor who has made a levy stands in the same position as a purchaser for value, but it is in antagonism to the principle laid down and clearly defined in the *Mears Case*. Immediately following what I first read, the learned judge in the case of *England v. Forbes* says: "It is the law of this state, as decided in the case of *Mears v. Waples*, that mere insolvency of the buyer, well known to himself and concealed from the seller, does not in itself furnish sufficient grounds for rescinding a contract of sale; nor will the fraudulent purchase and obtaining of goods with an intention of never paying for them of itself render the contract absolutely void, even as between the seller and buyer; yet it will render it voidable at the election of the seller, but, if the goods are sold by such fraudulent buyer to an innocent purchaser for value, the latter will take and hold them under a valid title." So that the decision in the case of *England v. Forbes* not only goes beyond the decision in the *Mears Case*, but is in conflict with the principle laid down in the latter case. We hold—and we think it the just course—that, whenever the court finds it has made an error, it is its duty to correct such error. It is a duty it owes to the public. It is a duty it owes to the litigants themselves, that they may not be driven to another court to ascertain that which this court believes to be wrong. Again,

it is a principle that the court will at all times recognize that wherever the right is clear, that that right shall be distinctly announced, and, if it has made an error, to correct it in a frank, manly, and prompt manner. That being the opinion of a majority of this court, we do not think a nonsuit ought to be granted in this case.

PENNEWILL, J. The CHIEF JUSTICE has very correctly stated the position of a majority of the court, and I do not propose to go over that at all. I only wish to say that if I could feel satisfied that it has been the settled policy and practice of this court to adhere to its former decision upon the same subject, even though it was believed that such decision was erroneous, I might feel constrained to be governed by the decision in *England v. Forbes*, in regard to an execution creditor having the same protection as an innocent purchaser against the claim of the defrauded vendor. But I am not satisfied that such has been the settled policy and practice of this court, and therefore I must view this as a matter of law, and not as a question of policy and practice. That being the case, I cannot indorse a principle which my judgment does not approve, at least until it has been so declared by the court of last resort, when I must recognize it to be the law of the state. Not approving of that part of the opinion of Chief Justice Comegys which relates to an execution creditor, I cannot indorse it; and, not being satisfied that it has been the policy and practice of the court to adhere to its former decision under such circumstances, I feel constrained to take the position against granting the motion for a nonsuit in this case.

GRUBB, J. (dissenting). As I dissent from the majority of my brethren, and can have no other opportunity to express the grounds of my dissent, and especially because of the serious nature of the consequences that may follow which require my dissent, I will have to express my grounds for it now, because, if it should go to the jury, I could not antagonize the charge of the majority of the court, and express my reasons against it. Let me state this case as it stands before this court. The plaintiffs, *Falt & Slagle Company*, a corporation of the state of Maryland, have brought this action of replevin against the sheriff of this county and his bailiff, who have taken the goods in question under an execution and levy. The plaintiffs contend and have sought to show to this jury that the alleged sale of the plaintiffs to *Morrow & Coulbourn* was fraudulent, in that the sale and delivery to *Morrow & Coulbourn* were procured by means solely and wholly of the fraudulent representation made by *Morrow & Coulbourn*, the alleged fraudulent vendees, or their agent; that, the alleged sale and delivery having been tainted with fraud, the title never vested in *Morrow & Coulbourn*, but remained in the plaintiffs, *Falt & Slagle Company*; that, therefore, they had the right to bring this action of replevin, relying upon the title which had never passed from them,

and to obtain the value of these goods and damages for the detention from the time of their taking in this action, because the goods (counter bond being given) were never returned to the plaintiffs' possession.

Now, it is contended by the defendants in this motion for a nonsuit that the nonsuit should be granted on two grounds, or on one at least of the two: First, on the ground that there has not been any evidence in this case of a fraudulent sale and delivery to the vendees which would warrant the submission of this case to the jury, and therefore we are asked not to let it go to the jury for want of sufficient evidence for that purpose. Their second ground of contention in favor of the nonsuit is that even if the court should be satisfied that, as an absolute fact, this sale and delivery, as between the Fait & Slagle Company and Morrow & Coulbourn, were fraudulent, and that no title passed to Morrow & Coulbourn, yet a bona fide execution creditor, having made a levy upon these goods without knowledge of such fraudulent sale and delivery, would be protected against the claim of the defrauded vendor or seller, the Fait & Slagle Company in this instance. So that, laying aside the first ground, which I do not consider it necessary for the purposes of my own judicial action to determine, and assuming, for the sake of argument (although it is denied by the defendants), that it has been proved that it was a fraudulent sale and delivery as between Fait & Slagle Company and Morrow & Coulbourn, still if the law as laid down in the case of *England v. Forbes*, 7 Houst. 306, 31 Atl. 895, which has been cited, and in which Chief Justice Comegys appears to have delivered the unanimous opinion of the court, be so laid down by the court, and is *res adjudicata*, and not mere *obiter dictum*, then, under that law, an execution creditor in this state would be protected against the claim of the defrauded vendor if the execution creditor and the sheriff representing him in the execution of the judgment and the levy had no knowledge, at the time of such levy, either by direct notice or otherwise, that it was a fraudulent sale and delivery to the alleged fraudulent vendees, or to the actual fraudulent vendees, Morrow & Coulbourn in this case. By reference to said case of *England v. Forbes*, in which Chief Justice Comegys rendered the decision, it is shown by the third prayer of the plaintiff therein that judgment and execution were pending at the very time of the contract of sale. So there is a case of a debt antecedent to the alleged fraudulent sale, and of an execution pending at the very time of the fraudulent sale; for it says judgment and execution were pending at the very time of the levy. That case shows that it was not one where an execution creditor had given credit after the alleged fraudulent sale, but was a case like that now before us, of a debt contracted and of a credit given before the time of the alleged fraudulent sale.

I, in common with my brethren, after the very thorough presentation of the authori-

ties and the very forcible argument of the learned counsel for the plaintiffs, am inclined to believe at present, from our hurried and rather imperfect investigation of the question, that Chief Justice Comegys and the court in that case were probably in error. Still, as the court announced it as the law, whether their reasons were sound or not in law, and whether they were right or wrong, the position I take is that as that case is on all fours with the case at bar, in legal contemplation, as we all agree, and was not an *obiter dictum* of the court, but was *res adjudicata* by the whole court, solemnly made in a deliberately written opinion, then this court ought not to overrule the decision of the superior court consisting of all the judges in that case; especially when their attention was brought to this very question now before us, and when the chief justice, speaking for the court, in language that is explicit and unambiguous, then declared that the exception which was made by Lord Ellenboro, and afterwards followed by Chief Justice Gilpin, in *Mears v. Waples*, and which protected a bona fide purchaser for value against a defrauded seller, was not confined to such purchaser, but extended further, and was also applicable to a bona fide creditor, whose credit was given upon the indebtedness contracted before the sale, as that secured by these judgments in the case before us appears to have been. Therefore in that case there was an extreme extension of the doctrine, and, as the learned counsel for the plaintiffs has truly, probably, said, such an extension as cannot be found to have been made by any court in the United States or in England. Yet this court did that in a case just like this at bar, where the action was brought by the defrauded vendor against the sheriff, representing the execution creditors, and the execution creditors were not named with the sheriff as defendants. It was the fraudulent vendees in the case who were mentioned with the sheriff, *Forbes & Banks*.

Mr. Vandegrift: And also the judgment creditors.

GRUBB, J. We do not consider that that distinguishes that case in any substantial way, in legal contemplation, from this case. So that you have in this case here, just as in the case of *England v. Forbes*, under Chief Justice Comegys, a case where the replevin is brought by the defrauded seller virtually against bona fide creditors, and nothing to the contrary appears in this case. This court, through Chief Justice Comegys, in the case of *England v. Forbes*, have said that they will carry the said doctrine of protection beyond what the court decided in the *Mears Case*. The court in the latter case could not have decided judicially that an execution creditor would not be protected against a defrauded seller, because that question was not before them. It was not

raised by the facts or by the contention of counsel, and therefore, if so declared therein, it would have been obiter dictum, and not binding upon us as *res adjudicata*. So that we cannot say that this court then would have decided contrary to what this court under Chief Justice Comegys did. That would be merely a supposition. We may think that, in carrying out the general principle stated in *Mears v. Waples* to a logical conclusion, Chief Justice Comegys and the court should not have decided as they did. But we know that that is what they did. So that the fact confronts us—and it is the one I stand on—that, it having been decided by the superior court in this state by a unanimous court, most solemnly and deliberately, that such was the law, it can matter little to this court whether or no: it is supported by reason or authority. *Stare decisis* has been the doctrine adhered to through ages by generations of judges and lawyers in England and in this country. It has been considered a wise rule and doctrine in the long run in human experience, and this court has seldom, if ever, disregarded it. I have been unable to find any deliberately considered instance of such disregard in the reports of this state. I have known myself, and all the older lawyers will remember, that at times the question has been raised and urged, that a decision previously made by this court was wrong, but the answer has been given: "Gentlemen, *ita lex scripta est*,—so the law has been written and announced by this court in this state, and you must go to a higher court for your redress. You are not remediless, because you have a tribunal beyond, which is final in this state." It has often been said, "You will have to go to the legislature, if you don't go to the supreme court," and that has been done when it was thought that a decision was wrong or would be detrimental or injurious as a matter of policy.

Now, I am brought face to face with the time-honored doctrine of the law. We have had a decision here, not by a divided court, not where there is any doubt about the question having been clearly raised and presented or unequivocally adjudicated. I will read what Chief Justice Comegys says on this question in that case of *England v. Forbes*. "But if, in the case of such vitiated contract of sale, the goods sold have been delivered to the buyer, who sells them to another, who buys them *bona fide*, without any notice or knowledge on his part of the fraudulent feature of the sale, such innocent purchaser acquires a valid title to them, which cannot be defeated by the original seller. Likewise, where, after possession has been obtained by a party who purchases under a fraudulent representation as to his solvency, they may be levied upon by an execution issued at the suit of a *bona fide* judgment creditor, having no notice or knowledge of any such representation, his execution lien can-

not be disturbed by, but will hold good against, the defrauded seller." We all agree on this matter, that this court has so decided, and there it is. Relying upon that decision of this court, the defendants, in their second ground, have based their motion for a nonsuit on the ground that there is no evidence whatever that these execution creditors were not *bona fide* judgment creditors, nor a scintilla of proof that they had any notice or knowledge whatever of the alleged fraudulent sale and delivery. That is true, for there is no evidence before this jury to prove that essential point in behalf of the plaintiffs to enable them to recover. That being so, if such is the law of this state,—and it was declared so to be by Chief Justice Comegys and the court,—this court would have to charge the present jury that they could not find a verdict for the plaintiffs. If they did, we would have to set it aside on a motion for a new trial.

So it comes down to this: There being no evidence, within the requirement of Chief Justice Comegys' decision above referred to, entitling the plaintiff to recover, we can only refuse the nonsuit, and let this go to the jury, and give the plaintiff an opportunity to recover before them, by saying that we will declare that what this same court adjudicated in Newcastle county a few years ago is not law. But, when we do this, we plainly violate, disregard, and override the doctrine of *stare decisis*. The considerations which induce courts to refrain from this are the mischievous consequences which may ensue. Until the decisions of this court have been overruled in the court above, we have always adhered to them. This is the unwritten law here, and counsel advise their clients on the faith of it. There may have been some ill-considered exception to this where the court have done otherwise, but I have always considered that such a departure would prove unwise in both policy and practice. But there is another thing,—and that is why I speak so earnestly to-day. If we let it go forth that counsel may dispute any former adjudication of this court, solemnly and deliberately made by a unanimous court, and strive to find whether we will think as they did or not, or recognize the force of the reasoning of the judges who have preceded us, it furnishes an inducement for every counsel to attempt it. In my judgment, in these days when there is less and less respect shown for authority, and a manifest desire for short cuts to get on in any way, it would prove a temptation for every able counsel and every strong reasoner to dispute any decision which has been made by this court, which would be a great wrong to lawyers and others who have advised clients under the same; and it would lead to great inconvenience, and great waste of the public time of the court, and unnecessary expense, and rearguing, reconsidering, and redeciding previous adjudications, and we would never know what the mind of the court is to

be, and there would be no certainty, and no end of such mischievous litigation. I can realize that there are some cases in which a court might have to overrule itself, where it was clearly wrong before, and where a departure from the doctrine of stare decisis might possibly be necessary and justifiable. That might be in a court of final resort. It has happened in the supreme court of the United States, and it has happened in other courts of highest resort, because otherwise there would be no opportunity to right the wrong. But even those courts have been very reluctant to do it, where legislation could avert the effect of the injurious decision. They have wisely refrained from such departures except when unavoidably necessary. Where constitutional questions were involved, and legislation could not remedy it, in some cases they have reversed themselves. But here the decision against these plaintiffs would not be remediless on this point of law through adhering to the former decision of this court, even if it was wrong. They can have their writ of error, and take it to the supreme court, where it has never been taken, and there, in the proper tribunal, have it decided finally, and to be binding not only in this county, but in all the counties of this state.

There are many considerations which have presented themselves to my mind since yesterday. I feel so seriously not only the impropriety, but the absolute absence, of any necessity of disregarding this decision of the superior court, and overriding it, in addition to the serious consequences that may ensue in this state from it, that I here express my dissent as earnestly and solemnly as I can against this ruling refusing the nonsuit, which does absolutely and unjustifiably override a decision of this court heretofore deliberately made by a unanimous court. Therefore I have not only dissented, but expressed my dissent. I regret that it has taken so long, but I have done it offhand, and not in writing, and therefore have consumed more time than I intended or desired to do.

Plaintiff's Prayers.

The plaintiff prayed, in substance, as follows: That a concealment on the part of the purchasers of their state of solvency, known to themselves at the time, accompanied by a pre-conceived design not to pay for the goods purchased, is such a fraud as would avoid the contract of sale. That the question as to the insolvency of the purchasers was for the jury, as was also the question of fraud arising out of the transaction, so far as the same was based upon their representations prior to the purchase, and their intention to pay or not to pay for the goods purchased. That a sale effected by fraud works no change of property. That if the plaintiff was induced to part with its goods by representations of Morrow & Coulbourn, or either of them, or their agent, that they were solvent, and would pay for the same, when, as a matter of fact, said Morrow &

Coulbourn, or either of them, then knew said representations were false, and their intentions, or the intentions of either of them, then was to obtain said goods and not pay for the same, then if the plaintiff seasonably disavowed the sale, and endeavored to reclaim the goods, there was no sale, and the title to said goods never passed from said plaintiff, and the defendant, as sheriff, had no right to hold the same under the execution in his hands, but should have delivered the same to the plaintiff as the property of it, the said plaintiff, not liable to be levied upon under executions issued against the said Morrow & Coulbourn.

Defendants' Prayers.

The defendants prayed as follows: (1) That where, after possession of goods has been obtained by a party who purchases under a fraudulent representation as to his solvency, they may be levied upon by an execution issued at the suit of a bona fide judgment creditor, having no notice or knowledge of any such representation, his execution cannot be disturbed by, but will hold good against, the defrauded seller. (2) That the plaintiffs in this action were bound to have rescinded the contract of sale before their right accrued to bring replevin against the vendee and recover the property so sold. (3) That the property came into the hands of the sheriff, the defendant in this suit, lawfully, and not tortiously. (4) That, after delivery of the goods in pursuance of a sale, the seller cannot rescind the contract or reclaim the goods on the ground of fraud without proving deceptive assertions or false representations, in some form or other, fraudulently made to induce him to part with his property. Mere insolvency of the buyer, though well known to himself, and concealed from the seller, does not in itself furnish sufficient ground for rescinding a contract of sale. (5) That an intention to deceive, and a false statement, even on a material point, will not overthrow the bargain, unless the statement was the means which produced the bargain; and the onus is on the plaintiffs to prove that the plaintiffs acted on the faith of the false representations. (6) If the plaintiffs chose to act on their own judgment, with full knowledge or means of knowledge of the facts, they cannot be heard to say they were deceived by the vendees' representations with respect to the sale. (7) That, in the absence of any stipulation to the contrary, the fair presumption is that the vendor, by delivering the goods before the condition is performed, waives the condition, and trusts to the responsibility of his vendee. (8) Where goods purchased under fraudulent representations as to solvency of the purchasers are levied upon by execution of a bona fide judgment creditor, having no notice or knowledge of any such representation, the execution lien cannot be disturbed, but will hold good against the defrauded seller.

LORE, C. J. (charging jury). This is an action of replevin brought by the plaintiffs, Fait

& Slagle Company, to recover from Joseph D. Truxton, late sheriff of this county, the defendant, the value of 96,000 tin cans, estimated at \$1,777, without interest (or, calculating interest, the claim amounts to-day to \$2,016), which cans the plaintiffs claim were their property, and were unlawfully seized and sold by the said defendant. The plaintiffs contend that in January, 1895, Morrow & Coulbourn, a firm doing business at Seaford, in this state, bought of the plaintiffs, then engaged in business in the city of Baltimore, Md., the cans in dispute; that the cans were delivered at Seaford, in three lots, on the 25th, 27th, and 29th days of June, 1895; that plaintiffs were induced to make the sale and delivery of the cans to Morrow & Coulbourn by reason of false and fraudulent representations of the said Morrow & Coulbourn, or their accredited agent, that they were solvent; that, within a few days after the delivery of the cans at Seaford, they were levied upon by the defendant Truxton, as sheriff, under sundry executions issued upon judgments in favor of other creditors of said Morrow & Coulbourn, which other debts were contracted prior to the sale and delivery of the cans; that Sheriff Truxton held the said cans under these executions, and did not give them up to the plaintiff when demand was made upon him under authority of the writ of replevin in this case; instead of giving them up, he gave what is called a "property bond," retained the goods, sold them, and applied the proceeds of sale to other creditors. The plaintiffs therefore claim that inasmuch as the cans were procured from them by fraud, by reason of the false and fraudulent representations of Morrow & Coulbourn as to their solvency, they were entitled to have the cans delivered to them by the sheriff, on demand, under this writ of replevin; that his refusal to make such delivery was unlawful, and entitles them to recover. On the other hand, the defendants contend that no such false and fraudulent representations of solvency were made by them, or by any accredited agent; that, even if such representations were made, the plaintiffs did not make sale relying solely thereon, but sought other sources of information, and relied upon their own judgment; that, even if Morrow & Coulbourn procured the goods by fraudulent representations, the levies thereon under execution of bona fide judgment creditors, without knowledge or notice of such fraud, hold good against the defrauded seller. Defendants further contend that no recovery can be had because the plaintiffs did not rescind the contract of sale before they brought this action of replevin.

To avoid a sale of personal property on the ground of false representations, they must have been made with the fraudulent intent to induce the seller to part with his property, and must have been the means of producing the sale on the part of the seller. Mere insolvency of the buyer, though well known to himself, and concealed from the seller, is not in itself sufficient. But if the purchaser made false representations

knowingly, with the intent to deceive, and the seller was thereby deceived, and, relying thereon, parted with his goods, it would be sufficient to avoid the sale. Again, the plaintiffs may not avoid the sale if they saw fit to make inquiries and rely upon information obtained from other sources, or acted upon their own judgment, with a knowledge of the circumstances. If Morrow & Coulbourn induced Falt & Slagle to sell and deliver the cans by reason of false and fraudulent representations of their solvency, the contract was inception in fraud, and was so vitiated by such fraud that it might be rescinded and avoided, or not, at the option of Falt & Slagle. *Mears v. Waples*, 3 Houst. 620. The right of Falt & Slagle to rescind and avoid existed so long as the cans remained in the hands of the fraudulent purchaser, or some one who had taken them with a knowledge of the fraud by which they were originally obtained. Until the contract was rescinded or avoided, the title or property in the goods was in the buyer, and he might sell or dispose of them to bona fide purchasers for value, and thus vest in them good, indefeasible, and irrevocable title to the property. This is the ruling in *Mears v. Waples*, 3 Houst. 620, and 4 Houst. 78, and *England v. Forbes*, 7 Houst. 306, 31 Atl. 895, and has been uniformly followed in this state. The contract therefore was not void, but voidable at the option of the vendor. *Benj. Sales*, § 433, uses this language: "It follows, therefore, that the vendor may affirm or enforce it, or may rescind it. He may sue in assumpsit for the price, and this affirms the contract; or he may sue in trover for the goods or their value, and this disaffirms it." This is the authority cited by the defendants to sustain their prayer that the plaintiffs were bound to have rescinded the contract before they could bring their action of replevin. It does not sustain that contention. On the contrary, it clearly indicates that the suing out of the writ of replevin was in itself a rescission of the contract. If this were the only contention, the plaintiff would be entitled to a verdict. But we are asked by the defendants to charge you that "where goods are purchased under fraudulent representations as to the solvency of the purchasers, and levied upon by execution of a bona fide judgment creditor having no notice or knowledge of any such representation, the execution lien cannot be disturbed by, but will hold good against, the defrauded seller." We cannot so charge. We do not think this proposition is sound in principle, or supported by well considered authority, in a case like the present, where the debt due the execution creditor, who has levied upon the replevied goods, was contracted prior to the alleged fraudulent sale.

It is true that in *England v. Forbes*, 7 Houst. 306, 31 Atl. 895, it was so decided. It is there, however, coupled with and placed on the same ground as that of the bona fide purchaser for value. Neither the reason nor the authority for such ruling is given. The case seems to stand alone, and is in conflict with an unbroken line of authorities from the leading case of *Lick-*

borrow v. Mason, 1 Smith, Lead. Cas. (7th Ed.) 1152, down to the present time. The case is not very clearly reported, as to the facts and questions involved; but, if it is correctly reported, we think that the ruling therein is very questionable, and the majority of the court hold that it should be disregarded. An examination of the Reports of this state will show that this court, in a number of instances, has reversed its former ruling, when satisfied that such ruling was wrong. It has recognized that it was its highest duty to announce the law correctly at the first opportunity, and has not been deterred from so doing by any adherence to the doctrine of stare decisis, or by any apprehension that a correct statement of the law would create confusion, or lead to supposed trouble or uncertainty. It has wisely determined that litigants should not be placed under the penalty of protracted litigation by reason of the errors of the court. In the leading case of Lickbrow v. Mason, above referred to, the rule governing this case was promulgated in this language: "Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Mears v. Waples, 4 Houst. 79. This rule is followed, and the class of persons covered by it is defined, by the late Chief Justice Gilpin, in the well-considered case of Mears v. Waples: "A purchaser for a valuable consideration, without knowledge or notice of fraud, takes a valid title from the fraudulent buyer, which cannot be defeated by the original vendor. And a consignee of goods, who in good faith makes advances upon them, stands precisely in the same position as a purchaser for value, and the same principles of law in this regard apply to his case. And permit me to say that this doctrine of the law is most reasonable and just, because, the owner having voluntarily parted with his goods, and clothed the buyer with a title which is good until the seller avoids it, which he may do, or not, as he pleases, it is through his own act that the buyer from him is enabled to sell the goods; and therefore a bona fide purchaser of them, without knowledge of the circumstances, ought not to be made to suffer." Benj. Sales, cited by the defendants (section 433), states the rule to be that if, before the seller elects to avoid the sale, "his vendee transfers the goods, in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person, for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person." Under this rule, supported by an unbroken current of authorities, courts of law have brought within its terms and protected only those persons who were innocent holders of a general or special property in the goods, for which they have given a valuable consideration, the loss of which they must suffer if the property is taken away from them,—such, for instance, as the innocent purchaser for value, and the consignee who in good faith makes ad-

vances upon the goods, relying on the possession permitted by the defrauded seller, who have parted with a valuable consideration, and, if the goods are taken from them, must suffer loss. They are clearly within the rule. An execution creditor, however, whose debt was contracted prior to the alleged sale, as heretofore stated, has parted with nothing; has paid no valuable consideration. In no sense can he be said to be an innocent sufferer, with respect to the defrauded seller. He has paid nothing for, nor has he acquired any title in or to, the goods. On the contrary, under cover of law he is taking the goods of the defrauded seller to pay the debts due to him from the fraudulent purchaser. In other words, he is taking one man's property, without consideration, to pay another man's debts. It must be manifest that such person does not come within the rule of innocent holders for value without notice.

We therefore instruct you that, if you believe these cans were procured by Morrow & Coulbourn from Falt & Slagle by fraudulent representations, and, while in the hands of Morrow & Coulbourn, were levied upon under executions issued on the judgments of other creditors, whose debts were antecedently contracted as aforesaid, such levies will not hold good against the defrauded seller, who has elected to avoid the sale, or prevent him from recovering these goods, or the value thereof, in this action. It is for you to apply the law as stated by the court to the facts in this case. Of those facts you are the sole judges, and you are to determine them, not from any statements in this charge, but from what you heard from the witnesses who testified in the case. To entitle them to recover, the plaintiffs must show to your satisfaction, by a preponderance of the evidence, that Morrow & Coulbourn were insolvent at the time of the sale, and that false and fraudulent representations of their solvency were made by Morrow & Coulbourn, or their accredited agent, to Falt & Slagle, and that Falt & Slagle were induced to sell and deliver the goods by reason of such false representations, and not by reason of any information from other sources or reliance upon their own judgment. If your verdict should be for the plaintiffs it should be for the value of the goods of which they have been deprived, as such value has been proved in this case. If your verdict should be for the defendant, it will simply be for the defendant.

Verdict for plaintiffs for \$2,016.

(1 Pen. 15)

RIDINGS v. McMENAMIN.

(Superior Court of Delaware. Newcastle.

Oct. 2, 1897.)

PLEADING—AFFIDAVIT OF DEFENSE—APPEALABLE ORDER.

1. An affidavit of defense in assumpsit, which simply alleges that the defense is payment, is sufficient.

2. An order overruling a motion for judgment

regardless of an affidavit of defense is not a final judgment, from which a writ of error can be taken.

Assumpsit on account by William Ridings against Andrew F. McMenamin. Motion for judgment notwithstanding the affidavit of defense. Denied.

Action of assumpsit on a book account; the claim being for several months' board. An affidavit of defense was filed, setting forth the following: "The defendant verily believes that he has a defense to the whole of the cause of action, the nature and character of which defense is payment."

Mr. Ward moved for judgment notwithstanding the affidavit of defense, contending: That the statute requiring the setting out of the nature and character of the defense means the setting forth of certain facts. That payment was a conclusion of law, and not an averment of fact. While payment was a good defense, it must be set out. There was no averment of payment to anybody, or of anything. The affidavit did not show to whom payment was made, nor how, when, or by whom it was made.

Herbert H. Ward, for plaintiff. Henry O. Conrad and Medford H. Cahoon, for defendant.

LORE, C. J. It is settled in this court that an affidavit of defense, alleging payment simply, is sufficient. The rule is that snap judgments are never granted if there is a doubt. The court has recognized the word "payment" as being sufficient in affidavits of defense. It has a specific and clear meaning, which is that the claim has been paid.

Mr. Ward asked leave to note an exception to the above ruling. The court held that no exception would lie, as it was not a final judgment, and no writ of error could be taken.

(1 Pen. 14)

DOE et al. v. ROE et al.
(Superior Court of Delaware. Newcastle.
Oct. 2, 1897.)

EJECTMENT—PRACTION.

Where counsel for defendant in ejectment has entered his name on the appearance docket as attorney, but has not entered into the consent rule, nor laid any pretensions according to the rules of court, judgment for plaintiff will not be rendered for such failure, but defendant must enter into the consent rule at once, and lay his pretensions by the first rule day in vacation.

Phillip Q. Churchman, for plaintiffs. J. Frank Biggs, for defendants.

LORE, C. J. In this case Mr. Biggs, attorney for defendants, has entered his name on the appearance docket as attorney, opposite the names of defendants, but has not entered into the consent rule, nor laid any pretensions, or taken any defense as to any particular property.

Mr. Churchman, attorney for plaintiffs, moves for judgment because of such failure on the

part of defendant to enter into the consent rule and lay pretensions.

We do not think judgment should be rendered, but order the defendant to enter into the consent rule at once, and to lay his pretensions by the first rule day in vacation. The correct procedure is for the attorney for the defendant to appear, upon filing with the prothonotary a written paper entering into the consent rule, specifying therein, by general description, for what premises he intends to defend; and shall consent in such rule to confess upon the trial, as well as lease, entry, and ouster, that the defendant (if he defends as tenant, or, in case he defends as landlord, then his tenant) was at the time of the service of the declaration in possession of such premises in pursuance of paragraph 2, rule 9, rules of court.

(1 Pen. 16)

STEWART v. STATE.

(Superior Court of Delaware. Newcastle.
Oct. 2, 1897.)

JUSTICES OF THE PEACE—JURISDICTION.

The record of a justice of the peace of a conviction for disorderly conduct must show that defendant submitted in writing to his decision, in order to confer jurisdiction on the justice.

John Stewart was convicted of disorderly conduct, and he brings a writ of certiorari to John A. Kelley, a justice of the peace in and for Newcastle county. The justice sent up the following record: "Personally appeared before me, one of the justices of the peace in and for Newcastle county, September 1, A. D. 1897, Marshal C. Pierce, of Christiana hundred, who made oath in due form of law that a certain John Stewart, of and at same hundred on the 1st day of September, A. D. 1897, was guilty of disorderly conduct, and making threats against the said complainant, while discharging his duty as a tax collector of school district No. 24, Christiana hundred, and calling him a son of a bitch. Warrant issued to Charles Green, constable, September 1, A. D. 1897. Constable returns 'Cepi corpus,' September 15, A. D. 1897. After hearing the proofs and allegations, I adjudge the defendant guilty, and impose a fine of five dollars and costs, and in default of payment of the same I commit him to prison. John A. Kelly, J. P." On September 21, 1897, Mr. Hayes filed the following cause of diminution of the record sent up by the justice, to wit: "That the justice of the peace by and before whom the above-stated cause was tried below has not sent up as part of the record in this cause said John Stewart's submission in writing to the decision made by said justice of the peace in this cause below, nor a copy of such written submission," and prayed the court that the justice be required by the court to certify to the superior court under his hand and seal a copy of said John Stewart's submission, in writing to the decision of the said justice. The answer of the justice (September 25, 1897) alleged, among other things, the following: "(1)

The transcript and papers heretofore filed by him, the said John A. Kelley, in the above-stated case, are true, complete, and correct copies of the entire docket entries in the said case of the state of Delaware against John Stewart remaining of file in this office, without diminution or curtailment thereof in any manner whatsoever. (2) The said John A. Kelley did not receive and did not make a docket entry of any submission in writing to his decision by the said John Stewart in the case aforesaid." Whereupon Mr. Hayes asked that judgment below be reversed upon the following exceptions filed: "(1) That it does not appear in, by, and from said record that the said John Stewart did, in writing, submit to the decision of the said John A. Kelley, justice as aforesaid, made in this cause below." (A second exception, alleging the same facts in the affirmative, was also filed.)

Walter H. Hayes, for defendant. William Michael Byrne, for the State.

LORE, C. J. Let the judgment below be reversed. The record does not show that the defendant submitted in writing, which was necessary to confer jurisdiction on the justice.

(1 Pen. 5)

In re SPIEGELHALTER'S WILL.
(Superior Court of Delaware. Newcastle.
Sept. 29, 1897.)

WITNESSES—COMPETENCY—EXECUTORS.

1. Under Rev. Code, p. 798, c. 537, § 1, allowing parties in interest in civil proceedings to testify, an executor is a competent witness for the purpose of probating the will.

2. The probate of a will is not an action by or against the executor, within Rev. Code, p. 798, c. 537, § 1, forbidding a party to testify, in an action by or against an executor, as to transactions with or statements by testator.

The following petition and issue were sent to the superior court by the register of wills for Newcastle county: "That on the 6th day of July, A. D. 1897, the instrument in writing hereto attached, purporting to be the last will and testament of Matthew Spiegelhalter, deceased, having been presented to me, as register as aforesaid, by Thomas A. Brown, the executor named therein, for probate, the said Thomas A. Brown being one of the two witnesses only to said paper writing, the said register did not know whether he should receive the said Thomas A. Brown as a witness in probating said paper writing purporting to be a will; he, the said Thomas A. Brown, being the person named therein as executor. It was therefore ordered by the register that an issue of fact touching the said instrument in writing, purporting to be a will as aforesaid, be sent to the superior court, there to be tried by a jury; the said issue of fact being, 'Is the paper writing hereto attached the last will and testament of Matthew Spiegelhalter, deceased?'"

Mr. Cooper, at the trial of the above issue, offered Dr. Thomas A. Brown, the executor

named in the will, as a witness to the execution of the same, and argued that he was a competent witness for the purpose of probating the will as follows: The statute allowing parties in interest in civil actions to testify, passed in 1881 (Rev. Code, p. 798), is as follows: "No person shall be incompetent to testify in any civil action or proceeding whether at law or in equity, because he is a party to the record or interested in the event of the suit or matter to be determined: provided, that in actions or proceedings by or against, executors, administrators, or guardians in which judgment or decree may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party." Before the passage of the above-quoted statute, it may be questioned whether an executor under the will was a competent testamentary witness, yet it has never been directly decided to the contrary. *Davis v. Rogers*, 1 *Houst.* 58-65; *Sutton v. Sutton*, 5 *Har.* (Del.) 459. It will thus be seen that if the executor was incompetent at all, as a testamentary witness, prior to the passage of the foregoing statute, it was on the sole ground that he was a party in interest, which objection the above-quoted statute expressly removes, unless he comes within one of the exceptions to the statute. What are those exceptions? In none of the states, except Alabama and Delaware, was an executor ever incompetent. 1 *Will. Exr's* 403, note; *Cornstock v. Hodlyme*, 8 *Conn.* 254, 262; *Peralto v. Costro*, 6 *Colo.* 354; *Snyder v. Bull*, 17 *Pa. St.* 54; *Stewart v. Harriman*, 56 *N. H.* 25. The statute permitting parties in interest to testify removes the disqualification of executors in probating wills. *Martin v. McAdams* (Tex. Sup.) 27 *S. W.* 255; *In re Folt's Will*, 71 *Hun.* 492, 24 *N. Y. Supp.* 1052; *In re Wilson's Will*, 103 *N. Y.* 374, 8 *N. E.* 731; *Manley's Exr's v. Staples*, 65 *Vt.* 370, 26 *Atl.* 630; *Hays v. Ernst* (Fla.) 13 *South.* 451; *Denning v. Butcher* (Iowa) 59 *N. W.* 69; *In re Glockner's Will* (Surr.) 2 *N. Y. Supp.* 97; *Foster's Exr's v. Dickinson*, 64 *Vt.* 233, 24 *Atl.* 258; *In re Buckman's Will*, 64 *Vt.* 313, 24 *Atl.* 252; *Richardson v. Richardson*, 35 *Vt.* 238; *Snyder v. Burks* (Ala.) 4 *South.* 225; *Stewart v. Harriman*, 56 *N. H.* 25; *Society v. Loveridge*, 70 *N. Y.* 387; *Rugg v. Rugg*, 83 *N. Y.* 592; *Loder v. Whelpley*, 111 *N. Y.* 239, 18 *N. E.* 874; *Sawyer v. Bennett*, 8 *Mich.* 411; *Reeve v. Crosby*, 3 *Redf. Sur.* 74; *McDonough v. Laughlin*, 20 *Barb.* 238. To exclude a witness under any of the enabling statutes, it should be made to appear that there is a direct, immediate conflict between his rights and those of the estate of the deceased person with whom it is proposed to prove a transaction. *Insurance Co. v. Sledge*, 62 *Ala.* 586; *Hill v. Helton*, 80 *Ala.* 532, 1 *South.* 340; *Snell v. Fewell*, 64 *Miss.* 635, 1 *South.* 908.

P. L. Cooper, Jr., for the will.

LORE, C. J. The probate of a will is a civil proceeding, as contradistinguished from criminal proceedings. The executor, therefore, would be a competent attesting witness, under the express terms of the statute (section 1, c. 537, Rev. Code, p. 798), unless shut out by the proviso. Can it be said, in any proper sense, that the probate of a will is an action or proceeding by or against an executor, and in which judgment or decree may be rendered for or against him as such executor? There are no parties to the action. In contemplation of law, it is solely an inquiry as to the validity of a certain paper writing,—whether it is or is not the last will and testament of the decedent; and the judgment or decree in such case is either that it is or is not such will. The costs are uniformly taxed upon the estate inquired about, and an executor is in no wise liable to have judgment or decree rendered for or against him, as such, for costs, charges, or otherwise. We think, therefore, the statute makes an executor a competent attesting witness to a will.

(87 N. H. 579)

EMERSON v. TOWN OF LEBANON.

(Supreme Court of New Hampshire. Grafton. March 16, 1894.)

DEFECTIVE BRIDGES—EVIDENCE.

In an action for personal injuries resulting from the breaking of a highway bridge railing, evidence that the highway surveyor had said, when the railing was put in, four years before the accident, that it was temporary, was properly excluded, as being too remote.

Exceptions from Grafton county.

Action by Frank V. Emerson, administrator of the estate of Mary L. Emerson, deceased, against the town of Lebanon. Judgment was rendered for defendant. Plaintiff excepted to certain rulings at the trial. Exceptions overruled.

Case for the loss of the life of the plaintiff's wife, occasioned by a defective highway. Trial by jury. Verdict for the defendant. While the plaintiff and his wife were riding with a horse and carriage upon a highway in Lebanon, on April 21, 1891, the horse suddenly turned to one side, and went against a railing separating the highway from Mascoma river, broke it, and, with the carriage and its occupants, went into the river, where Mrs. Emerson was drowned. The plaintiff claimed that the highway was narrow; that there were logs and a pile of wood on the side furthest from the river, which was liable to frighten horses; that the railing was rotten and insufficient; and that the accident was due to one or more of these defects. The plaintiff excepted to rulings at the trial as shown in the opinion.

G. W. Murray and Bingham, Mitchell & Batchellor, for plaintiff. J. L. Spring, W. H. Cotton, and Bingham & Bingham, for defendant.

WALLACE, J. One of the questions was whether the highway, at the time and place of the accident, was suitable for the travel thereon; and one of the alleged grounds of defect was an insufficient railing. The plaintiff offered to show that the highway surveyor stated, when the railing was put in, about four years before the accident, that it was temporary, and this was excluded. It is urged that this statement of the highway surveyor ought to have been received, because it is a part of the *res gestæ*. Many collateral circumstances and declarations which surround the principal fact or act under investigation may be shown as part of the *res gestæ* when they illustrate or explain the principal fact or act. But how far justice requires a tribunal to go in a particular case in the trial or examination of these collateral questions, how much time should be spent in their consideration, what evidence may be excluded for its remoteness of time or place, and what evidence is otherwise too trivial to justify a prolongation of the trial, are questions of fact to be determined by the court at the trial. There is, in many cases, a vast amount of evidence of collateral matters, relevant in a certain legal sense, but so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded. The parties being allowed, upon collateral questions, a latitude amply sufficient for the purposes of justice, under the circumstances of the particular case, they are not necessarily entitled, as a matter of law, to go further in that direction. *Gutterson v. Morse*, 58 N. H. 165; *Free v. Buckingham*, 59 N. H. 219, 226; *Amoskeag Co. v. Head*, Id. 332, 337, 338; *Perkins v. Towle*, 59 N. H. 583; *Tilton v. Society*, 60 N. H. 377, 384; *Watson v. Twombly*, Id. 491; *Cook v. New Durham*, 64 N. H. 419, 5 Atl. 832. The condition of the railing at the time of the accident was a fact, capable of clear and absolute proof by the exhibition of the railing itself, and other competent evidence available at the trial. No declarations of the highway surveyor, made years before, concerning it, could prove this fact more fully or satisfactorily, or furnish any additional aid to the jury in correctly determining the question of the condition of the railing at the time of the accident. The declaration of the highway surveyor, if, as a matter of law, it was not incompetent, was properly excluded, for the reason that it had so slight or remote a bearing on the main issue that its admission would only tend to prolong and complicate the trial.

Other exceptions taken by the plaintiff at the trial have not been urged or alluded to in argument, and for the reason, doubtless, that no consideration is required to show that none of them can be sustained. Exceptions overruled.

CHASE, J., did not sit. The others concurred.

(91 Me. 141)

BOWDEN v. DUGAN.

(Supreme Judicial Court of Maine. Jan. 1, 1898.)

AGISTER'S LIEN—PRIORITY—CHATTEL MORTGAGE—TENDER—TROVER.

1. A mortgagee of animals may subject them to a lien for feeding or sheltering them under Rev. St. c. 91, § 41, by his consent.

2. The defendant, a livery stable keeper, claimed to hold a horse against the plaintiff, who had a chattel mortgage thereon, by virtue of the statute Rev. St. c. 91, § 41, for its keeping, etc. The plaintiff denied that the defendant had such a lien, because the feeding and sheltering were not furnished "by virtue of a contract with, or by consent of, the owner." It appeared that the horse had been left with the defendant by the mortgagor on January 18, 1896, and that subsequently the defendant notified the plaintiff of his claim. On March 9th the plaintiff replied: "The horse is holden for his feed. You can proceed legally to get your pay from the horse." *Held*, that the horse was thereafter held by the defendant by virtue of the plaintiff's consent, and that the defendant had a valid lien for all food and shelter after March 9th, but that the defendant acquired no lien, as against the plaintiff, before that day.

3. The defendant refused to surrender the horse to the plaintiff until the whole bill for its keeping was paid, including the time for which he had no lien as well as that for which he had a lien. *Held*, that the plaintiff was thereby excused from making a tender of the amount secured by the valid lien, and could maintain an action of trover without proof of such tender.

(Official.)

Report from supreme judicial court, Somerset county.

Action by Benjamin D. Bowden against Michael Dugan. Judgment for plaintiff on report.

J. W. Manson and G. H. Morse, for plaintiff. S. J. & L. L. Walton, for defendant.

SAVAGE, J. Trover by plaintiff, a mortgagee, against defendant, a livery stable keeper, for the conversion of a horse. One Redman, the mortgagor, left the horse in question with the defendant, January 18, 1896. Subsequently the defendant learned that the plaintiff was owner or mortgagee of the horse, and wrote to him (date not certain) as follows:

"Mr. Bowden. We have your horse here, with about \$20.00 board due. Call for horse any time. Pay what due. Mr. Redman left him here."

The defendant claims also to have written plaintiff at another time, and to have telephoned to him. About March 9, 1896, the plaintiff replied as follows:

"Mr. Dugan—Dear Sir: The horse left with you as you say I presume I hold a bill of sale on to secure the payment of a note yet due, so I cannot legally take him; but, as the horse is holden for his feed, you can proceed legally to get your pay from the horse."

Subsequently, in March or April, and again in July, prior to the purchase of the writ, the plaintiff made demands on the defendant for the horse, and the defendant refused to deliver him to the plaintiff. Thereupon this action

was brought, and we are urged to hold that such refusal to deliver was a conversion.

The defendant claimed to hold the horse against the plaintiff by virtue of a lien. He bases his claim upon Rev. St. c. 91, § 41: "Whoever pastures, feeds or shelters animals by virtue of a contract with or by consent of the owner, has a lien thereon for the amount due for such pasturing, feeding or sheltering," etc. The plaintiff denies that the defendant had a lien, and says that the defendant's claim for feeding and sheltering the horse did not arise "by virtue of a contract with or by consent of the owner,"—in this case the plaintiff himself. We think otherwise. We think, after the plaintiff wrote to the defendant, March 9th, "The horse is holden for his feed; you can proceed legally to get your pay from the horse,"—that the horse was held by the defendant by virtue of the "consent" of the plaintiff mortgagee, qua owner; and that the defendant had a valid lien for all food and shelter furnished after March 9th. We are also of the opinion that the defendant acquired no lien, as against the plaintiff, for food and shelter furnished before that day.

At this point the plaintiff claims that the defendant waived or lost his lien for keeping and sheltering the horse after March 9th by refusing to surrender him, on demand, without the payment also of the sum due for keeping and sheltering before March 9th. On the other hand, the defendant claims that this action is not maintainable without proof of a tender of what was reasonably due for the keeping and sheltering for which he had a valid lien. And this is the issue.

What are the facts? It is not claimed that any tender was made. One witness for the plaintiff testified that in the month of March, or the first of April, 1896, he went to see the defendant in the interest of the plaintiff; that he told defendant he had come to get the horse; that defendant said he would give up the horse if witness would pay what was due, "some forty-odd dollars"; that "he should not give the horse up to any one till the bill was paid." The amount of the "bill" makes it clear that it covered the entire time from January 18th. Another witness testified that defendant said, on the same occasion, "he should hang on to the horse until he got the amount due"; "he would not give it up to any one unless this amount was paid." The defendant says that he told plaintiff's agent that he "would keep the horse till somebody paid his board." We are satisfied from the evidence that defendant's "bill" was for the whole time, both before and after March 9th; that he insisted on the payment of that for which he had no lien as well as that for which he had a lien, and that he refused to surrender the horse until the whole bill was paid.

It is the opinion of the court that by this refusal the plaintiff was excused from making tender of the amount secured by the valid lien, and can maintain this action without proof of such tender. The law, in a case like this, re-

quires no useless ceremonies. The plaintiff was not compelled to tender what the defendant said he would not receive. *Mattocks v. Young*, 66 Me. 459; *Brown v. Lawton*, 87 Me. 83, 32 Atl. 733. The defendant "made no distinction between what occurred before and what occurred after the notice to the plaintiff, but demanded the whole in one sum, and as one debt." *Hamilton v. McLaughlin*, 145 Mass. 20, 12 N. E. 424.

The language of some of the cases seems to indicate that, if a person who has a lien upon property sets up a claim to it, distinct from and independent of his lien, he will be deemed to have waived his lien. *Munson v. Porter*, 63 Iowa, 453, 19 N. W. 290; *Jones v. Tarleton*, 9 Mees. & W. 675; *Kerford v. Mondel*, 5 Hurl. & N. 931. But a rule which is sufficient for the proper disposition of this case, and which is satisfactory to us, is that "the demand for the whole as one debt, and the refusal to deliver the property unless the whole was paid, was a refusal to deliver the property upon the payment of the amount which had accrued after the notice, and to accept a tender of that, and rendered a tender of it unnecessary." *Hamilton v. McLaughlin*, *supra*, and cases cited. The last case cited is, in all essential particulars, precisely like the case at bar.

The defense fails. What were the damages? The testimony respecting the value of the horse was somewhat conflicting. Upon the whole, we think the entry should be:

Judgment for plaintiff for \$40.

391 Me. 1029

SHAW et al. v. COMMISSIONERS OF PISCATAQUIS COUNTY.

(Supreme Judicial Court of Maine. Dec. 27, 1897.)

HIGHWAYS—LOCATION—APPEAL—COMMITTEE.

Upon an appeal from the decision of county commissioners in locating a highway, the appellate court may appoint a member of the committee in the place of a member thereof who dies or declines to act, if seasonably done.

(Official.)

Exceptions from supreme judicial court, Piscataquis county.

Milton G. Shaw and others appeal from the decision of the county commissioners of Piscataquis county locating a highway. Motion to dismiss appeal, and exceptions taken. Exceptions overruled.

H. Hudson and A. M. Robinson, for appellants. W. E. Parsons, for appellees.

HASKELL, J. Motion to dismiss an appeal from the decision of county commissioners on petition to locate a highway in an unincorporated township, because the committee was appointed too late.

The appeal was seasonably entered at the February term, 1896, when a committee was appointed. One of the committee died the following vacation, and another was appointed in his place at the next term. During the ensuing vacation, that appointee declined the appointment, and another was appointed in his place at the next term, February term, 1897, when a motion to dismiss was filed and overruled and exceptions taken. A warrant to the new committee was issued during the following vacation, and this case was entered in the law court upon the exceptions in the following July, before the committee could have acted and returned their report to court. The case was still pending and in progress, for that committee must act and report at the second succeeding term or not at all, and it would be awkward to have the authority of such committee adjudged void by the law court while they necessarily must act under the apparent authority given them by their warrant. This case is therefore prematurely brought up. It should have rested below until the coming in of the report of the committee, when all questions could be considered, and a final judgment entered, which could be reviewed once for all by the law court, that cannot well consider a case piecemeal. *Phillips v. Commissioners*, 83 Me. 541, 22 Atl. 385; *Millett v. Commissioners*, 81 Me. 257, 16 Atl. 897.

Inasmuch as the authority of the committee is ample and their appointment regular, we are pleased to decide the question, although, if our decision were to be otherwise, we could not justly do so, and leave a committee required to act and incur expense with their authority revoked, and no case existing where their fees and expenses could be considered.

Rev. St. c. 18, § 44, gives an appeal to the next supreme judicial court, and provides: "If the appeal is then entered, not afterwards, the court may appoint a committee of three disinterested persons, who shall be sworn, and if one of them dies, declines or becomes interested, the court shall appoint another in his place. * * * They shall view the route, hear the parties, and make their report at the next or second term of the court after their appointment."

Statutes are intended to be operative, and not inoperative. This statute intended a committee that could act, and limited the time of their report to the second term after their appointment. That appointment was finally and legally made at the February term, 1897. It could not have been made at an earlier day. There was no unnecessary delay; no inaction that the parties could have avoided. The appointment was within the express terms of the statute.

Exceptions overruled.

(91 Me. 104)

LEWENBERG v. HAYES.

(Supreme Judicial Court of Maine. Dec. 27, 1897.)

WAIVER—ESTOPPEL—SALES.

1. The vendor of goods, sold for cash to a tradesman to be put on sale, is estopped from claiming them in the hands of an innocent purchaser, because the cash price has not been paid.

2. Equitable estoppel may be asserted as a defense in actions at law.

(Official.)

Exceptions from supreme judicial court, Penobscot county.

Action by Joseph Lewenberg against John H. Hayes.

This was an action of replevin of merchandise, in which the plaintiff claimed that he had never parted with his title. The defendant claimed to have purchased the merchandise in good faith, for a valuable consideration, of one Fred A. Dubay, who at the time had the goods in his possession.

The case was heard by the presiding justice without a jury, with leave to except. There was no conflict of testimony, and the court ruled pro forma, as matter of law, that, upon the evidence, the defendant was entitled to judgment.

The court also ruled pro forma that, if the plaintiff had parted with the title to the merchandise to the said Dubay, then he could not, in this action of replevin, be heard to question the bona fides of the sale by said Dubay to the defendant.

The plaintiff thereupon took exceptions to these rulings. Exceptions overruled.

J. F. Gould, for plaintiff. F. H. Appleton and H. R. Chaplin, for defendant.

HASKELL, J. Plaintiff sold one Dubay certain merchandise, half cash, half in 30 days, and delivered the goods without exacting the cash. The goods were shipped from Boston, September 4th, and were received in usual time by Dubay, and by him sold to defendant October 1st, and they were replevied during the month of October.

The delivery without exacting the cash payment was evidence that the same had been waived, and, if it had, the title passed to Dubay and his vendees. He had ordered goods August 27th and September 16th, both before and after the bill in question, and they were shipped upon the same terms. From the whole transaction a jury might infer that plaintiff did not intend to insist upon the cash payment. He knew Dubay was a tradesman, and would immediately put the purchased goods on sale. Perhaps a waiver may fairly be inferred, but waiver is a matter of fact when it is to be inferred from evidence, for the court says so in *Robinson v. Insurance Co.*, 90 Me. 389, 38 Atl. 320. This case was tried by the sitting justice below, who ruled, as a matter of law, there being no conflict of testimony, that defendant was entitled to judgment.

Now, this ruling was incorrect, unless the defense can be sustained upon some other ground than waiver, and we think it can. The plaintiff is a merchant in Boston; his vendee, a tradesman in Maine. The goods were sold with the knowledge that they were to be put on sale, and the plaintiff allowed the tradesman to expose the goods for sale as if he owned them; and the defendant, an innocent purchaser, bought them, relying upon the apparent authority of the tradesman to sell them. Here the plaintiff, by his own inaction, allowed the defendant to assume that the tradesman had the title to them, and might lawfully dispose of them. The defendant had a right to rely upon such apparent authority, and may invoke an estoppel against the plaintiff's claim that he had not waived the cash price, and had not parted with title to the goods. The plaintiff allowed the defendant to be deceived, and he cannot now be permitted to take advantage of his own default. Merely intrusting goods to another, without knowledge that they were to be put on sale, would not raise an estoppel. *Staples v. Bradbury*, 8 Greenl. 181. But knowledge that they are to be put on sale, and acquiescence in allowing them to be so exposed, is equivalent to authority to sell them, and well may raise an equitable estoppel. That is matter of law, and a defense now favored both at law and in equity. *Caswell v. Fuller*, 77 Me. 105; *Muliken v. Dockray*, 80 Me. 82, 13 Atl. 127, and cases cited; *Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68.

Exceptions overruled.

(91 Me. 116)

WOODRUFF v. HOVEY et al.

(Supreme Judicial Court of Maine. Dec. 27, 1897.)

MECHANIC'S LIEN—FILING CLAIM.

1. The lien of a person furnishing labor or materials in erecting a building, as provided in Rev. St. c. 91, § 30, will be dissolved unless a sworn claim thereof is filed in the town clerk's office within 40 days after he ceases to labor or furnish materials.

2. In this case the court holds that the plaintiff completed his contract, and that his work was accepted by the party with whom he made the contract, on the 22d of June, 1896, and that, by reason of his failure in not filing his claim for a lien in the town clerk's office until September 8th, he did not seasonably secure his lien.

3. A lien once lost cannot be recovered by subsequent work.

(Official.)

Report from supreme judicial court, Somerset county.

This was a bill in equity brought by Charles C. Woodruff against Frank W. Hovey and the Seabaticook & Moosehead Railroad Company to establish a lien on a round-house, and the lot upon which it is situated, in Pittsfield village. Dismissed.

The bill alleges that on the 9th day of May,

1896, the said Woodruff entered into a contract with the railroad company and the said Hovey to build a roundhouse on the land described (they being owners thereof), furnishing all the labor and material for the same, for the sum of \$1,100; that while erecting said roundhouse he entered into a further contract for additional work and material, therein described; that the building and extra labor and material were satisfactory, and accepted; that the last labor was performed on the 7th of August, 1896, and that within 40 days after that date he filed his lien claim with the town clerk; that there is now due him \$1,068.22,—and then prays that a lien may be established, etc.

The bill was dated and filed September 9, 1896.

Woodruff further claimed that from the time he took the contract, down to the filing of the bill, he supposed that the Seabastcook & Moosehead Railroad Company owned the land. He made the contract with them alone, but first saw Mr. Hovey, and told him he was going to build the roundhouse, and asked him if the company owned the land, and Mr. Hovey said they did; for which reason Mr. Hovey was made a co-defendant, with a purpose of claiming that he was estopped to deny a joint liability, the record title to the land standing in his name. But later it was discovered that, while the record title was in his name, the real title never was; and an amendment was made, to be allowed if necessary and proper.

The amendment discontinues as to Mr. Hovey as co-contractor, and sets up instead that he had wrongfully obtained a void deed of said land, and, by recording same, made a cloud on the title, and prays that he be ordered to release or convey same. These allegations were denied by Mr. Hovey.

The answer to bill of the defendant Hovey states that he does own the land, but never made the contract with complainant, and never promised to pay him; that the work was completed long before July 11, 1896, and that Woodruff did not file his lien claim or bring his suit seasonably; that Woodruff was to wait for his pay until certain bonds were sold, and the railroad completed to Harmony; that said bonds have never been sold, or road completed.

He also alleged that the statement of the lien claim filed in the town clerk's office was defective.

The answer of the Seabastcook & Moosehead Railroad Company claims that payment was not to be made until certain bonds were sold, and the road to Harmony completed, which has never been done. It admits indebtedness for building the roundhouse, but claims that all extra work has been paid for. It also claims that the roundhouse was completed on or before July 11, 1896, and that said claim was not filed within 40 days; that the statement of the lien was defective, as filed with town clerk.

J. W. Manson and G. H. Morse, for plaintiff. Frank W. Hovey and Forrest Goodwin, for defendant Hovey.

HASKELL, J. Bill in equity to enforce a mechanic's lien upon a building, and the land on which it stands. Assuming that all other facts necessary to support the bill have been proved (which it is unnecessary to here decide, and which we do not decide), the plaintiff has failed to prove one fact necessary to sustain the action, and that is that his lien was seasonably enforced.

Plaintiff contracted with defendant railroad company, in writing, on the 15th of April, 1896, to construct a roundhouse for the company, according "to plans furnished by the chief engineer of the company, and to the satisfaction of said engineer," for the sum of \$1,100. The specifications are given, but the plans are not sent up with the case. Both are said to be silent upon the point now in issue, and therefore of no consequence. Plaintiff began work May 13th, and on the 10th or 11th of June the plaintiff says the engineer came while he was on the roof, putting on the last wire to hold the smokestack. "I says: 'Have you looked the building over? Are you satisfied with it as far as it has gone?' And he says: 'I am going up the line, and I might as well accept the job now as any time. I have got all the confidence in the world in you, that you will go ahead and finish it up according to agreement.' He says: 'Now, if you will go ahead and finish it up, and do what you have got to do here as well as you have done what you have done, I will accept the job.' And he wanted to know how long it would take me to finish up, and I told him: 'Two or three days, perhaps. I can't tell exactly.'" Conversation then followed about the doors, and plaintiff was told that they were a part of his job, and that, as they were a little short, he would have to put on a wider flap at the bottom, that was to drop down over the track. Plaintiff says: "'Look here, now. I can go ahead, probably, and finish this all up, except round this track; and when is this track going to be put in here?' He says: 'Lancaster [the president of the company] is anxious to have this building, and the track will be right in here.'"

Plaintiff worked his couple of days, hung the doors, put on the flaps and quit on the 13th. The only remaining work was to put in a few additional screws, some hasps to hold up the flaps, and cut notches in them for the track. On the 22d of June, plaintiff saw Lancaster, and turned over the keys to him. By the terms of the contract, the plaintiff agreed "to take all risk of damage by fire, or any cause whatever, until said house is completed, and accepted by said engineer." Now, the job was accepted on the 10th or 11th, with plaintiff's assurance that he could complete it in two or three days. In that time he did substantially com-

plete it, and on the 22d delivered the building to the railroad company. That was when the contract work ended, and the contract was completed. The contract price then became due and payable. The parties must have so understood the transaction. If a few trifles remained to be done, like sawing the notches in the flaps, and turning a few additional screws into the hinges, and putting on a couple of hasps, that could all have been done inside an hour, either the defendant waived it as contract work, or relied upon its being done in the future as present compliance with contract work. It is incredible that either party then supposed the contract price would not become payable until such work had been done, or that any lien for contract work could not be enforced before.

After this it became known that the railroad company was in financial trouble, and after the lapse of more than 40 days from the acceptance of the contract work, when the lien had already lapsed for nonenforcement, the plaintiff, on the 7th of August, went down to the roundhouse, ex mero motu, sawed the notches in the flaps, turned in a screw or two more in the hinges, and put on some hasps to hold up the flaps, and then, on September 8th, made oath to his lien claim, filed the same with the town clerk on the 9th, and on the same day filed this bill to enforce the lien.

Nothing can be plainer than that the trifling work plaintiff performed on the 7th was for the purpose of reviving a lien that he had already lost.

A lien once lost cannot be revived by additional work. *Cole v. Clark*, 85 Me. 336, 27 Atl. 186; *Darrington v. Moore*, 88 Me. 589, 34 Atl. 419.

Bill dismissed.

(91 Me. 107)

STATE v. STEVENSON.

(Supreme Judicial Court of Maine. Dec. 27, 1897.)

INDICTMENT—EMBEZZLEMENT.

An indictment for embezzlement under St. 1893, c. 241, must allege the receipt of the property embezzled to have been on some trust and confidence.

(Official.)

Exceptions from supreme judicial court, Aroostook county.

George H. T. Stevenson was convicted of embezzlement.

After trial and conviction of the defendant, he moved in arrest of judgment, because of the insufficiency of the indictment. The presiding justice having overruled the motion, the defendant took exceptions to the ruling. Judgment arrested.

The indictment was found at the April term of this court, sitting below, on the fourth Tuesday of April, 1897, at Houlton.

The material portions of the indictment are as follows:

"The jurors for said state upon their oath present that George H. T. Stevenson, of Houlton, in said county of Aroostook, at Houlton, in said county of Aroostook, on the nineteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six, did receive and take into his possession certain money, of the amount and of the value of ninety-six dollars, and divers promissory notes current as money in said state of Maine, of the amount and of the value of ninety-six dollars, and sundry pieces of gold and silver coin current as money in said state of Maine, of the amount and of the value of ninety-six dollars, and one pension check of the United States of America, payable to the order of William H. Stewart, and indorsed by the said William H. Stewart, for the amount and of the value of ninety-six dollars, and all of the property and moneys of the said William H. Stewart, and all of which property and money was then and there delivered to him, the said George H. T. Stevenson, by said William H. Stewart; and that the said George H. T. Stevenson thereafterwards, on said nineteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, the said money, promissory notes, gold and silver coin, and check, so as aforesaid delivered to him, and by him had, received, and taken into his possession, then and there unlawfully and feloniously did embezzle and fraudulently convert to his own use, without the consent of him, the said William H. Stewart, the said money, promissory notes, gold and silver coin, and check being then and there the subject of larceny; whereby, and by force of the statute in such case made and provided, said George H. T. Stevenson is deemed to have committed the crime of larceny, and so the jurors aforesaid, upon their oath aforesaid, do say that the said George H. T. Stevenson, then and there, in manner and form as aforesaid, the said money, promissory notes, gold and silver coin, and check, of the property and moneys of the said William H. Stewart, feloniously did steal, take, and carry away, against the peace of said state, and contrary to the form of the statute in such case made and provided."

Motion in Arrest of Judgment.

"And now, after trial and verdict of guilty, and before judgment, the said George H. T. Stevenson comes, etc., and says that judgment ought not to be rendered against him, because he says that said indictment and the matters therein alleged in the manner and form in which they are stated are not sufficient in law for any judgment to be rendered thereon, and the said indictment is bad, defective, and insufficient in the following particulars:

"First. That said indictment contains no

description of the act complained of, and no averment of any crime.

"Second. That no crime known to the law is set forth in said indictment.

"Third. That said indictment does not state the purpose for which the property, money, goods, and so forth, mentioned in said indictment, were delivered to said respondent.

"Wherefore he prays that judgment on said verdict may be arrested, and that he may be hence dismissed and discharged.

"Dated this 11th day of May, A. D. 1897.

"George H. T. Stevenson."

Motion in arrest of judgment overruled pro forma, and indictment adjudged sufficient.

Wallace R. Lumbert, Co. Atty., for the State. Ira G. Hersey, for defendant.

HASKELL, J. Indictment under Act 1898, c. 241, for larceny by embezzling the goods of another. The indictment in substance charges that the defendant "did receive and take into his possession certain money," etc., delivered to him by one Stewart, which the defendant "unlawfully and feloniously did embezzle and fraudulently convert to his own use, the same being the subject of larceny, and so did feloniously steal, take, and carry away the same, contra pacem, etc.

The defendant was found guilty, and moves in arrest of judgment, because the indictment does not charge the receipt of the money, etc., in any fiduciary relation, or upon any trust and confidence.

The attorney for the state contends that such averments are unnecessary under the statute that inhibits, as larceny, the embezzlement of money, goods, or property, which may be the subject of larceny, delivered to the defendant.

The act is as follows:

"Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny."

The purpose of the statute is to create a peculiar species of larceny, where the felonious taking is wanting, and all authorities agree that in such case an indictment for larceny proper cannot be maintained; that is, proof of embezzlement will not support an indictment for larceny. It logically follows, therefore, that an indictment for larceny by embezzlement must distinguish the offense by apt averment, and the distinguishing element is the breach of some trust or confidence. That is the gist of the crime, and therefore must be charged. No authority can be found to the contrary. *State v. Walton*, 62 Me. 106, is cited at the bar, but that case squarely holds to this doctrine. That was an indictment against a public officer. The court says: "The

questions are: Was he a public officer? Has he fraudulently converted to his own use money, which he had in his possession and under his control, by virtue of his office? It is set forth in the indictment that the defendant, being a public officer, * * * did by virtue of his office, and while employed therein, receive and have in his possession certain money, etc., and the said money did then and there unlawfully and fraudulently embezzle and convert to his own use, and so did steal, take, and carry away the same." *State v. Lynch*, 88 Me. 195, 33 Atl. 978, is cited to the point that offenses must be charged in the words of the statute or in language equivalent thereto. Certainly, offenses must always be so charged, but sometimes such averments are not sufficient. One example is where an offense is prohibited, but not defined. There the indictment should charge the elements of the offense as well as the statute inhibition. For instance, a statute might prohibit murder, arson, robbery, or larceny, and would any one contend that an indictment charging those offenses in the words of the statute would be a sufficient compliance with our constitutional provision that the accused "may demand the nature and cause of the accusation, and have a copy thereof"? The indictment in this case charges the embezzlement of money delivered to the defendant. Suppose it were paid to him by mistake, and he converted it; should he be held as for larceny? Nothing more is necessarily charged. The very word "embezzle" implies the moral turpitude of a breach of trust equal to felonious taking. This is not a new question. If it were, customary laxity might say an indictment charging that a defendant did embezzle money the property of another, and so did steal, take, and carry away the same, would be sufficient. In substance, that is all there is of the indictment in this case.

The statute in question was copied verbatim from Pub. St. Mass. c. 203, § 37. It was first enacted there in 1857 (chapter 233), and has been in force ever since. It has many times been construed by the Massachusetts court, and it is fair to presume that its construction was intended by our legislature when it was enacted here. To supply the defect of a prior Massachusetts statute that did not reach the fraudulent conversion of a mere naked deposit of money for safe-keeping, the present statute was enacted. *Com. v. Hays*, 14 Gray, 62. In that case it is said that these prior statutes were intended to reach the fraudulent taking of money by persons to whom it had been intrusted by their employers and others on trust and confidence, where no conviction for larceny could be had for want of taking or asportation,—an essential element in that crime,—and that to such persons only the statutes apply. *Com. v. Stearns*, 2 Metc. (Mass.) 343; *Com. v. Libbey*, 11 Metc. 64; *Com. v. Williams*, 3 Gray, 461. In the same case it is further said that the present statute was "intended to embrace cases where property had been designedly delivered to a person as bailee or

keeper, and had been fraudulently converted by him; * * * that beyond this the statute was not intended to go"; and so it was held that where money was paid by mistake, and fraudulently converted, no conviction could be had under the statute, inasmuch as the moral turpitude was not so great as in those cases usually comprehended within the offense of embezzlement, and that the legislature could not have intended to place them on the same footing.

In *Com. v. Hussey*, 111 Mass. 432, it is held that "the fiduciary relation essential to characterize the crime is sufficiently expressed by the averment that the property was delivered to the defendant upon the trust and confidence that he would return it to the owner on demand." That was an indictment under the statute in question. Notice the expression "the fiduciary relation essential to characterize the crime."

In *Com. v. Smart*, 6 Gray, 16, an indictment under this same statute, the court say: "The general allegation that the defendant was 'intrusted' with certain enumerated articles, the property of Scott, is too loose and indefinite; since such an averment is equally applicable to a common carrier, and to any other person to whom chattels have been delivered, either to be carried for him, or to be kept or used or appropriated to any particular object or service in the manner which may have been prescribed and directed by the owner, or specially agreed upon by the parties. In neither of these particulars is there any discrimination or certainty in the averments contained in the indictment."

In *Com. v. Concannon*, 5 Allen, 506, an indictment under the same statute for embezzling a mortgage, it is said: "There is a distinct averment that the deed was delivered to the defendant, and that he took and received it for the purpose of carrying and delivering it to the prosecutor. We cannot see that this does not fully and formally set out the agreement or trust on which the deed was received by the defendant." It was held sufficient.

In *Com. v. Simpson*, 9 Metc. 138, an indictment under the prior statute for embezzling goods, it was held that a conviction could not be had under an indictment good only as an indictment for larceny. The court say: "The general object of the various statutes in relation to embezzlement, in England and in this commonwealth, doubtless was to embrace, as criminal offenses punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection, arising from the fact of a possession lawfully acquired by the party, screened him from punishment. They were therefore declared crimes punishable by law.

"The purposes of this statute may, as it seems to us, be sufficiently attained, without any infringement of those rules of criminal pleading which require the charge to be par-

ticularly and certainly set forth. The defendant should, as far as is reasonably practicable, be apprised, by the indictment, of the precise nature of the charge made against him. This, in embezzlement, so far as respects the nature of the offense or character of the crime charged, may be easily indicated by setting forth the fiduciary relation, or the capacity in which the defendant acted, and by means of which the property came into his possession, and by charging the fraudulent conversion. Such seems to have been the practice under the English statutes, 21 Hen. VIII. c. 7, 39 Geo. III. c. 85, and 52 Geo. III. c. 63. See the forms of indictment in 3 Chit. Cr. Law (4th Am. Ed.) 961 et seq.; Archb. Cr. Pl. (1st Ed.) 156.

"The court are of opinion that the two offenses of larceny and embezzlement are so far distinct in their character that, under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction, and that, in cases of embezzlement, the proper mode is, notwithstanding the statute to which we have referred, to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. Although the party, in the language of the statute, 'shall be deemed to have committed the crime of simple larceny,' yet it is larceny of a peculiar character, and must be set forth in its distinctive character."

That case was referred to and adopted in *Com. v. Pratt*, 132 Mass. 246. It is there held that no judgment for embezzlement can be given unless the indictment directly charge larceny by the phrase "feloniously did steal, take and carry away," as well as set out the nature of the embezzlement that is made larceny by statute. In *Com. v. Mead* (1894) 160 Mass. 319, 35 N. E. 1125, an indictment under the act in question charges the fiduciary relation. So does *Com. v. Parker* (1896) 165 Mass. 526, 43 N. E. 499. All of these decisions were made notwithstanding an existing Massachusetts statute (Pub. St. 1882, c. 203, § 44), providing that in such cases "it shall be sufficient to allege generally in the indictment an embezzlement, fraudulent conversion or taking with such intent of money to a certain amount without specifying any particulars of such embezzlement." But they hold that the breach of trust and confidence which is essential to charge embezzlement must be averred as well as proved.

Three things must be averred:

- (1) Fiduciary relation.
- (2) Fraudulent conversion.
- (3) Larceny in apt phrase.

Unless all of these be proved, no conviction can be had; and it is common learning that all elements of a crime necessary to be proved must be averred.

Under our statute, construed in the light of the Massachusetts cases, from whence we adopted it, there is no escape from holding

the indictment in this case insufficient, and the result is supported by reason as well. Judgment arrested.

(91 Me. 140)

BARTLETT v. BAYBUTT.

(Supreme Judicial Court of Maine. Dec. 31, 1897.)

SUPERIOR COURT—JURISDICTION—TRESPASS Q. C.

The superior court for Kennebec county has neither original nor appellate jurisdiction of an action of trespass quare clausum, irrespective of the question whether the title to real estate is involved or not.

(Official.)

Appeal from superior court, Kennebec county.

Bill by Almira Bartlett against John Baybutt. Judgment for plaintiff, and defendant appeals. Dismissed.

The facts are stated in the opinion.

The statute (chapter 104, Acts 1891) under which the defendant claimed that the superior court for Kennebec county had jurisdiction of his appeal to that court is as follows:

"Within said county, said superior court has exclusive jurisdiction of civil appeals from municipal and police courts, and trial justices, exclusive original jurisdiction of actions of scire facias on judgments and recognizances not exceeding five hundred dollars; of bastardy trials, and of all other civil actions at law not exclusively cognizable by municipal and police courts, and trial justices, where the damages demanded do not exceed five hundred dollars, except complaint for flowage, real actions, and actions of trespass quare clausum; and concurrent original jurisdiction of proceedings in habeas corpus, and libels for divorce."

S. S. & F. E. Brown, for appellant. C. F. Johnson, for appellee.

STROUT, J. The question presented is whether the superior court for Kennebec county had jurisdiction of the case.

The action is trespass quare clausum, brought before the municipal court of Waterville, where judgment was rendered for plaintiff. Appeal was taken, and entered in the superior court. No question of title to real estate was involved. Chapter 104 of the Laws of 1891, amending section 67, of chapter 77 of the Revised Statutes, provides that within Kennebec county the superior court should have "exclusive jurisdiction of civil appeals from municipal and police courts and trial justices," and certain other exclusive and concurrent jurisdiction, but excepted "complaints for flowage, real actions, and actions of trespass quare clausum." The same section which conferred jurisdiction of civil appeals excepted from the jurisdiction actions of trespass quare clausum, eo nomine, irrespective of whether the title to real estate was in question or not.

This exception must be applied to civil appeals in actions of trespass quare clausum. The superior court has no jurisdiction of that class of actions. Any other construction would involve the absurdity of giving that court jurisdiction of actions of trespass quare clausum which came there by appeal, and denying the jurisdiction if the action was originally brought there. It was the manifest intention of the legislature that the superior court should not have jurisdiction of any action of that kind.

Appeal dismissed, with costs.

(91 Me. 172)

STEWART et al. v. PATTANGALL et al.

(Supreme Judicial Court of Maine. Jan. 1, 1898.)

APPEAL—REVIEW—NEWLY-DISCOVERED EVIDENCE.

1. In a real action the question to be determined was the location upon the face of the earth of the dividing line between the southeastern and southwestern quarters of township No. 19, middle division, in Washington county. The line was described by the commissioners who made the partition as "beginning at a pine stake three miles distant from the easterly line and two and one-half miles from the south line of the township, and running south, 2° 15' west, to the south line of the township." The jury returned a verdict in favor of the defendants, and the plaintiffs move to have this verdict set aside as against the evidence, and on the ground of newly-discovered evidence.

Held, that the question of fact which the jury were called upon to settle was neither complex nor difficult. They heard the witnesses, and saw the sections of trees with the "spots" exhibited, and they could hardly fail to comprehend the true relation and force of the evidence. Even if there now appeared to be a greater weight of evidence in favor of the plaintiffs, that fact would not necessarily authorize the court to set aside the verdict of the jury; but a careful examination of all the evidence reported discloses a clear preponderance in support of the conclusion reached by the jury.

2. Newly-discovered evidence that does not seem to be of such vital importance as to induce the belief that a different result would have been reached if it had been presented at the trial is not sufficient to grant a new trial. The same result follows where it is fairly to be inferred, from the circumstances disclosed, that by the exercise of proper diligence this evidence might have been seasonably procured.

(Official.)

Action by Arthur L. Stewart and another against William R. Pattangall and others. Verdict for defendants. Plaintiffs move to have the verdict set aside. Overruled.

H. H. Gray and F. I. Campbell, for plaintiffs. W. R. Pattangall, for defendants.

WHITEHOUSE, J. This was a real action, brought to determine the location of the dividing line between the southeastern and southwestern quarters of township No. 19, middle division, in Washington county.

It appears that a partition of the township was made in 1850 between John B. James and Moses G. O. Emery, by which the commissioners appointed for that purpose set out to James two separate lots of land called the

northwestern and southeastern quarters; but from the admeasurements and boundaries of these two quarters as stated and described in the report of the commissioners it does not appear that the westerly line of the southeastern quarter and the easterly line of the northwestern quarter were designed to be a continuous line from the northern to the southern boundary of the township, or that the lots thus laid out for James' half interest were anywhere contiguous to each other. But it is admitted that the plaintiffs had title to the southwestern quarter up to the line on the east then established by the commissioners, and that the commissioners' line was the western boundary of the southeastern quarter owned by the defendants; and the question to be determined was where, upon the face of the earth, was the line described by the commissioners as "beginning at a pine stake three miles distant from the easterly line and two and one-half miles from the south line of the township, and running south, 2° 15' west, to the south line of the township."

The jury returned a verdict in favor of the defendants, and the plaintiffs move to have this verdict set aside as against the evidence, and on the ground of newly-discovered evidence.

It is the opinion of the court that both motions must be overruled. The question of fact which the jury were called upon to settle was neither complex nor difficult. They heard the witnesses, and saw the sections of trees with the "spots" exhibited, and they could hardly fail to comprehend the true relation and force of the evidence. The issue was submitted with instructions to which no exceptions were taken. Even if there now appeared to be a greater weight of evidence in favor of the plaintiffs' contention, that fact would not necessarily authorize the court to set aside the verdict of the jury; but a careful examination of all the evidence reported discloses a clear preponderance in support of the conclusion reached by the jury.

Nor does the newly-discovered evidence seem to be of such vital importance as to induce the belief that a different result would have been reached if it had been presented at the trial. Furthermore, the plaintiffs introduced no testimony tending to show that this newly-discovered evidence could not have been obtained at the trial by the exercise of reasonable diligence on their part. On the contrary, it is fairly to be inferred from the circumstances disclosed that, by the exercise of proper diligence, it might have been seasonably procured.

Motions overruled.

(91 Me. 124)

MURDOCK v. BRIDGES et al.

(Supreme Judicial Court of Maine. Dec. 27, 1897.)

TRUSTS—CHARITIES—UNCERTAINTY OF BENEFICIARIES—EXECUTION OF TRUST—INTERPLEADER.

1. The plaintiff on July 15, 1896, received from one Ann Banks \$1,200, and at the same time took from her a writing of the following tenor:

"To Whom it may Concern: This is to certify that I have this day appointed W. E. Murdock to look after my property and pay all my honest debts, and after that to keep in trust all of my personal property, and to look after my husband, Nathan E. Banks, the rest of his days, and to pay his honest debts with the balance of my personal property; and after his death the balance shall go to the people who have cared for me, as W. E. Murdock shall think best."

Under this authority, plaintiff paid for Ann Banks \$100, leaving a balance of \$1,100 principal in his hands. Ann Banks died August 1, 1896, and Nathan E. Banks died on the 28th of the following October, leaving a small estate. *Held*, that the plaintiff is a trustee of an executed trust, and holds the fund which he received from Ann Banks in trust for her heirs at law, to be paid to her administrator for distribution.

2. Also, that a trust was created by said writing for two purposes: First, to pay the debts of the cestui que trust; and, second, to provide for her husband.

3. Also, that the remaining purpose of the distribution in the plaintiff cannot be exercised, because it is an attempted disposition of property among a class of persons wholly uncertain, to be selected by the plaintiff and distributed among them as he may choose; and, as a testamentary disposition of property, it must fail, for not complying with the statute of wills. As a trust, it must likewise fail, for want of certainty, and because it is a pure benevolence, and not a charity.

4. *Held*, that a decree of interpleader, under these circumstances, is not required, and the defendants' demurrer is therefore well taken.

(Official.)

Report from supreme judicial court, Penobscot county.

This was a bill of interpleader filed April 6, 1897, by William E. Murdock against John N. Bridges, administrator of the estate of Ann Banks, deceased, and against Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb. Bill dismissed.

The material portions of the bill are as follows:

"First. That on the 15th day of July, A. D. 1896, Ann Banks, then of said Springfield, since deceased, paid over and delivered to the said plaintiff, William E. Murdock, twelve hundred dollars in cash, and at the same time executed and delivered to him written instructions in the following words, to wit: 'To Whom It may Concern: This is to certify that I have this day appointed W. E. Murdock to look after my property and pay all my honest debts, and after that to keep in trust all of my personal property, and to look after my husband, Nathan E. Banks, the rest of his days, and to pay his honest debts with the balance of my personal property; and after his death the balance shall go to the people who have cared for me, as W. E. Murdock shall think best.' Which said written instructions, in court to be produced, will more fully appear.

"Second. That the said Ann Banks died on the 1st day of August, A. D. 1896; that afterwards, to wit, on the 28th day of October, 1896, the said Nathan E. Banks died, leaving personal property valued at six hundred and forty-eight dollars and fifteen cents, as will appear by an inventory duly filed in the office of the probate court for

said county of Penobscot; that on the 3d day of December, 1896, the said defendant John N. Bridges was duly appointed administrator of the estate of the said Ann Banks; and that on the 30th day of December, 1896, the said plaintiff, William E. Murdock, was duly appointed administrator of the estate of the said Nathan E. Banks.

"Third. That he, the said William E. Murdock, has paid on account of the said Ann Banks, since her decease, from the twelve hundred dollars held in trust as aforesaid, the sum of one hundred dollars, leaving a balance still in his hands of eleven hundred dollars.

"Fourth. That the legal heirs of the said Ann Banks are Lillian J. Lowell, of Bridgewater, John G. Potter and James M. Potter, both of Monticello, and all in the county of Aroostook; Henry E. Potter, of Ft. Leavenworth, in the state of Kansas; and Mary J. Donahue and Jennie Donahue, both of Lowell, in the commonwealth of Massachusetts.

"Fifth. That the persons who cared for the said Ann Banks prior to her death, and during her last sickness, were the said defendants Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb, who insist that, by the written instructions given to the said plaintiff by the said Ann Banks at the time she paid over and delivered to him said twelve hundred dollars, the balance ought to be paid to them, as the said William E. Murdock shall think best.

"Amendment of Bill.

"The said complainant further says that it is his judgment, and he decides, that the said respondents Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb are the only persons who cared for said Ann Banks in accordance with the terms of said instrument of trust, and that it is his judgment, and he decides, that the balance of the personal property now in his hands should be equally divided among said respondents Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb.

"Sixth. That the said John N. Bridges, as administrator of the estate of the said Ann Banks, has demanded payment from the plaintiff of the said sum of eleven hundred dollars, and insists that said sum belongs to him as administrator of the estate of said Ann Banks; that the said John N. Bridges has brought a suit at law against the plaintiff, claiming said sum as administrator of the estate of the said Ann Banks, on account of which the plaintiff is exposed to great risk and danger of trouble and expense and litigation, and that various claims have been and may be preferred against him on behalf of some of the other persons hereinbefore mentioned; that the plaintiff has no interest in the matter in controversy between the several defendants, and is ready and willing to pay the said sum of money to such of said defendants, if any, as shall

be found legally entitled to receive the same, but, by reason that they persist in their several adverse claims, the plaintiff is advised that he cannot safely proceed in the matter without the direction and judgment of this court sitting in equity.

"Wherefore the plaintiff prays that the several defendants may be decreed to interplead touching their respective rights, in order that the plaintiff may be informed to whom said sum of money now in the hands of said plaintiff ought to be paid; that the plaintiff may have leave to pay the same into court, which he offers to do for the benefit of such of the parties as shall be found or decreed to be entitled thereto; and that the said John N. Bridges be restrained by the order and injunction of this honorable court from commencing or prosecuting any suit at law or in equity against the plaintiff for the recovery of the said sum now held by him as aforesaid," etc.

The respondents Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb appeared and answered. The respondent Bridges appeared, and demurred generally to the bill. By agreement, the prayer for the injunction was withdrawn, and the case was reported to the law court upon the demurrer alone. At the argument before the law court the parties agreed, at the bar of the court, that the court might order an interpleader, if the case should require it, regardless of the form in which the case came into the law court.

The facts in this case, as presented by the plaintiff, are as follows: Ann Banks, a short time before her death, deserted by her relatives, and knowing that her husband did not have sufficient property with which to care for himself, called the complainant, Mr. Murdock, to her bedside, and paid over and delivered to him \$1,200 in cash, at the same time executing and delivering to him written instructions directing the disposition, not only of the money paid him, but of any other property which she possessed. Her property at that time consisted wholly of money and other personal property. She owned no real estate. The written instructions are incorporated in the bill. Soon after the death of Mrs. Banks, her husband, Nathan E. Banks, died, possessed of a few hundred dollars of personal property in his own right. A very small amount of the money paid over to Mr. Murdock by Mrs. Banks has been paid out, so that nearly the entire amount which he received still remains in his hands. A demand has been made upon the complainant, Mr. Murdock, by the respondent John N. Bridges, who is administrator of the estate of Mrs. Banks, and who claims the money in Mr. Murdock's hands as administrator of Mrs. Banks' estate. A demand has also been made upon Mr. Murdock by the other respondents, Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb, who claim the money in his possession; being the only persons who cared

for Mrs. Banks, and being the persons designated by Mr. Murdock as entitled to receive the balance in his hands. On the 3d day of December, 1896, the respondent John N. Bridges was appointed administrator of Mrs. Banks' estate, and, later on, commenced an action at law against the complainant, Mr. Murdock, to recover the balance in his hands for the benefit of Mrs. Banks' estate.

E. C. Ryder, for plaintiff. P. G. White, for defendant Bridges.

HASKELL, J. The plaintiff on July 15, 1896, received from one Ann Banks \$1,200, and at the same time took from her a writing of the following tenor:

"To Whom It may Concern: This is to certify that I have this day appointed W. E. Murdock to look after my property and pay all my honest debts, and after that to keep in trust all of my personal property, and to look after my husband, Nathan E. Banks, the rest of his days, and to pay his honest debts with the balance of my personal property; and after his death the balance shall go to the people who have cared for me, as W. E. Murdock shall think best."

Under this authority, plaintiff paid for Ann Banks \$100, leaving a balance of \$1,100 principal in his hands. Ann Banks died August 1, 1896, and Nathan E. Banks died on the 28th of the following October, leaving a small estate.

What is the legal effect of the writing given to the plaintiff by Ann Banks? It is contended that it creates a trust, with power of distribution in the plaintiff, who now proposes to execute the same. It does create a trust, for two purposes: First, to pay the debts of the cestui; and, second, to provide for her husband. Both these purposes have been performed. Can the remaining purpose of distribution be exercised by the plaintiff? It is an attempted bestowal of property upon a class of persons, wholly uncertain, to be selected by plaintiff, and is to be distributed among them as he may choose. As a testamentary disposition of property, it must fail for not complying with the statute of wills. As a trust, it must likewise fail, for want of certainty, and because it is a pure benevolence, and not a charity. Suppose the plaintiff had died before attempting to appoint the distributees. Could a court invest a new trustee with power for the purpose, or exercise the power itself? The power attempted to be given was personal, and would have perished with the person. It is not a charity, nor does it even name a certain class of distributees. It says, "To the people who have cared for me, as W. E. Murdock shall think best." A more uncertain class of distributees could not be thought of. They are not supposed to be kindred, nor even those who have performed services for which a compensation would be due, for all debts were to be paid, and have been paid, but persons who have been most meritorious in their

attentions to the donor, in the opinion of the plaintiff. It is wide open to favoritism and fraud, and obnoxious to a court of equity, that favors the equal distribution of estates among kindred, where no charity or particular person or classes of persons are named.

This is an executed trust, with a power of disposal unexecuted, and the question is whether the power be valid.

In *Fox v. Gibbs*, 86 Me. 87, 29 Atl. 940, a testator bequeathed the residue of his estate to trustees, to be by them distributed "for the causes of education and learning, for the promotion and assistance and growth of benevolent and charitable associations and objects, etc., within the county of Cumberland." These trustees were to exercise the power, selection, and distribution within the scope of the trust. It was objected that the trust was void from uncertainty, but the court say that it is settled otherwise in this state. It was further objected that the trust was void because the trustees might use the funds for benevolent purposes that were not charitable. The court says: "This objection must be fatal to the validity of the bequest, if such was the intention of the testator. Trusts cannot be upheld which are devoted to mere benevolence or liberality or generosity." The trust was upheld because it was a charity, and not for benevolence that was not charitable.

Trusts of this sort are usually defined by the words "benevolent" or "charitable." Now, "benevolent" is a word of much broader significance than "charitable," and may include what are not charities; and the courts invariably inquire into the meaning of the testator or donor, and, if the meaning implies a charity, the trust stands; otherwise not. In this case neither word is used. Therefore such inquiry need not be made. But the language used clearly implies a benevolence, not a charity. It is a kindness to persons who have cared for the donor, not a compensation. The trustee is to name such persons, and apportion the fund among them. It is purely good will, a benevolence, as much as if that word had been used. It does not relieve suffering or poverty or distress, or go in aid of education or religion, or of any object known to the law as a charity.

In *Chamberlain v. Stearns*, 111 Mass. 267, a trust solely for benevolent purposes is held void. In that case many cases are cited and classified.

In *Nichols v. Allen*, 130 Mass. 211, the residue of an estate was bequeathed to executors, "to be by them distributed to such persons, societies, or institutions as they may consider most deserving"; and the court held the trust not a charity, and too indefinite to be executed, and that the kindred took by way of resulting trust. The court says: "Two general rules are well settled: (1) When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title

only; and a trust results by implication of law to the donor and his representatives, or to the testator's residuary legatees or next of kin. *Briggs v. Penny*, 3 De Gex & S. 525, and 3 Macn. & G. 546; *Thayer v. Wellington*, 9 Allen, 283; *Sheedy v. Roach*, 124 Mass. 472. (2) A trust which by its terms may be applied to objects which are not charitable, in the legal sense, and to persons not defined by name or by class, is too indefinite to be carried out. *Morice v. Bishop of Durham*, 9 Ves. 399, and 10 Ves. 521; *James v. Allen*, 3 Mer. 17; *Chamberlain v. Stearns*, 111 Mass. 267." Many cases are reviewed in the opinion that need not be mentioned here.

"That a gift should be charitable, there must be some benefit to be conferred upon, or duty to be performed towards, the public at large, or some part thereof, or an indefinite class of persons. A bequest for the aid or benefit of defined persons is not a charity, but a trust only, as a gift to be distributed among certain poor families named, or certain persons identified in the bequest." *Bullard v. Chandler*, 149 Mass. 540, 21 N. E. 951.

Norris v. Thompson's Ex'rs, 19 N. J. Eq. 307, is a case very like the one at bar. A testator directed that his wife might by will devise a certain residue of her estate to such benevolent, religious, or charitable institutions as she might think proper. There the power was conferred by will. Here, by written declaration. There it was held to be void, because too indefinite, and not for charity. A devise or trust for benevolent objects, not charities, is void. *Morice v. Bishop of Durham*, 10 Ves. 522; *James v. Allen*, 3 Mer. 17; *Ellis v. Selby*, 1 Myne & C. 286; *Williams v. Kershaw*, 1 Keen, 227, note; *Kendall v. Grange*, 5 Beav. 300; *Vesey v. Jamson*, 1 Sim. & S. 69; *Brown v. Yeall*, 7 Ves. 50, note; *Ommanny v. Butcher*, Turn. & R. 260; *Adye v. Smith*, 44 Conn. 60.

In this case the plaintiff is a trustee of an executed trust, and holds the fund as a resulting trust in favor of the donor's heirs at law, and it should be paid to her administrator for distribution. This result does not call for a decree of interpleader, and the defendants' demurrer is therefore well taken.

Bill dismissed.

(81 Me. 135)

In re RAILROAD CROSSING IN TOWN OF OLD ORCHARD.

(Supreme Judicial Court of Maine. Dec. 27, 1897.)

HIGHWAY—PREScriptive EASEMENT—RAILROAD CROSSING.

1. If a highway is located along and over a prescriptive way, the public easement in the prescriptive way becomes merged in the public easement in the highway.

2. The prescriptive way is extinguished by the location of the highway; and, if the highway is afterwards discontinued, the easement of the public in the prescriptive way is not thereby revived or restored.

3. And this is true, although the town within

which the highway was located never took possession of the land to build or repair the way, and failed for six years to open the highway.

4. Where the presiding justice accordingly ruled, as a matter of law, that the public had lost its right of crossing the track of the Boston & Maine Railroad Company at the place where the "Old Salt Road," so-called, formerly was, and where the highway was laid out by the county commissioners, and discontinued in 1894; and it appeared that the Old Salt Road was a public way, established by adverse use for over 20 years; and it also appeared that the highway which was located, and afterwards discontinued, was laid out substantially along and over the Old Salt Road,—*held*, that the ruling was correct. (Official.)

Exceptions from supreme judicial court, York county.

In the matter of the report of the railroad commissioners on the railroad crossing in the town of Old Orchard, at Temple avenue. Exceptions by the Boston & Maine Railroad Company and Silas W. Milliken and Frank W. Nutter. Exceptions overruled.

Geo. F. & Leroy Haley, for petitioners. J. W. Symonds, D. W. Snow, and C. S. Cook, for Boston & M. R. R. H. Fairfield and L. R. Moore, for other remonstrants.

SAVAGE, J. From the admissions and testimony in this case, it appears that there existed in the town of Old Orchard, prior to the construction of the Boston & Maine Railroad, in 1872, a way known as the "Old Salt Road." It is admitted that this way was then "a public way, established by adverse use for over twenty years, twenty-five feet wide." This way was crossed by the Boston & Maine Railroad, and the railroad company "planked between and outside the rails, built and graded the approaches, and have maintained them ever since at the crossing of the railroad and the Salt Road." This crossing has been traveled by the public ever since the construction of the railroad, the same as the old road had been traveled before. But the railroad commissioners have never fixed the manner and conditions of this crossing.

The county commissioners, by due proceedings, which were closed in 1887, located a highway "over the general line of the Salt Road." It is admitted that "no portion of the old public way known as the 'Salt Road' was outside of the limits of the highway as laid out by the commissioners in 1887, at the railroad crossing; but, while the highway was laid out substantially over the public way known as the 'Salt Road,' there were some places where the Salt Road, in its windings, was outside of the limits of the highway as laid out."

By due proceedings, which were closed in 1894, the county commissioners discontinued the highway laid out by them in 1887, and located a new highway crossing the Boston & Maine Railroad at Temple avenue, 1,465 feet from the Old Salt Road crossing.

The selectmen of Old Orchard petitioned

the railroad commissioners to determine the manner and conditions of crossing the railroad track at Temple avenue, in the new highway, under the provisions of Rev. St. c. 18, § 27, as amended. The railroad commissioners, it seems, were in doubt whether there is now a legal crossing at the Old Salt Road, but intimated that, if such is the fact, they would be unwilling to allow another crossing so near it. They assumed, however, that by the discontinuance of the old highway, in 1894, there is "no legal crossing of the Boston & Maine Railroad by the highway at what is known as the 'Old Salt Road,'" and they "decided to grant the prayer of the petition, and report the matter to the court."

At the hearing upon the acceptance of this report of the railroad commissioners, it appeared also that the town of Old Orchard never opened or constructed the highway located in 1887; that the town resisted all efforts to compel it to do so; that the owners of land adjoining did build or repair some portions of it; that the prescriptive way was passable at the time the highway was located over it; and that the public continued to travel upon it down to the time of the hearing, the same as it had done before the highway was located. Thereupon the presiding justice ruled, "as a matter of law, that the public has lost its right of crossing the track of the Boston & Maine Railroad Company at the place where the 'Old Salt Road,' so called, formerly was, and where the highway was laid out by the county commissioners, and discontinued in 1894," and therefore accepted the report of the railroad commissioners.

The correctness of this ruling is the only question presented by the exceptions. We think the ruling was correct. The highway was located along the general line of the prescriptive way, and at the railroad crossing, which is the point in question, the latter way was entirely within the location. Along the prescriptive way the public had an indisputable right to travel. The public had the same right, no more, no less, in the highway. Can the public have two equivalent, but separate and distinct, rights of travel over the same land at the same time? We think not. The public easement in the prescriptive way was merged in the public easement in the highway. The prescriptive way was extinguished by the location of the highway. *Hancock v. Wentworth*, 5 Metc. (Mass.) 446. See, also, *Chadwick v. McCausland*, 47 Me. 342. Counsel, in support of the exceptions, denies the authority of *Hancock v. Wentworth*, supra, for the reason that the town of Old Orchard never opened or built the located highway, while in the case of *Hancock v. Wentworth* the way was opened and built. It is contended that the new location could not ex-

tinguish the old easement until the town took possession to build or repair; and that, if the town failed for six years to open that highway, it would be discontinued by virtue of the statute (Rev. St. c. 18, § 36); and that the original easement would remain in the public. In other words, it is claimed that the location would not take effect, so as to extinguish the easement in the prescriptive way, until the way was opened and built. We think otherwise. The location of a highway is a definite judicial act. It is made a matter of record. The time of location is certain. The rights of the public and the duties of the town become fixed from that time. The precise time of opening and building a way is, within certain limits, a matter of municipal convenience and discretion. The opening and building adds nothing to the legal effect of the location. It is true that the payment of land damages is postponed until the land "has been entered upon and possession taken for the purpose of construction or use." But this does not control the legal effect of the location. Until possession is taken by the town, the landowner is not disturbed in the beneficial use of his property. The statute does not give the town any option about building. It is presumed that a highway duly located will be opened and built. So far as concerns the question under consideration, the way became a highway at the time of its location. It had a legal existence from that time. The location, *ex proprio vigore*, extinguished the prior easement. *Ballard v. Butler*, 30 Me. 94; *Mussey v. Union Wharf*, 41 Me. 34. Were the rule otherwise, it may well be questioned whether, in a case like this, where the way is actually open and passable, and is used by the public for the purposes of travel at the time of location, any formal technical act of opening is necessary. *Heald v. Moore*, 79 Me. 271, 9 Atl. 734.

It is contended that the result at which we have arrived works a hardship upon the public as well as upon the owners of the land adjoining the prescriptive way; that whereas, before the various proceedings of the county commissioners, both the public and the landowners had certain rights in the old way, now they have none, in either the old or the new. Very true. But it is to be presumed that those who were injured in their property by either the location or discontinuance of the highway have received damages therefor. *Heald v. Moore*, supra. And the public, by which, in its organized capacity, the highway was first located, and then discontinued, will be supposed to be content with such avenues for travel as its own tribunals have afforded.

It is the opinion of the court that the exceptions should be overruled.

Exceptions overruled.

(91 Me. 146)

GOULD v. FORD et al.

(Supreme Judicial Court of Maine. Jan. 1, 1898.)

POOR DEBTORS—BOND—APPROVAL—DISCLOSURE—FEES—ADJOURNMENT.

1. When the justices approving a poor debtor's bond are not selected according to the directions of the statute, it cannot be treated as a statute bond, and can only be held good at common law.

2. There is no provision of the statute which makes the payment of fees to the justices, or any formal organization, a prerequisite condition to the exercise of the power to adjourn, expressly conferred upon the justices sitting in a poor debtor disclosure by Rev. St. c. 113, §§ 5, 28, 42.

3. Where a citation was operative in bringing all the parties interested in a poor debtor disclosure to the place of disclosure at the time appointed in the forenoon, and in procuring the attendance of the justices requisite to constitute the court, *held*, that an adjournment was sufficiently regular that secured the reassembling of the court and the reappearance of the parties and their attorneys at the time specified for an adjourned session in the afternoon session; also, it appearing that it was done by unanimous consent of all present, *held*, that no injustice or inconvenience was occasioned by it, and there is no substantial reason for declaring it irregular or unauthorized.

4. In fulfilling the conditions of a poor debtor's bond, good only at common law, the debtor is not required to perform any other of the statute provisions than those named in the bond.

5. In this case the court holds that the debtor submitted himself to examination before two justices of the peace and of the quorum, and took the oath prescribed, as the result of a legal citation for that purpose, and that he has performed one of the alternative conditions of his bond according to its terms and requirements.

(Official.)

Report from supreme judicial court, Penobscot county.

This was an action by Walter B. Gould against John H. Ford and others on a six-months poor debtor's bond, the plaintiff claiming a forfeiture because the poor debtor's oath was administered by two justices who, as is claimed, had no jurisdiction to grant to the principal debtor his discharge. The following facts were found by the justice presiding, the case having been referred to the court:

The citation to appear at the time and place of disclosure was duly served upon the creditor, who appeared accordingly with counsel and a justice who was selected by him to act for the purpose of such disclosure.

After the parties got together within the hour after the time prescribed by the notice, there being present the debtor and creditor and their respective counsel, and also the two justices selected by the parties, and after an examination of the citation and the officer's return thereon, some one remarked that the funeral of the late Judge Dutton would occur at 11 o'clock (the persons above named having met at 10 o'clock), and that the members of the bar were invited to attend, when it was remarked that an adjourn-

ment might be made for that purpose, after an organization was effected. Thereupon the attorney for the debtor said, "We will consider this an organization," and no one objected to it or said a word to the contrary; and then the attorney for the creditor remarked that "the counsel for the parties had the power to assent to an adjournment, and that he was always ready to adjourn either for the marriage or burial of a brother lawyer"; and so, without further words or action, the disclosure was adjourned until 2 o'clock in the afternoon, for the purpose of attending the funeral.

Promptly at 2 o'clock all the same parties were present at the place where they met in the forenoon, excepting the creditor and his attorney, who, however, came in about 30 minutes later.

On their reassembling, the justice for the creditor was paid his fees, and those of the justice for the debtor were arranged satisfactorily by the debtor's attorney, and the proceedings were announced to be in readiness for hearing the disclosure, when the attorney for the creditor announced that the justices had no jurisdiction in the premises, in his opinion, because the disclosure was adjourned in the morning without any authority therefor before the court of disclosure was duly organized; and he withdrew his justice, and said he was not authorized to act for him, and that the proceedings were in his judgment utterly void. Whereupon the justice for the creditor, under the advice of the creditor's attorney, declined to further act, and refused to pay back the fees which had been prepaid to him; and thereupon both the creditor and counsel, as well as the justice selected by the creditor, went away.

After the creditor's attorney had withdrawn the creditor's magistrate, and refused to participate in the hearing, the debtor proceeded to the house of a deputy sheriff of the county, a resident of Ellsworth, but found that he was in Bar Harbor, and would not return until the next day; and, as there was no other deputy then living in Ellsworth who could be called in to select a new justice, the justice selected by the debtor adjourned the proceedings until the next forenoon, at 10 o'clock a. m., when the deputy sheriff's presence was secured, and he selected a justice for the creditor, when the two justices thus constituting the court heard the disclosure of the debtor, administered the statutory oath, and granted him a discharge; the proceedings being conducted as indicated by the records and papers put in evidence at the trial.

The defense pleaded the disclosure and discharge of the debtor as regularly obtained, and claimed that the damages should be chancered, and that actual damages or nominal damages only be recovered if the actual disclosure and discharge be irregular in any way, and the court should find that the

plaintiff was entitled to recover any damages. Judgment for defendants.

A. W. Weatherbee, for plaintiff. M. Laughlin and D. E. Hurley, for defendants.

WHITEHOUSE, J. This is an action on a poor debtor's bond given to obtain the principal defendant's release from arrest on execution.

It is provided by sections 24 and 42, c. 113, Rev. St., that such a bond may be approved in writing by two justices of the peace and quorum, one to be selected by the debtor and the other by the creditor, his agent or attorney, and, in the event of the creditor's neglect or refusal to make a selection, one may be selected by the officer.

In this case the sureties on the bond appear to have been approved in writing by two "disinterested justices of the peace and of the quorum," but there is nothing in their certificate of approval or elsewhere in the bond to indicate by whom either of these justices was selected. As it does not appear that the justices approving the bond were selected according to the directions of the statute, it cannot be treated as a statute bond, and it can only be held good at common law. *Smith v. Brown*, 61 Me. 70, and cases cited. It has, indeed, been contended with much force of reason, that the act of the creditor in accepting such a bond, and bringing a suit upon it, ought to be deemed a waiver of the statutory method of approval, or sufficient to estop the creditor from asserting that it is not a statute bond; but in this state the court appears to have adopted the opposite view, and the question must now be deemed *res judicata*.

One of the alternative conditions of this bond is that if the debtor within six months from its execution "shall cite the creditor before two justices of the peace and of the quorum, and submit himself for examination, agreeably to chapter 113 of the Revised Statutes, and take the oath prescribed in the thirtieth section of that chapter, then this obligation to be void."

It is contended in behalf of the defense that, upon the statement of facts and records submitted in this case, the debtor is shown to have performed this condition of the bond according to its precise terms and requirements.

It appears from the records in the case that, within the six months named in the bond, the debtor duly cited the creditor before two justices of the peace and of the quorum, submitted himself to examination, "made a full disclosure of the actual state of his affairs, and of all his property, rights, and credits, answered all proper interrogatories in regard to the same, and complied with all other requirements of the statute regulating poor debtors," and thereupon took the oath prescribed in section 30, c. 113, of the Revised Statutes. But it is argued on the

part of the plaintiff that, although this record would seem to show a full compliance with the literal requirements of the bond, the justices who signed the record had no jurisdiction of the matter at the time they heard the disclosure and administered the oath, and that these proceedings were therefore void.

It appears from the statement of facts that the time fixed in the citation for the examination was 10 o'clock in the forenoon, and that within an hour after that time the debtor and the creditor both appeared with their respective counsel, and each selected and procured the attendance of a justice to hear the disclosure; that "after an examination of the citation and the officer's return thereon," but before the justices had actually received their fees for services, by the unanimous consent of parties, attorneys, and justices, the disclosure was adjourned until 2 o'clock in the afternoon of the same day for the purpose of attending the funeral of a member of the bar; that, at the time and place to which the adjournment was taken, the parties and their attorneys and the justices selected were again present, the appropriate fee was paid to the justice selected by the creditor, and payment to the other justice duly guaranteed. But the attorney for the creditor then objected to the jurisdiction of the justices, on the ground that the adjournment from 10 o'clock until 2 was taken before the court was duly organized, and was therefore without authority in law; and, under the advice of the creditor's attorney, the justice selected by the creditor refused to act further, and with the creditor and his attorney withdrew from the place of the hearing. Thereupon the justice selected by the debtor adjourned the proceedings until 10 o'clock in the forenoon of the next day, when a justice for the creditor was selected by the officer, in accordance with section 42, c. 113, Rev. St., and the disclosure heard and the oath administered by the two justices then constituting the court, as already stated.

Section 28, c. 113, Rev. St., declares that "the examination shall be before two disinterested justices of the peace and quorum, * * * who may adjourn as provided in section five, and shall examine the citation and return, and if found correct shall examine the debtor on oath," etc. Section 5 provides that "the justices may adjourn from time to time, if they see cause; and if either of them is not present at the adjournment, the other may adjourn to another time."

It will be perceived that in section 28 the mention of the right to "adjourn as provided in section five" precedes the specification of the duty to "examine the citation"; but in this case the only examination of the citation made by these justices, or before these justices, appears to have been made immediately after their selection on the first morning, and before the first adjournment. The

justices then present, selected by the debtor and creditor as required by the statute, were "disinterested justices of the peace and of the quorum," legally qualified and competent to act in the matter. There is no provision of the statute which makes the payment of fees to the justices or any formal organization a prerequisite condition to the exercise of the power to adjourn, expressly conferred upon "the justices" by sections 5, 28, and 42. It is entirely competent for the justices to assent to delay in the arrangements for the payment of their fees, or to waive such payment altogether. In this case the justice selected by the creditor promptly appeared at the time and place to which the adjournment was had, and accepted the fees tendered him. The creditor and his attorney, and the justice selected by the debtor, were also present, and the debtor again appeared to make his disclosure. The citation had been operative in bringing all the parties interested to the place of disclosure at the time appointed therefor in the forenoon, and in procuring the attendance of the justices requisite to constitute the court. The adjournment was sufficiently regular to be effectual in securing the reassembling of the court and the reappearance of the parties and their attorneys at the time specified for the afternoon session. The "justices" regularly selected and legally in attendance adjourned, as they were authorized to do by the express language of the statute. It was done by unanimous consent of all present. No injustice or inconvenience was occasioned by it, and no substantial reason has been suggested for declaring it irregular and unauthorized.

The afternoon session must therefore be deemed a legal one. But, under the advice of the creditor's attorney, the justice chosen by the creditor refused to participate in the examination, and withdrew from the room. It would seem that the contingency specified in section 42, c. 113, had then arisen, and that the creditor then "neglected and refused to procure the attendance of a justice." If so, the justice chosen by the debtor was then authorized to adjourn not exceeding 24 hours, to enable the debtor to procure the attendance of another justice. This course was pursued, and the disclosure proceeded to the final result already stated. It thus appears that the debtor submitted himself to examination before two justices of the peace and of the quorum, and took the oath prescribed, as the result of a legal citation for that purpose.

It is unnecessary to determine whether, upon the doctrine respecting the withdrawal of one of the justices, laid down by a majority of the court in *Ross v. Berry*, 49 Me. 434, this proceeding could have been held a legal performance of the condition of the defendant's bond, if it had been a statute bond; for it has been seen that the bond in suit is not a statute bond, and is only good at

common law. And it has been held in numerous cases in this state that in fulfilling the conditions of a poor debtor's bond, which is good only at common law, the debtor is not required to perform any other of the statute provisions than those named in the bond. *Clark v. Metcalf*, 38 Me. 122; *Flowers v. Flowers*, 45 Me. 459; *Bank v. Lord*, 49 Me. 99; *Ross v. Berry*, Id. 434; *Bell v. Furbush*, 56 Me. 178; *Smith v. Brown*, 61 Me. 70.

In the case at bar there was full compliance on the part of the debtor with one of the alternative conditions of a common-law bond; and the language of the court in *Bell v. Furbush*, supra, is peculiarly applicable here: "The debtor did cite the creditor, did submit himself to examination in accordance with the terms of his bond, before two justices, and take the required oath; and, the bond not being a statute bond, it matters not, according to the cases above cited, that the requirements of the statute were disregarded in their selection and proceedings. It is a satisfaction to remark that there are no apparent equities with the creditor. He declined to hear the proffered disclosure, and sought to work a forfeiture of the bond by a resort to technicalities. For want of technical accuracy in the outset in the taking of his bond, the effort proves unavailing."

Judgment for defendants.

(70 Conn. 242)

Appeal of GUINAN.

(Supreme Court of Errors of Connecticut. Feb. 8, 1898.)

GIFT—WHAT CONSTITUTES—EVIDENCE OF—ESTOPPEL.

1. A delivery of bank books with intent to vest in the donee the title to the money therein represented is a sufficient delivery to constitute a valid gift of the money.

2. On the question of the validity of a gift of money by delivery of the bank books shortly before the donor's death, the declarations of the donor made prior to such delivery, as to her intention to give the money to the donee, are admissible.

3. A conversation had between a judge of probate and an administratrix, prior to her appointment, concerning a gift of money made to the latter by intestate shortly before her death, by delivery of the bank books, and the refusal of the banks to pay the money except to the administrator of intestate's estate, is admissible to show the purpose of the administratrix in procuring her own appointment as such.

4. An administratrix claiming title to certain money of the intestate through a delivery to her by intestate, shortly before her death, of the bank books, with the intention of thereby giving to her the money therein represented, but which the banks refuse to pay except to the administrator or administratrix of intestate's estate, who procures her own appointment as such for the purpose of procuring payment, is not estopped to claim title to the money in her own right by receipting to the banks therefor as administratrix.

Appeal from superior court, New Haven county; Frederick B. Hall, Judge.

Final accounting by Winifred Miller, administratrix of the estate of Kate Healy,

deceased. From the order of the probate court approving and allowing said account, Maria Guinan appealed to the superior court in New Haven county, where judgment was rendered for Winifred Miller. For alleged errors in the rulings of the court, Maria Guinan appeals. No error.

The court of probate in the district of Waterbury appointed Winifred Miller administratrix on the estate of Kate Healy, who had died intestate in that district. On the 24th day of April, 1897, pursuant to an order of notice by said court to all persons in interest, and duly complied with, she settled her administration account, which was accepted, allowed, and approved by the said court. From the order and decree of that court approving and allowing the said account, Maria Guinan appealed to the superior court, and assigned the following as her reasons of appeal: "(1) Said Kate Healy, the decedent, was at the time of her death the owner of certain jewelry, clothing, two trunks, one satchel, and about \$1,200 in cash, which was deposited in part in the Derby Savings Bank, at Derby, Conn., in part in the Ansonia Savings Bank, at Ansonia, Conn., and in part in the Waterbury Savings Bank, at Waterbury, Conn. (2) After her appointment as said administratrix on the estate of said Kate Healy, said Winifred Miller did, as said administratrix, demand and receive said \$1,200 from said banks. (3) Said Winifred Miller, administratrix, as aforesaid, did neglect and refuse to make any account of said \$1,200 as a part of the estate of said Kate Healy in said administration account, or charge herself with the same or any part thereof, but, on the contrary, did in said administration account represent said estate as without any assets whatsoever. (4) Said \$1,200 was at the time of the death of said Kate Healy, and ever since has been, and still is, a part of the estate of said Kate Healy, and should have been included in said administration account, and charged therein against said Winifred Miller, as administratrix." The appellee, the said Winifred Miller, for defense to these reasons of appeal, said: Paragraphs 1, 2, and 4 of the appellant's reasons of appeal are denied. Paragraph 3 of said reasons of appeal is admitted. The superior court found the issue for the appellee, and rendered judgment that the said order and decree of the said court of probate be affirmed, with costs. The appellant, Maria Guinan, now appeals to this court.

The finding of facts is this: "(1) Kate Healy, of Waterbury, died intestate at Naugatuck, on the 4th of April, 1896, of pneumonia. (2) Unless, upon the facts hereinafter stated, the \$1,200, which at the time of her death was on deposit in her name in the Derby Savings Bank, the Ansonia Savings Bank, and the Waterbury Savings Bank, is to be regarded as a part of her estate, she

left no estate, excepting a few articles of wearing apparel and personal property, of no value. (3) The said Kate Healy, who was unmarried, left, surviving her, a brother, residing in Massachusetts, a sister Maria Guinan, the appellant, wife of Patrick Guinan, of Shelton, a sister Winifred Miller, wife of Charles Miller, of Waterbury, and Thomas Bergen, of Ansonia, who is a child of a deceased sister. (4) Said Kate Healy had for many years worked as a servant girl, and the said \$1,200 was money she had saved from her earnings, and had deposited in said banks. (5) When out of employment or unable to work, she had made her home with her sister Winifred Miller, for whom she had a greater affection than for her other relatives, and who for many years she had intended should have her money upon her death. She had so lived with her sister Winifred several years in all, without paying board. (6) Said Kate Healy, at the time of her death, was visiting a Mrs. Lavigne, for whom she had worked. She had left the house of her sister Mrs. Miller, at Waterbury, on Wednesday, April 1st, and died on the following Saturday. The physician who attended her at the house of Mrs. Lavigne on Wednesday, April 1st, found she had pneumonia, and on the following day Kate Healy caused her sister Winifred Miller to be sent for. (7) Mrs. Miller, in company with a friend, Mrs. Caulfield, arrived Thursday evening, April 2d. While they were alone with Kate Healy in the room where she was sick in bed, Kate Healy took the three bank books in question from under her pillow, and gave them to the said Winifred Miller, and also gave to her the keys to her trunks, which she took from a small satchel. (8) In giving these articles to Mrs. Miller, Kate Healy said: 'Those bank books I give to you, and the keys to my trunks. These are yours, and everything I got belongs to you. If anything happens to me, I want you to have everything.' (9) I find that, at the time of making said gifts to Mrs. Miller, the said Kate Healy was in the expectation of immediate death, and that, in making said gifts, she intended that the same should take effect immediately, as absolute gifts of said bank books and of the said money in said savings banks. (10) Soon after the death of Kate Healy, Mrs. Miller, with said bank books, applied at said savings banks for the money credited upon said books, but was informed by the several cashiers that the money could only be paid to a duly-appointed administrator or administratrix upon Kate Healy's estate; and one of said cashiers, to whom she had told the circumstance of said gift, advised, as the proper way to get said money, to see the judge of probate, and take out letters of administration. (11) Mrs. Miller thereupon, on the 8th day of April, applied for letters of administration, and informed the judge of probate that said bank books had been

given to her by her sister, and of all the circumstances. The judge of probate advised her to consult an attorney before taking out administration, and went with her to the office of the late D. F. Webster. After having laid all the facts before her said counsel, Mr. Webster, she was advised by him that the easiest way for her to get her money, without a lawsuit, was to apply to be herself appointed administratrix. (12) Acting upon such advice, and for the sole purpose of procuring for herself said money, which she was advised and believed belonged to her, she applied to be appointed, and on the 14th of said April was appointed, administratrix of said estate, and gave bonds to the amount of \$1,200. (13) Upon furnishing proof of her said appointment to said banks, said moneys were paid over to Mrs. Miller, and she receipted for the same as such administratrix. (14) No appraisers were ever appointed on said estate, nor was any inventory ever filed. (15) On the 24th of April, 1897, said Winifred Miller filed her final account, Exhibit D, hereto attached as a part of this finding, in which she represented said estate consisted of no property. (16) Said account was accepted and approved by said court of probate. (17) Upon the trial of said case in this court, counsel for the appellant, objected to the evidence offered by the appellee of the declarations of the deceased, Kate Healy, made prior to said 2d of April, 1896, as to her intention to give said money to said Mrs. Miller. The court overruled said objections, and admitted said evidence, and the appellant excepted to said ruling. (17½) Counsel for the appellant objected to proof of the conversation between the judge of probate and Mrs. Miller referred to in paragraph 11 of this finding. The court overruled said objections, and permitted proof of said conversation for the purpose of showing why the said Mrs. Miller was appointed administratrix, and why, as administratrix, she drew said moneys from the banks. The appellant duly excepted to said ruling. (18) Upon said facts, the appellant claimed that there was no such expectation of death upon the part of said Kate Healy as would render said gift of said savings bank books and said money valid as a gift causa mortis, and that said facts did not constitute a valid gift inter vivos of said money in said savings banks. (19) That, upon the facts aforesaid, the said Winifred Miller was estopped from setting up in herself any title to said bank books, or said moneys in said banks. (19½) That the alleged gift was invalid, in that it was contrary to the testamentary laws of this state, being an attempt to dispose of all the estate of the deceased person by parol. (20) The court held upon said facts that there was a valid gift of said bank books and said money in said banks, and that the said Winifred Miller was not estopped from setting up her title thereto in this action."

V. Munger and Ernest L. Staples, for appellant. Edward F. Cole, for appellee.

ANDREWS, C. J. There are various reasons of appeal set down in the record. There is, however, but one real question: Was there a valid gift of the money from Kate Healy to Winifred Miller, so that the money belonged to her, and not to the estate? The superior court decided that there was. A gift is the transfer of property without consideration. It requires two things,—a delivery of the possession of the property to the donee, and an intent that the title thereto shall pass immediately to him. This is a gift inter vivos. In such a gift the donee takes an absolute, indefeasible title. A gift causa mortis differs from a gift inter vivos in that the donee takes a present title, liable to be divested on the recovery of the donor. If the donor dies, then the effect of the gift is the same as in the case of a gift inter vivos. It will not be denied that the delivery of the bank books by Kate Healy to Winifred Miller, if the intent existed that Mrs. Miller should take the title to the money represented therein, would be a sufficient delivery to make a valid gift of the money. *Camp's Appeal*, 36 Conn. 88; *Minor v. Rogers*, 40 Conn. 512; *Buckingham's Appeal*, 60 Conn. 143, 22 Atl. 509; *Tillinghast v. Wheaton*, 8 R. I. 536; *Keniston v. Sceva*, 54 N. H. 24; *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627; *Alger v. Bank*, 146 Mass. 418, 15 N. E. 916; *Cain v. Moon* (1896) 2 Q. B. 283; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415.

The appellant claims that Mrs. Miller is estopped to deny that the money belonged to the estate of Kate Healy. The claim is that, having received the money as administratrix, she cannot be allowed to set up a title to it herself. This claim really begs the question. Mrs. Miller insists that she did not receive the money as administratrix at all; that all the time she claimed to own it herself. The trial court sustained her claim. The fact that she gave receipts for the money which she signed as administratrix was a very strong circumstance against her claim, but it was not conclusive. It was for the trial judge to weigh. All the evidence which was objected to, we think, was admissible, either to show the delivery of the bank books, or the intent with which Kate Healy made the delivery to Mrs. Miller. There is no error. The other judges concurred.

(70 Conn. 248)

SCHROEDER v. TOMLINSON.

(Supreme Court of Errors of Connecticut. Feb. 8, 1898.)

LANDLORD AND TENANT—LEASE FOR LIFE—SUMMARY PROCESS—ABATEMENT—DEMURRER—PRIORITY UNDER RECORDING ACT—BONA FIDE PURCHASERS—ADVERSE POSSESSION—FORFEITURE—SUBLETTING.

1. Under Gen. St. § 1000, providing that no proceeding shall be abated for circumstantial er-

rors if the person and the cause may be rightly understood, an action of summary process was not abatable by reason of an error in the date of the summons.

2. In an action of summary process against a tenant for life, under a lease in which she covenanted not to sublet without the written permission of the lessor, where the complaint contained no allegation that the underletting complained of was without plaintiff's written consent, such defect, being one of form, and not of substance, could not be reached by a demurrer to the reply.

3. Under Gen. St. § 1184, providing that an execution duly levied on land, and returned and recorded, shall vest all the title of the debtor in the creditor, and section 2961, declaring that no conveyance of land shall be effectual, except as to the grantor and his heirs, unless recorded, a bona fide purchaser was entitled to priority over a creditor of his grantor, whose execution was levied after such conveyance, but before the recording thereof, where the proceedings on such execution were not recorded until after the recording of his deed.

4. Where a purchaser of the reversion took a proper conveyance thereof, more than two months prior to the levy of an execution against his grantor, in pursuance of a contract made and recorded nearly a year before, the fact that his deed was a quitclaim did not make his rights any the less than if it had contained full covenants of warranty.

5. A tenant for life could acquire no title by adverse possession, subsequent to the levy of an execution on her behalf, against the owner of the reversion, where her occupancy was justified under her lease.

Case reserved from court of common pleas, New Haven county.

Action of summary process by Anna Schroeder against Edward D. Tomlinson, before a justice of the peace, resulting in a judgment for the defendant. Writ of error to the court of common pleas, reserved on a stipulation containing an agreed statement of facts. No error.

The complaint, after reciting a lease from Theodore King to the plaintiff in error, in 1869, for her life, for a residence only for herself, she covenanting not to assign the lease, or underlet or otherwise dispose of all or any part of the premises, without his written permission, and that, if she should, the lease should thereupon expire, and summary process lie to repossess the lessor, without any re-entry, alleged that in 1892 she did underlet to parties unknown to the defendant in error; that in 1896 she leased the premises to another party, who was now in possession; that in 1870 she married, and lived on the premises with her husband until 1885, when he died; and that in 1871 the lessor conveyed the reversion to the defendant in error, who now owned it. The summons annexed to the complaint was dated October 27, 1897, and required the plaintiff in error to appear before the justice on April 3, 1897. She appeared, and pleaded in abatement that he had no authority to issue the summons so dated. This plea was overruled, and she then answered, and the cause was finally tried before a jury. The bill of exceptions showed that she requested the justice to give certain instructions to the jury which were refused, and a verdict was

rendered against her, followed by a judgment of dispossession. She then brought a writ of error to the court of common pleas, and the parties there stipulated as to the essential facts. These are sufficiently stated in the opinion.

John Elliott, for plaintiff. V. Munger, for defendant.

BALDWIN, J. The original action was not abatable by reason of the error in the date of the summons. Gen. St. § 1000. It is claimed that the complaint is insufficient for want of an allegation that the underletting by the plaintiff in error was without the written consent of the lessor or his assigns, and that this omission was reached by a demurrer interposed before the justice of the peace to the second reply to the second defense, on the principle that a demurrer searches the whole record, and attaches ultimately to the first substantial defect. The second reply set up an assignment of the reversion, in 1872, by deed, pursuant to a previous contract recorded in 1871, to the defendant in error; and the second defense was rested on a title in the plaintiff in error by levy of execution on the interest of the lessor, prior to the record of such deed. Under our statutory rule that all demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient, it is, to say the least, doubtful whether a demurrer to a reply for one cause can ever call for a judgment that the complaint is insufficient for another cause. In the case at bar, however, the defect in the complaint was one of form, not substance. It was a defective statement of title, but not a statement of a defective title. Even at common law, therefore, it would not have been reached by the demurrer in question.

The substantial controversy between the parties was as to the present ownership of the reversion. The plaintiff in error, Mrs. Schroeder, received the life lease recited in the complaint from her son, Theodore King, in 1869, and upon her marriage, in 1870, he brought an action of summary process against her, on the ground that the marriage, and the occupation of the premises by her husband with her, worked a forfeiture, and recovered judgment. She brought a writ of error to the court of common pleas, and prevailed. Pending a motion in error to this court, which was afterwards decided against him (Schroeder v. King, 38 Conn. 78), he sold and conveyed to Tomlinson, the present defendant in error, a lot adjoining the demised premises, and on the same day made a written contract with him, stating that in consideration of such purchase, and "the further consideration of the taxable costs and counsel fees incurred and to be incurred in a suit now pending for the recovery of the possession of the premises herein-after described, which the said Edward D. Tomlinson hereby agrees to pay as a part

consideration of the purchase of said premises, the said Theodore has agreed, and does hereby agree, that upon the termination of said suit and the payment of the taxable costs and counsel fees as aforesaid, or at any time before said termination at the election of the said Edward D. Tomlinson, and upon his, the said Tomlinson's, paying the costs and counsel fees in said suit up to the date when he, the said Edward D. Tomlinson, may choose to accept a conveyance of the premises as hereinafter described, and pay said costs and fees as above, he, the said Theodore King, will execute and deliver to the said Edward D. Tomlinson a quitclaim deed conveying all his present interest in" the premises then occupied by his mother under her lease. Tomlinson also signed this contract, agreeing "to accept said deed and conveyance of said premises, and pay said taxable costs and counsel fees in the manner above specified." It was executed, attested, and acknowledged on January 5, 1871, in the same manner as a deed of land, and recorded in the land records of the town where the premises were situated on January 18th. Subsequently, upon the affirmance of the judgment in favor of Mrs. Schroeder, she took out an execution upon it, and on March 30, 1872, the officer levied it on King's interest in the demised premises. His return stated that he levied upon the land, and the debtor's interest therein, said land being subject to the incumbrance of a lease to Mrs. Schroeder during her life; that certain appraisers were duly appointed—one by the creditor and two by a proper magistrate—to appraise said land with the incumbrances thereon; that, after viewing it, "and ascertaining in view of the incumbrances thereon," they appraised "the equity, right, and interest of said debtor in said premises, subject to the life lease of Anna Schroeder, at the sum of thirty dollars," and delivered to him a certificate of such valuation, which was annexed; and that on said day he set off to her the whole of said land in part satisfaction of the execution. Appended to the return was the magistrate's certificate that he had appointed two appraisers, who were named, to act with the appraiser named by Mrs. Schroeder in appraising the value of the land and the debtor's interest therein, subject to her life lease, and that all three had been duly sworn before him. Then followed the certificate of the appraisers, which stated that they, "having been appointed and sworn, as above specified, to appraise the above piece of land to be set off on said execution, did appraise the same at the sum of thirty dollars." On January 10, 1872, King had conveyed the demised premises to Tomlinson by a quitclaim deed of that date purporting to be given in pursuance of their contract on record, and on April 1st Tomlinson lodged this deed for record. On April 3d the officer caused the execution and his

return thereon to be recorded in the land records, and on April 12th returned it to the office of the clerk of the court whence it issued. Prior to March 30th, Mrs. Schroeder had no notice of any claim of ownership by Tomlinson, except so far as Gen. St. § 2964, might make the record of his contract with King "notice to all the world of the equitable interest thus created." Ever since that date she has claimed and exercised absolute ownership over the land, and has expended large sums in improvements upon it, under the belief that she was the sole owner. In 1892 she underlet it to tenants who have since been in possession under her. Tomlinson never paid her anything upon her judgment for costs against King. He has, ever since the record of his deed on April 1, 1872, claimed to own the land subject to the life estate of Mrs. Schroeder, nor did he ever have knowledge that she claimed anything under her levy of execution, but always supposed her occupancy and claim to be solely under her lease.

Our statutes provide that all executions duly levied on land, and returned and recorded, shall vest all the title of the debtor in the creditor and his heirs and assigns. Gen. St. § 1184. The parties are at issue on two questions: First, as to whether the execution was duly levied; and, second, as to whether the proceedings under it were affected by the record of Tomlinson's deed on April 1st. The objection to the validity of the levy is that the appraisal was not of the value of the debtor's interest in the land,—that is, of the reversion,—but of the land itself. The terms of the appraisers' certificate support this contention, and unless it can be controlled by their reference to the oath which they had taken to appraise it subject to the lease, the legal basis for setting it off at \$30 is wanting. Such proceedings are stricti juris, and no title passes unless the statute is exactly pursued. *Fish v. Sawyer*, 11 Conn. 545. We find it, however, unnecessary to decide this question. At the date of the levy King owned the legal title to the reversion in the demised premises, so far as concerned Mrs. Schroeder. Tomlinson had acquired this title more than two months before, but by a conveyance which was ineffectual, except as to King and his heirs, unless recorded. Gen. St. § 2961. The same policy, however, which demands the record of a deed has dictated a similar requirement in case of a levy of execution. A levy on land, followed by a set-off, occupies the place and serves the purpose of a conveyance. Standing alone, it is not even an inchoate transfer of title, except as against the judgment debtor and those identified in position with him. The execution creditor must not only see that due return is made to court, but, like a grantee by deed, must place that under which he claims on record within a reasonable time; and any delay is at the risk of being postponed by a prior record of some other evidence of title, derived from the execution debtor by another. He is

held to stricter obligations in this particular than the holder of an ordinary conveyance, since the levy is inoperative to effect a transfer of title, even against the judgment debtor, unless and until the proceedings are recorded, and recorded, within the life of the execution. *Coe v. Stow*, 8 Conn. 536. It is true that under a levy duly perfected the title of the creditor commonly relates back to the first step in the process; but this legal fiction is never permitted to work injustice to a bona fide purchaser, in whom any rights may have meanwhile become vested. Tomlinson stood in such a position. He purchased the reversion, and took a proper conveyance of it, more than two months previous to the levy, in pursuance of a contract made and recorded nearly a year before. His deed was a quitclaim, but this, under the principles of our system of conveying, does not make his rights any the less than if it had contained full covenants of warranty. *Robinson v. Clapp*, 65 Conn. 365, 382, 32 Atl. 939. By the contract of January, 1871, he was bound to accept it whenever tendered after the termination of the suit between King and his mother, and thereupon, as part of the consideration of the conveyance, to pay "the taxable costs and counsel fees incurred" in that action. The other part of the consideration he had previously discharged by purchasing of King the adjoining lot for \$1,500. The costs and fees described in the contract were evidently those which might be due from King, and Tomlinson's duty was to pay the money necessary to satisfy them to King, to enable him to discharge his obligations to his creditors. The quitclaim deed was given after the end of the suit mentioned in the contract, and the consideration clause recites a payment of \$200, which there is nothing in the record to contradict. Tomlinson acquired title, therefore, as a bona fide purchaser; and, while he failed to record his deed within a reasonable time, this did not impair his right to perfect his title by a subsequent record, except as against some other purchaser of greater diligence. It was recorded on April 1st, two days before the record of the proceedings upon the execution. This priority of record, had his deed been taken after the commencement of the levy, would *prima facie* have given him priority of title, to be defeated only by proof that he was guilty of fraud, or that which is equitably equivalent to fraud. *Wheaton v. Dyer*, 15 Conn. 307. *Bush v. Golden*, 17 Conn. 594, 602. Much more is he entitled to insist on priority when his conveyance long preceded the levy. Knowledge of the existence of an unrecorded deed may be a sufficient ground for the imputation of constructive fraud to a subsequent purchaser. *Hamilton v. Nutt*, 34 Conn. 501. No such knowledge, as respects the levy of execution, is charged against Tomlinson. The question is not the same which would arise if the property had been under attachment upon mesne process in favor of Mrs. Schroeder when he placed his deed on record. The levy of an

execution upon land, in respect to the rights acquired by the creditor, differs essentially from the levy of an attachment. The object of the latter process is to impose a lien; that of the former to transfer an estate. The first step in attaching land is to make an entry of the proceeding upon the land records. In setting land off on execution, the entry there is one of the last steps. When Tomlinson's deed was lodged with the town clerk, there was nothing on the land records to indicate that a levy had been begun. There was, therefore, neither knowledge nor notice; and it is unnecessary to inquire whether, had he had knowledge, the record of his deed would have been too late. No title by adverse possession could be acquired by Mrs. Schroeder, subsequent to her levy, against the owner of the reversion, since her occupancy was justified under a paramount title; that is, the lease. Her subletting, without his consent, was a cause of forfeiture, of which the defendant in error had a right to take advantage by the action of summary process. Gen. St. § 1358. The rulings of the justice of the peace in the course of the trial have ceased to be material by reason of amendments of the pleadings before him, made by mutual consent, and the stipulation filed in the court of common pleas, upon which the case was reserved for our consideration. The verdict and judgment are supported by the agreed facts, and the cause was properly disposed of upon its merits. The court of common pleas is advised that there is no error. The other judges concurred.

(68 N. H. 447)

AMEY v. WINCHESTER.

BUCKLEY v. SAME.

(Supreme Court of New Hampshire. Coos. March 13, 1896.)

INNKEEPERS—EXTENT OF LIABILITY FOR LOST GOODS.

An innkeeper is not liable to one whose hat was stolen while he was attending a banquet given at the hotel, though he had registered, and been assigned a room, where the banquet was given by a club, and was not furnished to the guests of the house.

Separate actions of "case" by John T. Amey and W. P. Buckley against A. M. Winchester, an innkeeper, for the loss of property. Facts found by the court. Near the entrance to the dining room of the defendant's hotel in Manchester, he has a rack on which his guests are invited to deposit their hats while eating their meals. On the evening of January 8, 1895, he provided in his dining room a banquet for a club, under a contract by which the club agreed to pay a specified sum for each plate. About 100 persons, mainly residents of Manchester, attended the banquet. The plaintiffs were not members of the club. They arrived at the hotel that evening, registered their names, and were assigned a room, which they occupied. They attended the banquet by invitation of the club, which paid for

their plates. On entering the dining room, they, in common with others, deposited their hats on the rack. About 11 o'clock they left the banquet, intending to return before it closed, and, without taking their hats, went to their room, where they remained more than an hour. On their return they found the banquet ended, the doors of the dining room closed, and their hats missing. They lodged at the hotel that night, and the next morning demanded their hats of the defendant, who was unable to produce them, and refused to pay for them. There was no actual negligence on the part of the defendant. Judgment for defendant.

Drew, Jordan & Buckley, for plaintiffs. I L. Heath and Ladd & Fletcher, for defendant.

BLODGETT, J. To subject the defendant to liability as innkeeper, it must appear not only that the plaintiffs' goods were lost at his inn, but that he was acting in the capacity of innkeeper when the goods were lost, and that the plaintiffs were his guests; or, in other words, that the plaintiffs were at the inn for purposes which the common law recognizes as the purposes for which inns are kept, namely, the accommodation and entertainment of travelers and wayfaring men, and not for those who may be there for some special purpose not connected with passage or travel. Calye's Case, 8 Coke, 82, and note, 1 Smith, Lead. Cas. *131; Carter v. Hobbs, 12 Mich. 52; Fitch v. Casler, 17 Hun, 126; Gastenhofer v. Clair, 10 Daly, 265, 266; 11 Am. & Eng. Enc. Law, 20, 21; McDaniels v. Robinson, 62 Am. Dec. 590, note. Upon the facts as reported, we think the rigorous rule that makes the landlord of an inn responsible for the goods of his guests under almost all circumstances, and without proof of negligence or fault on his part or of those in his employ, cannot be extended so as to protect the plaintiffs, for, as to the banquet where the loss occurred, and which they attended on the invitation and at the expense of the club, the plaintiffs are justly to be regarded as its guests, and not of the defendant, as innkeeper or otherwise, who simply provided the banquet as caterer under a contract with the club, without any lien or claim for compensation against its guests, and with no right or power to exclude anybody from participating in its festivities whom the club might properly invite. Neither by contract nor by operation of law was the defendant acting in the character of innkeeper as to the club, and still less as to its guests, who would have had no right whatever to attend except upon its invitation. Both the club and its guests came, not as ordinary travelers to an inn, but as to a banquet, for the purpose of participating in and enjoying its festivities. And likewise as to both the fact that the defendant chanced to be keeping an inn, and served the banquet there, makes his liability no greater than that of any other person not

an innkeeper, who might have taken and executed the contract, either at the inn or elsewhere. One may be an innkeeper without being a club caterer, or he may be a club caterer without being an innkeeper, or he may be both; but, if he is, the two employments are so far separate and distinct in respect of duties and liabilities as not to make him responsible in the one capacity for liabilities incurred in the other. See *Minor v. Staples*, 71 Me. 316. Nor does the fact that the plaintiffs had registered, and been assigned a room in the inn, affect the legal status of either party. As to the banquet where the loss occurred, "which was not furnished to the guests of the house, and was not one of the meals provided for them," the plaintiffs' registration and assignment put them in no different position, in a legal sense, than they would have occupied if they had registered and obtained a room elsewhere, or if the defendant had served the banquet at some place separate from and disconnected with his inn. Not having lost their property at the defendant's inn in the character of guests, but in the execution of a purpose distinct from their accommodation as guests, the plaintiffs' actions are not maintainable. Authorities supra. Other grounds of defense need not be considered. Judgment for the defendant.

CARPENTER, J., did not sit. The others concurred.

(98 N. H. 464)

TUTTLE v. LANGLEY.

(Supreme Court of New Hampshire. Rockingham. July 31, 1896.)

TENANCY AT WILL—RIGHTS AND DUTIES OF TENANT—QUESTIONS OF FACT—FINDINGS.

1. Where one enters under an agreement to lease a farm at an annual rental for a term of years, but no written lease is signed, as the parties cannot agree as to the right of the lessee to sell the hay, the lessee claiming that the oral agreement was that he could sell some of the hay, if it was done so as not to injure the farm, the lessee is a tenant at will from year to year, under Pub. St. c. 246, § 1, providing that every tenancy or occupancy shall be deemed to be at will, unless a different contract is shown, and, as such, he is entitled to its annual fruits, of which the hay is one, even if the hay were subject to the restriction that it be fed out on the farm.

2. Whether a tenant at will carries on a farm in a husbandlike manner is a question of fact.

3. In trover by a tenant at will for hay, where a referee has found that such tenant has carried on the farm in a husbandlike manner, it may be regarded as a finding that good husbandry did not require him to spend on the farm that portion of the hay in controversy.

Trover by Jacob Tuttle against Orlando S. Langley. Facts found by a referee. Judgment on the report for plaintiff.

Early in 1890 the plaintiff and one Haley, who owned a farm in Exeter, had negotiations with reference to Haley's leasing his farm to the plaintiff for the term of five years, and Haley agreed to give a lease for

said term for \$150 a year, and allow the plaintiff to sell some of the hay raised on the farm, provided it was done so as not to injure the farm; meaning, if any hay was sold, manures or other fertilizers should be bought and used. No agreement in writing or memorandum was made or signed at this time. The plaintiff moved on the farm about April 1, 1890, where he remained one year. Haley died December 21st of the same year, no written lease having been executed. A lease was drawn up by Haley, which the plaintiff refused to sign, because they could not agree as to the right of the plaintiff to sell any of the hay raised on the farm, the plaintiff claiming he was to have the privilege of selling hay if he left the farm in as good condition as he found it. This Haley would not agree to, and no lease was signed by either. About April 1, 1891, the plaintiff left the farm, leaving hay in the barn raised during the year. A part of this hay was afterwards sold to the defendant by the executor of the will of Haley. The plaintiff carried on the farm in a husbandlike manner during the year he was there.

Eastman, Young & O'Neill, for plaintiff.
Frink & Marvin and T. Leavitt, for defendant.

BLODGETT, J. The plaintiff's occupancy of the farm was that of a tenant at will from year to year (Pub. St. c. 246, § 1; *Whitney v. Swett*, 22 N. H. 10, 13), and, as such, entitled him to its annual fruits, of which the hay was one (*Felch v. Harriman*, 64 N. H. 472, 473, 13 Atl. 418; *Plummer v. Currier*, 52 N. H. 287, 296, and authorities cited). And this would still be so, even if the hay were subject to the restriction that it be fed out on the farm. *Griswold v. Morse*, 59 N. H. 211, 214. As tenant at will, the plaintiff was bound to carry on the farm in a husbandlike manner. Whether he did so is a question not of law, but of fact (*Pickering v. Moore*, 67 N. H. 533, 32 Atl. 323, 329); and, having been found in his favor by the referee, it may properly be regarded as equivalent to a finding that good husbandry did not require him to spend on the farm that portion of the hay now in controversy (*Noyes v. Patrick*, 58 N. H. 618, 619; *Whittredge v. Edmunds*, 63 N. H. 248, 249). Giving this effect to the finding, the defendant can have no cause of complaint as to the basis on which the damages were assessed by the referee, and, if the plaintiff has any, he has failed to make it known. Judgment on the report for the plaintiff. All concurred.

(124 Pa. St. 585)

PALETHORP et al. v. PALETHORP et al.
(Supreme Court of Pennsylvania. Feb. 21, 1893.)

EQUITY—PROCEEDINGS IN VIOLATION OF RULES.

The court appointed a master, and directed that a certain equity case should be proceeded

in before him to a final judgment. The case was brought after amended equity rules of January 15, 1894 (28 Atl. vi.), abolishing the office of master in chancery in such cases, went into operation. *Held*, that a decree confirming the master's report, and all proceedings in such case after it was put at issue, should be set aside, as a nullity.

Appeal from court of common pleas, Philadelphia county.

Bill in equity by Harriet Palethorp, widow, etc., and others, against Robert Palethorp and others. From a decree confirming the report of a master, defendants appeal. Decree set aside.

Robert Palethorp, for appellants. William A. Manderson, for appellee.

WILLIAMS, J. The rules regulating the practice in equity in the several courts of this commonwealth were amended by this court on the 15th day of January, 1894, and it was then ordered that the said amendments should take effect on the first Monday of the March following, and be applicable to all causes in equity brought or put at issue after that date. Among these amendments was one which provided as follows: "The office of master in chancery is hereby discontinued except in proceedings where decrees or interlocutory orders are to be executed or their execution supervised by an officer of the court." 28 Atl. vi. The trial of causes in equity was to be conducted before a referee or in open court, and to be conducted "as near as may be as a trial at law is now conducted." The plaintiffs' bill was filed in this case between six and seven months after these amended rules went into operation. Some two months later, or on the 17th day of December, 1894, the court below appointed a master, and directed that the cause be proceeded in before him to a final determination. This was about ten months after the office of master had ceased to exist as a part of the machinery for the trial of causes in equity, and conferred no authority on the appointee. The report of the master so appointed was not filed until the 6th of January, 1897, and the report was confirmed, and the decree from which this appeal was taken was made on the 20th of July last. The fact is brought to our attention by an examination of this record that the equity rules have been utterly disregarded, and that there has been no trial had in this case. We cannot consider a decree made under such circumstances as an adjudication upon any question to which it relates. The appointment of the master was a simple nullity. The proceedings before him were coram non iudice, and therefore a nullity. The decree resting on his report has absolutely nothing to support it, and it is therefore a nullity. There is no question before us except the question whether we can sanction or overlook the brushing away of the orders of this court in this manner whenever it may suit the convenience or the whim of the parties.

to trample upon them? It may be said that the defendants are in no position to raise this question now because of their appearance before and recognition of the master as an officer of the court, and that, as this case has been heard on the testimony, the result ought not now to be disturbed. But it had not been heard before any one having the right to hear it. Moreover, if we are to give to the mistakes of parties, or to their intentional disregard of our orders, the force and efficacy of regularity and law, what will become of our rules of practice? They will be set aside at will, or without purpose, by mere inattention and carelessness. We have but one thing to do in this case, and that is by no means a pleasant one. We must treat this record as it actually is,—as an incurable series of mistakes,—and set aside all that has been done since the appointment of the master, by him, or by the judge of the court below resting upon or in any manner relating to what the master has done. We were compelled to treat a decree as a nullity because of the violation of the equity rules in the case of *Chester Traction Co. v. Philadelphia, W. & B. R. Co.*, 180 Pa. St. 432, 38 Atl. 916, and to lay down the rule that: "Where an equity case has been tried in violation of the equity rules of January 15, 1894, the supreme court will, upon appeal, set aside the decree, together with all proceedings in the cause after the case was put at issue except such as relate to the testimony of the sick, aged, absent, and waygoing witnesses, and will direct that each party shall pay its own costs made since the cause was at issue." In accordance with the rule so laid down, the decree in this case is set aside for the reasons given above, and all the proceedings in the case since it was put at issue are also set aside; the plaintiff to pay the costs made by her, including the master's fee; the defendants to pay the costs made by them, including their witnesses. The record is remitted to the court below, and a procedendo directed.

(184 Pa. St. 618)

COATS v. POTTS.

(Supreme Court of Pennsylvania. Feb. 21, 1898.)

NOTE—RENEWAL—NOTICE.

A note dated May 1, 1890, payable in one year, with interest payable semiannually, provided that it might "be renewed for one year, at the option of the maker, and thereafter renewed from year to year, unless six months' notice to the contrary, prior to maturity, be given by the holder thereof. At the expiration of such notice, the note shall become due and payable." The interest was paid at the end of six months, and again soon after the end of the year. The note was never renewed, and the maker was never served with said "six months' notice to the contrary" before suit was brought on it, in March, 1894. *Held*, that the suit was not premature because such notice was not served.

Appeal from court of common pleas, Delaware county.

Action by Edward H. Coats against Benjamin C. Potts. From a judgment entered on a verdict directed by the court in favor of plaintiff, defendant appeals. *Affirmed*.

Isaac Johnson, for appellant. V. Gilpin Robinson, for appellee.

WILLIAMS, J. This action was brought upon a promissory note made by the defendant for \$5,000, payable one year after date, with interest at the rate of 6 per cent., payable semiannually. At the bottom of the note was the following memorandum: "It is agreed that this note may be renewed for one year, at the option of the maker, and thereafter renewed from year to year, unless six months' notice to the contrary, prior to maturity, be given by the holder thereof. At the expiration of such notice, the note shall become due and payable." The note was given on the 1st day of May, 1890. The interest was paid at the end of six months, and again a little after the end of one year. The maker did not exercise his option to renew the note, and he made no further payments upon it. Three years after its maturity, the plaintiff, in March, 1894, brought this suit. No defense upon the merits is suggested, but the defendant complains that the action is prematurely brought, because he had not been served with six months' notice that the holder declines to make any further renewal of the note. But the notice was provided as a means of terminating the series of renewals that might follow if the defendant had exercised his option to renew the note when it matured. He did not do this. The process of renewing the note never began, and, of course, required no notice from the holder to end it. It fell due, according to its terms, on the 1st day of May, 1891; and, in the absence of the exercise of the maker's option to renew, it became, and thereafter remained, an overdue note, which the holder was at liberty to proceed upon at his convenience. The forbearance of the holder was not equivalent to an exercise by the maker of his choice to renew, and cannot take away from him his right to proceed to the collection of the unpaid and unrenewed obligation of his debtor. The learned judge of the court below was right in directing the verdict in favor of the plaintiff, and the judgment entered thereon is now affirmed.

(184 Pa. St. 615)

BOROUGH OF PHOENIXVILLE v. WALTERS et al.

(Supreme Court of Pennsylvania. Feb. 21, 1898.)

LANDLORD AND TENANT—AGREEMENT AS TO NOTICE TO QUIT.

Where a lease by borough councils was renewed by a borough ordinance which changed the former lease so that notice of one year should be given the lessees before being required to surrender possession, it was binding on the parties, even if the effect of the lease so renewed was only that of a lease from year to year.

Appeal from court of common pleas, Chester county.

Action by the borough of Phoenixville against Lewis R. Walters and others, as the Wheatley Cadets. From a judgment for plaintiff, defendants appeal. Affirmed.

V. Gilpin Robinson, for appellants. A. M. Holding, for appellee.

PER CURIAM. This is a proceeding to recover possession under the landlord and tenant laws. It was heard in 1892, and is reported in 147 Pa. St. 501, 23 Atl. 776. We then held that the character of the defendants' possession, and whether it was held under the alleged renewal of a former lease made by the borough councils, or as tenants from year to year, was a question of fact to be decided by the jury. The case went back for a new trial upon that question. The new trial has been had, and has resulted in a finding that the extension of the old lease authorized by a borough ordinance, which changed the notice to quit so as to require one year's notice to be given the defendants, was in force when the notice to quit was given in this case. Even if the effect of the lease so renewed was only that of a lease from year to year, we do not see why the time agreed upon as that which the defendants should have before being required to surrender possession was not binding upon the parties. Upon this finding by the jury, the result reached is correct. The defendants had the benefit of the one-year notice. They did not surrender possession when the year closed. The proceedings begun after the year expired were justified therefore. They were regularly conducted, and have resulted in a verdict in favor of the plaintiff. Upon this verdict the judgment was rightly entered, and is now affirmed.

(124 Pa. St. 578)

FENNELL v. HARRIS et al.

(Supreme Court of Pennsylvania. Feb. 21, 1898.)

RAILROADS—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY.

A carter whose view of the tracks at a street crossing was obstructed, stopped, and looked and listened, when he reached the crossing, and attempted to cross only on finding the safety gates open, and on being twice signaled to do so by the flagman. At the first moment when he could view the tracks he saw a train rapidly approaching without warning, so near as to make escape impossible. *Held*, that he was not guilty of contributory negligence as a matter of law.

Appeal from court of common pleas, Philadelphia county.

Action by Edward Fennell against Joseph S. Harris and others, receivers of the Philadelphia & Reading Railroad Company, for personal injuries caused by defendants' negligence. From the refusal to take off a judgment of compulsory nonsuit, plaintiff appeals. Reversed.

William F. Harrity, James M. Beck, and A. R. Haig, for appellant. Gavin W. Hart, for appellees.

WILLIAMS, J. This appeal presents a very close question. It is whether the facts shown by the testimony on the part of the plaintiff are of such a character as to justify the court below in pronouncing upon their effect as a matter of law, or whether they should have been submitted to the jury as raising a question of fact for their decision. The distinction between the functions of the court and the jury is, in a general way, quite clear; but cases are sometimes encountered, and this seems to be one of them, in which the practical application of the distinction to the facts of a case trying is by no means easy. The plaintiff sought to recover damages for an injury received on the defendants' railroad at a crossing, on the allegation that the negligence of the defendants' employees was the cause of his injury. The defendants replied that the testimony showed contributory negligence, without which the injury could not have taken place. The court below entertained the same opinion, and entered a compulsory nonsuit. From the refusal to take off the judgment so entered this appeal is taken. We are therefore to look at the case made out by the plaintiff in order to see if he was entitled to go to a jury upon the question of his own negligence as the evidence stood when he closed his case. The plaintiff was a carter. In company with another carter and one or two helpers, he was on his way to Twenty-Seventh and Jefferson streets. The party was coming north on Twenty-Fifth street, and when they reached Green street they turned east, intending to go to Twenty-Fourth street, in order to avoid a grade that had to be encountered if they continued up Twenty-Fifth street, and then turn north again. The defendants' railroad crosses Green street near its intersection with Twenty-Fifth street, and a little east of such intersection with its four tracks. The plaintiff and his company, on turning into Green street, found the safety gate at the crossing raised, but the plaintiff says they nevertheless stopped, looked, and listened to see if there was anything to indicate an approaching train. The flagman, seeing them, signaled them to come on, and they started to cross in the following order: Lacey, the other carman, was walking beside his horse in the lead. Fennell, who had been walking with Lacey, fell back as they started to cross the tracks, and was, as he says, near the rear of Lacey's cart. His own horse and cart was in charge of Lehr, just behind him. As they moved forward there was a switch engine on the north of them that was plainly visible, but the view down the track was obstructed by the direction or angle at which the railroad approached Green street, and by a row of empty box cars standing on the westernmost track, extending practically up to Green

street from the south. After they had started, the movements of the switch engine disturbed them, and they stopped for a moment, when the flagman again signaled them to cross over. At this signal they moved forward. Lacey says that, when he got to or on the third track, he saw a train coming towards them from the south on that track, and, by quickening the motion of his horse, succeeded in getting over. Fennell, who was at the rear of Lacey's cart, got on the third track just in time to see and be almost instantly struck by the train. He says: "The flagman gave a signal to come on. I crossed. I don't know any more. I could not say whether I heard the bell or the whistle. I just looked, and I saw the engine approaching. I don't know anything more after that." It is said by counsel for the defendants that Lacey saw the train, and got out of the way, and therefore, if Fennell had exercised proper care, he could have seen the train and escaped the danger. But it must be remembered that Fennell was some 10 or 15 feet behind Lacey, and when the train became visible to him it may be that it was too late for him to escape. Upon his testimony this is possible, if not probable. It is a question of fact, as it seems to us, whether, in view of all the circumstances, the open gate, the repeated signals of the flagman, the absence of a warning by the train of its approach, and the impossibility of seeing down the tracks until fairly upon them, the plaintiff omitted any precaution that a prudent man should have taken to secure his safety from danger. He was responsible for none of the circumstances to which we have referred. He had the assurance of the defendant company by the open gate, and by the positive intimations of the flagman, that there was no train approaching within such a distance as could threaten his safety in crossing the tracks, and there was nothing to counteract this assurance or put him on notice of danger. He knew that his view of the tracks was obstructed, but one who had superior knowledge of the moving trains allayed his apprehensions by signaling him that it was safe to cross at that time, and that he should proceed to do so. In view of all these considerations, and his own testimony, the question of contributory negligence was surely not a question of law. It depended upon the plaintiff's credibility, upon the situation of the obstruction to his view down the railroad, upon the opportunity to escape after he saw the train, upon the want of any warning of its approach by the train, and upon the conduct of the flagman. These were to be considered, the natural inferences to be drawn from them were to be settled, and the jury was to determine whether the plaintiff did all that a reasonably prudent man could be expected to do under such circumstances or not. If he is believed, he looked down the road at the first moment when it was practicable for him to see an approaching train, and when he did

so the train was practically on him. Upon this story, it is hard to see what it was possible for the plaintiff to do more than he did so. He stopped, looked, and listened as he approached the crossing. The open safety gate invited him forward. The flagman signaled to him to cross over. He started, and, at the first moment when a view of the tracks could be had, he saw a train coming rapidly towards him, and so near to him as to make escape impossible. If, as upon a motion for a compulsory nonsuit we must do, we take this testimony as true in every particular, the plaintiff made such a case of negligence by the railroad company as entitled him to go to the jury. We do not say that it entitled him to recover necessarily, but that it fairly put the company upon the defensive. The true rule upon the subject on which this appeal depends is stated in *Davidson v. Railroad Co.*, 179 Pa. St. 227, 36 Atl. 291, and this case falls within the province of the jury, as there defined. The judgment is reversed, and a procedendo awarded.

(184 Pa. St. 608)

GIBBONS v. MOYAMENSING HOOK & LADDER CO., NO. 1, OF CHESTER.

(Supreme Court of Pennsylvania. Feb. 21, 1898.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where an appeal is directed against the findings of fact of an auditor, the burden is on appellant to show clearly that they are erroneous, and it is not enough to show that they rest on evidence that was attacked.

Appeal from court of common pleas, Delaware county.

Action by Lydia Gibbons against the Moyamensing Hook & Ladder Company, No. 1, of Chester, to foreclose a mortgage on real estate, in which there was a judgment for plaintiff. The property was sold under an execution issued on such judgment, and part of the proceeds of the sale were paid into court. On the petition of William Provost, Jr., an auditor was appointed to make distribution thereof. From a judgment dismissing his exceptions to, and confirming, the auditor's report, William Provost, Jr., appeals. Affirmed.

Geo. B. Lindsay and W. B. Broomall, for appellant. H. C. Howard and O. B. Dickinson, for appellee.

PER CURIAM. This is a contest over the proceeds of a sheriff's sale of the defendant's real estate. The appellant is the holder of a mechanic's lien, and claims payment out of the fund. The plaintiff (the appellee) is the holder of a mortgage upon the same property, and asserts that the appellant is, in equity, estopped from claiming under his lien, because he had agreed to release his right of lien, as an inducement to her to advance money upon the mortgage, which was paid to him. The auditor, after hearing the testimony at length, found the facts in favor of the plaintiff, and

reported a decree in her favor. The findings were reviewed in the court below, and affirmed. The legal conclusions follow logically upon the facts. An appeal in this case was therefore directed against the findings of fact, and the burden assumed by the appellant was that of showing clearly that they were mistaken. To show that they are in some doubt, or that they rest on evidence that was attacked, is not enough. We have looked into the testimony in this case. We can see that the auditor could have reached a different conclusion from that embodied in his report, but we are not prepared to say that he should have done so, or that substantial justice has not been done by the distribution which he recommended. The assignments of error, nearly all of which are to the findings of fact, are therefore overruled, and the decree of distribution appealed from is affirmed.

(184 Pa. St. 588)

DEMPSEY v. DOBSON et al.

(Supreme Court of Pennsylvania. Feb. 21, 1898.)

CUSTOMS AND USAGES—EVIDENCE.

An alleged custom in the business of carpet making, by which the results of the color mixer's skill and labor in the service of his employer are recognized as belonging exclusively to the mixer, and his employer is not regarded as having any title to them, is both unreasonable and contrary to law, and may not be shown to defeat the rule which otherwise provides that a color mixer cannot assert, as against his employer, an exclusive title to the various combinations and shades of color devised by him for use in the manufacture of carpets in his employer's mill.

Appeal from court of common pleas, Philadelphia county.

Action by John W. Dempsey against John Dobson and another. From a judgment of compulsory nonsuit, plaintiff appeals. Affirmed.

Geo. W. Harkins, for appellant. Richard P. White, for appellees.

WILLIAMS, J. This case was in this court in 1896, and is reported in 174 Pa. St. 122, 34 Atl. 459. A verdict and judgment had been obtained in the court below against the defendants, from which they appealed. We reversed the judgment; holding that a color mixer could not assert, as against his employer, an exclusive title to the various combinations and shades of color devised by him for use in the manufacture of carpets in his employer's mill. But we awarded a *venire facias* de novo, because of an allegation that violence had been used by the defendants, in the detention of the plaintiff, and in preventing him from carrying away from the mill his color books. A new trial has now been had. The charges of the use of unlawful violence do not seem to have been pressed, but the plaintiff attempted on the trial to prove a custom or usage prevailing in the business of carpet mak-

ing, by which the results of the color mixer's skill and labor in the service of his employer are recognized as belonging exclusively to the employé, the color mixer; the employer, the manufacturer, for whose use the colors were devised, having no title whatever to them. The several assignments of error relate to the rejection of the evidence offered to establish such a custom. It is one of the requisites of a good custom that it must be reasonable. Another is that it must not be contrary to law. The custom sought to be set up was an unreasonable one. The color mixer, like the designer and the weaver, is employed because of his supposed ability to serve his employer in the particular line of labor which he is expected to follow. First comes the work of the designer, who prepares, or invents, it may be, the pattern after which the carpet is to be made. Then comes the color mixer, who is to mix his employer's colors in such proportions as to produce the necessary shades required by the pattern that has been adopted. Finally come the application of the colors and the weaving. The services of each and all these mechanics are requisite to the production of the carpet. The employer has an equal right to the faithful service of each, and is equally, so far as his own business is concerned, entitled to the results of the labor of each. If a color mixer could at his pleasure carry off the recipes and color books from his employer's factory, and refuse to permit their further use except upon his own terms, it would be in his power to inflict enormous loss on the manufacturer at any moment, and not merely to disturb, but to destroy, his business. Such a custom would not be reasonable, and could not be sustained. But it is against the law. The courts of the United States, of this state, and, so far as I have been able to examine, of all the states in the Union, recognize the rule laid down when this case was here in 1896, that "the designs and recipes so made for an employer are, as between his employé and himself, his, for the purpose of his own manufacturing business. Even if his employé had obtained letters patent for his formula, protecting himself thereby against the public, still the employer's right to continue its use in his own business would be protected by the United States courts." *Solomons v. U. S.*, 137 U. S. 342, 11 Sup. Ct. 88. To the same effect are *Slemmer's Appeal*, 58 Pa. St. 155; *Dempsey v. Dobsons*, 174 Pa. St. 122, 34 Atl. 459. The several offers made for the purpose of showing the existence of the alleged custom were properly rejected. In the absence of proof of the alleged acts of violence, we fully concur with the learned judge of the court below that there was nothing shown by the evidence on the part of the plaintiff sufficient to sustain a verdict against the defendants, and that the case was a proper one for a compulsory nonsuit. The judgment is affirmed, and judgment is now entered in favor of the defendants.

(124 Pa. St. 533)

MILLER v. BILLINGTON.

(Supreme Court of Pennsylvania. Feb. 21, 1898.)

PLEADING—AMENDMENT—TERMS.

Motion to amend bill to conform to case as developed by testimony should be on terms; plaintiff having been put on notice by the answer, and the amendment not having been moved for five months, during which a large part of the costs accrued, much of which would have been unnecessary if the amendment had been promptly made.

Appeal from court of common pleas, Philadelphia county.

Suit by Elizabeth W. Miller against James H. Billington for an accounting. Decree for plaintiff. Defendant appeals. Modified.

Amos Briggs, for appellant. Charles L. Smyth and Theodore F. Jenkins, for appellee.

WILLIAMS, J. The principal question raised in this case is one of practice. It is presented on the following facts: Mrs. Miller, the plaintiff, was in March, 1883, the owner of a process for making and putting up for sale a variety of cotton packing known to the trade as "Globe Packing." She also owned a trade-mark, used in connection with the business, called the "Braid-Core Trade-Mark," which had been duly registered in the patent office under the number 2,239. On the 31st day of March, 1883, she sold this business, and everything pertaining to it, including the trade-mark, to Daniel Gage, by an agreement, in writing, binding him to continue the manufacture of the packing, at his own cost and expense, and to use due diligence in the effort to put it upon the market and make sales of it. Gage also undertook to pay Mrs. Miller what is described in the contract as a royalty upon all the packing so made and sold, as a consideration for the sale of the business and an assignment of the trade-mark. The amount of the royalty was fixed by deducting from the sales all the expenses of the manufacture and sale, plus 7½ per cent. of the selling price, and dividing the remainder into two equal parts, one of which was to be paid to Mrs. Miller. Gage also agreed to keep correct accounts of the packing made and sold, which should be open to inspection by Mrs. Miller, and to render her quarterly a statement of his sales, showing the amount due to her. In May, 1890, Billington succeeded by purchase to all the rights of Gage under this contract, and assumed all his covenants and agreements made therein. Mrs. Miller approved and ratified this arrangement, accepting the defendant's undertaking in place of that of Gage. Very soon after this was done, he discontinued the use of the "Braid-Core" trade-mark, but continued the manufacture and sale of the Globe packing, and refused to account to Mrs. Miller for her royalty. He seems to have regarded the so-called royalty as a compensation for the use of the trade-mark No. 2,239, which ceased to be demandable when he ceased the use of the trade-mark. Mrs. Miller then filed

the bill for an account now before us. The bill was drawn upon much the same theory as that on which the defendant had acted. It stated the obligation of the defendant to account, in the fifth paragraph, as resting upon a promise "to pay to your orator as a royalty for the use of said trade-mark, and as a consideration for the assignment thereof to him." Her demand was stated in the eighth paragraph to be for a royalty "on all packing embodying the said trade-mark made and sold" by the defendant. The defendant admitted his liability to account for packing sold under the trade-mark No. 2,239, but denied that he had made any use of it since the 1st day of June, 1890. The bill and answer really raised the question of the use by the defendant of the trade-mark. The case went to the master, before whom much testimony was taken upon this question, as well as upon another, on which the decree was finally made. After this had been done, an application was made to amend the bill in order to make its averments conform to the plaintiff's case as developed in the testimony, and place the defendant's liability, not upon the use of the trade-mark, but upon the manufacture and sale of Globe packing, and the undertaking to pay Mrs. Miller a share of the profits upon such manufacture and sales. This amendment was allowed, but by the terms of the final decree the defendant is required to pay the costs of his own successful defense against the bill as originally drawn. This was inequitable. The amendment should have been allowed upon terms. The answer made in December, 1891, put the plaintiff on notice; but the amendment was not moved for until May, 1895, after a large part of the costs in this case had accrued, much of which would have been unnecessary if the amendment had been promptly made. The motion should have been granted upon payment by the plaintiff of the costs, that would have been unnecessary if the bill had been properly drawn in the beginning. The order allowing the amendment is now so modified, and the amendment allowed on payment of one-half of the costs accrued prior to that date, and with this modification the decree is affirmed.

(124 Pa. St. 594)

BAILEY et al. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. Feb. 21, 1898.)

CITIES—EXECUTIVE FUNCTIONS—LEASING GAS WORKS—ORDINANCES DELEGATING LEGISLATIVE POWER—MONOPOLIES—OBLIGATION OF CONTRACT.

1. Supplying public places and private citizens with gas for lighting purposes is not a strictly municipal function, but its power in this respect is conferred on the city as a corporation, and need be exercised at its option only.

2. An ordinance for lease of city gas works is a legislative act, and therefore not within the prohibition of Act June 1, 1885, against ordinances interfering with the exercise of the executive functions of the departments.

3. Supplying gas not being a municipal duty, the leasing of the city gas works is not objectionable delegation of municipal power.

4. Provisions in a lease by a city of its gas works, that during the term of the contract it would do nothing to in any way interfere with the exclusive right thereby vested in the lessee, is not the conferring of a monopoly, as the city was merely acting in its business capacity, and the franchise of the lessee is derived from the legislature, and on it depends whether the lessee's franchise is or shall be exclusive.

5. A lease by a city of its gas works is not objectionable because for a long term of years, on the ground of binding the discretion of the councils for such a long time, as the contract is made by the city in its business capacity only, and binds it in that capacity.

6. A lease by the city of Philadelphia of its gas works cannot be enjoined by the holders of the bonds given for loan to the city for gas works, the revenues thereof not being pledged for security of the bonds, and the provision of the ordinance of December 26, 1868 (section 3), under which the loan was made, for retention, annually, by the trustees of the gas works, of an amount equal to a certain per cent. of the loan, and its payment into the city treasury, whereupon the city undertakes to apply part of it to the payment of the interest on the loan and to pay the other part into the sinking fund, not being part of the contract between the city and bondholders, but being terms imposed by the city on the trustees of the gas works as conditions on which the city would raise the money.

Appeal from court of common pleas, Philadelphia county.

Suit by Joel J. Bailey and others against the city of Philadelphia and others to enjoin the leasing of the city gas works. Decree for defendants. Plaintiffs appeal. Affirmed.

John C. Bell, Peter Boyd, Geo. Tucker Bisham, and Jos. L. Caven, for appellants. Ernest Lowengrund and James Alcorn, Asst. City Sol., and John L. Kinsey, City Sol., for appellees.

MITCHELL, J. The gas works are the property of the city of Philadelphia, not as a municipality, but as a business corporation. However much the idea that the city is not required by its municipal duty to supply its citizens with light in the streets and public places may seem to fall below the modern conception of a city, yet it is beyond question, on settled legal principles, that in the performance of that function the city acts under authority merely, and not under municipal obligation. This was the rule of the common law, and no statute in reference to the city of Philadelphia has altered it. Hence the city may change its mode of action, or cease to act altogether, in its discretion, and the discretion is purely legislative. The courts have no power to interfere unless the proposed action contravenes some express statute or violates some binding contract. These principles are elementary, and need not be enlarged upon, since they are conceded by the learned counsel for appellants, and the corollary admitted, and that the lease now sought to be enjoined would have been clearly within the power of the city prior to the act of June 1, 1885 (P. L. 37), commonly known as the "Bullitt Bill." The argument of the appellants is arranged under

three heads, and may be conveniently considered in that order.

First, that the ordinance for the lease of the gas works is an interference with the executive functions of the department of public works, and therefore within the prohibition of the act of June 1, 1885. Of that act this court has already declared that "the subject with which it deals is the administrative government of cities of the first class, and its manifest purpose was to reform existing abuses in the executive department of the only city of that class." *Com. v. De Camp*, 177 Pa. St. 112, 35 Atl. 601. The particular provisions of the act which are relied on by the appellants are article 2, § 1: "There shall be the following executive departments: * * * Department of public works." Article 4, § 1: "The department of public works shall be under the charge of one director or who shall be the head thereof." "Gas works owned and controlled by the city, the supply and distribution of gas, * * * the lighting of streets, alleys, and highways, * * * shall be under the direction, control, and administration of the department of public works." And article 16: "Councils shall by general ordinances provide for the proper and efficient conduct of the affairs of the city by the mayor and several departments, and the boards thereof; but they shall not pass any ordinances directing or interfering with the exercise of the executive functions of the mayor and departments, boards or heads or officers thereof." These provisions do not take away nor in any degree lessen any municipal authority previously lodged in the city, still less any merely business corporate power. They merely regulate the operation of its executive and legislative functions as to such public property of the enumerated classes as the city may at any time have. The prohibition to councils in article 16 is against interference with "the exercise of the executive functions" of the departments. The lease or sale of the gas works is not an executive function. If it was, it would belong to the director of public works, as the head of the department. But no one would contend that the director has any power to make a sale or such a lease. That is a parting with the title and possession of the city which can only be done by a legislative act. As a legislative act, it is within the clear power of the city. The right to change the property which is the instrument through which the city exercises its powers is inherent in its ownership, whether municipal or merely corporate, unless prohibited by contract or by the terms of a trust upon which it was acquired. But, to avoid all doubts, the right of alienation is given in express words in the charter of 1789, all the powers granted in which were preserved by the consolidation act (Act Feb. 2, 1854, § 6; P. L. 25), and which appears to be still in force. *Com. v. Walton*, 182 Pa. St. 373, 38 Atl. 790. And the right is not taken away by the act of 1885, which, as already said,

merely regulates the mode of exercise of executive, and incidentally of legislative, functions without changing the rights which appertain to those functions.

But it is urged that, although the city may sell and change the specific property, it cannot abdicate the function, and must therefore substitute other property, through which its control and operation of the franchise may be continued; and the analogy is relied on of a trustee with a power to sell, who may by virtue thereof change the subject-matter, but cannot destroy the trust. This brings us back again to the preliminary question, on which the whole case rests, whether supplying the public places and private citizens with gas for lighting purposes is a strictly municipal function, or merely a power conferred on the city as a corporation. If the former, it is a duty as well as a power, and cannot be abandoned; if the latter, it is an authority only, and may be exercised or not, at the city's option. Although the appellants start out with the concession that the lease in question would have been within the city's powers prior to the act of 1885, yet the elaborate and ingenious argument for them rests upon the contention that the lighting of the city, at least since that act, is a municipal duty, and, though presented in different aspects and from different points of view, the argument constantly comes back to this contention, for without it there is confessedly no ground for the case to rest upon. But, for reasons already stated, we are of opinion that the act of 1885 made no change in the city's municipal powers, either inherent or statutory, but merely regulated their exercise so far as related to executive officers, and incidentally to such purpose restrained what had become legislative usurpation. Under that act, so long as the city owns and operates the gas works, it must do so through the department of public works; but there is no compulsion upon the city to continue the manufacture and sale of gas at all, or to do it through its own officers, if in its legislative judgment it is no longer expedient to do so.

The second proposition of the appellants is that the ordinance assumes in respect to the public lighting to delegate a public legislative power, and in respect to the private lighting to confer a monopoly on the grantee, and in both cases to bind the discretion of councils for a long term of years. It is manifest that this proposition in the use of the phrase, "public legislative power," comes back, as already indicated, to the contention that public lighting is a municipal duty. It is true that it is a legislative power, in the sense that it is the exercise of the will of the owner with respect to ownership of the property. If such ownership was coupled with a municipal duty, such duty could not be escaped by lease or other form of delegation. But the gas works, as already discussed, are held by the city as a business corporation. If the use of gas should be

so far superseded as to make its manufacture and sale unprofitable, there is no compulsion on the city to continue it or to embark in any new venture for the supply of a different light; and if the management and operation of the works can be more profitably or more conveniently carried on by a lease, instead of by the city's own immediate servants, the city, in making a lease, is determining a business question in its legislative corporate capacity, just as any private corporation might do, but is not delegating any municipal power, legislative or other, which involves municipal duty. In regard to the conferring of a monopoly, the appellants cite the provision in the lease that "the city of Philadelphia agrees that during the term of this contract it will do nothing, by ordinance or otherwise, which will in any way interfere with, or limit, restrict, or imperil, this exclusive right hereby vested in the said United Gas Improvement Company, its successors or assigns," and claim that this creates a monopoly which is void on the ground of public policy. To this objection it would be a sufficient answer that, as already held, the city in this matter is acting in its business, not its governmental, capacity, and the owner of business property, even though a municipal corporation, may, in dealing with it, make such terms as, in its discretion, it deems best for its interest. When the owner of a business sells it, with its good will, etc., he may agree, as part of the consideration to the purchaser, not to go into the same business again as a rival, within an agreed territory, or for an agreed time. The city of Philadelphia, selling its gas-making plant and good will, may do the same thing. But in the provision of the lease now under consideration the city does not assume to grant any franchise. It could not do so if it would. What the city does is to covenant that it will do no act in derogation of the right of the lessee under the grant to operate the gas works and supply the city and the citizens with light therefrom. The franchise of the lessee to furnish light is not derived from the city, but from the legislature, and whether it is exclusive or not at present, or shall be exclusive or not in the future, does not and will not depend on the city, but on the legislature. All that the city does is to agree that it will do no act itself whereby the privileges granted by it to the lessee, and intended to be exclusive so far as it is concerned, shall be limited or interfered with. This was clearly within its power in dealing with its business property. Whether the legislature may hereafter impose upon the city a municipal duty in regard to lighting which may conflict with its present contract is a question we need not consider until the case shall arise, with proper parties in interest to such a question.

It is further argued that the lease undertakes to bind the discretion of councils for

a long term of years. This again comes back to the contention that lighting the city is a strictly municipal or governmental function, as to which councils cannot bind their successors. But, as already held, the city is acting in its business capacity only, and the contract binds it in that capacity. All contracts which contemplate things to be done after the immediate present must, to that extent, bind and limit the power of the contracting party. This principle has already been adjudicated in its application to the city of Philadelphia and the gas works in the cases of *Western Sav. Fund Soc. v. City of Philadelphia*, 31 Pa. St. 175; *Id.* 185; *Wheeler v. City of Philadelphia*, 77 Pa. St. 338.

The last proposition of the appellants is that the ordinance impairs the obligation of the city's contract with certain holders of its bonds. This was the ground of decision in *Western Sav. Fund Soc. v. City of Philadelphia*, supra. But the cases are not at all alike in the facts. In *Western Sav. Fund Soc. v. City of Philadelphia*, the ordinance of 1841 distinctly pledged the revenues of the gas works to the creditors for security of payment of the bonds, and provided for the management by trustees for that purpose. The ordinance of 1868, under which Mr. Campbell, one of the complainants, is a bondholder, has no such provision. The loan was made to the city, and upon the city's general credit, without any pledge of its revenues from the gas works or any other specified source. On the contrary, the ordinance gave express notice in section 4 that the terms and provisions of the ordinance of 1841 should not apply in any way to this loan. Section 3 of the ordinance requires the retention by the trustees of the gas works of a certain per cent. of the amount of the loan, annually, and its payment into the city treasury; whereupon the city undertakes to apply part of it to the payment of the interest on the loan, and to pay the other part into the sinking fund. These provisions are not part of the contract between the city and the loanholders, but are terms imposed by the city on the trustees of the gas works as conditions on which the city will raise the money for the latter's use. Without these terms the city would have had to meet the bonds at their maturity out of general taxation, and could not have looked for repayment from the revenues of the gas works unless at the option of the trustees. By these terms the city guarded itself from this risk, and secured repayment to itself from the revenues of the department for whose use it had borrowed the money. But the requirements of this section were for the protection of the city only, and involved no pledge to the loanholders. They loaned on the general credit of the city, and perhaps also on the faith of the sinking fund pledged for the payment of this and other loans. But there is no aver-

ment that the sinking fund has not been kept up by appropriation from the city treasury from time to time, as required by law. Without such averment and proof, it does not appear that any obligation of the loanholders' contract has been impaired. None of the grounds on which the court is asked to interfere can be sustained, and the injunction was rightly refused. Decree affirmed, at costs of appellants.

(91 Me. 153)

OUSICK v. BARTLETT.

(Supreme Judicial Court of Maine. Jan. 1, 1898.)

CORPORATION—DIRECTORS—STOCK—UNPAID SUBSCRIPTION—TRUST—ESTOPPEL.

1. A director must exercise the power with which he is intrusted for the common interest of all the stockholders, and not for his private interest.

2. A director may sell his stock freely. But a board of directors may not sell all the property and business of the corporation, under the guise of a sale of their stock, and thereby receive the entire proceeds of the sale of the corporate property to their own private use.

3. In an action to recover an unpaid subscription to the capital stock of a corporation organized under the laws of Maine,—the plaintiff, a director in the corporation, alleging that the claim (no certificate of stock having been issued) had been assigned to him by the corporation at the same time of a sale by its directors of all the business and property of the corporation to another company, and the proceeds of the sale not being paid into the treasury of the corporation, but received by the plaintiff for his own benefit, and the defendant getting nothing,—*held*, that the plaintiff's acts were in entire disregard of the rights of the defendant as a stockholder, and as to the defendant they were fraudulent; also, that the claim assigned cannot be enforced, and that the plaintiff gained no rights against the defendant by virtue of the assignment.

4. In this case the directors and treasurer of the corporation owned all the stock that had been issued. *Held*, that while the principal trade was a sale, in form, of all the issued stock to another company, it was in substance the sale of all the business and property of the corporation (except the choses in action assigned to the plaintiff), accompanied with a delivery of all the corporate property to the purchaser.

5. The court finds that, for the following among other reasons, upon the facts reported, there was a sale of all the property and business of a corporation, rather than a mere transfer of its capital stock: The purchaser understood that it was purchasing all the stock of the corporation, and as such purchaser took and used accordingly all the property of the corporation. It obtained the good will and trade of the corporation, and carried out all its contracts. It made no further use of the corporation, whose organization, business, and books were not kept up. The treasurer (the plaintiff), after the sale, did not know what had become of the property of the corporation, and failed to pay into the treasury the proceeds of the sale, a portion of which arose from a sale of the plaintiff's other property, which he was thereby enabled to sell at the same time.

6. *Held*, that the defendant, not being cognizant of the proposed trade for the sale of the corporation's assets, cannot be estopped from avoiding the assignment on the ground that, having a full knowledge of the facts, he allowed the corporation to receive the benefits of the contract.

(Official.)

Report from supreme judicial court, Cumberland county.

This was an action of assumpsit by John F. Cusick against Ralph W. Bartlett to recover the sum of \$2,000. The declaration sets out, in substance, that on the 1st day of June, 1895, the defendant, Ralph W. Bartlett, subscribed for 30 shares of the capital stock of the New England Milk Company, which 30 shares amounted, at par value, to \$3,000; that the defendant only paid \$1,000 on this subscription, leaving a balance unpaid of \$2,000; that on the 9th of November, 1895, the said New England Milk Company, for value received, assigned the defendant's unpaid subscription for stock to the plaintiff, John F. Cusick; and that by virtue of this assignment the defendant became liable and promised to pay to the plaintiff the sum of \$2,000 on demand.

To the plaintiff's declaration the defendant pleaded the general issue, with a brief statement of special matters of defense, and filed as a set-off a claim against the corporation. Judgment for defendant.

A summary of the evidence reported is as follows:

For some time previous to June 1, 1895, John F. Cusick, the plaintiff, had been a student in the office of Ralph W. Bartlett, the defendant, a Boston attorney. There was at this time in Boston a combination of milk companies, called the New England Dairy Association, and more commonly called the Boston Milk Trust. A large part of the business of this Boston Milk Trust was bringing in milk from the country, and selling it to local dealers, both wholesale and retail, in the city. Cusick, previous to his entering Mr. Bartlett's office, had for many years been engaged in the milk business in Boston; and while he was studying in the defendant's office the matter of establishing a business in competition with the milk trust was frequently talked over, and some time in May, 1895, it was practically decided by the plaintiff and defendant to start such a business. Cusick, the plaintiff, went to Connecticut to make arrangements with farmers for a supply of milk; and it being necessary, in order that he might have credit with the farmers, that money should be on deposit, Mr. Bartlett gave Mr. Cusick on May 31, 1895, the sum of \$1,000, to deposit for this purpose; and Cusick, putting with it \$3,000 of his own, deposited the whole \$4,000 in a Connecticut bank, under the name, New England Milk Company.

On June 1, 1895, Mr. Bartlett, Mr. Cusick, and one James O'Bierne, a friend of Mr. Cusick, came to Portland, and organized a corporation, under the laws of Maine, called the New England Milk Company; the object of the corporation being to carry on the business of milk contractors, in and about Boston. The capital stock of the company was fixed at \$10,000, divided into 100 shares,

with a par value of \$100 each. At the meeting of incorporators a subscription list was opened. The plaintiff, John F. Cusick, subscribed for 30 shares of stock, amounting at par value to \$3,000, the defendant subscribed for the same amount, and Mr. O'Bierne subscribed for 10 shares. The \$3,000 deposited by Mr. Cusick in the bank was considered a payment of his subscription, and the \$1,000 of Mr. Bartlett's deposited in the bank was considered a part payment of his subscription. The usual business was transacted at this organization meeting. A code of by-laws was adopted, and a board of officers elected, as follows: President, John F. Cusick, the plaintiff; treasurer, Ralph W. Bartlett, the defendant; and directors, John F. Cusick, Ralph W. Bartlett, and James O'Bierne. Mr. Cusick was to act as business manager of the concern, and the three persons above named were the only persons interested.

The enterprise was very slow in getting under way. The idea was to have a special car run from Connecticut into Boston every morning with the milk. This car could not be obtained at once. All the milk that came in came in as freight on other cars, and was all used by Mr. Cusick in his private business. The business was in such a confused state that Mr. Cusick himself could not tell whether it was done in the name of the New England Milk Company, or in his own name. Mr. Bartlett was not satisfied with this confused state of affairs. There were frequent disputes between the parties interested, and especially between Mr. Cusick and Mr. Bartlett; and at a directors' meeting held on September 18, 1895, Mr. Bartlett, becoming dissatisfied with the way the company was managed, and with the whole matter, tendered his resignation, and announced his determination to withdraw absolutely from the company. His resignation was tabled, and the meeting adjourned, with an agreement between Mr. Cusick, Mr. O'Bierne, and Mr. Bartlett that they would meet again in the evening, and talk the matter over. In the evening they met as agreed. The testimony as to what took place at this meeting is conflicting. Bartlett and another witness present both testify that he still insisted upon withdrawing from the company, and refused absolutely to go on with it in any capacity. They say an understanding was arrived at and agreed upon by Mr. Cusick, Mr. O'Bierne, and Mr. Bartlett that Mr. Bartlett might withdraw from the company. No stock had ever been issued to Mr. Bartlett up to this time, although stock had been issued to Mr. Cusick and Mr. O'Bierne. It was claimed that Mr. Bartlett agreed not to call for any stock in the company, and the \$1,000 that he had paid in was to be considered a loan to be paid back to him. Mr. Bartlett says the balance of his subscription was not to be demanded of him as a subscription, but he agreed that, if it was need-

ed, he would loan it to the company upon notes indorsed by Cusick and O'Bierne; and he was to continue to work with the company as treasurer, and help them along, until some one could be found to take his place.

Mr. Bartlett did not see the plaintiff again until the latter part of December, 1895. After the directors' meeting of September 18, 1895, above referred to, Mr. Cusick, the plaintiff, went to Connecticut to see about obtaining milk, was taken sick with typhoid fever, and did not get out to attend to business until late in December. In the meantime Mr. Bartlett, although he was unfamiliar with the milk business, kept up the work, and did all that he could to keep the company going. He testifies that he considered and understood that as between himself, Mr. Cusick, and Mr. O'Bierne, who were the only persons interested in the company, he was released and out of the company; but, no one having been found to fill his place, he kept at work as treasurer, and in fact ran and managed the whole business, during Mr. Cusick's illness.

When Mr. Cusick did get out, in December, Mr. Bartlett expected that the matter of his leaving the company would be arranged as talked in September. But Mr. Cusick and Mr. O'Bierne then took an entirely different stand. At times they would deny that they had ever reached any agreement with him about his withdrawal from the company. Sometimes they would treat him as a stockholder, and at other times as though he had no interest whatever in the company, so that he could not tell what their real position was. He continued, however, to draw checks as treasurer, and to act for the company in this capacity, until shortly after July 21, 1896. Up to this time no one had been interested in the company except Mr. Cusick, Mr. Bartlett, and Mr. O'Bierne. On July 20, 1896, Mr. Cusick transferred a share of his stock to his brother, W. H. Cusick; and on July 21st, at an adjournment of the annual meeting of the stockholders, Mr. Bartlett's name was dropped from the board of officers, and a new board was elected, as follows: James O'Bierne, president; John F. Cusick, the plaintiff, treasurer; and James O'Bierne, John F. Cusick, and W. H. Cusick, directors. From this time on, Bartlett had nothing further to do with the company's affairs, except that in some matters he continued to act as counsel for it.

About November 1, 1896, it came indirectly, and by chance, to Mr. Bartlett's attention, that certain negotiations were being carried on between Mr. Cusick, the plaintiff, and one George O. Whiting, the head man of the Boston Milk Trust, in regard to the disposal of the property and business of the New England Milk Company. Mr. Bartlett inquired of Mr. Cusick in regard to the matter, and was told that there were no such negotiations pending; that the only negotiations Mr. Cusick had on hand were for the sale of his private milk route. But up-

on further inquiry Mr. Bartlett's suspicions were confirmed. George O. Whiting, above named, and F. G. Holcombe, attorney for the Elm Farm Milk Company, one of the corporations in the Milk Trust, testified that during the month of September and October the Elm Farm Milk Company, through George O. Whiting and Mr. Holcombe, were negotiating with Mr. Cusick in regard to the purchase, as they expressed it, of the New England Milk Company. They desired to buy, and proposed to buy, the property, assets, business, good will, and everything else, of the New England Milk Company. At the same time they were incidentally considering the purchase of Mr. Cusick's private milk route, Mr. Cusick finding it necessary to dispose of this route if he was going to part company with the New England Milk Company. The purchase of this private milk route was apparently made one of the conditions or part of the sale of the New England Milk Company.

Mr. Cusick and Mr. Whiting went over and estimated the value of the private milk route, and of the property and business of the New England Milk Company, and, as Mr. Whiting testifies, agreed upon \$13,000 as a lump sum for the whole business. Mr. Whiting, however, insisted that he would not take the New England Milk Company unless it was free from debt. The proposition of Mr. Whiting and the Elm Farm Milk Company was to buy the property and business of the New England Milk Company. This was the original plan, but it was found undesirable by Mr. Cusick to go through the "machinery" of getting authority from the stockholders of his company for a sale of the company's property and business. He decided not to try to transfer the property of the company to the Elm Farm Milk Company, but he represented to Mr. Whiting and to Mr. Holcomb that there were only 70 shares of stock issued, or that could be issued, by the New England Milk Company, and that this stock was all held by himself, Mr. O'Bierne, and his brother, Mr. W. H. Cusick; that, instead of transferring the property and business to the Elm Farm Milk Company, they would transfer all of this stock, and in that way the Elm Farm Milk Company would be taking the whole concern. The lump sum of \$13,000, which had been agreed upon as the price for the property and business of the New England Milk Company and Mr. Cusick's private milk route, was then divided on paper into \$7,000 for the 70 shares of stock of the New England Milk Company held by Mr. Cusick and his friends, and \$6,000 for Mr. Cusick's private milk route. As has already been stated, one of the conditions of the trade was that all of the debts of the New England Milk Company were to be assumed by Mr. Cusick, and a bond was taken from him by the Elm Farm Milk Company to the effect that he would pay these debts; and the last act of the three directors of the New England Milk Company, Mr. Cusick, Mr. O'Bierne, and Mr. W. H. Cusick, who were all interested in this transaction, was to hold a

directors' meeting, and authorize Mr. O'Bierne, the president of the company, and William H. Cusick, a director, to effect for the company, and in its name, a general assignment to John F. Cusick of all the bills receivable of the New England Milk Company, upon consideration that he pay the company's indebtedness. According to Mr. Cusick's testimony, this agreement or assignment was part and parcel of the deal of selling out the company. The contract was executed in an unusual and peculiar way. The by-laws of the company provided that no contracts, notes, or other obligations should be valid unless signed by the president and treasurer. This contract or assignment of the bills receivable to Mr. Cusick, which is the assignment upon which the plaintiff in this case bases his right to recover, was not executed by the president and treasurer, as required by the by-laws, but by the president and W. H. Cusick, a director. No ratification of the assignment, or of its execution, was ever had in any way by the corporation or its stockholders, or by any board of directors, other than the directors who signed the contract, and who were all interested personally in the deal.

Through all these negotiations with the Elm Farm Milk Company, the testimony of Mr. Holcombe and Mr. Whiting is that Cusick never told them that Mr. Bartlett was in any way interested in the stock of the New England Milk Company, or that he was owing the company any balance of an unpaid subscription for stock. On the contrary, they say that Mr. Cusick represented that the 70 shares of stock which he, Mr. O'Bierne, and W. H. Cusick held comprised all of the stock of the company outstanding, and that by the purchase of it the Elm Farm Milk Company would be acquiring the New England Milk Company, as thoroughly as by a transfer of its property. Mr. Bartlett was not recognized in any way as a stockholder in the New England Milk Company throughout these dealings and this transaction. He knew in the beginning that such negotiations were on foot, although Mr. Cusick attempted to conceal this fact from him by stating that the only deal on foot was the sale of his private milk route. This was not disputed by Mr. Cusick. A few days later Mr. Bartlett inquired of Mr. Holcombe what had been done, and Mr. Holcombe told him that he did not think the deal would go through. He did not know that the deal had been carried out until a month or more after it was accomplished, when he learned of the matter accidentally; and, at about the same time he learned of the accomplishment of the deal. Mr. Cusick began this proceeding to collect, by virtue of the assignment obtained as above stated, \$2,000, which he claimed was unpaid on Mr. Bartlett's subscription.

Robert Treat Whitehouse, for plaintiff. O. A. Hight, for defendant.

SAVAGE, J. Action to recover the sum of \$2,000, the balance claimed to be due on de-

fendant's subscription for 30 shares of the capital stock of the New England Milk Company, a corporation organized under the laws of this state. The plaintiff alleges that this claim has been assigned to him by the corporation. The defendant sets up several defenses, technical and substantial, only one of which, however, do we find it necessary to consider.

An examination of the evidence reveals the following material facts: The corporation in question was organized in June, 1895. The plaintiff and defendant were both among its promoters and incorporators, and they, with one O'Bierne, constituted its first board of directors. The purposes of the corporation were to carry on a general dairy business, and to buy and sell milk and cream. The par value of the shares was \$100 each, and the capital stock was fixed at 100 shares.

At the organization, the plaintiff and the defendant each subscribed for 30 shares; and O'Bierne, 10. The plaintiff paid his subscription in full,—\$3,000. The defendant paid \$1,000 on his subscription, and this suit is brought to recover the balance, which it is admitted has not been paid. Subsequently other shares of stock were issued and paid for. And on November 9, 1896, the date of the alleged assignment of this claim by the corporation to the plaintiff, there had been issued, in all, 70 shares of stock, all of which had been paid for, and all of which were then owned by the plaintiff, O'Bierne, and one W. H. Cusick. The only other interest in the capital stock at that time was the defendant's interest, by virtue of his subscription for 30 shares of the stock, and his payment of \$1,000 upon his subscription. But no certificate of stock had ever been issued to the defendant for any amount.

After the corporation was organized, it engaged in the milk business, buying milk in Connecticut, transporting it to Boston, and there selling it to milk dealers. By contract with a railroad company, it had a special car for the transportation of its milk. The business was continued up to the date of the assignment, and the plaintiff testified that it amounted to \$75,000 a year. During all the time that the corporation was engaged in business, the plaintiff owned and operated a private milk route, for the sale and distribution of milk in Boston, on his own account, and he purchased part of his milk from the New England Milk Company. The defendant continued to be a director of the corporation until July 21, 1896, when a new board of directors was elected, consisting of the plaintiff, O'Bierne, and W. H. Cusick. These gentlemen continued to be directors until the assignment of this claim was made in the following November. Dissensions arose between the plaintiff and defendant respecting the management of the corporation, which fact is only important as throwing some light upon the transactions which followed.

In September or October, 1896, negotiations were entered into between the directors of the New England Milk Company and the managers of the Elm Farm Milk Company, a rival milk

company doing business in Boston, looking to a withdrawal of the former from business.

This result was accomplished by a series of contracts entered into by the interested parties November 9, 1893, to take effect as of November 1st. The plaintiff, O'Bierne, and W. H. Cusick were all the directors of the New England Milk Company, and owned all the capital stock of the company which had been issued, and which was all of the capital stock except the defendant's interest. O'Bierne and W. H. Cusick transferred their 35 shares of stock to the plaintiff (but whether as the result of a sale, or for convenience merely, does not appear), and the plaintiff sold and transferred these, with his own 35 shares (70 shares in all), to the Elm Farm Milk Company, for \$7,000. The plaintiff, who was general manager of the New England Milk Company, delivered all of its tangible assets, consisting of a milk shed, cans, separator, boiler, and other articles used by it, to the Elm Farm Milk Company. The plaintiff also sold his private milk route in Boston to the same purchaser for \$6,000. The plaintiff assumed the liabilities of the New England Milk Company, and gave an indemnifying bond; and the New England Milk Company, in pursuance of a vote of the plaintiff, O'Bierne, and W. H. Cusick, as directors, assigned to the plaintiff all debts and claims due to the corporation. It is under this assignment that the plaintiff derives his title to the claim in suit. The defendant contends that this assignment is void, because it was not executed in conformity to the by-laws of the corporation. He further contends that it is void as to him because it is fraudulent. For the purposes of this case, we assume, but do not decide, that the execution of the assignment was legal.

This brings us directly to a consideration of the other defense, which raises the simple question whether this assignment gave the plaintiff a good title to the claim sued, so as to enable him to enforce it against the defendant.

The various contracts of November 9th were all component parts of one transaction, one trade, and were all contrived and agreed upon to accomplish one purpose. We cannot consider the assignment alone. We must look to all parts of the transaction, as well as to its purpose. In form, the principal trade was a sale of all the issued stock of the New England Milk Company. In substance, it was the sale of all the business and property of the corporation, except the choses in action assigned to the plaintiff. Nothing was left for the corporation. Even its good will was lost. Such, we cannot doubt, was the real intention of the parties. Such was the purpose of the purchaser, and that purpose, we think, was understood, and its accomplishment aided, by the plaintiff.

The plaintiff claims, indeed, that the transaction was in this respect merely a sale of stock. But the evidence satisfies us that it was adopted as a convenient, though perhaps not a

strictly lawful, mode of transferring to the purchaser the property of the corporation. We think this was intended by the parties. The purchaser understood that it was buying all the stock of the corporation in which any one had an interest, and as sole stockholder it took and used the property of the corporation. It took possession of the property, as directed by the plaintiff. It carried out the contracts with the milk producers. It continued to run the special car. It obtained the good will and trade of the corporation. The plaintiff, who was its treasurer, and after the sale of stock the only officer of the corporation, ceased to exercise any care or control over its property, and claimed at the trial of this case that he did not know, of his own knowledge, what had become of it. The purpose of the transfer of the stock is evident. It was to wind up the business affairs of the corporation, and take it out of the field of competition. The New England Milk Company was merged in, or, rather, was swallowed up by, the Elm Farm Milk Company, its competitor. Since then the former has possessed only a theoretical existence. It has possessed no assets. It has had no good will. It has transacted no business. It has kept no books of account. It has had no directors, and no corporate meetings. It has apparently descended to the realm of shades of departed corporations. The purchasers of its capital stock had no use for the corporation after it had been sold out of business.

Now, it needs no argument to show that by these combined transactions, in which the plaintiff participated, and by which he gets his title to this claim, the value of the capital stock which the defendant is asked to pay for here was utterly destroyed.

Although the tangible corporate assets of the New England Milk Company all passed into the possession of the Elm Farm Milk Company, and although the business and good will of the former company passed to the latter, the New England Milk Company received nothing out of the trade. But the plaintiff was enabled thereby to sell his stock at par, and to sell his private milk route for \$6,000; and in addition he now seeks to recover \$2,000 on a subscription for stock in the wrecked corporation, which was rendered worthless by the acts of the directors, in which he participated. By resorting to the sale of stock as a means of transferring the corporate property,—and that is what was really done,—the proceeds of the sale went into the pockets of the plaintiff, who then also held the stock of his associates, and not into the treasury of the corporation. The plaintiff received the entire benefit of the trade, whatever it was, and the defendant has got nothing. On the other hand, if the corporate property had been sold, in form, as it was in effect, to the Elm Farm Milk Company, the proceeds would have gone into the treasury of the New England Milk Company, and would have inured to the benefit of all the stockholders proportionately,—to the defendant as

well as to the plaintiff. For the defendant, though he held no certificate, was a stockholder. *Chaffin v. Cummings*, 37 Me. 76.

An examination of the actual results of the transaction show this in even a clearer light.

The bookkeeper of the corporation, a witness for the plaintiff, testified that on November 1, 1896, the cash on hand was \$349.79; bills considered good amounted to \$4,781.94. These items, amounting to \$5,131.73, came to the plaintiff by assignment. The proceeds of the sale to the Elm Farm Milk Company were \$7,000, and if the unpaid subscription of the defendant, \$2,000, was an asset, as the plaintiff claims it was, the total assets of the corporation amounted to \$14,131.73. There is besides an item of doubtful accounts, \$2,547.87, which we do not take into account. Prior to November 9, 1896, all of these assets belonged to the corporation, and the defendant had a right to have their value (which it seems amounted to the sum of \$14,131.73 if he paid the balance of his subscription, or \$12,131.73 if he did not) applied to the purposes of the corporation. The liabilities amounted to \$8,529.72. After payment of the debts, there would have remained in the one case \$5,602.01 for all the stockholders, or \$3,602.01 in the other case. The defendant would have been entitled to thirty-hundredths of the former sum, or ten-eighths of the latter, according to whether he had paid the balance of his subscription or not. The defendant not having paid, the plaintiff received the net sum of \$3,602.01. The defendant, although he had contributed one-eighth of the capital stock, received nothing. So far as the defendant is concerned, it is immaterial in what proportions the retiring stockholders received the money, relatively to each other, if the plaintiff was acting for them, nor whether the plaintiff, by assuming the bills payable and taking the bills receivable, was a gainer or loser. We have only to consider the nature and effect of the plaintiff's acts so far as they affect the defendant's rights. The plaintiff now seeks to recover \$2,000 more of the assets for his own use, and this, if allowed, will make a total amount of \$5,602.01 received, in one way and another, by the plaintiff, out of the trade, while the defendant will have a minority holding of 30 shares in a corporation which the plaintiff and his associate directors have stripped and made derelict.

In view of the circumstances of this case, may the plaintiff be permitted to recover? We think not. The acts of the plaintiff on November 9th—the sale of his stock, the delivery of the corporate property to the purchaser of the stock, the obliteration of the business and good will of the corporation—were all for his personal benefit, and in entire disregard of the rights of the defendant as a stockholder. These acts were a breach of the trust duties which the plaintiff, as a director, owed to the defendant, as a stockholder. As to the defendant, they were fraudulent. The plaintiff did

not use towards the defendant that good faith which the law, as well as good morals, requires of a director of a corporation. A director may sell his stock freely. That is his right. But a board of directors may not sell all the property and business of the corporation, under the guise of a sale of their stock, and thereby receive the entire proceeds of the sale of the corporate property to their own private use. Nothing can be plainer than this. The proposition is elemental that a director, in dealing with corporate matters, must exercise the power with which he is intrusted for the common interest of all the stockholders, and not for his private interest. To hold in this case that the plaintiff may recover on a subscription for stock which he himself has rendered of no value, would be as much as to say that a director may stab a stockholder with one hand, and at the same time pluck him with the other.

The plaintiff claims that the defendant was cognizant of the trade proposed with the Elm Farm Milk Company, and, with full knowledge of the facts, allowed the corporation to receive the benefits of the contract, and that, therefore, he is estopped to avoid the assignment. But the evidence fails to show that the defendant was informed of all the facts, or how his rights were affected, until weeks after the trade was consummated. Besides, he is not seeking to avoid anything the plaintiff has done under the assignment. He is simply resisting the attempt of the plaintiff to enforce it against him. This is the first opportunity he has had to resist. He is not estopped. The plaintiff gained no rights against the defendant by virtue of the assignment.

As the plaintiff cannot recover as assignee, we do not consider the account in set-off filed by the defendant, which is against the assignor, the New England Milk Company.

Judgment for defendant.

(37 Md. 219)

BERKLEY v. WILSON et al.

(Court of Appeals of Maryland. Feb. 10, 1898.)

JUDGMENT AGAINST TORT FEASORS—SATISFACTION
—RELEASE OF JOINT OR SEVERAL TORT
FEASOR—RES JUDICATA.

1. A verdict for nominal damages, and a judgment non pros. entered thereon, in an action against contractors for breach of contract, and negligence in the construction of a building, is a bar to a recovery for the same negligence in an action against the supervising architects, wherein the damages are alleged to have been caused by the failure of the architects to properly supervise the work, provided the judgment has been paid, or the amount thereof properly tendered.

2. A verdict for nominal damages, followed by a judgment non pros., is a conclusive adjudication of the amount of the debt, under Act 1888, c. 366, providing that the amount of such a verdict shall be a debt due, recoverable before a justice of the peace, and a short copy of the verdict and judgment shall be conclusive evidence thereof.

Appeal from Baltimore city court.

Action by Henry J. Berkley against J. A. Wilson and others for damages from negli-

gence in constructing a building. From a judgment for the defendants, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, BOYD, ROBERTS, and FOWLER, JJ.

John P. Poe, for appellant. Wm. A. Fisher and John J. Wade, for appellees.

FOWLER, J. The appellant made a contract with one Bunnicke to build a house on Park avenue, in Baltimore, according to plans and specifications to be prepared by the appellees, who are architects. The work was done by Bunnicke under their supervision, inspection, and direction. They agreed to, and in fact did, prepare the plans and specifications, and also supervised and examined the work as it progressed, and until its completion. In the year 1890, the appellant being dissatisfied with the work done by Bunnicke, as well as with the plans and specifications prepared by the appellees, and with their supervision of the work, brought two suits,—one against the appellees, and the other against Bunnicke. In his action against the latter, the appellant claimed damages for the violation by him of the building contract. Bunnicke, by his pleas, admitted the contract as alleged in the narr., but denied that he had violated it, or any part of it, or that by any breach of covenant he had caused the appellant to suffer any damage whatever. The case against Bunnicke was tried upon its merits before a jury, and the result was a verdict for one cent damages, and a judgment of non pros. The case now before us was also tried upon its merits, as we think, and the verdict of the jury was for the appellees. During the trial the plaintiff (now appellant) reserved two exceptions. Both of them, however, raised the same question, namely, that which is presented by the plaintiff's demurrer to the defendants' additional plea, which is a plea against the further continuance of the suit, puis darrein continuance, so far as said suit rests upon the alleged violation of contract by Bunnicke. The second and third pleas having been withdrawn, and the demurrer to all the other pleas having been sustained, the case was tried upon the general issue, and the issue joined upon the replications to the plea just mentioned. By this plea the former suit against Bunnicke to recover damages for his alleged breach of the building contract, the recovery therein of a verdict, and the tender by Bunnicke of the amount of such verdict before the trial of this case, are set up by the defendants as a bar to so much of the damages here sued for as were recovered in the other suit. The demurrer to this plea was overruled, whereupon two replications to it were filed. The first alleged that the damages claimed by him in this suit are not damages claimed for the same matters set out in said suit against Bunnicke, and the second asserted that the appellees were the supervising arch-

itects employed by him to superintend the building, and that it was their duty to see that no improper work was done, or defective and improper materials furnished, by Bunnicke; that they negligently and carelessly approved of work done and materials furnished by Bunnicke, and wrongfully accepted said work, whereby his right of action against Bunnicke was injuriously affected, and whereby he sustained damages not recoverable against said Bunnicke; and that the damages claimed in this suit are not the same damages, nor are they covered by or included in the former suit against Bunnicke. Issue was joined upon these replications.

The first exception is based upon the refusal of the trial court to exclude from the jury the record in the former case against Bunnicke, and the second exception arises upon the defendants' second and fourth prayers, which were granted. These prayers both instructed the jury, substantially, that, if they find the facts set forth in the additional plea, they must confine their attention to the question whether the appellees exercised reasonable skill and care in the preparation of the plans and specifications, and the superintendence of the erection of the building by Bunnicke; thus, in effect, telling them that, as matter of law, the plaintiff could not recover, under the narr. in this case, any damages for which he sued and recovered in the other suit, and which had been duly tendered. It appears, therefore, that the question raised by the demurrer and the two exceptions is the same in substance: Is the record in the Bunnicke case admissible in evidence in this case, and, if so, what is its effect? We will consider the question as presented by the demurrer to the plea puis darrein continuance. As we have already seen, the former suit against Bunnicke was based on his violation of the building contract, while this suit appears, by the allegations of the narr., to have been brought for the purpose, not only of recovering damages from the defendants for their own alleged negligence as architects, but also to recover from them damages arising in consequence of the omissions, negligence, unfaithfulness, and wrongdoing by Bunnicke in the building of the house. It is true that the acts of Bunnicke which formed the basis for the damages awarded by the jury in the suit against him are alleged, in the narr. in the case now before us, to have been allowed to occur by reason of the negligence of the appellees in the performance of their duty as architects. But whether the wrongdoing complained of in the former case be the joint act of Bunnicke and the defendants, or the several tort of each, can make no difference in determining the validity of the plea, or the admissibility of the record in evidence in this case. If the defendants and Bunnicke had both been sued in the first case for the injury there alleged, there could, of course, have been but one recovery; and it would seem to be very clear, upon reason and

authority as well, that the same result must follow when the same injury is caused by the independent acts of several wrongdoers. The reason of this rule is apparent. It is neither just nor lawful that there should be more than one satisfaction for the same injury, whether that injury be done by one or more. *Cleveland v. City of Bangor*, 87 Me. 264; *Brown v. City of Cambridge*, 8 Allen, 474; *Lovejoy v. Murray*, 3 Wall. 1; *Gunther v. Lee*, 45 Md. 67. In the case first cited, *Whitehouse, J.*, speaking for the supreme judicial court of Maine, said: "No sound reason has been given, and it is believed none can be assigned, for such a distinction between the case of wrongdoers who are jointly and severally liable, and those who are only severally liable, for the same injury. In either case the sufferer is entitled to but one compensation for the same injury, and full satisfaction from one will operate as a discharge of the others. And in *Gunther v. Lee*, supra, our predecessors said that while it was settled in England that a judgment in an action against one of two joint wrongdoers, of itself, without satisfaction or execution, is a sufficient bar to an action against the other for the same cause, yet this rule, to its full extent, is not generally accepted in this country. In *Livingston v. Bishop*, 1 Johns. 290, it was held by *Kent, C. J.*, that recovery against one of several joint tort feorsors is not, of itself, without satisfaction, a bar to the right to recover against the others. And the rule thus expressed has been sanctioned by the supreme court of the United States. *Lovejoy v. Murray*, supra. It was said in *Gunther v. Lee*, supra, that the facts in that case did not require the court to say which rule—the English or the one generally prevailing in America—they would approve of, nor do the facts here require us now to do more than reaffirm the well-settled rule that one satisfaction for an injury is a bar to any further suits to recover compensation for the same injury. It is true that the verdict in the former suit was for a nominal sum, and was followed by a judgment of non pros.; but the act of 1888, c. 366, provides that the amount of such verdict shall be a debt due from the defendant to the plaintiff, recoverable "before a justice of the peace; and a short copy of the verdict and judgment * * * shall be conclusive evidence" of the debt. It is apparent, therefore, that the verdict and the judgment of non pros. in this case are of a different character, and are clothed with a conclusiveness which does not ordinarily attach to such judgments. By force of the statute the amount of the debt is conclusively established by the verdict and judgment. The appellant has never, in fact, received the compensation thus ascertained by the former suit, but it is conceded it was duly tendered to him. This being so, he was bound to accept it, and by refusing so to do he will not be allowed to assume the position and enjoy the legal rights claimed to attach to one who has recovered judgment, but has

not received, or been able to obtain, satisfaction. The amount of compensation the plaintiff was entitled to recover for the injury having been ascertained by the jury, and the defendant in the former suit having tendered it to the plaintiff, he must be held to have "received full satisfaction, or what the law must consider as such." *Lovejoy v. Murray*, supra. It must be seen, therefore, that we are of opinion that the demurrer to the plea was properly overruled, and that the record offered in evidence to sustain the allegations of the plea puts darrein continuance is admissible for that purpose. It also follows that the second and fourth prayers of the defendants were properly granted. Judgment affirmed.

(37 Md. 191)

JACKSON v. STATE.

(Court of Appeals of Maryland. Feb. 10, 1898.)

COURTS—DIVISION—CONSTITUTIONAL LAW.

1. The holding of a criminal court in separate departments in the city of Baltimore is valid, under Const. art. 4, § 32, providing that judges assigned to each of the courts of the city may sit either separately or together in the trial of cases, and that judges so assigned shall have all the powers and exercise all the jurisdiction which may belong to the court so being held.

2. Where the constitution speaks in plain language with reference to a particular matter, courts cannot place a different meaning on the words employed, because the literal interpretation is inconsistent with other parts of the constitution in relation to other subjects.

Appeal from criminal court of Baltimore city.

William Jackson was convicted of murder, and he appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Robt. M. McLane, Jr., for appellant. Atty. Gen. Clabaugh, Henry Duffy, and W. Calvin Chesnut, for the State.

FOWLER, J. The traverser was indicted in the criminal court of Baltimore for murder. Subsequent to the finding of this indictment, Judge Dobler was assigned by the supreme bench of Baltimore city to that court, and Judge Stockbridge was by the same authority also assigned to the same court, with a jury, to sit separately from Judge Dobler for the January term, and until further ordered, as an additional judge for the said court. It will thus be seen that the criminal court of Baltimore has been, in effect, divided by the supreme bench into two parts, which for convenience have been designated part 1 and part 2. It is contended by the appellant, the traverser, that no warrant can be found in the constitution for such division; while the state contends that by the true construction of section 32, art. 4, Const. Md., each part, or the judge holding the same, has all the jurisdiction and power conferred upon the criminal court of Baltimore by the constitution of this state. The question thus presented is the only one be-

fore us on this appeal. We will briefly consider it, having already announced our conclusion, namely, that the trial of the traverser had in part 2 of the criminal court, before Judge Stockbridge and a jury, was quite as regular, and that the judgment rendered against him is quite as conclusive, as if he had been tried and convicted in the criminal court itself.

In order to justify this conclusion, it seems to be only necessary to examine section 32 of article 4 of the constitution. By this section it is provided that the judge or judges assigned to each of the courts in Baltimore city "may sit either separately or together in the trial of cases," and that, when "so assigned" to the several courts, such judge or judges shall have all the powers and exercise all the jurisdiction which may belong to the court so being held. It would seem to be a perfectly clear construction upon the language itself to say that the judges "so assigned" to the criminal court may sit either together in one court room, with one jury, or separately, in different rooms, each with a jury, and with all the power and jurisdiction they possessed when they sit together. But when we know, as we do, that the object was to provide more courts as well as more judges, in order that more cases could be disposed of, it becomes, we think, apparent that the plain meaning of this section is that the supreme bench should have power, whenever necessary, and in its judgment the public interest required it, not to create new courts, but to divide into parts the courts already created by the constitution; and to assign to such subdivisions the additional judges elected and to be hereafter elected under section 39 as amended by the act of 1892. Such has been the construction given to this section of the constitution by the supreme bench of Baltimore for several years; and we believe it was generally understood, when the constitutional amendment of 1892 was adopted, that its object was to facilitate the trial of cases in Baltimore by increasing the number of judges without the additional expense of new courts and clerks.

It was urged with earnestness and ingenuity that a court is necessarily a unit, and can only be divided into parts by an amendment or express provision of the constitution. In answer to this argument, it may be said, first, that the Baltimore county court, prior to 1851, sat in Baltimore, not as a unit, but in several parts. The late Mr. Crisfield, a member of the constitutional convention of 1851, said: "You have, by a practice which has grown up in the city of Baltimore, to meet the exigencies of business, Baltimore county court severed into three distinct tribunals. You have one judge in one room, performing the common-law jurisdiction; you have another in another room, presiding over appeal cases; and another in a third room, transacting the chancery business." Nor is it unusual, even under the system now prevailing in the circuits outside of Bal-

timore, to see a similar division of the circuit courts in some of them when there is a press of business. In one room one of the judges may be sitting trying criminal or civil cases, with or without a jury, and in another room in the same building another judge of the same court may be holding a session to dispose of equity business. As we have seen, this practice prevailed even before 1851, and it certainly has continued in some of the circuits, especially in those circuits where there is, as in Baltimore city, such a press of business in the courts that it is the only practical and economical way in which the overcrowded dockets can be disposed of. But if the contention of the appellant should prevail, and his theory of the absolute unity of courts should be adopted, such a practice would be as impossible now as it was supposed to be before the adoption of the constitution of 1851. In view of this practice, and of the well-known object of the people had in view in adopting the constitutional amendment of 1892, providing for the election of additional judges for Baltimore city, we are all of opinion that the appellant's position cannot be maintained. The constitution is not to be construed in a technical manner, but, in ascertaining its meaning, we are to consider the circumstances attending its adoption, and what appears to have been the understanding of the people when they adopted it. *Bandel v. Isaac*, 13 Md. 202; *Mayor, etc., of City of Baltimore v. State*, 15 Md. 376. But in the second place, if it be necessary to have an express constitutional provision here in Maryland, where, as we have seen, our courts for many years, when composed of more than one judge, have been sitting in several parts, we have such a provision now in section 32 of article 4. It was also suggested that, if there is to be more than one judge having criminal jurisdiction in Baltimore, the difficulty would arise as to which one of them is to exercise the important power of appointing a state's attorney in case of vacancy by death, etc., as provided by section 11 of article 5. This section confers the power of appointment upon the judge of the county or city having criminal jurisdiction in the county or city in which such vacancy shall occur, etc. But, ever since the constitution of 1867 has been in force, there have been three judges in each circuit, either one of whom has had criminal jurisdiction in each county. But vacancies in the office of state's attorney have been filled many times in the various counties, without difficulty or question. When section 11 of article 5 was first adopted the state was subdivided into a large number of circuits, and there was a judge appointed for each circuit, and the same section relating to appointment of state's attorneys appears to have been retained without material change in the constitution of 1864 and the present one. Under the former constitutions of 1851 and 1864, of course, there could be no difficulty in ascertaining

the appointing power in case of vacancy in the office of state's attorney, for there was one judge in each county having criminal jurisdiction. Under the present constitution, although there are three judges having equal power and jurisdiction in each county, such appointments have been made by the majority of the judges having criminal jurisdiction, or by the judge who happened to be sitting alone, with the assent of one or both of the others. But independent of this suggestion, and even if there could be supposed to be a serious question now raised as to the practical construction of section 7 of article 5, in the absence of any such difficulty during an experience of 80 years, yet, as was said in *Cantwell v. Owens*, 14 Md. 215, "where the constitution speaks in plain language in reference to a particular matter, courts have no right to place a different meaning on the words employed because the literal interpretation may happen to be inconsistent with other parts of the instrument in relation to other subjects." Therefore whatever difficulty may be supposed to exist in reconciling the provisions of section 32 of article 4, or of section 21 of the same article, relating to circuit courts, with the provisions of section 7 of article 5, relating to appointment of state's attorneys, the plain and literal meaning of the former sections must not be sacrificed. It certainly has never been suggested that there was or could be any doubt in regard to the construction of section 21 of article 4, relating to circuit courts, and yet it, as we have seen, is quite as much in conflict with section 7, as with section 32, as now construed. For these reasons, and without further elaboration, the judgment appealed from has been heretofore affirmed.

(86 Md. 692)

NEGLEY v. HAGERSTOWN MANUFACTURING, MINING & LAND-IMPROVEMENT CO.

(Court of Appeals of Maryland. Feb. 10, 1898.)

EQUITY JURISDICTION—REMEDY AT LAW.

Equity has jurisdiction to cancel a subscription to stock on the ground of fraud, though an action of deceit might lie.

Appeal from circuit court, Washington county.

Bill in equity by Charles Negley against the Hagerstown Manufacturing, Mining & Land-Improvement Company of Washington County. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PEARCE, PAGE, and BOYD, JJ.

Alex. Armstrong, N. B. Scott, Jr., and S. B. Loose, for appellant. A. R. Hagner, for appellee.

McSHERRY, C. J. This case is the outgrowth of one of those speculative ventures, recently so numerous, and generally, in their results, so disastrous to the individuals who, allured by the promise of speedy and fabulous

gains that were never realized, became the unfortunate subscribers to and owners of shares of stock therein. In various sections of this and adjoining states, a few years ago, land and improvement, manufacturing and mining, and diversified development companies sprang into existence with startling rapidity, ostensibly owning capital stock aggregating many millions of dollars. Flaming prospectuses, couched in the most extravagant terms, were scattered broadcast, stimulating a feverish spirit of speculation, that, to the conservative and reflecting observer, was doomed, at the very outset, to a reaction as sudden as it ultimately proved to be destructive and depressing. Doubtless, in steering many of these enterprises crafty and cunning adventurers were engaged, while in others upright and straightforward citizens, swept by the tide of the moment into these novel undertakings, and honestly believing in their stability and final success, assumed control. In Hagerstown several of these companies were organized. The first to become incorporated was the appellee. Its certificate of incorporation bears date in February, 1890. Among those who subscribed to its capital stock was the appellant. He subscribed for 300 shares, of the par value of \$20 per share, but was to pay only 50 per cent. thereof in full of his subscription. At the time he subscribed, he was not in funds with which to make payment in cash, and accordingly an arrangement was entered into between him and the company to the effect following: He made application to the company for the loan of \$3,000, the repayment of which he proposed to secure by the hypothecation of 30 shares of the capital stock of the Hagerstown Iron Works, and the 300 shares of the appellee's stock for which he offered to subscribe. This proposal was accepted by the appellee on April 29, 1890, and on the following day the appellant subscribed for the 300 shares of stock. Subsequently the 30 shares of the iron-works stock were transferred to a certificate in the name of the appellee, and the certificate was delivered to the appellee's secretary, who then made out, in the name of the appellant, a certificate for 300 shares of the appellee's stock. These two certificates, together with the written contract embodying the terms of the proposal and acceptance, were placed in an envelope, and sealed up, and retained by the appellee company. The loan (or, more properly speaking, what is called a "loan") made by the appellee to the appellant was to be repaid in five years, with interest. In point of fact, no money was actually furnished by the appellee to the appellant, and though the transaction purported, in form, to be a loan, it was in reality an acceptance by the company of his subscription, with a delivery by him of the iron-works stock, and the shares subscribed for, as collateral for the payment of the sum due on that subscription. In less than a year afterwards the Hagerstown Iron Works went into liquidation, and sundry sums were from time to time paid by it to the appellee on the 30

shares of stock transferred by the appellant to the appellee as collateral. The total amount thus paid reduced the sum due by the appellant to the appellee for the 300 shares of stock subscribed for by him to \$837.80. The last-named amount was the balance of the \$3,000 remaining due on May 17, 1892. After the expiration of the five years, at the end of which the alleged loan was payable, the appellant filed a bill on the equity side of the circuit court for Washington county against the appellee, wherein he charged that he had been induced, by misrepresentations contained in a certain prospectus issued by the appellee, to subscribe for the 300 shares of its capital stock, and wherein he prayed that a decree might be passed requiring the appellee to pay over to him all the sums it had received from the iron-works stock, together with interest thereon; and also seeking a cancellation of the agreement of subscription. To this bill an answer was filed, and thereafter evidence was taken. The court below, upon final hearing, dismissed the bill upon the ground that a court of equity had no jurisdiction to grant the relief prayed. From this decree the pending appeal was taken.

While the result reached by the circuit court was right, we do not concur in the reasons assigned to support it. The learned judge fell into an error in holding that, because an action of deceit might lie and be sustained in a court of law, a court of equity was without jurisdiction to decree a cancellation of the subscription, if that subscription had been in fact procured by fraud. This branch of equity jurisprudence has been so recently and so fully considered and discussed by us in *Refining Co. v. Campbell & Zell Co.*, 83 Md. 36, 34 Atl. 369, that we do not deem it necessary to go into it again.

The bill avers that the false statements and misrepresentations which influenced the appellant to subscribe for the appellee's stock were set forth and contained in a prospectus issued by the directors. He makes no pretense or claim that he was persuaded or controlled in the slightest degree by any other representations whatever. If, therefore, assuming the prospectus to be false and fraudulent, it did not cause him to enter into the contract which he made, the relief sought must be denied, not because the court is without jurisdiction to grant it, but solely because the facts do not justify it. This resolves the case into a mere inquiry of fact. The overwhelming weight of the evidence leaves no room to doubt that the appellant's subscription was actually made and completed several days before the prospectus was printed. It is morally certain that he could not have been induced by the statements contained in that prospectus to make the subscription, when in point of fact the prospectus had no existence at the time the subscription was made. And this is all we need say. As thus presented, the case does not call for an analysis of the statements contained in the prospectus, nor require us to express an opinion as to what the result of

this proceeding would have been, had the appellant in reality been induced by that prospectus to enter into the contract which he now seeks to have annulled. For the reasons we have given, but not for the one assigned in the opinion of the judge of the circuit court, the decree appealed from will be affirmed. Decree affirmed, with costs.

(87 Md. 153)

REIDEL v. PHILADELPHIA, W. & B.
R. CO.

(Court of Appeals of Maryland. Jan. 12, 1898.)

INJURY TO TRESPASSER ON TRACK.

In an action against a railroad company for personal injuries, it was shown that plaintiff attempted to cross the tracks, on a dark night, where there was no crossing; that he looked up and down, and saw and heard nothing, and crossed three side tracks, again looking up and down, with the same result; that he crossed one main track, and seeing a train on the other, going north, nearly upon him, drew back, but seeing another train, going south, was forced to stand between them, where he was knocked down and injured. A witness testified that he heard the whistle of both trains, and waited for them to pass. The trains were running faster than permitted by ordinance. *Held* that, although the company was negligent in running in violation of the ordinance, the injured party could not recover, since he was a trespasser, and the evidence showed contributory negligence.

Appeal from circuit court, Harford county.

Action by Charles Reidel against the Philadelphia, Wilmington & Baltimore Railroad Company for damages for personal injury. From a judgment in favor of the defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Albert Constable and Jas. J. Archer, for appellant. Thos. I. Donaldson, Thos. H. Robinson, and L. Marshall Haines, for appellee.

FOWLER, J. This is an action to recover damages for injuries to the plaintiff alleged to have been caused by the negligence of the defendant railroad company on the evening of December 28, 1891, at Wilmington, Del. The suit was commenced in the circuit court of Cecil county on the 5th of December, 1894. On the 14th of January following, the declaration was filed. The case appears to have been continued by consent from term to term until the 25th of March, 1897, when the plaintiff filed a suggestion and affidavit for removal, and the record was thereupon sent to the circuit court for Kent county. On the 20th of April following, the defendant filed a suggestion for removal, and the record was accordingly sent to the circuit court for Harford county, and was filed there on the 26th of April, 1897; and the trial was commenced in that court on the 8th of June of the same year, and on the 11th of the same month the learned judge below instructed the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover. On the 23d of

June, judgment on the verdict was entered, and the same day the defendant appealed.

The sole question involved in this appeal is whether the jury were properly instructed to find a verdict for the defendant. We think the learned judge below was quite right in taking the case from the jury. The general principles which must govern the decision of this case are well settled in this state, and it is unnecessary, therefore, to look for authorities in other states, however interesting and instructive they may be. A number of those cited by the appellant (notably, those reported in 89, 107, and 175 Pa. St.)¹ are cases which relate to the principles which are well settled in reference to injuries inflicted by a railroad company at public crossings. Such adjudications have no application to the case before us, for, when injured, the plaintiff was, and is conceded to have been, a trespasser on the track of the defendant company, where it had "the exclusive right of way for the operation of its trains." *Baltimore & O. R. Co. v. State*, 69 Md. 555, 16 Atl. 212. But, inasmuch as the legal sufficiency of the evidence is questioned, it will be necessary to examine it. Only two witnesses testify in regard to the facts of the accident,—the plaintiff and the witness Woerner, who testified in his behalf. It appears that the injury complained of was received at Wilmington, in Delaware, while the plaintiff was in the act of crossing the tracks of the Baltimore, Philadelphia & Wilmington Railroad Company at the foot of Second street, in that city. He was at the time of the injury, and had been for some years, employed by it as a night laborer at its roundhouse. According to his own testimony, on the 28th of December, 1891, he left his home, in Wilmington, about a quarter before 6 o'clock in the evening, for his work, passed along Second street in the same way he had always done during all the time he had worked for the company, and when he came near to the end of that street, which terminates at the railway of the defendant, there being no crossing there, he stopped, and looked up and down the railroad, to the right and left, but did not see or hear anything. He then walked towards the railroad, and crossed the first three side tracks; and, when he passed out from behind some freight cars on one of the side tracks, he again looked up and down the railroad, but neither saw nor heard anything. He then walked across the first main, or south-bound, track, and was in the act of stepping on the north-bound track when he saw a train approaching him on that track, and going towards Philadelphia. When he first saw this train it was nearly upon him, or, as he says, about a car's length distant from him, and running at a speed, according to his testimony, of from 10 to 12 miles an hour. Upon seeing this train, he drew back

to let it pass, and, before he could escape, another train, running at a speed of 20 miles an hour, appeared on the south-bound track; and he stood on the space between the two tracks, trying to make himself slim. But he was knocked down and seriously injured,—whether by the north or south bound train, he does not say. It appears that both trains reached the spot where he was standing about the same time. The night, he says, was cold and dark. He heard no whistles or bells from either train. However, he qualifies this by saying he was too excited, and did not know anything that was going on around him, which, under the circumstances, was but natural. It appears from the testimony that quite a number of employes of the defendant were in the habit of walking across the tracks at the foot of Second street, going to and returning from their work at the defendant's roundhouse, but this does not alter the fact that the plaintiff was a trespasser. *Stebbing's Case*, 62 Md. 517; *Allison's Case*, Id. 487. It has been suggested that the plaintiff was an employe of the defendant, and, if so, he might be subjected to the rule pertaining to the rights of fellow servants, and for this reason, if for no other, he could not recover; but this defense was not relied on by the defendant, and we will not, therefore, consider it. The remaining testimony relating to the facts of the accident is that of Anthon Woerner, a fellow workman of the plaintiff, who, according to his testimony, must have reached the end of Second street about the time the plaintiff started to cross the tracks. He was late in getting to his work, the hour he was required to be there being 6 o'clock. He, also, was in the habit of crossing at the foot of Second street, and on this occasion he said he ran and tried to get over before the north-bound train came up, because he had heard the 6 o'clock whistle, but there was a car there, and it was impossible for him to cross. He heard the whistle of the north-bound train before he got to the railroad tracks, and about the time he got there he heard the whistle of the south-bound train. He was fortunately too late, in his opinion, to attempt to cross before the north-bound train came up. On cross-examination he said that as soon as he got to the corner he heard the south-bound train coming in, and it was coming very fast,—in his opinion, at the rate of 12 to 15 miles an hour. Some one called his attention to a man who was on the track, and in danger, whereupon he looked through some cars standing on the side tracks, and saw, as he says, "only the man by his legs and his dinner kettle." This witness confirms the plaintiff's testimony that the trains met where the plaintiff was standing,—the one going south running, as he supposed, about twice as fast as the one going north; the speed of the latter being 6 or 8 miles an hour. He thinks the south-bound train was 300 or 350 feet up the track when it whistled, but he appears to have

¹ *Railroad Co. v. Werner*, 89 Pa. St. 59; *Schum v. Railroad Co.*, 107 Pa. St. 8; *Philpott v. Railroad Co.*, 175 Pa. St. 570, 34 Atl. 858.

heard the train coming as soon as he arrived at the crossing.

Both of these witnesses were examined and cross-examined at much length, but we have given enough of their testimony to show that, notwithstanding the defendant appears to have given the ordinary signals, yet it was guilty of negligence in violating the ordinance of the city of Wilmington by running on this occasion one, if not both, of its trains at a speed greater than was allowed by ordinance within the city limits. It is settled law that in all such cases as this the violation of a municipal ordinance regulating the speed of trains within certain limits is not, *per se*, such negligence as will afford a right of action. The person injured "must have been in a position to entitle him to the protection that the ordinance was designated to afford, and he must show how, and under what circumstances, the duty arose to him personally, and how it was violated, by the negligence of the defendant, to his injury." *Stebbing's Case*. It is quite immaterial to the case of the plaintiff that the defendant company was guilty of violating the ordinance, "unless it be shown that the injury complained of was occasioned by such unauthorized speed of the train, without any direct contributory negligence on the part of the plaintiff himself." If it appears that he knew, or could have known by the exercise of his powers of observation, either by sight or hearing, of the near approach of the trains, in time to get out of the way of danger, and failed to do so, he has no right of action, notwithstanding the violation by the defendant of the ordinance. This rule was applied by Chief Justice Alvey in the case just cited, in clear and forcible language. And that same eminent judge, in the more recent case of *Baltimore & O. R. Co. v. State*, 69 Md. 554, 16 Atl. 213, in delivering the opinion of this court, again reiterated and enforced the rule applicable to trespassers who are injured on the tracks of a railroad. In that case it is said: "It is true, the train was running at a much higher rate of speed than that allowed by the ordinance of the city, and in this, it is conceded, there was negligence. But this disregard of the ordinance, and consequent act of negligence on the part of the defendant, did not excuse or in any way justify the glaring act of negligence on the part of the deceased. That has been ruled in many cases, and is now the settled law." The conduct which we characterized in the case just cited as a glaring act of negligence consisted in walking in open daylight on the track of the railroad, facing an approaching train. But in *Bacon's Case*, 58 Md. 485, the opinion of the court having also been delivered by Chief Judge Alvey, the facts were more like the present case. There the time of the accident was night, as here, and the persons injured were, as here, also trespassers, and, as we have said, were there assuming all the risks of the perilous position in which they had voluntarily placed themselves; there being no duty imposed upon the defendants employed on the train to keep a lookout for them. Un-

der these circumstances, we said: "The night being dark, they must have known that they could not depend for their safety upon being seen by those in charge of the train, beyond the reflection of the headlight. They knew perfectly well that their safety depended alone upon the use of their senses, and the exercise of a proper degree of caution. It is difficult to suppose they did not see the approaching train, with its glaring headlight confronting them, in time to enable them to step from the track. If the deceased did see or hear the approaching train in time, and failed to get out of the way, he was certainly guilty of the grossest negligence; and, if he did not see or hear the approaching train, it must have been because he did not use his senses for his protection, and he was therefore guilty of negligence, and that negligence directly contributed to his death." Now, what are the facts of this case? As we have seen, the plaintiff, on a dark evening in December, attempted to cross the defendant's tracks at a place where, the moment he stepped upon them, he became, in contemplation of law, a trespasser. He says there were three rows of cars standing on the side tracks, and he went behind those cars, and stood there, and looked up and down to see if he could see a train, and, seeing nothing, he walked across the two rails of the south-bound track, and just as he put his foot on the north-bound track he saw the train for Baltimore about a car's length distant from him. He stepped back into the space between the two tracks, and was then between the two trains, both going by him at the same time. He was then in a most dangerous position, but he was there by his own fault. It is apparent, from the proximity of the trains to the plaintiff as he put his foot upon the rails of the north-bound track, that, if he had made proper use of his senses, he must have seen or heard the trains. He says he looked, and did not see; but it is impossible for him not to have seen or heard one train or the other, for they were there, and, if he did not see or hear them, it is his misfortune. "If he did not see or hear the approaching train, it must have been because he did not use his senses." *Bacon's Case*. It seems to us the conduct of the plaintiff was reckless. His knowledge of the locality should have persuaded him—and would have, we think, induced any prudent man—to have waited until he could, by looking, or if he could not see, by listening, convince himself that no trains were approaching. If it be conceded that it be possible that he did not and could not see the approaching trains, yet that he did not hear them is incredible. He must have heard but he did not heed. The plaintiff, like others who were in the habit of crossing at the place, had become so familiar with its dangers that they no longer had any effect upon him. It appears that one of the witnesses was in the habit of getting over the cars which stood on the side tracks, and thus obstructed his way across the defendant's road. Familiarity with danger has in this case had its

usual effect, and the plaintiff had the misfortune of being added to the long list of those who become reckless of their own safety by daily contact with perils which in others would inspire fear, caution, and prudence.

In the view we have taken, the remaining exceptions, based upon the refusal to admit the testimony of the witness Moreland, become unimportant; for our conclusion is based upon the conceded fact that the defendant was guilty of negligence in running its train at a greater speed than allowed by the ordinance, and, as we understand it, the rejected testimony was offered to show that there was such a violation of the ordinance. Judgment affirmed, with costs.

(87 Md. 224)

BALTIMORE & S. P. R. CO. v. HACKETT.

(Court of Appeals of Maryland. Feb. 10, 1898.)

EXPERT EVIDENCE — OBSTRUCTION OF SURFACE WATER — RIGHT OF ACTION.

1. A civil engineer may give his opinion as an expert as to whether a railroad was properly constructed so as to provide outlets to drain the surface water from plaintiff's lands.

2. When land is not permanently injured by the construction of a railroad through it, but the damages to crops from the overflow of water, caused by the construction of the roadbed and the negligent maintenance by the defendant road of ditches, recur at frequent intervals, the right of action for such damages is in the lessee of the land at the time of the injury, and not in the person who owned the land at the time the road was constructed.

3. An owner of land which is drained of surface water by a ditch of defendant's, whose duty it is to keep the ditch unobstructed, need not enter on the premises of defendant, and remove the obstructions, in order to recover damages resulting to his crops by an overflow occurring afterwards because of such obstructions.

4. In an action against a railroad company for damages resulting from an overflow of water caused by the condition of the ditches and the culvert of defendant, an instruction that, if the water flowing over the road crossing ran down from the plaintiff's land, and was not caused by the culvert, then the jury can consider the injury done by said water in estimating the damages to plaintiff, is properly refused as misleading, as it ignores the evidence that the water flowed over the crossing by reason of the damming of it below by defendant's embankment and obstructions in the ditch, and fails to inform the jury of the relative rights and obligations of the parties in respect to the water.

Appeal from circuit court, Harford county.

Action by William T. Hackett against the Baltimore & Sparrows Point Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, O. J., and BRYAN, BRISCOE, RUSSUM, PAGE, and BOYD, JJ.

J. Alex. Preston, Robert L. Preston, and W. W. Preston, for appellant. Frank I. Duncan and S. A. Williams, for appellee.

PAGE, J. The appellee was possessed of a tract of land in Baltimore county, upon which he was engaged in growing vegetables and other farm products for market. Through this land passes the railroad of the appellant. It is alleged in the narr. that the

appellant did not "properly provide and maintain gutters and drains along and under its railroad for the natural drainage of the land adjacent thereto, and in consequence of which the premises of the appellee were flooded, and crops of vegetables and farm products were destroyed." The appellee is the lessee of the premises on which the damages alleged occurred. His property lies on both sides of and adjacent to the railroad. It slopes from the east to the west, so that prior to the construction of the railroad the surface water was carried off by natural drains and ditches running eastwardly and westwardly to Colgate creek. The bed of the road ran across these drains and ditches, and to take the water formerly carried by these a ditch was opened on the property of the railroad, and on the east side of the track, to Colgate creek. In the east, on top of the hill, which slopes rapidly to the railroad, is the barn of the appellant, from which a road runs to the crossing. The ditch on the company's property is parallel with the track, and a few feet therefrom. It extends from St. Helena station to Colgate creek. At the farm crossing, where the road from the barn is about on a level with the tracks, there is a culvert, intended to carry the flow of the water coming from the north. There are no drains from the east to the west side of the tracks. The land of the appellee on the west side of the track being higher towards the east, the surface water falling on it must flow down to the ditch, and be carried off therein. If this becomes obstructed, or is insufficient for the purpose, the water will be accumulated on the land of the appellee; and, should it be held back by the embankment of the railroad in sufficient quantities, it will eventually rise higher than the level of the farm crossing, and flow over and inundate the land of the appellee that lies on the west of the tracks. There was also evidence going to show that in June, 1896, the ditch had been permitted to become obstructed with debris of various kinds to such an extent as to be inadequate to carry off the water flowing into it from the higher land to the east and from St. Helena station; so that on several occasions the water became so dammed up as that the land of the appellee on both the east and west sides of the track was inundated, and the crops thereon destroyed.

The first exception presents a question of evidence. The witness McLean has testified that he was a civil engineer, and had been engaged in the construction of railways, and that he knew the property of the appellant, and had made surveys of it, the results of which were shown on the plat offered in evidence. He then described the location of the appellant's tracks and the embankments, the slopes of the land of the appellee, and the provision made by the appellant for the water coming from the east and from St. Helena station. He was then asked by the counsel for the appellee whether, in

his judgment as an engineer, "in view of the lay of the land," the railroad was properly constructed, "where there are no outlets to the west side," and, if so, "to what extent there should be outlets for proper drainage"; to which the witness replied that he thought "it would have been the part of good work to have located at different points cross drains, to have relieved the pressure of the water against the railroad, and also to have carried off that water." The ground of the objection, as stated in the brief of counsel, and insisted on at the argument, was that there was no obligation upon the defendant (the appellant), as against the appellee, to provide any drains under its tracks, for the reason that, the appellee having become possessed of the property after the construction of the railroad, any damage done by improper construction accrued to the former owner. It was therefore contended that the testimony sought to be elicited by the question and contained in the reply was irrelevant. The only case cited to support this position was that of *Ortwine v. Mayor, etc., of City of Baltimore*, 16 Md. 387. In that case the plaintiff sued the city to recover damages for injury done to his property by the wrongful and illegal act of the city in grading a city street. It appeared that the plaintiff became possessed of the property after the grading and paving of the street, and that the damage consisted in the formation of a gully through which the water passed. It was not shown that the water affected the property as a recurring nuisance, but that by the formation of the gully the property was intrinsically and permanently injured. The court held that such injury, having been occasioned before the plaintiff acquired his title, with a knowledge of its existence, furnished a cause of action which had not devolved on the plaintiff, but had accrued to the former owner. The case at bar is not of the same character. Here the complaint is that by reason of the failure of the appellant properly to construct and maintain its road, and to provide and maintain suitable drains, the surface water, after each rain, was backed up, and overflowed the premises of the appellant, and destroyed his crops of vegetables. The questions, therefore, at issue, were, was it the duty of the appellant to provide such drains, and, if it was, had that duty been performed? The witness had testified that by reason of the slope of the land to the east of the tracks the surface water falling on that part of the appellee's property flowed by natural channels, before the construction of the railroad, from the higher land westwardly down to and over and across the ground now occupied by the bed of the railroad, to Colgate creek. The embankment of the railroad thus intercepted the natural flowage, and to take the place of the natural drains by which the water was so carried the company had constructed a ditch parallel with its tracks,

and on its own property, and by this ditch all the water that came from the appellee's property lying to the east of the tracks, as well as all that came down from the station, was conveyed to the creek. It is clear that, if this artificial means of flowage was insufficient, or was allowed to become obstructed, so that damage ensued to the appellee, there would arise a cause of action against the appellant in favor of the appellee. In such a case the railroad company, having changed the natural flow, would be bound to provide proper outlets of ample capacity to carry off the water, so that it should not be injuriously accumulated on the lands of the adjacent owners. *Railroad Co. v. Davis*, 68 Md. 290, 11 Atl. 822. It was therefore relevant to inquire whether the outlets actually provided were adequate, and the witness, being an expert, could very properly be called upon to express his opinion whether they were or not.

The other exception brings before us the action of the court in disposing of the instructions asked for by the appellant. Its first, second, fourth, and sixth prayers were granted, but the third and fifth were rejected. The third announces as a legal proposition that, if the appellee saw that the ditch and culvert were obstructed by sand, grass, etc., so that his crops were liable to be injured, and by "labor or reasonable outlay of money could have stayed or avoided such injury, then" all the consequences resulting from his failure or neglect to use timely and reasonable precautions to prevent the injury complained of should fall upon the plaintiff. We have already stated that the appellant, having obstructed the natural flow of the surface water, was bound to provide adequate ditches or culverts for its passage, and to maintain them in proper condition, so that the adjacent land should not be injured. Moreover, it is conceded the ditch running parallel with the tracks after the construction of the embankments of the railroad company was the only exit for the water coming from the higher land to the east, and that this ditch was on the land of the appellant. As applied to this case, the theory of this prayer amounts to this: that, though it may have been the duty of the appellant to provide sufficient passage for the water, yet it was also the duty of the appellee, when he saw that the ditch was obstructed, to enter upon the premises of the appellant, and remove the obstructions, if he could do so, "by labor or reasonable outlay of money." It must be observed, also, that the alleged negligence of the appellee in so failing to remove the obstructions has no connection with the commission of the alleged wrong of the appellant. It is not contended that the obstructions were placed in the ditch by the appellee, or that he was in any respect responsible for their presence there. The proposition of the prayer is that the appellee was bound to remove them, if he knew of them, so as to avert the consequences of the appellant's

failure to perform the duty of keeping the ditch in proper condition. We have been cited to no case that supports this contention. The doctrine that after the commission of the tort the party injured must do what he can to save himself from injury, provided it can be done by reasonable exertion and expense, has been held in many cases. But this rule cannot be invoked by a party who has caused the injury to defeat the right of the injured party to maintain his action. It goes only to the question of assessing the damages, and operates to deprive a party from the right of recovering to the extent of such consequences as result "from his own willful failure or gross neglect to use timely and reasonable precautions to prevent an extension or increase of the injury." But the rule should not be extended, in a case like this, so that the duty to lessen the loss arises before the commission of the breach. These principles are distinctly announced in *Lawson v. Price*, 45 Md. 136, relied on at the argument by the counsel for the appellant. There this court, speaking through Alvey, J., said: "After the wrong was committed, it was certainly the duty of the appellee to avoid the consequences of that wrong as far as he reasonably could. If, by labor or a reasonable outlay of money, he could have stayed or avoided the consequences of the appellant's wrong, he should have done so. * * * It is a question to be considered in assessing the damages, and does not go to the right of the plaintiff to maintain his action, and recover against the wrongdoer." We do not think this rule can be invoked by the appellant in this case to excuse itself from the consequences of its alleged neglect. *Suth. Dam. §§ 88-90; Smith v. Railroad Co.*, 38 Iowa, 518-523; *Plummer v. Association*, 67 Me. 367; *Gilbert v. Kennedy*, 22 Mich. 117.

The appellant's fifth prayer was properly rejected. By it the jury were to be told that, if they found that "the water, or any part of the water, flowing over the road crossing, * * * ran down from the plaintiff's land, and was not caused by the culvert, then they are entitled to consider the injury done by said water in estimating the damages, if they find any verdict for the plaintiff." It was offered in mitigation of damages; and, while its terms are not very clear, we think its meaning is that the jury were not to include in the damages they might find anything for the injury caused by the water that ran down from the plaintiff's land, provided such flow was not caused by the culvert. The prayer, therefore, practically tells the jury that the defendant could not be liable for any water passing over the crossing, provided it came from the plaintiff's land, and its flow was not caused by the culvert. It wholly ignores the evidence tending to show that the water flowed over the crossing by reason of the damming of it below by the appellant's embankment, and the obstructions in the ditch, and wholly fails to inform the jury as to relative rights and obligations of the parties in

respect to the water. It in fact assumes as matter of law that no injury can legally be attributable to the appellant if the water passing over the road crossing came down from the land of the appellee. There was evidence in the case, as already has been said, tending to show that the ditches and drains before the construction of the railroad carried the water coming down from the appellee's land to Colgate creek, and that the embankment of the company cut these off, so that the only channel for the water was afterwards through the ditch running parallel with the tracks; and that by reason of obstructions in this ditch, or of its inadequacy to perform the work for which it was created, the water coming from the appellee's land on the east was backed up until it reached a sufficient height to pass over the road crossing, and inundate the appellee's land on the west of the railroad. If the jury had found these facts, the prayers would have misled them, because, though they should then have found for the plaintiff, the requirements of this instruction would have precluded them from assessing any damages therefor. Finding no error in the rulings of the court, the judgment will be affirmed. Judgment affirmed.

(86 Md. 550)

INTERNATIONAL FRATERNAL ALLIANCE OF BALTIMORE CITY v. STATE.

(Court of Appeals of Maryland. Jan. 4, 1898.)
INSURANCE AND BENEFIT COMPANIES—FORFEITING
CHARTER.

1. Laws 1894, c. 295, § 143e, defining a beneficial society to be a corporation formed and carried on "for the sole benefit of its members and their beneficiaries, and not for profit," operating on the lodge system, with ritualistic work, and declaring that such corporations shall be exempt from the provisions of the insurance laws, and may continue business under the provisions governing fraternal beneficiary societies, on condition that each deposit \$10,000 with the insurance commissioner, as a guaranty of payment of "certificates" issued by it, does not authorize the issuance of life insurance policies, or the blending of the business of a stock insurance company with that of a beneficial society, so as not to be separable; section 143r providing that any association, entitled to do business under the provisions of sections 143e and 143r, which shall so conduct its affairs, or change its charter, constitution, or laws, that it shall not answer to the definition of a beneficial society, shall cease to be entitled to the privileges of said provisions.

2. A corporation, with only \$10,000 stock, which issues life insurance policies for over \$1,000 each, will have its charter forfeited for abuse and misuse of its powers; the only provision for insurance companies with less than \$100,000 capital invested in securities, and deposited with the state treasurer, being Code Pub. Gen. Laws, art. 23, §§ 127, 128, as amended by Laws 1892, c. 483, § 128, and Laws 1894, c. 256, § 128, permitting organizations issuing no policy of more than \$1,000 on one life to be formed on the mutual, co-operative, assessment, or stock plan, and, if on the latter, then requiring that they have a paid-up policy of at least \$10,000, and requiring every such company to deposit \$10,000 with the insurance commissioner.

Appeal from superior court of Baltimore city.

Petition by the state of Maryland against the

International Fraternal Alliance of Baltimore City for a forfeiture of its charter. From a decree for petitioner, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, and BOYD, JJ.

Charles Marshall, John P. Poe, and Charles L. Wilson, for appellant. H. L. Clabaugh and George R. Gaither, Jr., for appellee.

BOYD, J. By direction of the governor, the attorney general instituted proceedings in the superior court of Baltimore city against the appellant, alleging that it had been guilty of abuse and misuse of its corporate powers and privileges. The authority for this proceeding is given by article 23, § 255, of the Code; and the succeeding sections, to 262, inclusive, regulate the practice. The grounds relied on in the petition are, in substance: (1) That the defendant, as shown by the by-laws, was not organized for "fraternal beneficial purposes," and that, in conducting the operations described in its by-laws, it was guilty of both abuse and misuse of its corporate franchises, and is carrying on operations without due warrant of law. (2) That while purporting to be organized for fraternal beneficial purposes, under the provisions of chapter 295 of the Laws of 1894, it is organized with a capital of \$10,000, and subject to the control and management of its stockholders, and although purporting to give representation to its certificate or policy holders, under its by-laws it subjects them to the will of the stockholders. (3) That the business carried on is substantially in the nature of insurance business, and it has issued a policy known as the "Golden Cycle Policy," which would mature in seven years, and the holders of which are subject to certain dues and assessments; that, in addition to the regular dues, the corporation has levied a "note assessment" of \$650 upon each "maturing holder" in or about the last year of the maturing of the policy, and, in the event of the notes not being given for such assessment, the policies would lapse; that the levying of such excessive assessments was a practical forfeiture of the policies, and an abuse and misuse of the charter powers. (4) That the defendant, though incorporated with a capital of \$10,000, and having deposited with the state insurance commissioner the sum of \$10,000, is issuing, or offering to issue, policies for more than \$1,000 on any one life. (5) That it is pretending to operate under the scheme of a fraternal beneficial society, as set out in chapter 295 of the Laws of 1894, and at the same time is subject to the rights, privileges, and control of its stockholders. (6) That, purporting to carry on the business of a fraternal beneficial society, it has issued policies of insurance, to the number of 2,400, to infants under 10 years of age, which is contrary to the purposes of such societies. (7) That the business carried on by said corporation is substantially in the nature of an insurance business, and not within the scope of

the scheme of fraternal beneficial societies, and not in accordance with its charter rights. The defendant filed an answer which denies that it has violated its charter, and gives a history of its organization. In June, 1888, a corporation was formed, under the name of the Order of the International Benevolent & Fraternal Company of Baltimore City, "for social, benevolent, fraternal, and beneficial purposes," with a capital stock of \$5,000, divided into 1,000 shares of \$5 each. In January, 1889, the charter was amended, whereby the stock feature was omitted, and the name changed to the Order of the International Fraternal Alliance of Baltimore City; and in June, 1893, it was further amended by changing the name to the International Fraternal Alliance of Baltimore City, and providing for a capital stock of \$10,000, divided into 100 shares of \$100 each. It is stated in these amended articles that the corporation was formed "(a) for social or fraternal beneficial purposes, or both," etc.; "(b) to grant and issue insurance on the lives of individuals of both sexes, upon the mutual, assessment, or co-operative plan, as provided in section 127 of article 23 of the Code of Public General Laws of the State of Maryland, and the other sections of said article applicable to such mutual, assessment, or co-operative insurance," etc. It is also authorized to provide in its by-laws for loans to its members, policy or certificate holders, of any surplus accumulations, upon the building association plan, as defined in sections 95 to 124, inclusive, of article 23. In November, 1895, the charter was further amended, and the defendant was operating under the articles as thus amended at the time these proceedings were instituted, and hence we are to determine whether or not they have been violated as charged, so far as we can from the answer, as the case was submitted on demurrer to the answer.

In the case in 77 Md. 547, 28 Atl. 1040, against this corporation, this court had before it the charter of January, 1889, and held that the appellant had no authority under that charter to carry on the insurance business. The lower court had ordered that its charter be forfeited, but this court, although fully concurring with the judge below that the appellant had exceeded its powers, decided that it should be permitted to continue, and either resort to the appropriate jurisdiction to adjust and wind up its insurance business, or amend its charter under sections 17 and 38 of article 23 of the Code, and bring itself within the provisions of the insurance laws of the state. That case was decided on the 21st day of June, 1893; and five days afterwards the charter was amended by the articles of June, 1893, above referred to. Chapter 295 of the Laws of 1894 having been passed, another amendment to the charter was adopted in 1895, as above stated. After the passage of the act of 1894, some of the members of the appellant filed a bill alleging that it was insolvent, charging fraud in the management

of its affairs, and claiming that the whole scheme of the corporation has been changed, in violation of the rights of the complainants. *Barton v. Fraternal Alliance*, 85 Md. 14, 36 Atl. 658. In that case we said: "A corporation of this character is clearly within the terms of the act of 1894, c. 295. Its charter authorizes it to be, and it is, a fraternal beneficial association, operating on the lodge system, and carried on for the sole benefit of its beneficiaries." The relief prayed for was refused because, under our construction of section 143e of chapter 295 of the Laws of 1894, we were confined to the single question whether or not the corporation was insolvent, and that it was not shown to be. It has thus been determined by this court that this appellant could unite the insurance business with the original purposes of its charter, by a proper amendment, and that the act of 1894 was applicable to it. Let us, then, see whether it has violated its charter in any of the particulars alleged in the petition.

One of the most serious and important charges is that embodied in paragraph 7, wherein it is alleged that the appellant is unlawfully issuing policies for more than \$1,000 on any one life. The answer admits that it had issued, in all, 59 policies, for amounts ranging from \$1,250 to \$5,000, and that it still had in force 31 of them, but it denies that it is a violation of its charter. The charter, as amended in 1895, provides for a corporation "for social or fraternal beneficial purposes, or both," and "to grant and issue insurance or benefits upon the lives of individuals of both sexes, as provided in section 127, art. 23, of the Code, and as provided in section 143e," etc. The language used in stating the purposes of the organization, as to the social or fraternal beneficial feature, is the same as that in the charter of 1889, which was before this court in 77 Md., 26 Atl. It was distinctly held in that case that the appellant was not authorized to issue the policies then being considered, which were those in the Golden Cycle class, because it was thereby conducting an insurance business, which its charter did not empower it to do; and it would seem to follow as a necessary consequence of that decision that it cannot now, under that branch of its charter, issue policies either of the Golden Cycle class, or of the other classes in the record; the latter being clearly as much subject to the insurance law of the state as the former. Prior to the passage of chapter 295 of the Acts of 1894, the only possible excuse for the appellant's issuing any policies of insurance was by virtue of section 127 of article 23 of the Code, "and the other sections of said article applicable to such mutual, assessment or co-operative insurance," as its charter of 1893 expressly relied on them for such power. That section provided for imposing penalties on those who fail to comply with the insurance laws, and defined what was to be deemed a life insurance company, within the meaning of

article 23, but provided that the business might be conducted on the mutual or co-operative plan, on the terms therein set out. Section 128, as amended by chapter 488 of the Laws of 1892, provided "that organizations, as described in section 127, other than fraternal orders issuing certificates for the payment of money or other benefits in the event of sickness, accident, or death, or other contingency, either to the member, policy or certificate holder," etc., but issuing no certificates for the payment of a greater sum than \$1,000 upon one life, could be formed either on the mutual, co-operative, assessment, or stock plan, and, if on the latter, should have a paid-up capital of at least \$10,000, and required every such company to keep the sum of \$10,000, in money or securities, with the insurance commissioner. The appellant fixed its capital stock at \$10,000, and alleges in its answer that it has deposited \$10,000 with the insurance commissioner, although we suppose, from the connection, it meant to say that the deposit had been made under chapter 295 of the Acts of 1894. Section 128 was further amended by chapter 256 of the Acts of 1894, and in that amendment it omits the words "other than fraternal orders," but continues the provisions as to stock, and requires all such companies, whether formed on the mutual, co-operative, assessment, or stock plan to keep \$10,000 on deposit with the insurance commissioner, and still limits the certificates to \$1,000 upon any one life. The amendment of 1895 provided for issuing insurance or benefits upon the lives of individuals of both sexes, as provided in section 127 and section 143e, subject to the supervision of, and the making of reports and the payment of fees to, the insurance commissioner, under chapter 295 of the Laws of 1894. Section 143e does not provide for the formation of corporations, but it does provide for the corporations, etc., therein described, continuing business under the provisions governing fraternal beneficiary societies, orders, or associations, on the condition that each shall deposit the sum of \$10,000, in dividend-bearing securities, with the insurance commissioner, as a guaranty of the payment of certificates issued by it. The certificates therein referred to are such as fraternal beneficiary associations issue, and not insurance policies, such as those in the record are. The latter are of the character that co-operative assessment associations issue. This corporation could not issue such policies of insurance, as a fraternal beneficiary society. It was decided in 77 Md., 26 Atl., that it must become an insurance company, in order to do so; and the act of 1894 did not aid it in that respect. It did become an insurance company, and, although it amended its charter, and, in terms, referred to section 143e, etc., it cannot escape from the requirements and limitations of the insurance laws by such means. It is evident that the legislature did not intend, by the provisions in section 143e,

to authorize a corporation to issue such policies as the court had said could only be issued by insurance companies; and, if there were any doubt on that question, section 143r ought to remove it. It says that "any association entitled to do business in this state under the provisions of section 143e to section 143r (both inclusive) of this article, which shall so conduct its affairs, or shall in any manner change its charter, constitution or laws, so that it shall not answer to the description of a fraternal beneficiary association, as set forth in section 143e, shall thereupon cease to be entitled to the privilege of said section." It cannot be said that a corporation having a capital stock, and issuing policies such as these, is then acting "for the sole benefit of its members, and their beneficiaries, and not for profit" (the description of a fraternal beneficiary association set forth in section 143e); and hence it cannot issue these policies, under that section, and, if it attempts to do so, it ceases to be entitled to the privileges of it. When the appellant became an insurance company, it made itself subject to all the provisions of article 23 applicable to life insurance companies, excepting so far as it brought itself within some of the exemptions. By section 116, every life insurance company incorporated under that article is required to have a guaranty capital of not less than \$100,000 to be invested in securities, which shall be deposited in the treasury of the state as a guaranty for the payment of the policies issued by it; and sections 112 and 136 provide that the capital stock, excepting mutual companies, shall not be less than \$100,000. It was doubtless to avoid these requirements that section 127 was referred to in appellant's charter. Section 128, as we have seen, authorizes the formation of organizations as described in section 127, with a capital of \$10,000, and a deposit of \$10,000, but it is upon the express condition that no policy should issue upon any one life for more than \$1,000. The appellant is therefore not authorized to issue such policies as those in the record for more than that amount on any one life, and has violated its charter by doing so. Indeed, so far as we can gather from the answer, it would appear that only one sum of \$10,000 had been deposited with the commissioner, and that under the act of 1894; but, as that is not clear, we have assumed, for the purposes of the discussion, that it had made the deposit under the insurance branch of its charter, as well as under the act of 1894.

We do not deem it necessary to discuss at length the question, which occupies considerable space in the very able brief of the appellant's attorneys, whether, under our laws, there can be a "double incorporation" for such purposes as those named in the appellant's charter. It is proper to say that we do not understand, as contended in that brief, that the learned judge below decided that question in the negative, but, on the contrary,

he did not pass on it. He did hold, however, and very properly so, "that, where the law attaches certain conditions and limitations to the exercise of any given corporate purposes, those conditions and limitations cannot be destroyed or subverted by combining such purpose with some other, under one corporation. If the two cannot be united in a joint prosecution, their administration must, at least, be kept separate. The statute will not permit the evasion or abrogation of prescribed requisites and conditions by a scheme of combination." So, although it may be that one corporation can, as a fraternal beneficiary association, carry on a certain part of its business "for the sole benefit of its members and their beneficiaries, and not for profit," and can, as an insurance company, conduct another part of its business for the benefit of its stockholders, yet it is impossible that the business of two such classes can be so blended as not to be separable; for, if that be done, it can no longer be for the sole benefit of its members. Assuming that the appellant could issue certificates of the kind contemplated in chapter 296 of the Laws of 1894, for such sums as it saw proper, it cannot issue insurance policies for any amount under that law, and under the insurance law is limited to \$1,000. If there be profits in the insurance business, are the stockholders, exclusively, or all the members, to share in them? Undoubtedly the former would be the case, unless there be some express provision in the charter or by-laws to make it otherwise. It is true there are some by-laws of the appellant which apparently vest the control in the hands of the members, to some extent, at least, but there is in the book of the by-laws adopted in 1896 a note which states that certain by-laws of 1895 are to remain in force. Among them is article 7 of part 2, which says, "The stockholders may at any special or annual meeting exercise all or any of the powers conferred upon this corporation by the public general laws of the state of Maryland, anything to the contrary in these by-laws notwithstanding," etc. It is not necessary to enumerate the powers stockholders have under our general incorporation laws in corporations having capital stock. We find no provision in the charter or by-laws requiring the members to be stockholders, and it would, of course, be impracticable, as there are only 100 shares of stock. The "members," as they are called, are at the mercy of the stockholders, and the business is conducted for the pecuniary benefit of the latter, so far as we can see from the by-laws and the conduct of the business; and, notwithstanding the space given in the charter and the by-laws to the regulations and provisions of the social or fraternal features of the alliance, the conclusion is irresistible that it is in reality a life insurance company, and is seeking to relieve itself of some of the burdens imposed on corporations of that character, for the protection of the public, by assuming the guise of a fraternal beneficiary society. Its answer, and article 6 of part 2

of the by-laws, show that it is engaged in issuing and offering policies to the amount of \$5,000, while it has no authority to issue them in a larger amount than \$1,000 on any one life, even if it has made the deposit as required by section 128 of article 23. But it is urged in its behalf that it was innocent of any intentional violation of the law, and therefore its charter should not be forfeited. This court has previously been called upon to deal leniently with it, and, although legal cause was shown for the forfeiture of its charter, yet, being of opinion that the public interest did not then demand it, we permitted it to continue its existence. But it would be going very far, when we for the second time have found that it was exceeding its charter powers, to again grant it such indulgence. That it has abused and misused its corporate powers by issuing policies in sums in excess of \$1,000, we have no doubt. It is true that section 263 of article 23 authorizes proceedings to restrain a corporation from assuming or exercising any franchise, liberty, or privilege, or transacting any business, not allowed by the charter, but that does not exclude other proceedings; and in this instance, in the exercise of them there have been both an abuse and a misuse of its corporate powers by the appellant. When a company is authorized to insure under provisions that expressly limit the amount of the policies to be issued, and it deliberately exceeds that amount, it clearly abuses and misuses the powers vested in it. It is no longer safe to permit it to continue to exercise even the powers that were authorized. Nor can we doubt that there has been a deliberate attempt to evade the insurance laws of the state, and that, too, in one of its most important provisions. There are so many schemes to catch the unwary, and so many inducements offered to attract people, especially those of limited means, desirous of making some provision for those dependent upon them, that it is of the utmost importance that all corporations, organizations, and individuals that engage in life insurance be made to understand that they must at least obey the laws of the state, and that no evasion of them will be tolerated. This is necessary for the protection of the public, as well as those conducting their business in accordance with law.

It is not necessary that we should discuss the other grounds relied on by the state, as we are of opinion that those already referred to are sufficient to require us to affirm the order of the court below. Order affirmed, with costs.

(70 Conn. 420)

MOREHOUSE v. MOREHOUSE.

(Supreme Court of Errors of Connecticut.
March 2, 1898.)

DIVORCE—STATUTORY RESIDENCE—INTOLERABLE CRUELTY—REBUTTAL—RECEPTION OF EVIDENCE—OBJECTION TO PLEADING—WAIVER—CONCLUSIONS OF FACT.

1. Where a husband and wife come into the state with intent to make a permanent home,

the fact that they spend their winters in New York is not inconsistent with their continued residence in the state, within Gen. St. § 280a, requiring plaintiff in a divorce suit to have "continuously resided in the state three years next before the date of the complaint."

2. In a divorce suit, it appeared that defendant, knowing that his wife was affected with heart trouble, which his conduct would aggravate, frequently appeared before her intoxicated, used vulgar language, and made vile and unfounded charges against her; that his conduct often made her ill, a result which he knew would follow; that, while affected with an infectious disease, he solicited intercourse, while his wife was ignorant of his condition, and communicated to her the disease, from which she suffered for months; that afterwards, while still having this disease, he solicited intercourse with her, and, on her refusal, attempted to accomplish his purpose with violence; and that plaintiff was made seriously and dangerously ill. *Held*, that the acts constituted "intolerable cruelty,"—a statutory ground for divorce a vinculo.

3. A husband, defendant in a divorce suit, had on cross-examination denied having any business relations with one C., whom he had charged on the trial with having improper relations with plaintiff, and denied having made to C. certain admissions as to his own conduct towards plaintiff. Plaintiff produced C., in rebuttal, to contradict defendant, and prove defendant's admissions. *Held*, that C.'s testimony was admissible for such purpose.

4. If C.'s testimony should be regarded as strictly evidence in chief, its admission in rebuttal was not an abuse of discretion.

5. Where a decree for plaintiff wife is granted on the ground of defendant's intolerable cruelty, the admission of immaterial evidence as to interviews, after plaintiff left defendant, between plaintiff and a person whom defendant had charged on the trial with having had improper relations with plaintiff, is without prejudice to defendant.

6. In a divorce suit begun by a wife, where the answer charges plaintiff with adultery, and there is a trial and judgment for plaintiff, the objection that the record does not show a formal denial of the charge of adultery cannot be first raised on appeal.

7. Such objection is waived on the trial by treating the allegation as denied, and offering evidence to prove it.

8. Errors claimed to have been made by the trial court, in finding from the evidence its conclusions of fact, cannot be considered by the appellate court.

Appeal from superior court, Litchfield county; Ralph Wheeler, Judge.

Suit by Minnie C. Morehouse against Joseph J. Morehouse for a divorce. Tried to the court. Facts found and judgment rendered for the plaintiff, and appeal by defendant for alleged errors in the rulings of the court. The defendant also filed a motion to correct the finding. No error.

The complaint alleged three grounds of divorce: Adultery, habitual intemperance, and intolerable cruelty. The answer denied the main allegations of the complaint, and alleged that the plaintiff had committed adultery. In the judgment the court finds: "(1) That the plaintiff has resided in the state of Connecticut continuously for three years before the date of this complaint; (2) the plaintiff, by the name of Minnie C. Burchard, was lawfully married to the defendant on the 28th day of June, 1883; (3) that the defendant on divers days between April 1, 1892, and the date of this complaint has been guilty of intolerable

cruelty to the plaintiff,"—and thereupon adjudges a divorce. The special facts on which the judgment is founded are found as follows: "(1) The plaintiff and defendant intermarried at Danbury, in this state, on June 28, 1883. (2) They have no children. (3) Shortly after their marriage they went to Chatham, New York, to live, and remained there until June, 1890, when they came to Connecticut, where they intended to, and did, make their home and residence, and where they have ever since resided. From said Chatham they came to Salisbury, in this state, and boarded at the Maple Shade Hotel until August 10, 1891, when they moved into their own home, which had been in the meantime built, in the village of Chapinville, in said Salisbury; and both resided there until February 26, 1896, with the intention of making it their home indefinitely, when the plaintiff left the defendant, for the reasons hereinafter stated, and returned to said Danbury, her native place, where she has ever since remained. The defendant has continued his home and residence at said Chapinville, and still resides there. In 1890 the defendant became connected with the Landon Iron Company, having a furnace in Chapinville. Since 1889 the defendant has been connected with a number of other corporations, doing business in different localities, and has had an office in New York City. The plaintiff and defendant, while living together and having their home in Chapinville, passed a portion of each year, from December 1st to May 1st following, in New York, where they occupied a leased flat. (4) I find that the plaintiff and defendant have each continuously resided in this state as aforesaid since June, 1890. (5) While I do not find that the defendant was habitually intemperate, within the meaning of our statute, I do find that he was habitually addicted to the use of intoxicating liquor in large quantities, and at times drank to excess, usually at home, and out of business hours, and under such circumstances as to cause the plaintiff mortification and suffering. The plaintiff used such liquors moderately, in a social way, and at table with him. (6) This habit of drinking grew upon him, and was more marked during the last few years of their married life, and was to a considerable extent the cause of his conduct and treatment of her hereinafter found. (7) Her remonstrances in respect to his habits were of no avail. He persisted in them, well knowing the consequences, and fully aware of the effect upon her of his conduct and treatment, so caused. (8) In 1891 or 1892 the plaintiff became affected with a heart trouble, functional in its nature, which continued thereafter as long as she lived with him, and which was often seriously aggravated by his abuse and ill treatment of her. (9) The plaintiff is a lady of culture and refinement. (10) The defendant, when under the influence of liquor, as he very frequently was, was vulgar, profane, brutal, and jealous. (11) When under

the influence of liquor, he frequently, and particularly during the last three years of their married life, used towards his wife, and in her presence, violent, abusive, profane, and obscene language, was persistently unkind to her, and on several occasions falsely accused her of being unchaste and unfaithful to him. (12) When sober the defendant was not jealous of his wife, and had perfect faith in her innocence and fidelity. (13) The plaintiff has always been a faithful wife. (14) The defendant was fully aware of the nature and extent of his wife's heart trouble, and well knew that his ill treatment of her would aggravate it, and make her seriously ill. (15) Still he continued to humiliate her by his vulgar and profane language, abused her shamefully, with vile and unfounded charges, and at times resorted to brutal violence, when she was ill, and he knew it, thereby knowingly aggravating her illness. On very many occasions his ill treatment made her ill,—a result which he knew would follow such treatment. (16) The defendant has a slight, congenital phimosis,—a fact which he concealed from his wife while they lived together. (17) In 1891, by reason of neglect and uncleanness on his part, he had from this cause an attack of acute balanitis, with some complications; and from that time on, and particularly and almost constantly in 1895 and in 1896, until she left him, he had recurring attacks of the same disease, due to the same causes, and in an aggravated form, with considerable inflammation and copious discharge, notwithstanding the fact that he was under medical treatment for the disease. (18) The radical cure for phimosis, which was advised by his physicians, is circumcision,—a simple and speedy method, and one causing the patient little pain and annoyance. (19) Ordinary care and cleanliness of person would have avoided these attacks of balanitis. (20) This disease was infectious, and could be communicated to his wife by intercourse, and he well knew it. (21) In June, 1895, while he had this disease, and he knew it, and his wife did not know it, he had intercourse with her, at his own solicitation, and communicated to her the disease, resulting in acute urethritis and vaginitis, and later in chronic catarrhal endometritis, which disease caused her great fright and fear, and intense and long-continued suffering, and very seriously impaired her health. She was necessarily subjected to medical treatment for months, and was not cured of the last-named disease until after she left him. (22) After the defendant communicated to the plaintiff, in June, 1895, the disease aforesaid, and she became aware of the fact, as she did almost immediately, she did not cohabit with him, or permit him to have intercourse with her, although he frequently solicited intercourse, notwithstanding the fact that he then had the same disease, and she was still suffering from the disease communicated to her by him as stated, all of which he well knew. During a part of this time she occupied the same bed

with him. (23) In February, 1896, he came home from a business trip in an intoxicated condition, still having this disease, and solicited intercourse with her, and, on her refusal, insisted, and attempted to accomplish his purpose with actual violence. He took hold of her throat with one hand, and held her down on the bed with the other, and only desisted from further violence when the plaintiff threatened to call for help. (24) As the result of this treatment the plaintiff was made ill for some days. She had a nervous chill, and was very sick all night. (25) In November, 1895, the plaintiff had been ill for some time because of his ill treatment. When she was so ill, he abused her all night long, with profane and violent language, so that she had no sleep whatsoever. On the following morning he continued his abuse, and went to her bed where she lay, raised up with pillows, took hold of her shoulders, and violently pushed her over on the bed, saying that he wished he could never see her face again; he hoped that she would lie there and suffer until her eyes dropped out,—at the same time using very profane language. He also at that time accused her of being untrue to him in many instances, and said that she was diseased, and that he hoped that he would never see her again. (26) As the result of this treatment the plaintiff was made seriously and dangerously ill; had bad fainting spells all that day, and for two days thereafter; and her condition became most serious, and her life was endangered. Her illness thus caused continued for a long time, and she had not recovered from it, and the effects of his ill treatment last mentioned, at the time she left him. (27) The defendant was well aware of the necessary result of all of his conduct and ill treatment aforesaid, and well knew that her health would be most seriously endangered thereby. (28) The defendant's treatment of the plaintiff became and was intolerable; and on February 26, 1896, she left him, under just apprehension of great danger to her life, health, and person. (29) The allegation in said complaint that the defendant on divers days between April 1, 1892, and the date of the writ, has been guilty of intolerable cruelty to the plaintiff, is found to have been fully proved. (30) The allegation contained in the third paragraph of the defendant's answer is found to have been disproved. (31) The allegations of habitual intemperance and adultery contained in the plaintiff's complaint are not proved, as grounds of divorce. (32) Upon the foregoing facts the defendant claimed, as matters of law, that the acts of the defendant did not constitute intolerable cruelty, within the meaning of the law, and that the facts do not constitute residence for either plaintiff or defendant within this state, as required by the statute, and that the plaintiff had not resided in the state of Connecticut continuously the length of time required by the statute to entitle her to maintain this action. (33) The court overruled such claim,

and held and decided that such acts did constitute intolerable cruelty, under the law, and that the parties had resided within the state the requisite length of time. (33½) The defendant's counsel also claimed that the plaintiff's residence had been and was that of the defendant, who resided in the city, county, and state of New York. The court found as a fact that the defendant had resided in this state continuously from August 10, 1891, to the day of trial, and also found and held that the plaintiff had also so resided with the defendant. (34) Thereupon the court rendered judgment granting to the plaintiff a divorce on the ground of intolerable cruelty, with change of name, as prayed for."

Upon the trial the defendant charged one Herbert N. Curtis with having improper relations with his wife, and upon cross-examination denied having any business relations with Curtis since January, 1895, and denied having made certain admissions as to his own conduct to his wife. The plaintiff produced Curtis, in rebuttal, for the purpose of contradicting the defendant, and for the purpose of proving the defendant's admissions as to his habits and ill treatment of his wife. To this evidence, counsel for the defendant objected on the ground the statements of the defendant sought to be contradicted were made on cross-examination, and that the plaintiff had made the defendant her own witness. The evidence was admitted, and the defendant excepted. The witness Curtis was also offered in rebuttal for the purpose of proving the time, place, and circumstances of each interview he had had with the plaintiff since she left her husband. This evidence was objected to and admitted. The defendant excepted. The appeal contains numerous objections to the facts found by the trial court, and assigns errors in law in the rulings of the court that the facts found established "continuous residence," and that the facts found established "intolerable cruelty," and in the admission of testimony.

Donald T. Warner and Leonard J. Nickerson, for appellant. Samuel Tweedy and Eugene C. Dempsey, for appellee.

HAMERSLEY, J. The plaintiff and defendant have lived in this state since June, 1890. The court finds that when they came to Connecticut they intended to make their home here. There is nothing in the evidence certified at request of both parties to indicate that this finding violates any principle of law. Having made this state their home, the fact of spending their winters in the city of New York is not inconsistent with their continued residence here; and the court did not err in finding that the plaintiff had, as required by statute, "continuously resided in this state three years next before the date of the complaint." Gen. St. § 2806.

The defendant claims that the facts found by the court do not constitute "intolerable cruelty." When our legislature, in 1843, adopted as ground of divorce a vinculo "habitual intemperance" and "intolerable cruelty," it used these words with their ordinary meaning, but with special

reference to what had been since 1639 our settled policy in respect to divorce; i. e. marriage is a life status, and should never be dissolved unless one of the parties is guilty of conduct which in itself is a practical annulling and repudiation of the marriage covenant. Willful desertion for such a length of time as the statute says shall conclusively prove a permanent abandonment and repudiation of all marital rights and duties had been a ground for divorce. Following this analogy, the legislature in 1843 made grounds of divorce: Intemperance so long continued that the fixed habit renders the party incapable of performing the duties of the marriage relation; and cruelty of such a nature as to be intolerable, and to render a continuance of the relation by the suffering victim impracticable. *Dennis v. Dennis*, 68 Conn. 186, 192, 36 Atl. 34. Mere faults of temper and of manner do not constitute such cruelty. There are disagreeablenesses and trials, causing much weariness and suffering, which parties to the marriage contract must bear. The policy of the state, as well as the sacred nature of the marriage covenant, requires patient endurance. But there are injuries and insults which are outside the pale of that covenant, submission to which was never contemplated, and which are not to be borne. No complete definition can be given, because the exhibitions of cruelty cannot be forecast. In the present case it appears that the defendant illtreated his wife, a lady of culture and refinement. Knowing that she was affected with a heart trouble, and that his conduct would aggravate it, he frequently appeared before her in an intoxicated condition, humiliated her by his vulgar and profane language, and abused her with vile and unfounded charges. On many occasions his conduct made her ill,—a result which he knew would follow such treatment. While affected with an infectious disease, which he knew could be communicated to his wife by intercourse, he solicited intercourse (she being ignorant of his condition), and communicated to her the disease, from the effect of which she suffered for months. Afterwards, while still having this disease, he solicited intercourse with her, and, on her refusal, insisted, and attempted to accomplish his purpose with actual violence. As a result of the defendant's treatment of her, the plaintiff was made seriously and dangerously ill. This is intolerable cruelty. The mere statement of such conduct demonstrates its character. *Mayhew v. Mayhew*, 61 Conn. 233, 23 Atl. 966; *Brown v. Brown*, L. R. 1 Prob. & Div. 46; *Kelly v. Kelly*, L. R. 2 Prob. & Div. 31.

The testimony of the witness Curtis relative to conversations with the defendant was admissible for the purposes for which it was offered. If it should be regarded as strictly evidence in chief, its admission in rebuttal was a matter of discretion, and the discretion was not abused. It is difficult, from the record, to see how the testimony of Curtis as to his interviews with the plaintiff after she had left her husband was material. The evidence given, however, could not have injured the defendant.

The defendant claims in argument that the judgment is erroneous because the record does not show a formal denial of the allegation in his answer charging the plaintiff with adultery; that the allegation is therefore admitted, and constitutes a bar to the action. This claim was not made in the court below, and is not distinctly specified in the reasons of appeal. The allegation was treated by the parties upon the trial as denied. Evidence tending to prove it was offered by the defendant, and contradicted by the plaintiff, and it is found by the court to have been disproved. Moreover, by going into any trial the defendant treated the allegation as denied. If, as he now claims, the adultery of the plaintiff was admitted upon the record, he was entitled to a judgment without trial. He is estopped from now making this claim.

The errors claimed to have been made by the trial court in finding from the evidence its conclusions of fact cannot be considered. *Thresher v. Dyer*, 69 Conn. 404, 408, 37 Atl. 979. There is no error in the judgment of the superior court. The other judges concurred.

(20 R. I. 394)

HOPKINS, Overseer of the Poor, v. HOWARD.

(Supreme Court of Rhode Island. Feb. 21, 1898.)

SPENDTHRIFTS—APPOINTMENT OF GUARDIAN—PROOF.

1. Under Gen. Laws, c. 196, § 7, in a proceeding to have a guardian appointed to take charge of a person's property, it is necessary that the jury find that she was lacking in discretion in managing her estate, and is thereby liable to become a public charge, in order to warrant such appointment.

2. A petition for the appointment of a guardian over a person and her property, on the ground that she was lacking in discretion in managing her estate, will be denied, where there is nothing to show she is wasteful or extravagant, although she was somewhat eccentric in some transactions.

3. Acts of a person over whom a guardian is sought to be appointed, which happened 10 years previous, are too remote.

Petition by Leander Hopkins, as overseer of the poor, against Abbie J. Howard, for the appointment of a guardian to manage her estate. From a decree granting the petition, defendant petitions for a new trial. Granted.

Edward C. Dubois and Henry J. Dubois, for appellants. F. P. Owen, for appellee.

TILLINGHAST, J. The verdict in this case is fatally defective. The jury found, in the first place, that the respondent, at the time of the filing of the petition in the probate court, "was not of sound mind," which finding was not responsive to any issue raised, and was wholly without evidence to support it. They found, in the second place, that the respondent "was lacking in discretion in managing her estate," which finding is only responsive in part to the issue raised. The allegation in the petition is that the defendant, "from want of discretion in managing

her estate, is likely to bring herself and family to want, and to render herself and family chargeable upon the town of Scituate." Of course, the mere fact, as found by the jury, that she was lacking in discretion in the management of her estate, is not enough to warrant the appointment of a guardian at the instance of the overseer of the poor of the town. It must also appear that, by reason of such want of discretion, she is likely to become a public charge thereon, as alleged in the petition. Gen. Laws R. I. c. 196, § 7. Indeed, this allegation is practically the only thing that gives the petitioner any standing in court.

As the case must go back for a new trial, we will suggest that we think the evidence as reported falls far short of making out a case for the appointment of a guardian in any event. It shows that the respondent is possessed in her own right of unincumbered real estate of the value of \$1,000 or more; that there is some money belonging to her in the hands of her trustee, appointed by this court, Henry J. Dubois, Esq.; and that her property has not materially depreciated in amount during the last five years or more, although she has not only supported herself out of it, but also her husband, who has been sick and disabled during a large part of this time. It also appears, by the evidence and by the admission of the petitioner, that respondent is about to receive a legacy of a considerable sum from a deceased relative. The proof as to respondent's indiscretion in the managing of her estate consists mainly of the most ordinary, and in many cases the most trivial, expenditures, such, for example, as spending all the money she had at a given time (in many instances not more than 50 cents or a dollar) for sugar, tea, butter, or some other article of everyday use in a family; that she occasionally expressed a desire to buy calicoes, fancy boxes, and candles, especially at Christmas time, and sometimes asked to have articles of small value put aside for her until she could pay for them; that she occasionally bought a glass of soda or a few cents' worth of candy; and that at one time she bought a wagon by bargain for her use, for which she agreed to pay \$65 (at fair price, according to the evidence), but, being unable to pay more than \$30, she finally lost the wagon, it having been purchased on a "loan agreement," so called. It further appears that she occasionally bought eight or ten pounds of beef at a time for her family, which consisted of her husband, herself, and a boarder, spending all the money she had with her in that way; and that she sometimes bought shoes and other articles of ordinary necessity, and had them put aside for her until she could pay for them. Many similar transactions of various kinds are detailed at great length in the evidence, which simply go to show that the respondent was poor, and had the use of very little money; and, while it appears that

she is somewhat eccentric in some of her transactions, yet there is nothing to show that she is wasteful or extravagant, and no such evidence that she is likely to become a public charge from want of discretion in managing her estate as to warrant the court in placing her under guardianship.

As to the evidence offered by the petitioner for the purpose of showing that the respondent, 10 years ago or more, improvidently spent quite a portion of a legacy of about \$4,000 which she received, we think the court properly ruled at first that it was too remote, quoting from Smith, Prob. Law (5th Ed.) 121, in support of said ruling, as follows: "Acts of the person complained of [that is, the person over whom it is sought to appoint a guardian] at or near the time of making the complaint may be proved for the purpose of showing the state of his mind and his manner of life, but not his acts at a remote period." It seems, however, that this ruling was subsequently modified in so far as to permit the petitioner, against respondent's objection, to show how much money she received from said legacy, and also that she drew the larger part of it out of the bank within a few months thereafter. What disposition she made of the money, however, except that she spent about \$1,000 thereof in the purchase of a house, and deposited \$700 thereof with Mr. Dubois, her trustee, does not appear; the court ruling that, while the petitioner could show that she received the money, he could not show what disposition she made of it, except in so far as the statements of her trustee showed that fact. The respondent duly excepted to the ruling. This evidence was permitted to be used in argument by petitioner's counsel, against the objection of respondent, for the purpose of showing that she was incompetent to manage her estate; and it was also commented upon by the presiding justice, in his charge to the jury, as competent evidence for them to consider in determining whether a guardian should be appointed. The respondent duly excepted to the argument of counsel, in this regard claiming that the jury had no right to consider that part of the evidence. We think the exceptions were well taken; for while it rests largely in the discretion of the trial court to determine how far back the petitioner may go in cases of this sort, and while in this case we cannot say that the court might not properly have allowed the petitioner to go further back than two years, which was the limit fixed by it at first, yet we think that evidence of the respondent's financial condition ten years ago and more was too remote to have any bearing on the case. But, even conceding that it was admissible, yet there is nothing to show that respondent wasted or dissipated the money received at that time, as it was argued by petitioner's counsel that there was, and as suggested by the court in its charge to the jury. For aught that appears,

she may have lost it, as very many others have lost their money, by misfortune or bad investments. At any rate, the jury were not warranted, from anything that appears in the evidence, in finding that the respondent wasted or even improvidently used the money which she received from said legacy. Moreover, if evidence was admissible as to the receipt of said legacy, the manner in which it was used by the respondent was, of course, admissible also, for otherwise the jury might draw an unwarranted inference therefrom. Petition for new trial granted.

(20 R. I. 393)

ANGELL v. LEWIS.

(Supreme Court of Rhode Island. Feb. 11, 1898.)

HIGHWAYS—DRIVING ON WRONG SIDE—COLLISION—VERDICT—PRESUMPTION.

1. Plaintiff's wife was driving on the right-hand side of the road, and, meeting two teams, turned still further to the right to let them pass. As she was passing them, defendant, who was immediately behind them, turned out to the left, and collided with plaintiff's wife. It was dark at the time, and a team could not be seen at any great distance, and defendant did not see plaintiff's team until it was too late to avoid the accident. The teams in front of defendant were traveling at the rate of eight or nine miles an hour. *Held*, that a verdict for defendant was against the evidence.

2. One who drives on the wrong side of a road is required to use greater care than if he was on the right side; and, if a collision takes place under such circumstances, the presumption is against him.

Action by Byron Angell against Edward P. Lewis to recover damages caused by defendant's negligence in colliding with plaintiff's team. From a judgment for defendant, plaintiff petitions for a new trial. Granted.

A. J. Cushing, for plaintiff. Cooke & Angell, for defendant.

TILLINGHAIST, J. The evidence shows that on January 3, 1897, between 5 and 6 o'clock p. m., the plaintiff's wife, together with her hired girl, while driving from her home at Fruit Hill towards Centerdale, in North Providence, in the plaintiff's team, which consisted of a horse and top buggy, met with an accident in the following manner: The plaintiff's wife, while driving along on the right-hand side of the road, saw two teams coming towards her from the opposite direction, and seasonably turned out still further towards the right, to allow them to pass. As she was passing them, the defendant, who was in his team,—a two-wheeled village cart,—immediately in the rear of said teams, and coming in the same direction, instead of keeping behind them, suddenly turned out to his left, and, in attempting to pass said teams, ran into the plaintiff's team, and caused the damage to recover which this suit is brought. It was dark and foggy at the time of the accident, and a team could not be seen at any considerable distance. The de-

fendant admits that there were two teams ahead of him; that he turned out to his left to go by them; and that, as he turned out, he met and collided with the plaintiff's team, which he did not see until he started to go by the others, when it was too late to avoid the collision. He also admits that when he pulled out to pass the teams ahead of him he was not thinking that some one might be coming towards him on the other side of the road. The road where the accident happened was practically level, and was 37½ feet in width, 25 feet of which, at least, could be safely used for carriages. The teams in front of defendant were traveling, according to the testimony of the persons driving the same, at the rate of eight or nine miles per hour, when defendant attempted to pass them; and the evidence is pretty clear that defendant was driving at a rapid pace when he attempted to pass the other teams.

These being the material facts in the case, the verdict of the jury, which was for the defendant, was clearly against the evidence, and ought to be set aside. Gen. Laws R. I. c. 74, § 1, provides that "every person traveling with any carriage or other vehicle, who shall meet any other person so travelling on any highway or bridge, shall seasonably drive his carriage or vehicle to the right of the centre of the traveled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption." The evidence shows that the plaintiff's wife complied with this requirement on meeting the two teams aforesaid, and that she was in the act of passing them safely, when the defendant suddenly pulled his team to the left, and collided with hers. In thus taking the wrong side of the road, the defendant took the risk of the consequences which might arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injuries sustained by the latter while exercising ordinary care. In other words, one who violates the "law of the road" by driving on the wrong side assumes the risk of such an experiment, and is required to use greater care than if he had kept on the right side of the road; and, if a collision takes place in such circumstances, the presumption is against the party who is on the wrong side. And this is especially true where the collision takes place in the dark. *Cruden v. Fentham*, 2 Esp. 686; *Shear. & R. Neg.* (4th Ed.) § 651; *Elliot, Roads & S.* 620, and cases cited in notes 5-7; *Chaplin v. Hawes*, 3 Car. & P. 554. In *Brooks v. Hart*, 14 N. H. 811, the court say: "It is legal negligence in any one to occupy the half of the way appropriated by law to others having occasion to use it in traveling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause." To the same effect are *Wilson v. Manufacturing Co.*, 2 Har. (Del.) 70, and *Fales v. Dearborn*, 1 Pick. 345. See, also, 12 Am. &

Eng. Enc. Law, 957-960, and cases; *Kenard v. Burton*, 25 Me. 39. The plaintiff's wife had the right to presume that the driver of any team coming in the opposite direction would duly observe the law of the road as she herself was doing (*Wood v. Luscomb*, 23 Wis. 291), and hence she was not called upon to exercise that degree of care which devolved upon the defendant when taking the wrong side of the road (*Pluckwell v. Wilson*, 5 Car. & P. 375). Of course, if plaintiff's wife had discovered the defendant's team in time to have avoided the collision by stopping or otherwise, it would have been her duty to do so, notwithstanding the fact that defendant was guilty of negligence in violating the law of the road. *O'Malley v. Dorn*, 7 Wis. 236; *Cooley*, Torts, 66, 67. But it is very clear from the testimony that she did not see defendant's team until it was too late to avoid the collision, and hence that she was not in fault regarding the accident. Petition for new trial granted, the same to be had on the question of damages only.

(69 N. H. 77)

IONA SAV. BANK v. BOYNTON.

(Supreme Court of New Hampshire. Belknap. March 12, 1897.)

HUSBAND AND WIFE—WIFE'S CONTRACT FOR HUSBAND'S BENEFIT—LEGALITY.

The statute, providing that no undertaking by a married woman for her husband shall be binding upon her, does not preclude the wife from binding herself by a note given to obtain money with intent to let her husband use it.

Exceptions from Belknap county.

Assumpsit by the Iona Savings Bank against Mary E. Boynton on a promissory note. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled.

Assumpsit on the promissory note of the defendant, a married woman. Facts found by the court. The note was signed by the defendant at the request of her husband, who told her he needed the money. She signed the note to help her husband in his business, and authorized him to secure its discount and dispose of the proceeds. The defendant's husband applied to the plaintiff for a loan of \$5,000, with 60 shares of the capital stock of the Tilton Hosiery Company as collateral. It declined to make the loan, but told him that, if his wife desired to borrow that amount with the same security, the loan would be made. Shortly afterwards he brought to the bank the note in suit, with the collateral above named, and received the amount of the plaintiff. He deposited the avails in the Citizens' National Bank to the credit of the Tilton Hosiery Company, of which he was treasurer. The defendant never met or had any talk with any officer of the bank relative to the loan. Upon the foregoing facts the court found a verdict for the plaintiff for the amount due on the note, and the defendant excepted.

W. B. Fellows and E. B. S. Sanborn, for plaintiff. W. D. Hardy, F. E. Elder, and Bingham, Mitchell & Batchellor, for defendant.

WALLACE, J. The case discloses that the plaintiff refused to make the loan to the husband, but did make it to the wife alone, upon a note signed by her to which the husband was not a party, and that the hiring of the money by the defendant from the plaintiff was the independent contract of the wife as principal, and not as the surety or guarantor of the husband. The fact that she hired the money with the intention of letting her husband have it to assist him in his business, and did so let him have it, did not impair or suspend her legal capacity to make the contract, or make it an undertaking for him, or in his behalf, within the meaning of the statute. *Parsons v. McLane*, 64 N. H. 478, 13 Atl. 588; *Jones v. Holt*, 64 N. H. 546, 15 Atl. 214; *Wells v. Foster*, 64 N. H. 585, 15 Atl. 212. Exceptions overruled.

PARSONS, J., did not sit. The others concurred.

(69 N. H. 84)

In re WOLFEBOROUGH SAV. BANK.

(Supreme Court of New Hampshire. Carroll. March 12, 1897.)

TAXATION—BANKS—REDUCTION OF ASSETS—ABATEMENT OF TAXES.

1. Laws 1895, c. 90, § 1, providing that any bank which may claim that the taxes assessed upon it are inequitable may apply for an abatement thereof, may be applied to a cause of action which accrued before the enactment thereof, as such act merely changes the mode of judicial procedure to enforce a right without affecting the right itself.

2. When the assets of a savings bank have been reduced in value below the amount due the depositors, a petition may be maintained for an abatement of taxes to a corresponding extent.

Petition by the Wolfeborough Savings Bank for abatement of taxes, alleging that in October, 1893, upon the petition of the bank commissioners, the bank was enjoined from receiving deposits or paying out any money to depositors, except as decreed by the court; that on October 1, 1894, the deposits were cut down by order of the court to the amount of 25 per cent. of the whole sum due depositors, to wit, in the sum of \$38,069.98; and that the petitioners had paid taxes on that sum for that year, amounting to \$380.70. The prayer of the petition is that an abatement of \$380.70 may be ordered and decreed by the court, and that the same be certified to the governor of the state, that he may draw a warrant for the payment to the petitioners of the sum aforesaid, agreeably to chapter 90, Laws 1895, passed March 28th of that year. It is admitted that the allegations of the petition are true, but it is objected that no relief can be had under the

act of 1895, because the tax was assessed and paid before the act was passed.

S. W. Abbott, for petitioner. E. G. Eastman, Atty Gen., for the State.

BLODGETT, J. "Any savings bank, trust company, state bank, or insurance company, which may claim the taxes assessed upon it under the general laws are unequal or inequitable, may apply to the supreme court for an abatement thereof; and the supreme court shall, upon a hearing, abate said tax of such corporation to such an amount as may appear equitable." Laws 1895, c. 90, § 1. It is immaterial that the tax on which the present petition is founded was assessed and paid before the passage of this act. The act merely varies the mode of procedure in proceedings for abatement by substituting the court for the legislature, without in any manner affecting the right itself; and therefore it may properly be applied to causes of action which accrued before its passage, as well as to those accruing thereafter. Willard v. Harvey, 24 N. H. 344, 352-354; Rich v. Flanders, 39 N. H. 345; 23 Am. & Eng. Enc. Law, 450, and the numerous cases there cited. No other objection to the petition being made, and it further appearing that the petitioners have been subjected to the payment of a tax 25 per cent. in excess of what it ought to have been, equity (which, in the matter of taxation, is synonymous with equality) requires an abatement to a corresponding extent. See *Petition of Union Five Cents Sav. Bank* (Rockingham; Dec. Law Term, 1895) 36 Atl. 17. Petition granted. All concurred.

(36 Md. 521)

STATE v. SAFE-DEPOSIT & TRUST CO.
(Court of Appeals of Maryland. Jan. 4, 1898.)

TAXATION OF CORPORATIONS—TIME OF PAYMENT.

Code, art. 81, § 84, provides that a corporation shall pay the taxes on its capital stock on or before the 2d day of January after levy. Sections 132 and 144 provide that the assessment of the capital stock of corporations shall be had on or before May 15th of each year. Acts 1890, c. 244, passed subsequent to the former acts, provides that, on failure of a corporation to pay the taxes on its capital stock on or before November 1st of the year they are levied, a penalty shall attach, and both tax and penalty be collectible by suit forthwith. *Held*, that the taxes were due on November 1st of the year they were levied.

Appeal from circuit court of Baltimore city.

Action by the state of Maryland, at the instance of the comptroller of the treasury, against the Safe-Deposit & Trust Company, trustee of the Baxter Electric Motor Company. From a decree for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, ROBERTS, and BOYD, JJ.

J. Alex. Preston and Robt. Lud. Preston, for appellant. Edgar H. Gans, B. Howard Haman, and Vernon Cook, for appellee.

BRISCOE, J. This appeal is taken by the state of Maryland, at the instance of the comptroller of the treasury, and involves a construction of certain sections of article 81 of the Code, and subsequent acts of the general assembly of the state. The main question presented by the record is, when do state taxes assessed upon the capital stock of a corporation become due? It will be seen by section 84 of article 81 of the Code that the president or other proper officers of banks and other incorporated institutions and companies chartered by this state, or located and doing business therein, shall annually, on the 2d day of January, pay to the treasurer of the state the state tax imposed upon the shares of capital stock of said banks or companies for the previous year. As the law then stood, the state tax on the capital stock of a corporation was payable by the express terms of the statute to the treasurer of the state on or before the 2d day of January after their levy. But by Act 1890, c. 244, it is provided that, if any corporation of this state from which state taxes shall be due and payable on the assessed value of its shares of capital stock shall fail or neglect to pay the same to the treasurer of the state before the 1st day of November of the year for which such taxes have been assessed and levied, such corporation shall for such failure and neglect forfeit and pay to the state an additional amount of 5 per centum as penalty or damages to be added to the state taxes so due and unpaid. And it further makes it the duty of the comptrollers to add this penalty to the state tax, and to institute suit forthwith for the recovery of both the tax and the penalty, upon the failure of the company to comply with the terms of the statute. It is obvious, then, looking to the object and purpose of Act 1890, c. 244, that state taxes owing by corporations become due and are in arrear on the 1st day of November of the year for which they have been assessed and levied, and, unless paid before that date, are subject to the penalty prescribed by the act. The legislature would scarcely have imposed this penalty unless these taxes were to become due and payable on the 1st day of November of the year of their levy. If so, they would be imposing a penalty for the nonpayment of taxes which, by the express terms of the eighty-fourth section of article 81 of the Code, would not be due until the 2d day of January of the year succeeding their levy.

It is, however, contended upon the part of the state, that these taxes are due as early as the 15th of May, because, under section 132 of article 81 of the Code, the state tax commissioner is required, on or before that date, to assess the capital stock of all corporations for the purpose of taxation, and shall report the assessment to the comptroller. Now, while it is true that the assessment is to be made on or before the date referred to in section 132, yet it is further provided by section 144 of the same act that, as soon as the assessment shall have been made, it shall be

returned by the state tax commissioner to the comptroller of the treasury, who shall notify the president or other proper officer of the corporation of the valuation of the stock, and, if there be no appeal within 30 days after such notification, the valuation and assessment shall be final. There is nothing in this act which sustains the contention made by the state. It is fair to presume that if it had been the intention of the legislature that these taxes should be due and payable as early as the 15th of May or the 15th of June, when the assessment becomes final, this intention would have been so declared, and not left to implication or conjecture. We are therefore of opinion that as the sale of the property of the Baxter Electric Motor Company took place on the 23d of May, 1895, there were no taxes for that year due and payable, at the time of this sale, properly chargeable against the trustee, the appellee, in this case. The statute provides only for the payment of such taxes as may be due and in arrears at the time of the sale of the property. Act 1892, c. 518; Act 1896, c. 407; Wheeler v. Addison, 54 Md. 46; Casualty Ins. Co.'s Case, 82 Md. 564, 34 Atl. 778. For these reasons, the decree below will be affirmed, with costs. Decree affirmed, with costs.

(87 Md. 102)

BALTIMORE & O. R. CO. v. FLAHERTY.¹
(Court of Appeals of Maryland. June 24, 1897.)

**RAILROADS—RELIEF ASSOCIATIONS—DISSOLUTION
—DISTRIBUTION OF FUNDS—COURTS—
JURISDICTION—RECEIVERS.**

1. Before the repeal of the charter of a railroad employes' relief association 95 per cent. of the members assigned their interests to the railroad company in trust for its new relief department, under an agreement that the interest of each nonassigning member should be determined by an actuary and paid in money. Before the association's affairs could be wound up, two nonassigning members filed bills against the railroad company, alleging that the agreement was void, and praying the appointment of receivers to distribute the assets of the dissolved association. The railroad company then filed a bill against the association and the nonassigning members individually, asking the court to execute the trusts under the agreement. The causes were consolidated, a receiver refused, and 5 per cent. of the fund was adjudged to the nonassigning members. The railroad company's bill averred that all of the members of the extinct relief association had become members of its relief department "except the individuals named as defendants in the bill of complaint." No defendants were named except nonassigning members, and no process of any kind was ever prayed as issued against the assigning members. The old relief association and the relief department of the railroad company were entirely distinct. *Held*, that the court had assumed jurisdiction only over that portion of the trust funds which belonged to the nonassigning members of the relief association, and hence could not, on the intervening petition of an assigning member, order the whole fund paid into court.

2. Where a railroad company has passed into the hands of receivers appointed by a federal court, under an order that the receivers are "fully authorized and instructed to continue the

operation as heretofore of the several features of the relief department of said defendant," a member complaining of the operation of such department must seek relief by direct application to the appointing court, or by appeal from the order; the state courts having no jurisdiction to supervise the conduct of the receivers.

Bryan, J., dissenting.

Appeal from circuit court of Baltimore city.

In the matter of the intervening petition of John Flaherty in the consolidated suits by certain members of the Baltimore & Ohio Employes' Relief Association against the association and the Baltimore & Ohio Railroad Company, and by the Baltimore & Ohio Railroad Company against the association and such members who, on the dissolution of the association, had refused to assign their interests to the new relief department of the railroad company. The bill filed by the Baltimore & Ohio Railroad Company asked the circuit court of Baltimore city to assume jurisdiction over the trusts created by its agreement with the old relief association, and over the distribution of the association's assets. The agreement provided that the interest of each nonassigning member should be determined by an actuary, and paid in money. The sixth section of the bill filed by the railroad averred: "Your orator further shows that the whole number of members of said relief feature, on the 31st day of March, 1893, was 20,626, and that of said number all have availed themselves of the privileges secured to them by the contract filed as plaintiff's exhibit No. 3, and have become members of the relief department of your orator by executing application and transfer in the form, a copy of which is herewith filed, marked 'Plaintiff's Exhibit No. 5,' except the individuals named as defendants in this bill of complaint. That by virtue of the said contract, as well as by virtue of their membership in said relief association, the said defendants are entitled to receive out of the funds held by your orator as aforesaid each a certain sum of money,"—and stated that the amounts due the nonassigning members had been determined by an actuary, that such members refused to receive them, and the company was threatened with a multiplicity of suits. All the pending cases were consolidated, and finally decided after a protracted controversy. The intervener, claiming as one of the assigning members of the extinct relief association, and as a member of the relief department of the railroad company, averred a breach of the trust; that the trust funds were being endangered, and prayed that the railroad company be required to pay into court the whole fund assigned in trust by the extinct relief association. From an order granted as prayed by intervener, the railroad company appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, BOYD, RUS-SUM, and ROBERTS, JJ.

¹ For dissenting opinion, see 39 Atl. 1076.

Hugh L. Bond, E. J. D. Cross, and Geo. D. Penniman, for appellant. Geo. R. Gaither, Jr., Conway W. Sams, and J. Hemsley Johnson, for appellee.

PER CURIAM. A majority of the judges who heard the argument of this case are of opinion that the order appealed against should be reversed, and that the petition of the appellee should be dismissed. We are of that opinion for two reasons: First. Because the circuit court of Baltimore city did not heretofore assume jurisdiction and control over the whole fund mentioned in the proceedings, but only over that portion thereof which belonged to the nonassigning members of the extinct relief association; the other part of the fund, assigned to the railroad company, and held by it in trust for the relief department, having been alluded to in the consolidated cases merely for the purpose of ascertaining the amount or proportion of the entire fund distributable to the nonassigning members. And, secondly, because, the assets of the Baltimore & Ohio Railroad Company having gone into the hands of receivers appointed by the United States court, the petitioner, if he has any standing whatever to claim the relief prayed for, must seek that relief in the tribunal that now has jurisdiction over the assets of the railroad company, and, of course, therefore, over the funds held or due by the company, as trustee, to its relief department. An opinion giving at length our reasons in support of these conclusions will be filed hereafter.

BRYAN, J., dissents.

(Jan. 5, 1898.)

ROBERTS, J. From the views which we entertain of the various questions arising on this appeal, and the conclusions to which we have arrived and heretofore indicated in the per curiam filed, it will not be necessary for us to do more than state briefly the reasons which have controlled us in arriving at the result announced. This court has heretofore on three different occasions been called upon to consider and pass upon the conflicting interests and views of the members of the relief association and the appellant company. The cases will be found reported in 72 Md. 493, 20 Atl. 123 (Railroad Co. v. Cannon); 77 Md. 566, 26 Atl. 1045 (Baltimore & O. R. Co. v. Baltimore & O. Employees Relief Ass'n); and 79 Md. 442, 29 Atl. 524 (Railroad Co. v. Brown). This appeal is taken from an order of the court entered on an intervening petition of the appellee filed in the consolidated cases, directing the appellant company, as trustee, to pay into court on or before the 29th of January, 1897, to be deposited to the credit of the case, the sum of \$390,273.04, subject to the further order of the court, etc. The primary question which this appeal presents is, did the lower court,

under the facts and pleadings in this case, have the jurisdiction requisite to make the order appealed from? We have already said that it did not. Without going into a detailed statement of the various questions which have occupied the attention of this court in the cases heretofore referred to, we think the court below erred in assuming that it possessed jurisdiction of the case made by the appellee's petition by virtue and in consequence of the action and course of conduct of the appellant company in the cases passed upon by this court. To understand the question brought before us on this appeal, it will be necessary for us to make reference to some of the facts contained in the reported cases relating to this controversy. In 1888 the charter of the association was repealed. Just prior to this act going into effect, 19,200 of the 20,365 members of the association, in consideration of certain covenants made on the part of the railroad company, assigned in due form to the Baltimore & Ohio Railroad Company, in trust for the new relief department organized by it, all their interest in the funds of the employees' relief association. The obligations undertaken by the railroad company are set forth in its agreement with the relief association, dated March 29, 1889, and, among other things, it expressly stipulated that, if any member should refuse to join the new relief department, the value of his membership and interest in the old association should be ascertained by a competent actuary, and paid in money. 1,165 of the members did not make any assignment of their interests, and did not join the new relief department, and so became entitled to the surrender value of their interests in the old association. 79 Md. 444, 445, 29 Atl. 524. Referring to this bill, the court below has said: "The whole trust created by the agreement of March 29, 1889, was brought before the court, although it is quite manifest that the occasion for doing so was the fact that some of the members of the old association had refused to become members of the new relief department, and it was necessary to have the aid of the court in ascertaining their interests." In the whole trust are included the obligations of the railroad company to the 19,200 members of the old association who had assigned their interests to the appellant company, and become members of the department, and the company's obligations to the relief department as an unincorporated association, as well as the obligations of the company to the 1,165 members who did not assign, and who were named as defendants in the bill. We think it quite clear from the language of the sixth section of the bill referred to what the obligations were in the discharge of which the company sought the court's aid, and that they were its obligations to the dissenting members, and those only. The jurisdiction of the court extends only to the rights of the parties before it, and no use of language in the bill can extend the jurisdiction to the re-

lations between the plaintiff and parties not brought into court under the bill, even though such parties be named as defendants. Here no defendants are named except the 1,165 nonassigning members, and no process of any kind was ever prayed as issued against the assigning members of the relief department. This court has said in *Oliver v. Palmer*, 11 Gill & J. 448, 449, that "it is a fundamental rule of equitable jurisprudence, to the universality of which the case before us forms not one of the exceptions, that where a bill is filed to affect a fund in which different persons have an interest, all the persons interested therein must be made parties, ut finis sit litium, that a multiplicity of actions may be avoided." *Grier Mills & Co. v. Stoller*, 77 Fed. 1; *Scott v. McNeal*, 154 U. S. 34, 46, 14 Sup. Ct. 1108; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773.

The appellant contends that the rights and obligations which existed between the appellant company and the 1,165 defendants, whose rights were passed upon in 77 Md. 566, 26 Atl. 1045, were not created or determined by the agreement of March 29, 1889, and had nothing to do with the regulations of the relief department. These rights and obligations arose, as between the appellant company and said defendants, by reason of the fact that the former had come into possession of the assets of the old association, in which the defendants, as members of the association, had each an equitable interest. It mattered not whether the company's possession was lawful or unlawful, the simple fact of possession charged it with obligations to said defendants in reference to the property. But, after a careful examination of the record of this appeal, and of the appeals heretofore alluded to, we think it very clear that the relief department of the appellant company is an entirely distinct association from the Baltimore & Ohio Employees' Relief Association, and is composed of entirely separate and distinct members; and it nowhere appears from the records of the three former appeals which have been decided by this court that the lower court has at any time assumed jurisdiction and control over the whole fund mentioned in the proceedings in this cause, but only over that portion of said fund which belonged to the nonassigning members of the extinct employees' relief association; the other part of the fund assigned to the appellant company, and held in trust for the new relief department, having been alluded to in the consolidated cases merely for the purpose of ascertaining the amount or proportion of the entire fund distributable to the nonassigning members.

On the 29th of February, 1896, the appellant company passed into the hands of receivers appointed by the circuit court of the United States for the district of Maryland. The fourth paragraph of the order of said court appointing said receivers reads as follows: "That the said receivers be further

fully authorized and instructed to continue the operation as heretofore of the several features of the relief department of said defendant, in accordance with the regulations adopted by the president and directors of the said defendant for the government of same; to continue to collect and receive and to disburse the funds of said department in its several features, as provided by said regulations; and generally to fulfill and discharge all the duties and obligations of said defendant in connection with said relief department." Mr. Smith, in his recent work on Receiverships (section 7, folio 23), says: "The primary and proximate effects that follow the appointment of a receiver are: The property, funds, or whatever may be the subject-matter of the litigation that come to the hands of the receiver are in custodia legis, and, being so, will not be permitted to be interfered with, either by the parties to the suit, strangers to the suit, or other courts of co-ordinate jurisdiction." Again, the same author says: "Neither will the court permit its receiver to be sued or harassed by litigation without its express permission. to be granted only in exceptional cases for judicious and special reasons. The court first obtaining jurisdiction and appointing a receiver retains that jurisdiction, as a rule, for all purposes, settling and adjusting in the same suit all conflicting interests of whatsoever nature between the parties that grow out of or relate to the subject-matter in controversy." In *Beverly v. Brooke*, 4 Grat. 187, the court says: "By the order of appointment, the court takes the whole subject into its own hands, and ultimately disposes of all questions, whether legal or equitable, growing out of the proceeding." To the same effect are *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 356; *Heldritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 134; *Coal Co. v. McCreery*, 141 U. S. 475, 12 Sup. Ct. 28; *Hyland v. The James Roy*, 59 Fed. 784; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. 608. The state and federal governments, while they are distinct parts of a complete system, are each supreme within the limits of the authority confided to them. Each government is possessed of a judiciary power commensurate with its own objects and purposes, and partaking of its supreme authority; and the exercise of the judicial power in each is confided to the tribunals of the respective governments, and they can never come in conflict while they exercise only the authority which rightfully belongs to each. These tribunals are invested with the general as well as incidental powers necessary to the complete administration of justice. It is needless to pursue this inquiry further. If there was error in the passage, by the circuit court of the United States, of the order appointing the receivers of the appellant company, there were well-recognized methods by which that error could have been corrected, either by

direct application to the court which passed the order, or by an appeal to the appropriate tribunal to correct the error, if any such there was. It is certainly not within the province or jurisdiction of this court to supervise the conduct of the receivers, or to interfere in any way with the discharge by the circuit court of its important functions. That court has taken jurisdiction in the premises, and the fourth paragraph of its order has clearly outlined its relation to and control over the relief department of the appellant. We fail to recognize any other consequence that could be reasonably expected to follow an affirmation of the order of the lower court than loss and disaster to the many whose interests are involved in this controversy. It follows from what we have said that the order of the lower court must be reversed, with costs. Order reversed, with costs.

BRYAN, J., dissents.

486 Md. 687)

GORTER v. GALE

(Court of Appeals of Maryland. Jan. 4, 1898.)

SALE OF LAND—DESCRIPTION—SPECIFIC PERFORMANCE.

Description of land in a contract of sale as so many acres in a certain county is too indefinite for enforcement.

Appeal from circuit court of Baltimore city.

Bill by Albert L. Gorter against Caroline P. Gale. Bill dismissed, and complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BOYD, and FOWLER, JJ.

James P. Gorter and H. Arthur Stump, for appellant. Randolph Barton and Skipwith Wilmer, for appellee.

FOWLER, J. This is a bill for specific performance of a certain contract as it was in fact made, and not for its performance when reformed. The material part of the contract is as follows: "Witnesseth, that the said party of the first part does hereby bargain and sell unto the said party of the second part, and the latter doth hereby purchase from the former, the following described property, situate and lying in Rockingham county, state of Virginia, consisting of 13,650 acres, more or less, of timber land, and the improvements thereon, at and for the price of five thousand dollars, of which five (\$5) dollars have been paid prior to the signing hereof, and the balance to be paid as follows: The following ten houses on Guildford avenue, in Baltimore city: [describing them and certain incumbrances thereon.]" It is apparent that the terms of this contract in regard to the subject-matter—the land in Virginia—are so vague and uncertain that, according to well and long settled principles, no court of equity will enforce it. The land

in Virginia, as described in the contract, may be in any part of the county named. It is impossible to locate or designate it. But, in addition to this, it appears from the contract that the consideration to be paid for the Virginia lands is \$5,000, of which \$5 had been paid in cash, and the balance—that is, \$4,995—was to be paid by the conveyance of the property on Guildford avenue in Baltimore city. Both parties agree that they never intended to make any such contract, and the result is that, unless a court of equity will make a contract for the parties different from that which they made themselves, the decree dismissing the bill must be affirmed. *Waters v. Howard*, 8 Gill, 262; *Smith v. Crandall*, 20 Md. 482; *Hopkins v. Roberts*, 54 Md. 312; *Stodderd v. Tuck*, 5 Md. 28; *Myers v. Forbes*, 24 Md. 598. Decree affirmed, with costs.

(86 Md. 693)

MUTUAL FIRE INS. CO. OF MONTGOMERY COUNTY v. FARQUHAR.

(Court of Appeals of Maryland. Jan. 4, 1898.)

CORPORATIONS—MEETINGS—NOTICE—BY-LAWS—RESOLUTION OF MEMBERS.

1. A charter provision that the president shall annually give notice of the election to be held the first Monday in January in each year for directors does not prevent the meeting then held being made, by by-law or custom, an occasion for transaction of general business.

2. Under charter provisions that alteration of by-laws shall only be made by a general meeting of members convened by public notice, as in case of election of directors, and that the president, when required by 20 members, shall call the general meeting, by giving notice as in case of election for directors, for the transaction of such business as may be specified in such notice, by-laws cannot be changed at an annual meeting where notice is only given of election of directors.

3. A resolution of members, attempting to regulate mileage of directors, ineffectual as a by-law because of insufficient notice of the meeting, does not bind the directors.

Appeal from circuit court, Montgomery county.

Action by the Mutual Fire Insurance Company of Montgomery County against Allan Farquhar to recover money paid by defendant as mileage to directors of plaintiff. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

Henry E. Davis, H. W. Talbott, and C. W. Prettyman, for appellant. Thos. Anderson, W. Veirs Boule, Jr., Charles Abert, J. W. Warner, Ed. C. Peter, and Jas. A. Henderson, for appellee.

PAGE, J. This suit was brought by the Mutual Fire Insurance Company of Montgomery County, a corporation created by chapter 188 of the Acts of 1848 of the Legislature of Maryland, against the appellee, who is the treasurer of the company. At a meet-

ing of the members of the company held in January, 1896, the following amendment was passed, by a vote of 98 to 4: "By-Law. Two-thirds of the members present concurring, that after the date of this meeting, Jan. 7th, 1896, the mileage paid the directors and executive committee for attending meetings shall not exceed five cents per mile, one way." The only question presented by this appeal is whether this resolution is binding upon the directors of the company. It may be considered in two aspects: First, regarded as a by-law, was it properly passed? And, second, if not, is it obligatory upon the directors, as an expression of the will of the members?"

If it be taken as an amendment of the by-laws, by the addition of a new one, the question will involve the construction proper to be given to the sixth, seventh, and eighth sections of the charter. These sections are as follows:

"Sec. 6. That it shall be the duty of the president or secretary of the said company annually to give notice of at least two weeks, by advertisement in some newspaper published in Montgomery county, and in Howard district, of Anne Arundel county, or by notice posted at such public places as he may deem proper, of the election, which shall be held on the first Monday in January in each and every year, for thirteen directors of the company, who shall be members thereof; but," etc. "At all such elections each member shall have one vote, and may vote either in person or by proxy.

"Sec. 7. That the constitution and by-laws of the said company shall only be made by the concurrent vote of at least two-thirds of the whole board of directors, exclusive of the president; and any amendment or alteration of the constitution and by-laws shall only be made by a general meeting of members of the company, convened in pursuance of public notice, given as in cases of election for directors, when each member present shall have one vote, and two-thirds of the vote thus given shall decide; and any amendment or alteration of the constitution or by-laws that may be thus made shall be binding on all the members of the company.

"Sec. 8. That it shall be the duty of the president, whenever required in writing by not less than twenty members of the company, other than the directors, to call a general meeting of the members, by giving notice as in cases of election for directors, for the transaction of such business as may be specified in the said written requisition; and any resolutions or proceedings passed or had at such meetings by not less than two-thirds of the members who shall be present shall be binding on the president and directors and members of the company."

The law of the corporation relating to its power of amendment or alteration of the by-laws is to be found in the second clause of the seventh section, and all by-laws, customs,

or usages repugnant thereto cannot be sustained. *Miller v. Eschbach*, 43 Md. 7. From the bare reading of this clause, it is obvious—First, that the power to change the by-laws belongs to the members of the company; second, that such power can be exercised only at "a general meeting of the members"; and, third, that such "general meeting must be convened in pursuance of public notice given as in cases of elections for directors." The words "general meetings" are sometimes employed to describe those meetings at which any business of the corporation may be transacted, subject to such restrictions as the charter may impose. They differ from special meetings, in that the latter are called for particular purposes, and nothing can be done beyond the specified objects. This does not seem to be the sense in which the words are employed in this charter, but rather in the sense of meetings at which all the members are expected to attend. This is apparent from the provisions of section 8, where it is made the duty of the president, on the request in writing of not less than 20 members (other than directors), to call "a general meeting of the members," by giving notice, as in cases of election, "for directors, for the transaction of such business as may be specified in the said written requisition." However that may be, the charter provides for only two meetings,—one in January, by the sixth section; the other designated a "general meeting," on the call of the president, at the request of not less than 20 members, under the provisions of the eighth section.

It is contended that the January meeting, being called for the special purpose of electing the directors, cannot be regarded as a general meeting, and that, therefore, no other business can then be transacted. But it is certainly general in the sense that all the members must be notified and are expected to attend; and there are no inhibitions contained in the charter preventing it from transacting other business. There is nothing in section 6, or in the notice required by it, that restricts the meeting from transacting any of the business of the company. The notice provided for by that section is that the election for directors will be held on the first Monday in January, and a by-law making that meeting an occasion for general business would contain nothing inconsistent with its terms. It would be entirely within the power of the members to pass such a by-law. The proof shows, we think, that the unbroken custom or usage of the corporation for many years has been to regard the January meeting as an occasion when any of the business of the corporation could be transacted. From the year 1877 at least, up to the very last meeting of the members, in 1896, the subjects that came before the January meetings covered a very wide range. Annual reports were read and approved. Regulations as to steam thresh-

ers were passed. Rates of insurance were fixed. Rewards to persons for services at fires were voted. A committee to procure legislation was appointed. Receivers of interest for the company were directed to give bond. These are some of the matters that occupied its attention, and upon which it decisively acted. Under these circumstances, it cannot be doubted that all the members understood and must be regarded as having agreed that at these meetings, not only were the directors to be elected, but that any other matters in which the company was concerned could be taken up, considered, and definitely passed upon. A custom or usage so long continued and so invariably pursued has the force of a by-law, and, not being repugnant to any of the provisions of the charter, is valid. *Miller v. Eschbach*, supra; *Sampson v. Bowdoinham Corp.*, 36 Me. 78; *Insurance Co. v. Sanders*, 36 N. H. 252; *State v. Conklin*, 34 Wis. 21; *Warner v. Mower*, 11 Vt. 383.

But while the January meeting, by reason of the usage, is a general meeting for the transaction of general business, it does not follow therefrom that alterations to the by-laws can then be made, unless the further provisions of section 7 have been observed. Neither a by-law nor a usage having the force of a by-law can be supported if repugnant to any provision of the charter. 1 *Thomp. Corp.* § 943. For the members to legally amend the by-laws, there must be a general meeting, "convened in pursuance of public notice, given as in cases of election for directors"; that is, there must be a previous notice of the same general character as that required for a meeting in January to elect directors. Such notice, by the sixth section, must be given at least two weeks by advertisement in some newspaper in Montgomery county and Howard district, of Anne Arundel county, or posted at such public places as the president or secretary should deem proper; must inform the members that an election will be held at the meeting on the first Monday in January. So that the notice of a meeting to change the by-laws must be advertised in the newspapers severally published in the two counties, and must inform the members, at least two weeks before the meeting, that the business of altering or amending the by-laws would then be brought up and considered. The case of *Warner v. Mower*, 11 Vt. 385, was relied upon by the counsel for the appellant as supporting his contention. That case only decided that "common custom of a country is of great force in the construction of statutes as well as contracts," and that when the time and place of the meeting is fixed, and "there is no restriction in regard to business, any and all business pertaining to the interest and power of the corporation may be transacted."

But the question in the case at bar is: Does not the charter of this company restrict all meetings not convened in pursuance to the seventh section—that is, after notice of the required character—in such a manner as to prevent any alterations of the by-laws thereat? In *Warner v. Mower*, the court says, "It is undoubtedly competent for the corporation to restrict the business to be done;" and they might have added that the corporation itself has no power except such as the legislature has bestowed upon it. The charter is the measure of its powers and privileges, and, where the mode of exercising any of its functions is therein prescribed, it must be strictly pursued. *Kent v. Mining Co.*, 78 N. Y. 182; *Com. v. Mayor of Lancaster*, 5 Watts, 152; 5 *Am. & Eng. Enc. Law* (2d Ed.) p. 90; 1 *Thomp. Corp.* § 939. We are of opinion, therefore, that the by-law was not properly passed, and cannot be maintained as a law of the corporation.

The other branch of the question is, can the resolution be held to bind the directors as an expression of the will of the members? It is true, directors are trustees and agents of the bodies represented by them, and, as such, are held "to be within the rule which guards and restrains the dealings and transactions between the trustee and cestui que trust, and agent and principal. This was so held in *Parish's Case*, 42 Md. 598, and many other cases. But their authority is not delegated by the body, but is derived from the provisions of the charter and the by-laws. For the members to control them in the exercise of that authority, if the charter contains provisions directing a particular mode, their will must be expressed in a manner that conforms to that mode. In the case at bar the members undertook to pass a by-law establishing the rates of mileage to be paid directors and the executive committee. It regulates the rights of certain officers of the corporation as against the corporation itself. It affected only those who were members of the body, and created a rule that was general, and not special, in its operation. The resolution, therefore, had all the attributes of a by-law, and, if it had been adopted in accordance with the requirements of the charter, would have been not merely an expression of the will of the members, but a law of the corporation. *Flint v. Pierce*, 99 Mass. 68; *State v. Overton*, 24 N. J. Law, 441; *Brick Presbyterian Church v. Mayor, etc.*, of New York, 5 Cow. 540; 1 *Thomp. Corp.* 939, and authorities there cited. It must be regarded, therefore, as an ineffectual effort on the part of the members to enact their will into a law of the body. Being void as a law, it can furnish no evidence whatever of the will of the members, and cannot control or restrict the directors in the discharge of their duties. Judgment affirmed.

(37 Md. 34)

BEAR CREEK FERTILIZING CO. OF BALTIMORE v. MAYOR, ETC., OF CITY OF BALTIMORE.

(Court of Appeals of Maryland. Jan. 5, 1898.)

MUNICIPAL CORPORATIONS—CONTRACTS—RENEWAL.

A company entered into a two-years contract, with the privilege of renewal, with a city, to remove night soil, the purpose being to provide a good sanitary system. The contract was awarded by ordinance to the lowest bidder, and the company was required to give bond for the faithful performance of its duties, and, in case it should not perform the contract satisfactorily, it was to be revoked. The city had the right to abrogate the whole system of night-soil removal when, in its judgment, the public health could be protected in a better manner in some other way. Relying on the contract, the company leased land from the city, put up extensive works, and spent large sums in purchasing necessary appliances. For ten years similar contracts were issued successively every two years to the company; and later, on its becoming insolvent, a contract was made in the same way, and with the same conditions, with its assignee. Two years previous to this suit, moneys owing the assignor were paid under a resolution, passed by the city council and approved by the mayor, to the assignee, which assignment was approved by the council and mayor, and a renewal of the contract granted to the assignee under the seal of the city. The assignee in all ways complied with the contract. *Held* that, in the absence of a corporate act done in the city's legislative capacity abolishing or changing the system of night-soil removal, the assignee company was entitled to a further renewal of the contract.

Appeal from circuit court of Baltimore city.

Bill in equity by the Bear Creek Fertilizing Company of Baltimore against the mayor and city council of the city of Baltimore to procure a renewal of a contract. From a decree in favor of defendants, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

Robert H. Smith and Rich & Bryan, for appellant. Thos. L. Elliott, for appellees.

BRYAN, J. The appellant filed a bill in equity against the appellees. The cause was heard on bill and answer, and the bill was dismissed by the court pro forma. An appeal has been taken to this court. The Bear Creek Fertilizing Company had made a contract with the mayor and city council of Baltimore for the removal of night soil from the city, which, according to its contention, it had the right to renew. The object of the bill was to procure its renewal. The facts which are material to the decision of the question are all admitted. They will be stated: The joint standing committee of the city council on health, in March, 1880, having considered a communication from the commissioner of health, and also a petition asking that an ordinance should be passed providing a place of deposit for night soil, recommended the passage of a resolution which they attached to their report. This resolution au-

thorized and directed the commissioner of health to advertise for proposals for the removal of all night soil collected in the city, with a view to awarding the contract to the lowest responsible bidder. Afterwards, on May 11th, the same committee, after a careful review of the whole subject, reported an ordinance embodying a contract, which they believed would prove most advantageous to the city, and would be a great benefit in a sanitary point of view. The ordinance, with some unimportant verbal changes, was passed, and on May 24th was approved by the mayor. The first section of the ordinance is as follows: "Section 1. Be it enacted and ordained by the mayor and city council of Baltimore, that the mayor, comptroller of the city and commissioner of health be, and they are hereby, authorized and directed, in the name of the mayor and city council of Baltimore, to contract for a term of two years, with the privilege of renewal, with Messrs. R. R. Zell & Co., for the removal of all the night soil gathered in the city of Baltimore; said night soil to be transferred to air-tight barges, for removal from the city; the same to be done in an odorless and inoffensive manner, at two designated points within the city; compensation for said removal of night soil to be collected from the persons dumping the same, at the rate of twenty-five cents per load of not less than one hundred and sixty and not more than two hundred gallons; and the said Messrs. R. R. Zell & Co. shall be compelled to keep, at each of the above-designated points, air-tight barges, under a penalty of fifty dollars per day for each day of fourteen hours the said R. R. Zell & Co. fail to comply, and shall execute a bond, with approved security, in the penalty of ten thousand dollars, to the mayor and city council of Baltimore, for the faithful performance of said contract." By the third section of the ordinance, the mayor, comptroller, and commissioner of health were authorized and empowered to rent to Zell & Co. three acres of the city's property, in Anne Arundel county, for the purpose of erecting works to receive and utilize the night soil. The fourth section provided that if this use of the said three acres should be deemed a nuisance, and should be so declared by the commissioner of health, that Zell & Co. should remove their works, upon 30 days' notice from the mayor, under a penalty of \$50 per day for every day the same should remain after the expiration of the notice. And finally, by the fifth section, it was enacted that, if the contractors should fail to comply with the specifications of the contract to the satisfaction of the health department, it should be the duty of the mayor to revoke the same. Every step in this proceeding shows that the city council considered the subject with the deliberation and care which its gravity and importance required. It was a matter which vitally concerned the health of a large and populous city. Neglect in this respect might

and probably would cause contagious disease of the most malignant character. To use the words of the committee on health, they desired to make a contract which should be most advantageous to the city, and of great benefit in a sanitary point of view. The contract was made by the corporation itself, and not intrusted to the judgment and discretion of any public officer. Certain public officers were designated, whose duty it was to formulate the document containing the terms of the contract; but its terms and conditions and the individuals with whom the contract was made were all specified in the ordinance. The ordinance having provided for a contract which was considered advantageous and beneficial, it was determined that it should remain under the control of the corporate body, and suitable means were adopted to protect its interest. The contractors were required to give bond with approved security. If the works which they should erect on the land rented from the city should become a nuisance, they were required, under a heavy penalty, to remove them on short notice; and, in case they should not perform their contract satisfactorily, it was to be revoked. Superadded to all these precautions stipulated in the ordinance, there was the inalienable power of the corporation to abrogate the whole system of night-soil removal, when, in its judgment, the public health would be protected in a better manner in some other way.

In *Lake Roland Etl. Ry. Co. v. City of Baltimore*, 77 Md. 381, 26 Atl. 510, the police power which embraces the protection of the public health was said to be a high conservative power of the utmost importance to the existence of good government; and it was declared that its exercise could not be limited by contract or any other way; and reference was made to well-known and very remarkable cases in the supreme court of the United States. It is unnecessary for us at this time to mention the circumstances stated in the *Lake Roland Case* which would make a municipal corporation liable in damages. The corporation, having thus guarded the public interests, and its own rights under the contract, had no reason to desire a change of contractors, so long as the work should be done in a satisfactory manner. Those with whom they were dealing were required to provide an outfit which would involve large expense; and they were authorized to rent from the city real estate for the erection of valuable works. The preparations and expenditures were such as would not have been made for a contract of transient duration. There was certainly on both sides an expectation of a continuance of the relations between the contracting parties, unless future events should make a change desirable. The contract for the removal of night soil was duly made with Zell & Co., and they commenced the performance of it. But they failed in business, and the contract was sold

by public auction to Wetzler & Co., and by them sold and assigned to the appellant. From time to time the said contract has been renewed with the appellant by successive mayors, comptrollers, and commissioners of health, who in every instance described themselves as representing the corporation, and sealed with the corporate seal of the city of Baltimore the written instrument by which the contract was made. The contracts from 1883 to 1885, both years inclusive, are in the same form as the one which appears in the record, and these contracts have been faithfully performed by the appellant. The ordinance under which these contracts were made is still in force. It has been embodied in the codifications of the ordinances made under the authority and with the approval of the mayor and city council of Baltimore.

In the year 1885 the appellant presented a petition to the mayor and city council of Baltimore, in which it set forth that Zell & Co. had removed a quantity of night soil amounting to more than 13,000 loads, for which they were entitled to receive from the nightmen 25 cents a load, according to the terms of the ordinance; that the nightmen, before this work was done, informed Zell & Co. that they would not pay for it, and thereupon Zell & Co. had a consultation with the mayor, comptroller, and health commissioner, and they urged upon Zell & Co. the necessity of the prompt removal of the night soil, for the preservation of the health of the city, and ordered them to continue the removal without interruption, and said they would see that payment should be made to Zell & Co. for doing so. The petition further stated that the rights and claims of Zell & Co. under the contract, and their claim for the amount due for the removal of these 13,000 loads of night soil, had, for valuable consideration, been assigned to appellant. The prayer of the petition was that the appellant be paid 25 cents a load for the removal of the night soil, that being the sum stipulated in the ordinance, and amounting to more than \$3,000. A resolution was passed by the city council, and approved by the mayor, directing the payment, and it was duly paid to the appellant. So, we see that, after the assignment to the appellant of Zell & Co.'s rights, the contract of 1883 was made with the appellant; and in 1885, this contract being brought before the city council by the appellant's petition, it was recognized and approved by the corporate body under all the forms of legislation; a resolution being passed by both branches of the city council, and approved by the mayor, which ordered that more than \$3,000 should be paid to the appellant under the contract. This contract contained a statement of the assignment from Zell & Co. to the appellant, and an assent to the assignment by the mayor, the comptroller, and the commissioner of health, representing the corporation, and the further statement that the appellant had, in every respect, carried out

and fulfilled the contract; and it also stated that the appellant had requested the execution of the contract, with privilege of renewal, and that the mayor, comptroller, and commissioner of health, in the name of the mayor and city council of Baltimore, had assented to said renewal. It was under the corporate seal of the city of Baltimore. The contracts from 1883 to 1885 with the appellant contained the same statement, and are all under the corporate seal.

It appears, then, that the corporation made a contract with the appellant, which was regarded as most advantageous to it, and a great sanitary benefit; that it was made with great care and circumspection, and after much deliberation; that the appellant has in every respect fulfilled its part of the contract; that the corporation has regularly and uniformly renewed it from time to time; that in its last renewal, in 1895 (as in all the previous renewals), it was agreed that the appellant should have the privilege of renewal. From all these circumstances we must see that the corporation has manifested its assent to a continuance of it from time to time, until it should see fit to change its purpose by some corporate act. This corporate act must be done in its legislative capacity. In our opinion, the appellant is entitled to a renewal of the contract in the accustomed form; and it must be executed by the mayor, the comptroller, and the commissioner of the health, in the name of the mayor and city council of Baltimore. The pro forma decree must be reversed, and the cause remanded, in order that a decree may be passed in accordance with this opinion. Decree reversed and cause remanded, with costs above and below.

(86 Md. 545)

AVIRETT v. BARNHART.

(Court of Appeals of Maryland. Jan. 4, 1898.)

BILLS AND NOTES—EXTENSION OF TIME—BONA FIDE PURCHASERS—ESTOPPEL TO ALLEGED PAYMENT.

1. The extension of the time of payment of a note by the holder by an indorsement thereon, without the knowledge or consent of the maker, is a material alteration, and ineffectual, so that one taking the note and the mortgage securing it, after the original time, but before the extended time, of payment has expired, takes them subject to payments made to the assignor, not indorsed on the note.

2. Where the maker, without indorsing payments on the note and mortgage, returned them to the holder's agent, whom he fully informed of the payments, and who promised to inform any prospective purchaser as to them, the maker is not estopped from setting up the payments as against an assignee taking the note and mortgage after maturity as collateral security for an existing debt.

Appeal from circuit court, Allegany county.

Bill by Abraham B. Barnhart against John W. Avirett for foreclosure of a chattel mortgage. From a decree for complainant, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and

BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, and PAGE, JJ.

B. A. Richmond and J. N. Willison, for appellant. James A. McHenry and J. A. Mason, for appellee.

BRISCOE, J. The appellant, John W. Avirett, executed a chattel mortgage on the 29th of September, 1890, to J. Wilson Humbird, of Cumberland, Md., to secure the payment of a promissory note for the sum of \$2,500. On July 5, 1894, the mortgagee, Humbird, indorsed on the mortgage a receipt for \$850 and interest to date, leaving the sum of \$1,850 still due, and on the same day J. Wilson Humbird assigned the mortgage to Philip W. Avirett, a brother of the mortgagor. This mortgage was assigned by Philip W. Avirett, on September 11, 1894, to Edward Hoffman and A. P. Connor, and by them it was assigned on November 3, 1894, to the appellee, Abraham B. Barnhart. On July 5, 1894, when the above-mentioned payment of \$850 was made, the mortgagor, John W. Avirett, executed a new promissory note for \$1,850, payable 90 days after date, to the order of J. Wilson Humbird. This note bears the following indorsements:

"I hereby assign the within note to Philip W. Avirett, without recourse. J. Wilson Humbird.

"Nov. 2, 1894. For value received, I hereby assign the within note to Edward Hoffman and A. P. Connor. Philip W. Avirett.

"Nov. 3, 1894. For value received, we hereby transfer the within note to A. B. Barnhart. Edward Hoffman. A. P. Connor.

"Renewal in part of \$2,500 note, secured by mortgage for that amount, executed by John W. Avirett, and recorded in the clerk's office, Allegany county, Maryland. Philip W. Avirett.

"For value received, I hereby extend the within obligation for 1 year from September the 11th, 1894. Philip W. Avirett."

It appears that the mortgage was assigned by Philip W. Avirett to Hoffman and Connor in September, 1894, and that the note secured by it was assigned in the following November. While Philip W. Avirett was the holder of the note and mortgage, the appellant, John W. Avirett, made to him two payments,—one of \$800, and the other of \$250,—with the understanding that they should be credited on the mortgage and the note. No memoranda, however, of these payments were made by the holder on the note, but the same was assigned, after the date of its original maturity, to Hoffman and Connor, from whom the appellee took it; and from a decree refusing an allowance of these credits, and directing a sale of the mortgaged property, this appeal has been taken. It is contended upon the part of the appellee that he is the bona fide holder of the note for value before maturity, that he had no knowledge or notice that any payment had been

made thereon, and that he cannot, therefore, be affected by any equities between the original parties. Whether, however, the appellee took this note before maturity or not depends upon the effect to be accorded to the memorandum made on the note by Philip W. Avirett, by which he extended "the within obligation for one year from September 11, 1894." Now, while an extension of the time of maturity of a promissory note may be made with the consent of all the parties, so that it may continue to be a negotiable instrument after the time originally fixed for payment, yet it is not within the power of a payee or holder by his own act alone, and without the consent of the maker, to make any change in the time of payment. The evidence in this case entirely fails to show either when the memorandum in question was made on the note, or that the appellant, maker of the note, ever agreed that the note should be extended for one year from September 11th. On July 6, 1894, while Philip W. Avirett held the note and mortgage, he signed the following paper: "Cumberland, Md., July 6th, 1894. Received of John W. Avirett six hundred dollars, to be credited on mortgage of \$1,850, or assigned to me by J. W. Humbird on the Times and Alleganian plants of said John W. Avirett. The balance of mortgage I will extend for 1 year." At the same time he wrote to the appellant, saying: "I think this is all you need to cover the payments made to-day, but I will indorse the credit on note which I left in Hagerstown this morning." Inasmuch, then, as the extension of this note for one year from September 11, 1894, was done without the consent, or even knowledge, of the maker of the note, it must be treated as a material alteration. The holder of a promissory note cannot, by his own act, alone defer the time of maturity of the note, any more than he can by his own act accelerate the time of payment. It is competent, says Mr. Daniel, in his work on Negotiable Instruments (section 154), for either party to show by parol testimony the time when, the person by whom, and the circumstances under which a memorandum upon a bill or note was made. If made by the holder without the consent of the parties, it will vitiate and avoid it, being a material alteration. When the note, then, in this case, was assigned to the appellee and to the parties under whom he claims, it was overdue, and vitiated by an unauthorized attempt to extend the time of payment. Under these circumstances we do not think the appellee takes the mortgage free from all equities, but in seeking to foreclose the same, as assignee, he must do so subject to any defenses the appellant had against the assignor. In the case of *Iron Co. v. Parish*, 42 Md. 614, it is held that the transfer of a mortgage is so far within the rule which applies to other choses in action that, where the assignment is made without the concurrence of the mortgagor, as in this case, the

assignee takes the mortgage and the debt secured by it upon the same terms, and subject to the like equities and defenses, that it was subject to in the hands of the assignor. The mortgagor cannot be prejudiced by the assignment. As the credits claimed by the appellant in this case are fully established by the evidence, he is entitled to have them enforced against the appellee.

It was urged, however, that the appellant was equitably estopped from setting up his payment to Philip W. Avirett, as proper to be deducted from the amount mentioned in the mortgage and note. The principal ground of this contention is that the appellant was for a time in possession of the mortgage and note, and did not make thereon the indorsement of his payment, but permitted the same to pass from him appearing to be valid securities for the same mentioned on their face. The appellant, however, did not himself deliver those papers to the appellee, but gave the same to the agent of P. W. Avirett, whom he fully informed of the payments made by him. And this agent of P. W. Avirett promised that, in case the note was sold, the purchaser would be informed that it was subject to certain credits. The appellee was not misled by any act or representation made by the appellant, but took the note and mortgage as collateral security for a previously existing indebtedness to him by Philip W. Avirett. The appellant is not estopped, under the facts and circumstances of this case, from demanding that the payments made by him should be allowed as credits, on account of the mortgage debt, in the foreclosure proceedings in this case. For these reasons the decree below will be reversed, and the cause remanded, to the end that a decree may be passed in accordance with this opinion. Decree reversed, with costs.

(37 Md. 31)

NUMSEN et al. v. LYON.

(Court of Appeals of Maryland. Jan. 4, 1898.)

DEEDS—CONSTRUCTION—LIFE ESTATES—REMAINDERS—TRUSTS—PARTITION—PARTIES.

1. A conveyance of property, reserving a life estate to the grantor, was made to a trustee for the use of any descendants living at grantor's death, and, in default of such, for the use of grantor's heirs, with power, however, to devise the same, or to convey the same by deed, with the assent of the trustee. Held, that the grantor had an equitable life estate, with a contingent remainder to her descendants, if any, and, if none, then to her heirs.

2. Where the legal title in fee simple is vested in a trustee for the use of the grantor during life, and at her death for the use of her descendants, and the trustee has no powers or duties to perform after the vesting of the remainders, the legal estate is executed in the remainder-men at the grantor's death.

3. In a suit for partition of property which had descended to the widow and children of intestate, a trustee of all the widow's property was joined as the legal holder of her title, but was not sued in any other capacity. At the same time he held, as trustee, the legal title to a

daughter's portion, with remainder to her descendants. *Held*, that the trust for the daughter was not affected by the decree of sale.

4. In a suit for partition, remainder-men, under a trust executed by one of the joint owners, vesting the legal title in the trustee for the use of grantor during life, and with no powers or duties to perform after the vesting of the remainder, are necessary parties, though the trustee who holds the legal title is a party thereto.

Appeal from circuit court of Baltimore city.

Samuel H. Lyon filed exceptions to the ratification of a sale of land to him by N. Gideon Numsen and William N. Numsen, trustees. From an order sustaining the exceptions and setting aside the sale, the trustees appeal. *Affirmed*.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

Brown & Brune, for appellants. McHenry Howard, for appellee.

BRYAN, J. Nathaniel and William Numsen, trustees under a will, sold to Samuel H. Lyon a tract of land in the city of Baltimore. It was agreed as a condition of the sale that the title to the property should be in fee simple and clear of all incumbrances. The purchaser, by appropriate proceedings, excepted in a court of equity to the ratification of the sale. His exceptions were sustained, and the sale set aside and annulled. The trustees appealed.

The title to a portion of the land was derived from a sale under the decree of a court of equity in the case of Busk and others against King, passed in April, 1865. The exceptions to the ratification of the sale allege that this title is defective. John King died seised in fee of this portion of the land, and it descended to his heirs subject to the dower of his widow. His children were four in number. After his death the widow intermarried with Thomas M. Busk, and in 1854 they conveyed all of her property, of every kind, to John W. Randolph upon certain trusts, which are not involved in any question in this case. In 1859, Caroline, one of his daughters, in contemplation of marriage with Edgar G. Taylor, conveyed, in conjunction with him, to the said John W. Randolph, all of her property, of every kind, upon the following trust, that is to say: "To permit and suffer the said Caroline King, during the term of her natural life, to take, hold, use, and enjoy the said property, estate, and effects, and the rents, issues, and profits thereof, for her sole and separate use, as a feme sole, and, at her death, for the use of any descendants she may have living at the time of her death, and, in default of such, for the use of her right heirs; with power, however, to the said Caroline King during her life to devise or bequeath the same, or convey the same, by deed, with the assent of the said trustee, testified by his uniting in the same deed." Years after the execution of these deeds a bill in equity was

filed, which prayed a decree that the land should be sold for the purpose of partition. The parties to the suit were Caroline Busk, who had a second time become a widow; John W. Randolph, who is called, in the bill, "trustee as hereinafter mentioned"; Taylor and Caroline, his wife; the three remaining children of John King, deceased; and the husband of a married daughter. It was alleged in the bill of complaint that Mrs. Busk and her husband had executed the deed of trust already mentioned to John W. Randolph, but no allusion was made to the deed of trust executed by Taylor and his wife. A sale was decreed and made, and Mrs. Taylor received one-fourth of the proceeds of sale, after the deduction of the amount allotted to the widow in lieu of dower. By the terms of the deed to Randolph, Caroline Taylor had an equitable life estate, with a contingent remainder to such descendants as might be living at the time of her death, and, if none should then be living, a remainder was given to her right heirs. These remainders were legal, and not equitable. They depended on a contingency with a double aspect; that is, in the event of her leaving descendants living at the time of her death, their title then vested, but, in the other event of her leaving no living descendants at the time of her death, the title of her right heirs then vested. One of those contingencies would be sure to occur at the time prescribed, and only one of them could occur. Caroline had a power to devise this property, or to convey it by deed with the assent of the trustee, which consent was to be testified by his uniting in the deed. The nature of the estate belonging to Caroline, as affected by the power to dispose of it, is clearly shown in *Benesch v. Clark*, 49 Md. 504. The court there say: "Now, it is quite clear, upon all the authorities, that where an estate is given to a person generally or indefinitely, with power of disposition, such gift carries the entire estate; and the devisee or legatee takes, not a simple power, but the property absolutely. But where the property is given, as in this case, to a person expressly for life, and there be annexed to such a gift a power of disposition of the reversion, there the rule is different, and the first taker, in such case, takes but an estate for life, with the power annexed. * * * This distinction, while it has been said to be a refined one, is, nevertheless, as well established as any in the law, and judges and text writers alike recognize and adopt it as a principle too firmly settled to be questioned." By the terms of this deed, the legal title in fee simple was granted to Randolph, the trustee. It was necessary that he should hold it to protect the equitable estate for the sole and separate use of the married woman, but he had no powers or duties to perform after the vesting of the remainders which were expectant on her death. Upon the vesting of these estates, therefore, the legal

estate would be executed in the remaindermen. There is no rule in relation to trusts more fully settled than this. It is said in *Perry, Trusts*, § 312, that "the intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by the words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. * * * Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires." This deed is strikingly like the one in *Ware v. Richardson*, 3 Md. 505, where the same construction was made as to the execution of the legal estates as that which we have stated in this case. It is admitted in the case that, at the time of the institution of the equity suit, Caroline had two children living, and that she has several children living at the present time. Randolph was not made a party to the suit in his capacity as trustee under the deed by Caroline Taylor and her husband. It was not alleged or intimated in any way in the bill of complaint that he held any title for her benefit. The only trust alleged in the bill was distinctly stated to be for the benefit of Caroline Busk, under the deed executed by her and her husband. This trust had no connection whatever with the Taylor trust, no more than if a different person had been trustee. There could be no possibility of affecting the Taylor trust by proceedings against the trustee for anything done or intended to be done under the Busk trust. What Randolph might do by virtue of one of these deeds could have no effect on any rights existing under the other deed. But, even if Randolph had been made a party as trustee under the Taylor deed, the interests of the remaindermen would not have been bound by the decree. There were two living children of Caroline Taylor who ought to have been made parties. The decree cannot bind persons who were not made parties either personally or by representation. If all the interests in remainder had been represented, the decree would have bound them, and it would have been the duty of the court to order the portion of the fund distributable to the parties entitled under the Taylor deed to be invested for their benefit. The receipt by Mrs. Taylor of the one-fourth part of the proceeds of sale cannot bind the estate in remainder after her death. The record informs us that she is still living; so no question can arise in regard to the application of the statute of limitations. The estate subsequent to hers has not yet vested. It will be seen that the sale under the decree did not pass a complete title to the land sold under it. We must affirm the order setting aside the sale by the Numsen trustees to Lyon. Order affirmed, with costs.

(56 N. J. E. 545)

KOCHER v. KOCHER et al.

(Court of Chancery of New Jersey. Feb. 15, 1898.)

SUBROGATION—PAYMENT OF MORTGAGE—RIGHTS OF LIFE TENANT—LIMITATIONS.

1. A life tenant who pays a mortgage on the premises is entitled to be subrogated to the rights of the mortgagee; and the cancellation of the mortgage by inadvertence will not alter such right, where no other rights have been affected thereby.

2. The life tenant was not barred from enforcing her claim when less than 20 years had elapsed.

Bill by Elizabeth Kocher against John S. Kocher and others to obtain payment of the amount of a mortgage on land in which she had a life interest, and which she had paid and inadvertently canceled of record. Demurrer to the bill overruled.

John Kocher, the husband of the complainant, Elizabeth, died seised of a house and lot in the city of Newark, which was subject at his death to the lien of a mortgage thereon for \$1,000. By his will, he left the use of all his real estate for life to his widow, the complainant, and she has enjoyed the possession of it since. He left no personal estate whatever, except a little furniture, the precise value of which does not appear. Some time after his death, which occurred in 1879, the holder of the mortgage called on the widow for payment, and she paid the same out of her own estate, and, through inadvertence, had the same canceled of record. The property has since been taken on condemnation proceedings by the city of Newark, and the proceeds paid to the defendant trust company, to hold in trust for the purposes of the will. The object of the bill is to obtain payment out of the fund of the amount due upon the mortgage.

Herbert Boggs, for complainant. Edwin B. Williamson, for demurrant trust company.

PITNEY, V. C. The complainant, being interested in the premises as life tenant, and being obliged to pay the mortgage in order to protect her life estate, was clearly entitled, upon such payment, to be subrogated to the rights of the holder of the mortgage. In fact, she became the beneficial holder by virtue of the payment. On the case presented, the fact that she, through inadvertence and ignorance, canceled the mortgage of record, does not alter her right. *Coudert v. Coudert*, 43 N. J. Eq. 407, 5 Atl. 722. It could only take effect against her by way of estoppel, and the case made by the bill discloses no room for the operation of that principle. Nobody has changed his position or acquired any rights based on the idea that the mortgaged premises were free and clear of the mortgage in question. The right of the widow is to so much of the money in the hands of the trust company as represents the amount which was due

upon the mortgage at the death of the testator. From that time on she was bound, by her position as a tenant for life, to keep the interest down. Twenty years have not elapsed since she made the payment, and there was no occasion for her to sooner assert her rights. *Irick v. Clement*, 49 N. J. Eq. 590, 27 Atl. 434. The demurrer must be overruled.

(38 N. J. E. 547)

KOCHER v. KOCHER et al.

(Court of Chancery of New Jersey. Feb. 15, 1898.)

SUBROGATION—WHERE RIGHT EXISTS.

Where a son loaned his father money with which to pay assessments which were a lien on a lot, he was not entitled to be subrogated to such lien.

Bill by John S. Kocher against Elizabeth Kocher and others. Heard on demurrer to a part of the bill. Demurrer sustained.

Herbert Boggs, for complainant. Edwin B. Williamson, for defendants.

PITNEY, V. C. The case made by the bill is this: John Kocher died seised of a lot of land in Newark, incumbered by a mortgage given to William T. Haines, which has since his death come by assignment to the complainant. Subsequent to the Haines mortgage, but in John Kocher's lifetime, the mortgaged and other premises of the decedent were subjected to a lien for assessments for benefits; and the complainant, who is the son of John Kocher, loaned his father the money with which to pay those assessments, amounting to \$450. John Kocher died seised of the premises in 1879, and devised them to his widow for life, and at her death to his children. The widow survives, and is a defendant. She gave to the complainant a mortgage upon her interest in the lot in question, to secure him for the amount he had advanced to his father in his lifetime to pay the assessment in question. The testator left no personal estate whatever. Subsequently the city of Newark took by condemnation proceedings the mortgaged premises, and two other lots of land near by, of which the testator died seised, and the price was paid to the defendant trust company to hold in trust for the purposes of the will. The complainant files his bill asking to have paid out of the fund (1) the amount due upon the Haines mortgage, and (2) the amount due on the mortgage given to him by his mother to secure the money advanced by him to his father, and in support of this last claim asserts a right of subrogation to the lien of the assessment which the money so advanced went to pay.

To this part of the bill the trust company demurs, and I think the demurrer is well taken. The case is not governed by the doctrine of subrogation. The complainant was not, at the time he advanced the money to

his father, interested in any wise in the property in question, and occupied the position simply of a creditor of his father for money which the father happened to use for the payment of that incumbrance. I know of no principle upon which he can claim subrogation. The right of subrogation must either arise out of the circumstance that the party paying or asking subrogation was interested in the property, and entitled to pay the incumbrance in order to protect himself, or he must have made the payment at the request of either the debtor or the lienor, with the understanding that he should be subrogated. This latter is called "subrogation by convention." A leading case is *Payne v. Hathaway*, 3 Vt. 212, but the present case is not within the principle of that case. There a party recovered a judgment against the owner of land, and made, as he supposed, a valid levy. The land was subject to a mortgage of \$2,000, and, supposing that his levy gave him a valid lien, the judgment creditor borrowed money to pay the same, and gave a mortgage on the lands to the lender of the money to secure him. Subsequently it was decided by the courts that the judgment creditor's lien was invalid, and hence the mortgage he had given was worthless. The lender of the money filed a bill for relief against the land for the amount of the money advanced, and it was held that he was entitled to subrogation. That is an extreme case. But the present case is not within it. The demurrer must be sustained; but, of course, this decision does not affect the right of the complainant to be paid the amount due on the mortgage which he holds by assignment, or his right to be paid the amount of his mother's life interest in the fund.

(36 N. J. E. 305)

DIEFFENBACH v. GRECE.

(Prerogative Court of New Jersey. Feb. 15, 1898.)

WILLS—CAPACITY OF TESTATOR TO MAKE—UNDUE INFLUENCE.

1. Testator, when she made the will, which was in German, was 72 years of age, and could understand English with difficulty. At the time it was executed, she had been confined to her bed, was unable to retain nourishment, and was slowly dying of starvation. The attending physician was prescribing morphine to relieve her from pain, and, when the will was made, she was constantly under its influence, although capable of being aroused to intelligence. When the will was made, her husband was present, but apparently did nothing to influence her. A former will, in English, had been made, about a month previous, in which her property was not disposed of advantageously to him. Testator, when making the second will, informed the attorney making it that she had not understood the former will, as it was in English. *Held*, that testator possessed sufficient capacity to make the will.

2. There was no evidence to show the will was the production of undue influence.

Appeal from orphans' court, Hudson county; Hudspeth, Judge.

Appeal from a decree of the orphans' court probating what purports to be the last will and testament of Christina Trippensee. Affirmed.

James B. Vredenburg, for appellant. James A. Gordon, for respondent. Clarence Kelsey, for Ernst Trippensee..

MCGILL, Ordinary. Christina Trippensee executed two wills, so far as appears by the proofs in this case,—one on the 3d of May, 1894, and the other upon the 31st day of the same month. The latter was ordered to be admitted to probate by the decree of the orphans' court now in question, and this inquiry, reviewing the correctness of the decree, deals with its validity. Mrs. Trippensee died on the 8th of June, 1894, in the seventy-second year of her age. She had been twice married—First, to John George Steinbromm, who died in 1885, by whom she had one child, the appellant, Catharine Dieffenbach; and, second, in 1890, to Ernst Trippensee, a man 10 or 12 years her junior, who survives her. She left an estate worth less than \$10,000, consisting of a house and two lots on Sherman avenue, in Jersey City, where she lived at her death, valued, with its furniture, at about \$2,000; a mortgage for \$1,000, upon the house in which her daughter, Mrs. Dieffenbach, lived, on Zabriske street, in Jersey City; and a promissory note for \$6,000, made to her by Niven & Co., for money loaned. The will of May 3, 1894, gave the \$6,000 note to her daughter, the \$1,000 mortgage to her daughter's eldest son, a young man 23 years of age, who is blind, or partly so, and her household furniture to her husband, and also devised the Sherman avenue property to her husband and daughter; the husband to take it for his life or until he should remarry, and the daughter to take the remainder in fee; the daughter to pay all taxes and water rents, so that the husband's enjoyment should be free from those charges. It appoints Frederick Dieffenbach, Jr., the nephew of the husband of the appellant, its executor. The last will, of May 31st, gives the entire estate, real and personal, to the husband of the testator, for his life, with the remainder to the daughter, and provides that the executor of the will shall have power to sell the real estate if it shall be to the interest of the estate to do so, and if the husband of the testatrix shall be of that opinion, in which case the executor is to invest the proceeds of sale.

In early life Mrs. Trippensee was in religious belief a Lutheran, as were her relatives, but about 30 years before her death she took interest in the Christian Israelites, and thereafter worshiped with them. Among them she met Ernst Trippensee, whom she subsequently married. He appears to be a zealous member of that religious sect, and, because of his obtrusive zeal in furthering its interests, to have been

displeasing to his wife's relatives; so displeasing that the marriage led to a temporary estrangement between Mrs. Trippensee and her relatives, which later took permanent shape in relations more or less formal and strained. Trippensee was a carpenter by trade, but did little work after his marriage. He had a small sum of money, with the aid of which, supplementing his wife's income, he and his wife managed to live, in the lower floor of the Sherman avenue property, the upper floor being let to tenants. In March, 1894, it developed that Mrs. Trippensee was afflicted with a cancer in the stomach, which soon destroyed her ability to retain food and secure nourishment. She became emaciated, and, as the disease progressed, suffered so much pain that her physician commenced to administer morphine to relieve her. In April it was recognized that it would not be long before further nourishment would become impracticable, and she would die of starvation. Mrs. Dieffenbach lived about two blocks from her mother, and, during her mother's illness, was as attentive as her home duties and troubles would permit. After a sickness of several weeks, her husband died, on the 11th of April, 1894, leaving her with six children, the eldest of whom was the blind son already mentioned. But, with all this trouble at home, she saw her mother nearly every day, and frequently sent specially prepared dishes for her. Trippensee and Dr. Joseph L. Niven bestowed all the other care that the sick woman received. The husband was constantly with her, assiduously and tenderly performing every duty. It is insisted that the proofs demonstrate that the testatrix feared him, but my conclusion upon them is that the suggestion of fear on her part is true only to the extent that she believed that her husband would not approve of any disposition of her property that would not make provision for him during his life. The entire estate was small. He claimed that he was too feeble in health to work, and it appeared to her to be ingratitude, after his devotion to her, to deprive him of the income of any part of her estate. Her fear was of his disappointment and his possible reproach of her if she should refuse to give him the income of her estate for his life. It does not appear what the daughter's means of livelihood were, or that she was so straitened in circumstances after the death of her husband as to make a portion of her mother's income of great importance to her. There is no doubt that she desired to share immediately in her mother's estate; but whether that was because of her need, or because of her dislike to Trippensee, or because of both, is indeterminable from the evidence. Possibly she needed the assistance, and that fact contended in the mother's mind with her disposition to provide for her husband as he wished. In April, Dr. Niven resorted to morphine to alleviate the pains Mrs. Trippen-

see suffered. He commenced by giving her one-eighth of a grain every evening, and after that, as she became more accustomed to the drug, and less affected by it, he increased the size and frequency of the dose, reaching two grains a day before she died.

On the afternoon of the 3d of May, at about 2 o'clock, Jacob Kolb, a brother of Mrs. Trippensee, called to see her. He is a Lutheran minister. He had quite vigorously opposed his sister's marriage to Trippensee, and was so offended by it that for a year or more after the marriage he did not visit her. When he called, on the 3d of May, he advised his sister that she should make a will, and that her property should be given to Mrs. Dieffenbach, her daughter. Mrs. Dieffenbach was present at this conversation, and took part in it. She says that her mother expressed a wish to make a will, and talked with her uncle about its terms, concluding upon such a will as that which was made that day; that her mother said that Trippensee should be gotten out of the way when the will should be executed, and also that some one should be procured to draw the will. It appears that, immediately after this conversation, Jacob Kolb went away, and that about 5 o'clock in the afternoon Elizabeth Kolb, the wife of another brother of Mrs. Trippensee, with her daughter, came from New York to the Trippensee house; that, shortly thereafter, Trippensee was sent to Dr. Niven's office for medicine, where he was detained, as though by preconcerted arrangement, for an hour, first in waiting in an ante-chamber for an audience with the doctor, and then in a long conversation in which the physician engaged him; that Frederick Dieffenbach, the nephew of the appellant's husband, who is a New York lawyer, about that time came to the appellant's house, and the appellant's son William, the blind son, called two gentlemen to his mother's house, to act as witnesses to the will; and that then the lawyer and witnesses, Mrs. Dieffenbach, and her son went to the house of Mrs. Trippensee, arriving there after Trippensee had gone to the doctor's. Frederick Dieffenbach then prepared the will, and it was executed while Mrs. Trippensee was surrounded by those who were favorable to the claims of her daughter,—the daughter herself, her son, her nephew, her aunt, and her cousin, and two gentlemen who were not unfriendly. These two gentlemen satisfy me that Mrs. Trippensee appreciated what she was doing, although she was feeble and in bed. One of them says that "the only difference that occurred" was that Mrs. Trippensee insisted that Mrs. Dieffenbach should pay the taxes, remarking that "Ernst had little enough to live on"; that Mrs. Trippensee urged them to hurry, that Ernst would come; and, when the work was completed, she "thanked God" that it was finished. It thus appears that within a few hours the subject of will making was broached, and the will became an accomplished thing, and that although the will was made under the supervision and influence of the daughter and her relatives, and in the ab-

sence of the husband, the husband was not entirely excluded from a share in the property. The will in dispute was made 28 days later. The disease from which Mrs. Trippensee suffered had then progressed so far that Dr. Niven had given up all hope of her recovery, and was prescribing morphine merely to relieve her from pain. He says that he had increased the dose so that at that time she was taking three-quarters of a grain a day, and was constantly under the influence of the drug. The testimony of other witnesses exhibits that she was generally asleep or in a lethargic condition, but at the same time was capable of being aroused to intelligence.

Dr. Romeo F. Chabbert, a physician of the highest character and standing, with an experience of many years' practice in his profession, was called by the orphans' court, with the assent of all parties to the controversy, to testify touching the effect of morphine upon the human system. He said that, in his observation, the controlling effect of a dose of morphine passes away in about two hours; that the drug does not accumulate in the system, but, like alcohol, acts temporarily, and passes away. He is of opinion that the continuous subjection of the person to its use for months would weaken his power of resistance to the importunity of others; but he does not think that one-quarter of a grain of morphine, administered every six or eight hours to a woman in pain, would have any influence upon her mind. Of such a case he says that an hour after taking a quarter of a grain she would be in full possession of her mental faculties, and, if awakened 10 or 15 minutes after taking the dose, she would at first be confused, but, the effect passing over, she would be in possession of her mental faculties. The doctor was shown the signature of Mrs. Trippensee to the will in dispute, and was unable to detect any sign of a nervous trembling of the hand, and expressed the opinion that the person who wrote the signature was not at that time under the influence of morphine to any considerable degree.

The will of May 31st was executed in the presence of William Grece, a reputable lawyer of Jersey City, two neighbors, and the husband of Mrs. Trippensee. As has been stated, it differs from the earlier will in that it gives the husband the \$6,000 note and \$1,000 mortgage, as well as the Sherman avenue property, for his life, and thereby is apparently more favorable to him than the earlier will. Trippensee says that, on the evening of the 30th of May, a young man named Edward Hirsh came to see him, and that his wife then said: "Ernst, now Edward is here, go around to Mr. Meyers and Mr. Davis to come around here, that something be made, or else they will come, and take everything away from me, and will leave me nothing." He says that he did not then know that the will of May 3d had been made, and that he told her not to worry, that his God would take care of him; that the next morning he offered to go and get Mr. Grece, who is a German, and had theretofore been employed

by his wife; and that she appeared to him to be pleased, and told him to do so; that, locking her in the house alone, he ran and asked Mr. Grece to come to her, and then immediately returned home; that 10 or 15 minutes later Mr. Grece followed him, and inquired of his wife what she wanted him for, and she replied that she wanted to have a will made; that Mr. Grece, having a place prepared for him to write upon, sent him (Mr. Trippensee) to get witnesses for the will, and he went out, leaving Mr. Grece alone with his wife, and found Mrs. Davis, a next-door neighbor, and Elijah V. Meyers, a real-estate and insurance agent, both of whom had known his wife, and consented to act as witnesses. Mr. Grece testifies that Mrs. Trippensee said to him: "I want to make my will. Will you look out for Ernst? The other will was lost or destroyed, and I have signed some papers recently that Mr. Dieffenbach read to me. They were read to me in English, and I didn't understand it, and were read to me in a hurry, and I really don't know what it was that I have signed." He says that he then questioned her as to how she wanted to dispose of her estate, and she told him that she wanted it to go to her husband for his life, and then to her daughter. He says that she appeared to him to understand what she was doing; that she was sick, but conversed with intelligence for three-quarters of an hour, while her husband was finding the witnesses; that, when the witnesses came, he (Grece) translated the will to her in German, and then asked her if he should make known its contents to the witnesses, to which she replied that he might read it to them, that there was no secret in it, and that he then read the will in English to the witnesses, neither of whom understood German. It appears that Mrs. Trippensee could speak English with difficulty, but that she understood best when she was addressed in her native language.

The formalities required in the execution of the will were duly observed. The witnesses had each known Mrs. Trippensee about six years. They agree that she was very weak when the will was executed, but that she had sufficient strength to raise herself in bed to a sitting posture, take a book on her knee, and sign her name. They thought that she displayed as much intelligence as she had ever before exhibited. It appears that Trippensee was in the room during the presence of the witnesses, but that he did not do anything, apparent to them, to influence or control his wife's full agency. He did not even assist her to rise when she prepared to sign the will, though, after she had signed, he helped her to lie down again. It is possible, from the fact that the wife was dependent upon him for every attention she received, to the most trivial and menial office, that he may, by threats or coercion, have dominated her will; but there is no evidence, save in presumption from circumstances, that he essayed in the slightest degree to induce his wife to do that which she would not have done if she had been left to herself. The influence of his kind of-

fices to the suffering, dying woman is not to be accounted against him. His presence at the execution of the will, and his participation in the production of the instrument, are explained by his duty in respect of those offices. Against the necessity of his ministration to the wants of his wife and his testimony, direct and positive, that he did not coerce her to make the will, his part in the preparation of the instrument cannot prevail.

The insistence of Mrs. Trippensee when the will of May 3d was made, that the taxes upon the Sherman avenue property should be paid by her daughter, and her remark that Ernst had little enough to live on, and her haste to get through the execution of the will before her husband should return from Dr. Niven's, impress me that she was not entirely satisfied that she had treated her husband justly. It may well be that, after making that will, she meditated upon the patient continuance of her husband's devotion to her, and concluded that the gift of the entire income from her small estate would best emphasize her appreciation and gratitude. Moreover, she may have been influenced to make the change from the will of May 3d because that will did not procure from her any more attention from the women who were interested in its production than they had rendered her before it was made. I am of opinion that Mrs. Trippensee possessed sufficient capacity to make the disputed will, and that it has not been shown that that document is the product of undue influence. I will affirm the decree of the orphans' court.

(56 N. J. E. 649)

SCHMALZ v. WOOLEY et al.

(Court of Chancery of New Jersey. Feb. 5, 1896.)

TRADE-MARKS — INJUNCTION — COMPLAINT — STATUTES — SPECIAL AND LOCAL LAWS — SUBJECTS AND TITLES OF ACTS — CONSTRUCTION.

1. A bill on behalf of an association of journeymen hatters, against manufacturers of hats, to enjoin them from using a counterfeit of the union label adopted by it, because the factory is not working under the jurisdiction of such association, cannot be sustained, where it does not allege that said association is the owner thereof, or that it is trading in, the hats or caps to which the label is applied, or has ever put them on the market.

2. Gen. St. p. 3678, §§ 1, 2, 5, enact that associations of workmen may adopt, for their protection, labels and trade-marks, announcing that goods manufactured by members thereof are so manufactured; that persons counterfeiting such labels shall be guilty of a misdemeanor; that every such association adopting a label may enjoin the manufacture, use, display, or sale of any such counterfeits; and that all courts having jurisdiction thereof shall grant an injunction to prevent such manufacture, use, display, or sale, award complainant damages, require defendants to pay to the party injured the profits derived from such use, and order the counterfeit destroyed. *Held* unconstitutional, as a local law, granting to certain associations exclusive privileges.

3. Act March 23, 1892, is entitled "A further supplement to an act entitled 'An act to protect trade-marks and labels.'" There was no act

entitled "An act to protect trade-marks and labels," the only previous act relating to the subject of labels and trade-marks being the act of 1889 (3 Gen. St. p. 3678), entitled "An act to provide for the adoption of labels, trade-marks, and forms of advertising by associations or unions of workmen and to regulate the same." The latter act was unconstitutional as a private law granting exclusive privileges. *Held* that, assuming that the title to the act of 1892 is to be read as referring to the act of 1889, the former is a supplement to an act to provide for the adoption of labels by associations of workmen, to which restricted object the act itself must be limited, though the enacting part embraces all kinds of persons, and thereby makes it valid.

4. The act of 1889 (3 Gen. St. p. 3678) is entitled "An act to provide for the adoption of labels, trade-marks, and forms of advertising by associations or unions of workmen and to regulate the same." *Held*, that the words "the same" cannot be read as referring to labels, trade-marks, and forms of advertising generally, instead of to those only adopted by associations or unions.

5. Act April 16, 1897, "to amend and correct" the titles of the acts of 1892 and 1895, and "to declare the true intent and purpose of the titles hereby amended and corrected," provides that the title of the act of 1892, entitled "A further supplement to an act entitled 'An act to protect trade-marks and labels,'" should be amended so as to read "A supplement to an act entitled 'An act to provide for the adoption of labels, trade-marks and forms of advertising by associations or unions of workmen and to regulate the same.'" The title to the act of 1895, amending the act of 1892, was amended in like manner. *Held*, that the title of the act of 1897 only extends to labels and trade-marks adopted by associations or unions of workmen, and the body of the original act, or of any supplement thereto, must be restricted to such labels and trade-marks; and hence such legislation is unconstitutional, as a special law granting an exclusive privilege.

6. The court cannot reject a part of the title of an act for the purpose of saving the act.

Bill by Frederick W. Schmalz, who sues, etc., against Edwin Wooley and others, for an injunction and damages. Heard on demurrer to the bill. Demurrer sustained.

J. A. Beecher, for complainant. Guild & Lum, for defendants.

STEVENS, V. C. This bill is filed on behalf of an unincorporated association of journeyman hatters known as the Union Hat Makers' Association of Newark, N. J., of which complainant is president. It alleges that the association, on September 18, 1896, caused to be filed for record with the secretary of state duplicate copies of the label, trade-mark, etc., before that time adopted by said association, and that the same has been owned and in actual use by the United Hatters of North America and by the Union Hat Makers' Association, a subassociation, and the other subassociations and local unions of journeymen hatters throughout the United States and Canada, for about 10 years past, "for the purpose of designating, making known, or distinguishing goods, wares, merchandise, or other product of labor, as having been made, manufactured, produced, prepared, packed, or put on sale by such per-

sons or associations or unions of workmen known as journeyman hatters, or by a member or members of such associations or unions"; and that the class of merchandise to which the label has been appropriated consists of hats and caps upon which the skilled labor required has been done by a member of the United Hatters of North America or of the subassociations or local unions of journeyman hatters belonging thereto. The label consists of a picture or representation of a globe, over which is written the words "Union Made," and around which is written "The United Hatters of North America." The bill alleges (after stating the rules and regulations of the United Hatters and some other particulars, to which it is not necessary to advert) that the defendants Wooley and Crane, of the city of Newark, are and have been for more than three years last past partners in trade, engaged in the business of manufacturing and selling hats in large quantities at their factory in Fair street, Newark, and that they are now, and for the last three years have been, wrongfully and knowingly using a counterfeit or imitation label on all or nearly all hats finished at and sent out from their factory, and that their factory is a "foul shop," not working under the jurisdiction of the said United Hatters of North America. The bill prays for an injunction and damages. The defendants demur.

The complainant puts his title to relief—First, on the principle on which equity ordinarily interferes in such cases; and, secondly, on the provisions of those acts of legislature which provide for the adoption of labels by unions of workmen.

His first position is clearly untenable, in view of the decision in *Schneider v. Williams*, 44 N. J. Eq. 391, 14 Atl. 812. That case is, in all its essential features, identical with the case in hand. In both cases a label was adopted which was to be placed upon goods made by members of the association only. In both cases such labels had been used for a considerable period of time, and in both cases the defendants were alleged to be conducting their business in such manner as to deceive those who dealt with them. But in neither case did the bill show that the complainant, or those whom he represented, had any property right in the goods labeled. In referring to the bill then before him, Vice Chancellor Van Fleet said that it was defective in this respect: It did "not show that the complainants have applied their mark or label to a vendible commodity, of which they are the owners or in which they trade, and that they have put such commodity, marked with their mark, on the market." The case in hand discloses the same defect. It is not anywhere alleged that the association of journeyman hatters, on whose behalf complainant sues, are the owners of or that they are trading in the hats or caps to which the label is ap-

plied, or that they have ever put them on the market. Without overruling this decision, it would be impossible to give complainant relief on the ground of the ordinary practice of courts of equity in dealing with trade-marks or labels. The case of *Schneider v. Williams* has been followed in *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, and a similar conclusion has been reached in *McVey v. Brendel*, 144 Pa. St. 235, 22 Atl. 912.

But it is said that the statute has conferred a new right upon these associations. The first act was passed in March, 1889, the year after the decision in *Schneider v. Williams*, and presumably in view of that decision. It authorizes the court to enjoin the manufacture, use, or display of labels made to counterfeit the labels adopted by associations or unions of workmen. This act is attacked as being contrary to that provision of the constitution of this state, which prescribes that the legislature shall not pass private, local, or special laws "granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever." The argument is that the legislature has conferred upon associations or unions of workmen a right of property in labels or trade-marks which it has not conferred upon other citizens. What is the nature of the right conferred? Section 1 (3 Gen. St. p. 3678) enacts that it shall be lawful for associations and unions of workmen to adopt, for their protection, labels, trade-marks, and forms of advertisements announcing that goods manufactured by members of such associations or unions are so manufactured. By section 2 it is enacted that persons counterfeiting these labels, etc., shall be guilty of a misdemeanor punishable by fine and imprisonment; and by section 5 it is further enacted that every association or union adopting a label may proceed by suit in the courts of this state "to enjoin the manufacture, use, display or sale of any such counterfeits, and that all courts having jurisdiction thereof (1) shall grant an injunction to restrain and prevent such manufacture, use, display or sale"; (2) shall award the complainant damages; (3) shall require the defendants to pay to the party injured the profits derived from such use; and (4) shall order the counterfeit destroyed.

Now, it seems to me, by these provisions, the legislature has sought to convert what was only an imperfect right—that is, a right incapable of being asserted in a court of justice against those who violate it—into a complete and perfect one,—a right protected by both criminal and civil sanctions. Before its passage the right of property in a label or trade-mark could only be asserted by those who owned or traded in the goods to which it was applied. After its passage it was to become a species of property *per se*, without any reference to whether the owner of the label or trade-mark owned or traded in

the goods to which it was applied or not, or to whether it had ever been applied to any goods or not. This new property right was, however, by the act of 1889, given only to associations or unions of workmen. No doubt these words apply to unincorporated as well as to incorporated associations and unions. Giving to them this, their widest, signification, it is self-evident that they embrace neither associations nor unions other than associations or unions of workmen, nor individual citizens. What, then, the legislature has done is this: It has sought to give to some associations and to some individuals a right or privilege which it has not given to other associations and to other individuals. On this two questions arise: Is the right in question a "privilege," within the meaning of the constitution? and, if a privilege, is it one which may be given solely to associations or unions of workmen?

There are two cases which seem to me to have an important bearing on the first question: *Alexander v. City of Elizabeth*, 56 N. J. Law, 71, 28 Atl. 51, and *State v. Post*, 55 N. J. Law, 264, 26 Atl. 683. In the former case it was held that an act which conferred upon the owners of certain race tracks then existing a right to obtain licenses on conditions more favorable than were accorded to persons who might thereafter wish to obtain them was a special law, granting an exclusive privilege. This privilege was a right conferred upon some persons to acquire, on more favorable terms, what all other persons might acquire on less favorable terms. If it had been given exclusively to those who were more favored and withheld altogether from others, the vice entering into the legislation would have been still more apparent. In *State v. Post* it was held that a right to plant oysters, given only to those citizens of the state now using any grounds lying under the tide water of the state for the planting of oysters, was also a privilege, within the meaning of the constitution, and that, inasmuch as the class to which this right was given was a class less extensive than the whole class of citizens who might thereafter wish to plant oysters, subject to such general regulations as the legislature might prescribe, it was special, and therefore unconstitutional. These cases seem to me to be in point. If the rights there accorded were privileges, within the meaning of the constitution, then it appears to follow that the exclusive right to use the words, figures, and designs contained in labels or trade-marks, given to unions of workmen, must be equally a privilege, and a privilege, too, of considerable value. The right to the absolute ownership of a distinguishing mark or design, protected by all the sanctions of the law, which may indicate either the origin of the article made, aside from ownership, or the bodies or persons who may have examined or approved it, is undoubtedly a valuable right, to many persons, under any circumstances. It being clear that this right so conferred upon associations or unions of workmen is a privilege, in the constitutional sense, the question, then, is whether it is a privilege which

may be given solely to associations or unions of workingmen; that is, whether the law which confers it is or is not special. It is so, unless it embraces the entire class of persons to whose condition or needs it may be appropriate. The law conferring the privilege must, in the language of Mr. Justice Knapp in *Randolph v. Wood*, 49 N. J. Law, 88, 7 Atl. 286, "embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class." Now, the act in question does not embrace all whose condition and wants render such legislation appropriate. In the first place, it extends only to associations or unions of workingmen, not to individual workingmen, even though those workingmen may be members of an association or union. It would, I think, be difficult to assert that individual workingmen who have acquired a reputation for what they make might not derive the same kind of benefit, in greater or less degree, from the right to adopt a label, protected by the law, that associations might derive from it. In the second place, giving to the word "workingman" a very broad significance,—a significance perhaps broader than fairly belongs to it,—and conceding it to include all who work, whether with their hands or with their brains, it could not be held to embrace partnerships some of whose members contribute capital only, or corporations engaged in manufacturing or trading, and yet some of these firms and companies might find it convenient to have the same privilege, protected by the same sanctions, as is accorded to unions of workingmen; for this right is broader than the ordinary right to labels and to trade-marks, properly so called. It seems plain, therefore, that this act does exclude from its operation some classes of persons to whom such legislation would be appropriate, and it is therefore open to the constitutional objection of being a special law. In *State v. Julow*, 129 Mo. 163, 31 S. W. 781, much the same question was involved. The court was there considering the constitutionality of a statute which made it unlawful for employers to discharge members of labor unions on the ground of their membership therein. It was said: "The statute does not relate to persons or things as a class,—to all workingmen,—but only to those who belong to some lawful organization or society, evidently referring to a trade union, labor union, etc. Where a statute does this, where it does not relate to persons or things as a class, but to particular persons and things of a class, it is a special, as contradistinguished from a general, law."

But it is said that the defect is cured by the act of 1892 as amended by the act of 1895. 3 Gen. St. p. 3679. That act, so amended, provides that whenever any person or any association or union of workingmen has adopted or shall adopt any label, etc., it shall be unlawful to counterfeit it and to use and sell the counterfeit. Thus worded, it embraces, no doubt, all kinds of persons and associations. *Cohn v. People* (Ill. Sup.) 37 N. E. 60. The

word "person" is inserted, and the word "association" is divorced, by the mode of expression, from its exclusive relation to workingmen. The insistence on the part of the defendants is that this supplement does not comply with the constitutional requirement that "every law shall embrace but one subject and that shall be expressed in its title." The title of the act of 1892 is "A further supplement to an act entitled 'An act to protect trade-marks and labels.'" The title of the act of 1895 is "An act to amend an act entitled 'A further supplement to an act entitled 'An act to protect trade-marks and labels,' approved March 23, 1892.'" Now, the difficulty arises here. There is upon our statute books no act entitled "An act to protect trade-marks and labels." The original act of 1889, whose provisions I have already discussed, is styled "An act to provide for the adoption of labels, trade-marks, and forms of advertising by associations or unions of workingmen and to regulate the same." This was the only act upon our statute books relating to the subject of labels and trade-marks when the act of 1892 was passed. Under these circumstances, we may deal with the title of the act of 1892 in two ways: We may consider it literally, or we may read it as referring to the act of 1889. If we take it literally, it clearly fails to conform to the constitutional provision above mentioned. "The criterion in these cases," says the late chief justice in *Falkner v. Dorland*, 54 N. J. Law, 410, 24 Atl. 408, "is to ascertain, as closely as practicable, what impression, as to the object of the statute, its titular expression is calculated to disseminate." The expressed object of the title under consideration is to supplement another act, viz. an act entitled "An act to protect trade-marks and labels." But, as there is no such act upon our statute books, it cannot be supplemented. The expressed object of the act of 1892 is therefore incapable of being effectuated. The title "is erroneous in the worst degree, for it is misleading." Taken literally, it cannot be sustained.

But it is not necessary that the title of the amended act should be set out in *hæc verba*. Thus an act the title of which was "An act to amend the several acts in relation to the city of Rochester" was held to sufficiently express its object. *People v. Briggs*, 50 N. Y. 534, and in *State v. Woolard* (N. C. 1896) 25 S. E. 719, it was said that, if sufficient appears in the title to make it clear beyond cavil what prior act is referred to, it will be good. Does it clearly appear in the title of the act of 1892 that the prior act referred to is the act of 1889? While I think this may admit of some doubt, I will assume that, because there was only one act upon our statute book relating to this subject, the title of the act of 1892 is to be read as referring to that. Taking this view of the matter, and this is the view that is most favorable to complainant, we are met with another difficulty. The act then becomes a supplement to an act to provide for the adoption of labels, etc., by associations or unions of workingmen. To this restricted object the act itself, in its body,

must be limited. Says Mr. Justice Depue in *Dobbins v. Northampton Tp.*, 50 N. J. Law, 499, 14 Atl. 587: "The enacting part of a statute, however clearly expressed, can have no effect beyond the object expressed in the title. To maintain any part of such a statute, those portions not embraced within the purview of the title must be excised, and, if the superaddition to the declared object cannot be separated and rejected, the entire act must fall." In that case the operation of the act was, according to its title, limited to certain townships; in its body, it extended to all townships. It was held that it must be construed in subordination to its title, and that, so construed, it was open to the constitutional objection of being special. To the same effect are *Shivers v. Newton*, 45 N. J. Law, 469; *Evernham v. Hult*, Id. 53; *Falkner v. Dorland*, 54 N. J. Law, 409, 24 Atl. 403. The case in hand differs only from the cases just cited in this: In the cases cited the body of the act was, in the first instance, sufficiently general; in the case under consideration the body of the act, when passed, was as special as the title, and only became general by amendment. But this, in principle, can make no difference, and so, if authority were needed, the cases hold. *State v. Bowers*, 14 Ind. 196; *Hyman v. State*, 87 Tenn. 109, 9 S. W. 372; *Tingue v. Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625.

It was contended by counsel for complainant that the title of the act of 1889 might be so construed as to make it sufficiently general; that the words "the same" might be read as referring to labels, trade-marks, and forms of advertising generally, and not merely to those adopted by associations or unions. If the title in any part of it had dealt with the general subject of labels, trade-marks, and forms of advertising, this construction might be possible. But it does not; it only deals with labels, trade-marks, and forms of advertising by associations or unions. This limited class of labels, etc., is therefore the only antecedent to which the word "same" can by any possibility refer. There is no other. In *Stockton v. Railroad Co.*, 50 N. J. Eq. 70, 24 Atl. 964, the title under consideration was "An act to authorize the formation of railroad corporations and to regulate the same." There the title was by construction read thus: "An act to authorize the formation of railroad corporations and to regulate railroad corporations." So construed, it embraced not only companies organized under that act, but all railroad companies. Had the title read "An act to authorize construction of railroads by companies using steam for their motive power," I hardly think the court would have been warranted in reading the word "same" as referring only to the word "railroads," to the exclusion of the qualifying words "by companies [i. e. constructed by companies] using steam for their motive power"; thus making the act applicable to companies using electricity, horses, or other force. The title under consideration plainly has reference, not to labels, etc., generally, but only to those adopted by associations or unions of working-

men, and the word "same" can refer only to the labels, etc., so adopted.

I have thus far considered the case on the assumption that the act referred to in the title of the act of 1892 is the act of 1889. It may be suggested that the words of reference are not sufficiently clear to justify this assumption, and that what the legislature really intended to do by the act of 1892 was to legislate for the first time on the general subject of labels and trade-marks. To give effect to this supposed intention, we must drop the words "further supplement," and read the title thus: "An act to protect trade-marks and labels." To do this, however, would be to make a new title, not to take that already made by the legislature. I do not think it has ever been decided that the court may reject a part of the title for the purpose of saving the act. If it may, then a title which expresses a double object can easily be converted into one which expresses a single object; and, if the court may reject words, I do not see why it may not add them. But the very numerous decisions on this subject in our courts do not give the slightest intimation that the judicial branch of our government possesses any such power. They do show very conclusively that it does not. Those of them which have been adverse to the constitutionality of the legislation under review ought, on the assumption that the court could add or reject words, to have been differently decided. The fact is that the court has no more power to reconstruct the title than it has to remodel the act itself. It must take both the title and the body of the act as it finds them, and consider them accordingly.

I have thus far considered the case as affected by the statutes on the subject which have been enacted up to the time the bill was filed. On April 16, 1897, the legislature passed an act "to amend and correct" the titles of the acts of 1892 and 1895, and "to declare the true intent and purpose of the titles hereby amended and corrected." This act provided that the title of the act of 1892 entitled "A further supplement to an act entitled 'An act to protect trade-marks and labels,'" should be amended so as to read "A supplement to an act entitled 'An act to provide for the adoption of labels, trade-marks, and forms of advertising by associations or unions of workmen and to regulate the same.'" The title of the act of 1895 was amended in like manner. Assuming that the act of 1897, section 3 of which provides that it shall be retrospective in its operation, is a proper subject of consideration, it is manifest that it is open to the objection heretofore pointed out, viz. that, although a title might easily have been framed sufficiently broad to embrace the whole subject of trade-marks and labels, the title as actually framed only extends to labels and trade-marks adopted by associations or unions of workmen. As the title does not go beyond

these associations or unions, the body of the original act, or of any supplement thereto, cannot go beyond them. As it cannot, the restricted legislation in question, as already shown, is open to the objection of being a special law granting an exclusive privilege.

I have not thought it necessary to consider the other objections raised on the demurrer. I may say, however, that the bill, taken as a whole, does not make it very clear whether the label in controversy is that of the Union Hat Makers' Association or that of the United Hatters of North America. In Schedule B it is certified that it is the label of both organizations, but those portions of the constitution of the United Hatters set forth in the body of the bill would seem to indicate that it is under the exclusive control of the general organization. It is expressly stated in section 10 of the bill that the label counterfeited by defendants is the label of this general organization, and it is alleged in section 11 that any use made of the genuine label by the defendants, who are not entitled to use it, is in violation of the constitution of the United Hatters, not of the local association. The bill does not show what is the right of the local association, if any, in the label, or how, as against the general association, it may be or has been adopted by it, within the meaning of the statute. The demurrer should be sustained.

(184 Pa. St. 630)

**SMEDLEY v. HESTONVILLE, M. & F.
PASS. RY. CO.**

(Supreme Court of Pennsylvania. Feb. 28,
1898.)

**CARRIERS—DUTY TO PASSENGERS—DAMAGES FOR
PERSONAL INJURIES.**

1. More than mere reasonable care and prudence is required of carriers of passengers to relieve them from their duty of safe carriage.

2. Defendant cannot complain of an instruction that the jury could only give damages that would compensate plaintiff for her injury, "allowing her damages for the pain and suffering which she has undergone * * * and is likely to undergo, * * * and any permanent injury * * * she has suffered, and also any expense which she has been put to in the way of obtaining relief."

Appeal from court of common pleas, Philadelphia county.

Action by Clara Fisher Smedley against the Hestonville, Mantua & Fairmount Passenger Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. Howard Gendell, for appellant. James W. Latta, for appellee.

GREEN, J. There could not be any doubt that the accident which caused the plaintiff's injury resulted in some way from the condition of the track at the place where the car left the track. It was shown by abundant testimony, and not at all contradicted, that at the place of the accident the bed of the street had been dug out for the purpose of

changing the track from the old horse-car system to the kind of track required for the new electric system. New rails were being laid, and, for the purpose of continuing the travel while the work was going on, the old rails and the new were kept in a condition of temporary union at the ends, so that the cars could pass from the rails of the one system to those of the other. At the very moment of the accident, the car had passed from the new rails, and was on the old rails. There was quite a depression in the bed of the road, caused by the excavation which had been made, and into this depression or excavation the front wheels of the car dropped with sufficient force to throw the passengers with considerable violence from their positions on the seats. The plaintiff's head was dashed against the fare box or the side of the car, and she received severe contusions and lacerations of the head and face. That her injuries were very serious was fully proved by the medical testimony. As a matter of course, the plaintiff was in no degree responsible for the accident, either by way of contributory negligence or in any other manner. She was a passenger, who had paid her fare, and was entitled to safe conduct to her destination.

There were but two questions in the case,—one as to the defendant's negligence, and the other as to the measure of damages. The learned trial judge left both these questions to the jury with careful and correct instructions, and with adequate cautions against excessive damages. It was claimed for the defense that the accident was the result of an inevitable event, which could not have been foreseen or provided against. The court left this question to the jury on all the evidence, charging that the defendant was not liable for extraordinary events which it could not foresee or prevent. The charge was absolutely correct on this subject, and the defendant was allowed every possible opportunity to establish this defense. The jury, by their verdict, found for the plaintiff, and a reading of the testimony convinces us that they found correctly. We can discover no room for any theory that the accident was due to an inevitable event, which could not have been foreseen or prevented. It was manifestly due to some defect in the track, which was not explained, but for which the defendant was clearly responsible.

We think the learned court was not quite correct in the answers given to the fifth and sixth points of the defendant, in saying that they were refused because they concluded with the phrase "that the verdict should be for the defendant." We do not think the points asked a binding instruction, but only a direction that, if the hypothetical facts stated in the points were found by the jury, then the verdict should be for the defendant. But the rule of duty stated in the points was not sufficiently strict when applied to carriers of passengers, and therefore the points could not have been affirmed as they stood. It requires more than mere reasonable care and prudence to relieve carriers of passengers from

their legal duty of safe carriage. The refusal of the points therefore did no harm.

In regard to the question of damages, we see no error in the charge. The court instructed the jury that they could only give damages that would compensate the plaintiff for her injury, "allowing her damages for the pain and suffering which she has undergone in the past, and is likely to undergo in the future, and any permanent injury which you may deem she has suffered, and also any expense which she has been put to in the way of obtaining relief." There is nothing wrong in this. It is rather within than beyond the instructions which are generally given in cases of this character. Clearly, the charge on this subject was not erroneous as against the defendant. The assignments of error are all dismissed. Judgment affirmed.

(184 Pa. St. 645)

FITZPATRICK et al. v. BURGESS, ETC.,
OF BOROUGH OF DARBY.

(Supreme Court of Pennsylvania. Feb. 28,
1898.)

DEFECTIVE SIDEWALK—NEGLIGENCE.

A borough is not liable for injury from defect in sidewalk of which there was no indication, and which was probably occasioned by a heavy rain, on the morning of the accident, softening the clay some distance below the surface, at a point where, several months before, a ditch was dug by a plumber to lay a water pipe, which was immediately filled with earth, rammed into it.

Appeal from court of common pleas, Delaware county.

Action by Francis J. Fitzpatrick and wife against the burgess and town council of the borough of Darby for injury to said wife from a defect in a sidewalk. Judgment for defendant, and plaintiffs appeal. Affirmed.

George E. Darlington and Edward H. Hall, for appellants. Jesse M. Baker, for appellee.

PER CURIAM. The evidence on this record falls entirely to disclose any negligence on the part of the borough, or any notice to the borough authorities of any danger in the condition of the sidewalk at the place of the accident. The ditch was dug by a plumber to lay a water pipe to the adjoining property. It was about 30 inches wide and 3 feet deep. It was filled up immediately when it was made, and the earth was rammed into the trench when it was filled. It was on a public street, and was in constant use for nearly two months before the accident. It was trodden upon every day by all pedestrians passing over it, and did not give the least sign of being defective in any manner. The softening of the clay was probably occasioned at some point below the surface by a heavy rain storm in the morning just before the accident. Nothing of

39 A.—35

this was visible on the surface, and no indication of any danger whatever was given. In these circumstances showing a latent cause, and irrespective of our decision in *Borough of West Chester v. Apple*, 35 Pa. St. 284, and kindred cases, there was no evidence of negligence attributable to the borough, and the learned court below committed no error in directing a verdict for the defendant. Judgment affirmed.

(184 Pa. St. 626)

In re McCORKLE'S ESTATE

Appeal of MARSHALL.

(Supreme Court of Pennsylvania. Feb. 28,
1898.)

ORPHANS' COURT—JURISDICTION—DISPUTED TITLE—QUESTION NOT PROPERLY RAISED.

1. Petition of D. for inquest to make partition of decedent's real estate, presenting a case of apparent title to an undivided four-fifths thereof, supported by his muniments of title, and petition of M. containing nothing but a mere allegation of title unsupported by conveyances or proofs of any kind, do not develop a case of disputed title, divesting the orphans' court of jurisdiction.

2. Question as to deed not being separately acknowledged by wife, having been raised only on appeal, and then merely by verbal suggestion, will not be considered.

Appeal from orphans' court, Chester county.

Petition of Harvey B. De Haven for inquest to make partition of the real estate of the estate of William McCorkhill, or McCorkle, deceased. From a decree in favor of petitioner, Hannah A. Marshall appeals. Affirmed.

Chas. H. Pennypacker, for appellant. Butler & Windle, for appellee.

PER CURIAM. The pleadings do not develop a case of disputed title. De Haven's petition presented a case of an apparent title to an undivided four-fifths of the real estate in question, supported by his muniments of title. The petition of Hannah A. Marshall contained nothing but a mere allegation of title, unsupported by conveyances or proof of any kind. The matter being referred to an auditor, he reports that no testimony was offered in support of the Marshall claim, while the petition of De Haven was sustained by actual proof of the title claimed, and that this proof was not impeached in any way. Upon this state of the testimony the auditor was right in sustaining the proceeding upon the De Haven petition. The orphans' court so thought, and sustained the report, and in so doing there was no error. At the bar of this court a verbal suggestion was made that the deed of release made, in 1840, by Mary Shilds and Jane S. Young and their husbands, was not separately acknowledged by the wives. As no question upon that subject was raised before the auditor or the court below, nor by any assignment of error in this court, we make no decision in reference to it. Decree affirmed.

(185 Pa. St. 1)

JONES et al. v. VOGEL et al.

(Supreme Court of Pennsylvania. Feb. 26, 1898.)

AGENCY — CONTRACT OF MORTGAGOR AND MORTGAGEE.

Contract by mortgagor in default to pay to mortgagee weekly all money thereafter received from lots then or thereafter sold, the mortgagee to have access to books relating thereto, and to release lots sold when fully paid for, does not make the mortgagor agent of the mortgagee, so that the latter can be compelled to release to purchasers lots the purchase money of which they had paid to the mortgagor, but which he had failed to pay to the mortgagee; the contract between mortgagor and mortgagee at the time the lots were sold by the former providing merely for release of each lot as all the purchase money thereof was paid to the mortgagee.

Appeal from court of common pleas, Delaware county.

Action by John J. Jones and others against Frederick B. Vogel and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

The substance of the first five paragraphs of the bill is as follows:

In the first paragraph the conveyance of a tract of land of about 85 acres in Upper Darby, Delaware county, by William Albert Johnson and wife to Jacob Boon, on July 9, 1889, was alleged. In the second paragraph a statement of the purchase-money mortgage of \$117,000 was made. In the third paragraph it was alleged that Jacob Boon and wife had conveyed the premises subject to said mortgage and certain trusts to the Real Estate, Title & Trust Company, and in the fourth paragraph that the trust company had executed a declaration of trust, in which it was declared that the "title to the said tract of land vested in the said company shall be held by them so far as concerns the said Jacob Boon and all other persons until otherwise conveyed as personalty, and not realty," to convey as Frederick B. Vogel, attorney for Lansdowne Heights, shall direct, and divide the net profits between Vogel and Boon. In the fifth paragraph it was alleged that the tract had been laid out in lots, a plan recorded, entitled "Plan of Lansdowne Heights No. 2," upon which lots are laid out and numbered from 950 to 1,720.

The opinion of the court below, divided into findings of fact and conclusions of law, and the exhibits therein referred to, are as follows:

"Facts.

"The facts stated in paragraphs 1, 2, 3, 4, and 5 of the plaintiffs' bill are found to be true as therein stated. Sales were made from time to time of lots mentioned in said plan by Frederick B. Vogel, who signed himself as attorney for the Lansdowne Estate. The firm called the Lansdowne Estate consisted of Jacob Boon and the said F. B. Vogel, who were the only persons interested in said firm. The profits were to be equally divided between said Boon and Vogel. The said William A. Johnson had no beneficial interest in said firm, or the lands conveyed to Boon, except as mort-

gagee. Vogel had the entire management of said land, and acted only for himself and as attorney in fact for Boon, the legal owner, subject to the mortgage to Johnson. By a written agreement, signed by Johnson, dated June 11, 1889, two days after the date of the deed from Johnson to Boon, Johnson agreed to release from the lien of said mortgage debt all lots as laid out and sold, upon receiving the full consideration money obtained for said lots, said consideration to be not less than \$2,500 per acre for lots on Darby road and Owens avenue, and \$1,750 per acre for the balance, or at that rate. The said Vogel, acting for himself and Boon, proceeded to sell lots, and received the consideration, under an agreement in writing, of which Exhibit A, hereto annexed, is a copy. Under this agreement the plaintiffs in this bill purchased the several lots mentioned in the said bill of complaint. Johnson was not a party thereto, or known to any of the plaintiffs, when said lots were bought. His name was not mentioned in any way when the agreement to purchase said lots was signed or afterwards.

"Under the agreement marked 'Exhibit A,' the said Jones, to acquire title to lots Nos. 1,407, 1,408, 1,410, and 1,411, was required to pay \$1,800
On lot 1,455..... 250
\$2,050

He paid on this to Vogel
prior to Dec. 5, 1892..... \$1,160
He paid on this to Vogel after
Dec. 5, 1892..... 875
\$1,535

Leaving due to Vogel..... \$515
"Of the \$1,535 received by Vogel he paid to William Albert Johnson, after December 5, 1892, \$300, and nothing before that date, leaving of the \$375 so received after December 5, 1892, \$75 unaccounted for.

"(2) On June 26, A. D. 1890, the plaintiffs Horatio Lavender and Edmund W. Hetherington entered into an agreement with the defendant Frederick B. Vogel, attorney for the Lansdowne Heights Estate, similar in form to the one set forth in the first paragraph, for the purchase of certain lots designated on said plan as Nos. 1,563, 1,564, and 1,565.

"Under this agreement the said Lavender and Hetherington, to acquire title to the said lots, were required to pay..... \$975
They paid on this to Vogel prior to
Dec. 5, '92..... \$585
They paid after Dec. 5, 1892.... 195
\$780

Leaving due to Vogel..... \$195
"Of the \$780 received by Vogel he paid to William Albert Johnson, after December 5, 1892, \$90, and nothing before that date. Of this \$195, received after December 5, 1892, Johnson received only \$90.

"(3) On October 1, 1889, the plaintiff Calvin A. Brown entered into an agreement with the defendant Frederick B. Vogel, attorney for the Lansdowne Estate, similar in form to what is set out in the first paragraph, for the purchase of a lot designated on said plan as Nos. 1,368 and 1,369.

"Under this agreement the said Calvin A. Brown, to acquire title to said lots, was required to pay..... \$650
He paid on this to Vogel prior to
Dec. 5, '92..... \$470
He paid on this to Vogel after
Dec. 5, 1892..... 180

— \$650

"Of the \$470 received by Vogel prior to December 5, 1892, he paid nothing to Johnson, and of the \$180 received after that date he paid Johnson \$135.

"Prior to December 5, 1892, the plaintiff William August Haegele entered into an agreement with the defendant Frederick B. Vogel, as attorney for the Lansdowne Estate, similar in form to what is set out in the first paragraph, for the purchase of a lot designated on said plan as No. 1,257.

"Under this agreement the said Haegele was required to pay to Vogel, in order to acquire title..... \$325
He paid on this prior to Dec 5,
1892 \$250
He paid on this after Dec. 5,
1892 75

— \$325

"Of the \$250 received by Vogel prior to December 5, 1892, Johnson received nothing, and of the \$75 received by Vogel after December 5, 1892, he paid Johnson \$30.

"Prior to December 5, 1892, the plaintiff John O. Smith entered into an agreement with the defendant Frederick B. Vogel, as attorney in fact for the Lansdowne Estate, similar in form to what is set out in the first paragraph, for the purchase of four lots designated on said plan as Nos. 1,200, 1,201, 1,566, and 1,567.

"Under this agreement said Smith was required to pay to Vogel, in order to acquire title \$1,300
He paid on this prior to Dec.
5, 1892..... \$715
He paid on this after Dec. 5,
1892 585

— \$1,300

"Of the \$715 received by Vogel prior to December 5, 1892, Johnson received nothing, and of the \$585 received by Vogel after December 5, 1892, he paid Johnson \$300.

"On October 4, 1894, the plaintiff John F. Power entered into an agreement with Frederick B. Vogel, as attorney for the Lansdowne Estate, similar in form to the one set out in the first paragraph, for the purchase of Lots Nos. 1,641 and 1,642, for..... \$815
Of this he claims to have paid..... 320

— \$495

"Johnson has been paid upon the said

mortgage debt the sum of \$51,569.50, and has released lots (valued at the sale price) to the amount of \$48,569.50. The mortgagor being in default, the mortgage has been foreclosed, and after the sale of the balance of the land exclusive of the lots mentioned in this bill, there is still due to Johnson the sum of \$55,679.39.

"The sheriff's sale was on the 29th of February, 1896. The only connection the Real Estate, Title Ins. & Trust Co. have with the case will sufficiently appear by a declaration of trust, a copy of which is hereto annexed, marked 'Exhibit B.' This declaration of trust recognizes the said Vogel as the attorney in fact for Boon. Vogel at once commenced the sale of said lots under the form of an agreement of which Exhibit A is a copy. Johnson carried out his agreement, and released all lots sold by Vogel for which he was paid the full sale price, and quite a large number he released without receiving the sale price. The releases he signed without receiving the price were signed wholly upon the request of Vogel, and on his personal promise to pay over the said price. Payments on the mortgage being in default, Johnson threatened a foreclosure, whereupon an agreement was made, dated December 5, 1892, of which the paper annexed, marked Exhibit C, is a copy. Johnson carried out his part of this last agreement. Vogel becoming again in default, Johnson proceeded to foreclose his mortgage. None of the plaintiffs had any knowledge or notice of the agreement of December 5, 1892, nor of any agreement for the release of the lots they were buying, other than the record notice of the first agreement. No tender had been made of any amount admitted to be due. While Johnson does not recognize the right of the complainants to demand a release from him, he has expressed his willingness to execute such releases upon being paid the full amount of each purchase, less what he has received from Vogel. The above are all the material facts in the case.

"But two questions are raised: First. Have the plaintiffs a legal or equitable right to require Johnson to execute releases for the lots so purchased by them without paying him the full consideration money, less what he has already received from Vogel? Second. Are the plaintiffs entitled to credit on the purchase money of their lots for the money paid by them to and embezzled by Vogel? It may be admitted that the plaintiffs have an equitable right to have credit for all the money they have paid Vogel and which he has paid over to Johnson. This, as I understand Mr. Johnson, he has always been willing to do. This is all, therefore, that need be said upon the first question. The second question is the important one, and its answer must depend entirely upon the written evidence, as there is no parol testimony upon the subject. Unless, therefore, the agreement of December 5, 1892, standing

alone, can be construed as creating an agency, in which Johnson is the principal and Vogel his agent to receive the purchase money from the purchasers of such lots as Vogel should thereafter sell, or had theretofore sold, the plaintiffs must fail."

Conclusions of Law.

"We are of opinion that no sufficient evidence has been produced to warrant the court in finding that Vogel was the agent of Johnson for any purpose. There is no privity, either contract or estate, sufficient to raise such a presumption. We are also of opinion, in the present condition of the case, that Johnson cannot enforce any of the contracts made by Vogel, or compel any of the plaintiffs to pay the balance admitted by them to be due to Vogel and Boon on account of their purchase of said lots. It will therefore be useless for the court to make a decree which it cannot enforce. The plaintiffs are before the court as terre tenants, and not as contracting parties. If we were to require Johnson to execute the releases demanded on receiving the balances admitted to be due him, we could not make a binding decree that would require the complainants to pay said balances unless we find Vogel to be Johnson's agent. As we find no such agency, it follows that Johnson cannot recover the balances unpaid on a contract made with Vogel. The complainants can demand releases upon tendering the balance actually due, but, if we were to require Johnson to execute such releases, the complainants could decline to tender him the money. The contest is, therefore, not equal; they must be bound by our decree if he is. In the present condition of the real-estate market, those who have made but small payments would not show great wisdom in tendering Johnson the balance of their purchase money. If, however, the complainants, or any of them, will pay into court, within ten days from the filing of this decree, the full amount of their purchases, less what Vogel has actually paid over under the agreement of December 5, 1892, with interest thereon from the time the whole balance was due, then we will order and decree that Johnson shall execute the releases prayed for, and we will permit him to take out the money, and we will make an order on the trust company to execute the deed. On failure to pay said money into court within the time above limited, let the bill be dismissed, with costs. In any event, the costs are ordered to be paid by the complainants."

Exhibit A.

"This agreement, made the 21st day of June, Anno Domini 1890, between Frederick B. Vogel, attorney for Lansdowne Estate, party of the first part, and John L. Jones, party of the second part, witnesseth as follows: The party of the second part hereby bids the sum of eighteen hundred dollars for lots Nos. 1,407, 1,408, 1,409, 1,410, and 1,411 on the recorded plan of Lansdowne Heights,

situate at Lansdowne Heights, in Upper Darby township, Delaware county, Pennsylvania, which bid the party of the first part hereby accepts. The party of the second part agrees to deposit with the party of the first part on account of the said bid the sum of — dollars upon the signing of this agreement, the payment of which is noted in the receipt book issued to the party of the second part, and also to deposit with the party of the first part, at his office, No. 225 South Sixth street, Philadelphia, or otherwise, as designated by him for the purpose, the sum of not less than — dollars on the — day of each and every month until the entire amount of the said bid has been fully paid; and after the entire amount of the said bid shall have been paid as aforesaid the same shall be appropriated by the party of the first part in payment of the consideration money of the said lot or lots of ground, which the party of the first part thereupon agrees to sell, and by a proper deed of special warranty to have vested in the party of the second part the said ground, accompanied by a policy of the Real Estate, Title Insurance and Trust Company of Philadelphia, or any other company selected by the party of the first part, subject to the following restrictions, that is to say: Under and subject to the express condition and restriction, etc., that no tavern or building for the sale or manufacture of beer or intoxicating liquor of any kind and description, etc., shall at any time be erected, etc. Nothing herein contained, or otherwise howsoever existing, shall establish or vest in the party of the second part, or any person or persons claiming or to claim under him or her, any interest, right of possession, or other right, legal or equitable, in the said ground, until after a deed shall have been executed and delivered therefor, nor to render the party of the first part personally liable in any event as principal. When more than one payment shall happen to be in arrear, any payment or payments on account accepted by the party of the first part shall be credited by him to the payment longest in arrear. If default shall at any time be made by the party of the second part in making any one or more of the said monthly payments on account of the said bid, then and in such case the party of the first part may, at any time, at his option, and without notice to the party of the second part, sell the said ground at public or private sale, either or both, for such price or prices, and on such terms, as he can obtain therefor; and, upon such sale being made, the party of the first part may, without notice as aforesaid, make, execute, and deliver to the purchaser thereof proper assurances in the law to vest in such purchaser the said ground, subject to the said building restriction, in the same manner, and with the same effect to all intents and purposes, as if this present agreement had not been made. And immediately on such default all moneys deposited by the party of

the second part on account of the said bid shall, without notice to the party of the second part, become the sole and exclusive property of the party of the first part, as liquidated damages for the failure of the party of the second part to comply with the terms of the said bid; any law, custom, or usage to the contrary notwithstanding. No assignment of any interest in the said bid shall be valid until approval in writing by the party of the first part; and he shall not be obliged to approve any assignment not satisfactory to him. The party of the first part shall have the right at any and all times to use all moneys deposited with him, or with any other person or persons designated by him to receive the same under the terms of this agreement, without the consent of the party of the second part. In witness whereof, the parties hereto have hereunto interchangeably set their hands the day and year first above written. Frederick B. Vogel, Atty. for Lansdowne Estate. John J. Jones.

"Signed and delivered in the presence of ———."

Exhibit B.

Deed to the trust company, dated ———. It on the same day executed a declaration of trust, which is recorded in Deed Book C, No. 8, page 494, etc., and is as follows:

"Whereas, by indenture bearing even date herewith, and intended to be forthwith recorded, the said Jacob Boon and Lizzie F., his wife, conveyed to the Real Estate, Title Insurance and Trust Company of Philadelphia, aforesaid, in fee, the tract of land therein described upon the trusts specified in this present deed poll; and whereas, the said tract of land has been subdivided and laid out into building sites and avenues as indicated on the plan thereof (designated as Plan No. 2) made by Messrs. Franklin and Evans, civil engineers, in June, 1899, a copy of which is intended to be filed of record in the proper office at Media, Delaware county aforesaid: Now these presents witness that the parties hereto declare that the trusts referred to in the above recited indenture are as follows: (1) That the title to the said tract of land vested in the said company shall be held by them, so far as concerns the said Jacob Boon and all other persons, until otherwise conveyed as personalty, and not as realty. (2) The said company shall grant and convey the whole or any part of the said tract of land to such persons for such estates, and generally in such manner, as Frederick B. Vogel, as attorney for the said Jacob Boon or otherwise, shall from time to time direct; and shall, on the request of the said Frederick B. Vogel, execute and deliver all necessary and proper instruments of writing by specialty or otherwise, and generally perform all such acts, matters, and things as shall be deemed by the said company and the said Frederick B. Vogel proper and expedient, without, in any event, persons dealing with the said trustees and attorney being obliged to inquire in-

to the propriety of anything done or ordered by either of them, or to see to the application of the purchase money. And it is hereby declared to be the object of the said trust to enable the conveyance in absolute fee simple to all persons who shall have fully complied with all the terms of instruments in writing concerning the said Lansdowne Heights, or any part thereof; to enable the said Frederick B. Vogel, attorney for the said Jacob Boon or otherwise, to pay and discharge all incumbrances and indebtedness, however arising, concerning the said Lansdowne Heights, and all expenses incident thereto, including compensation to the said company for acting as trustee hereunder, and for issuing proper policies of title insurance; to enable the said Frederick B. Vogel, in compensation for these services already rendered by him, to retain and receive from time to time fifty per cent. of the net profits realized from the handling of the whole or any part of Lansdowne Heights, and to enable the said Jacob Boon, his executors and administrators to receive the remaining fifty per cent. of the net profits as aforesaid. And it is hereby also declared that nothing herein contained or otherwise howsoever existing shall render the said company liable for anything not actually done by themselves, nor create any trust, equity, or other right in favor of any person or persons whomsoever, whose name or names are not mentioned in the operative part of this deed poll."

Exhibit C.

"This agreement, made this fifth day of December, A. D. 1892, between Jacob Boon and Frederick B. Vogel, the said Jacob Boon acting herein by his duly-constituted attorney in fact, the said Frederick B. Vogel, of the first part, and Wm. Albert Johnson of the second part, witnesseth as follows: (1) Party of the first part agrees to pay weekly to the party of the second part all moneys hereafter received from lots now sold and hereafter to be sold in tract No. 2, of Lansdowne Heights. (2) Party of the first part agrees that the party of the second part shall at all times have full access to all books relating to the said tract No. 2. (3) Party of the first part agrees that the Real Estate, Title Insurance and Trust Company shall pay to the party of the second part all moneys received by the said company from tract No. 1 of Lansdowne Heights, after the claims of the said company thereon have been fully satisfied. (4) Frederick B. Vogel, as trustee for Brighton Heights, by virtue of the authority given him by indorsement hereon, agrees to pay to the party of the second part one-half of all current receipts hereafter coming to his hands from lots in Brighton Heights, New Jersey, now sold and hereafter to be sold, and that the books relating thereto shall at all times be open to the inspection of the party of the second part. (5) The party of the second part agrees forthwith to release to the Real Estate, Title Insurance and Trust Co., trus-

tees, from the lien and operation of the mortgage held by him all lots in tract No. 2, Lansdowne Heights now sold and paid for in full, and all lots in the said tract now sold, but not paid for in full, when the same have been fully paid for, saving and excepting lots Nos. 1,283 and 1,284, which, however, he will release as soon as the purchaser thereof, or any other party, shall purchase at the same price as said two were sold for, and make substantial payment on the three adjoining lots. The lots already sold and paid for in full, other than the two above mentioned, being Nos. 969, 970, 971, 972, 973, 974, 1,003, 1,004, 1,058, 1,059, 1,020, 1,023, 1,024, 1,027, 1,103, 1,104, 1,108, 1,109, 1,112, 1,186, 1,187, 1,214, 1,262, 1,271, 1,417, 1,473, and 1,713. (6) That when any purchaser of a lot hereafter sold shall have paid in all ninety-five per cent. of the purchase money thereof, and all such payments shall have been paid over to the said party of the second part as herein provided, the party of the second part will, upon payment of the remaining five per cent. by the purchaser to the party of the first part, release such lot from the lien of the said mortgage. (7) It is mutually agreed that, as soon as the party of the second part shall have received, under this agreement or otherwise, from the party of the first part, an amount of money equal to that which, up to such time, he would have received according to the original agreement made in 1889 with the said Jacob Boon, one of the parties of the first part hereto, then this agreement shall be canceled and destroyed, and the policy of insurance on the life of the said Frederick B. Vogel for ten thousand dollars, issued by the Penn Mutual Life Insurance Company, now held by the party of the second part, shall be returned to the beneficiary therein named. (8) This agreement shall be binding on and available to the heirs, executors, and administrators of the several parties hereto. In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first herein above written. [Signed] Jacob Boon, by his Attorney in Fact, Frederick B. Vogel. Fredk. B. Vogel. Jacob Boon. Wm. Albert Johnson."

E. H. Hall, Geo. T. Butler, and Fred'k J. Geiger, for appellants. V. Gilpin Robinson and A. Lewis Smith, for appellee W. Albert Johnson.

PER CURIAM. The decree in this case is affirmed upon the findings of fact and conclusions of law contained in the opinion of the learned court below.

(91 Me. 237)

HILDRETH v. GOOGINS.

(Supreme Judicial Court of Maine. Jan. 8, 1898.)

WAY OF NECESSITY—ACCESS BY WATER.

1. The defendant claimed a right of way by necessity over the plaintiff's land. The defend-

ant's land bordered on the ocean, and over which access to his land could be had. *Held*, that necessity, and not convenience, is the test of the defendant's claim, there being no evidence that the way by water was unavailable.

2. Implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored except in cases of strict necessity.

3. The court instructed the jury that the ocean was a public highway; and to a question by a juror, "whether the ocean was a public highway if it was not available, and whether it was for the jury to decide whether it is available in the present case," the court replied "that if there was any evidence as to availability it was for them to decide, but, if there was no evidence, they must assume that it was available." They were further instructed "that cases must be decided upon the evidence introduced, and not with reference to any individual knowledge that any juror may have"; and the following general instruction was then added: "Nothing appearing to the contrary, the ocean is a highway." *Held*, that exceptions do not lie to these instructions.

(Official.)

Exceptions from supreme judicial court, York county.

Action by Herbert L. Hildreth against Lizzie Googins. Verdict for plaintiff. Defendant moves for a new trial, and excepts. Motion and exceptions overruled.

G. F. & Leroy Haley, for plaintiff. J. B. Donovan and S. M. Came, for defendant.

STROUT, J. The controversy in this case is whether there is a right of way from the lot of land occupied by the defendant at Old Orchard, as tenant of the heirs of William Emery, over and across the plaintiff's land to the street, as appurtenant to defendant's lot. At the trial below the right of way was claimed first by deed, second by prescription, and third by necessity. The evidence failed to sustain either of the first two claims, and they are abandoned here. But it is strenuously contended that a way of necessity exists from defendant's lot across that of plaintiff.

Lawrence Barnes on June 15, 1871, owned in one tract the land, part of which is now owned by the plaintiff and part by the heirs of William Emery. On that day he conveyed to one Seavey that part of the land now occupied by defendant. William Emery derived title under this deed through mesne conveyances. Barnes' deed to Seavey did not contain any grant of a right of way across Barnes' remaining land. Plaintiff derives his title through deed from Barnes to Francis Milliken, dated October 16, 1879, and mesne conveyances. The land owned by the Emery heirs is bounded on one side by the ocean. No access to it from the street can be had, except by the ocean or crossing land of other owners. Under these circumstances it is claimed that the conveyance by Barnes to Seavey implied a grant of a way over and across the plaintiff's lot, then owned by Barnes, as appurtenant to defendant's lot.

"Implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored, except in cases of strict necessity, and not from mere convenience."

Kingsley v. Improvement Co., 86 Me. 280, 29 Atl. 1074. In that case it was held by this court that, as free access to the land over public navigable waters existed, a way by necessity over the grantor's land could not be implied. The same rule applies here. Defendant's land borders on the ocean, a public highway, over which access to her land from the street can be had. It may not be as convenient as a passage by land, but necessity, and not convenience, is the test. *Warren v. Blake*, 54 Me. 276; *Dollif v. Railroad Co.*, 68 Me. 176; *Stevens v. Orr*, 69 Me. 324. There is no evidence in the case that the water way is unavailable. The court instructed the jury that the ocean was a public highway; and to a question by a juror, "whether the ocean was a public highway if it was not available, and whether it was for the jury to decide whether it is available in the present case," the court replied "that if there was any evidence as to availability it was for them to decide, but, if there was no evidence, they must assume that it was available." They were further instructed "that cases must be decided upon the evidence introduced, and not with reference to any individual knowledge that any juror may have; and I give now the general instruction that, nothing appearing to the contrary, the ocean is a highway."

Exception is taken to these instructions. But they are so clearly in consonance with well-established principles and the decisions of this court that it is unnecessary to discuss them. *Kingsley v. Improvement Co.*, *supra*; *Rolfe v. Rumford*, 66 Me. 564.

We perceive no reason for disturbing the verdict upon the motion.

Motion and exceptions overruled.

(91 Me. 175)

HAMLIN v. DRUMMOND.

(Supreme Judicial Court of Maine. Jan. 3, 1898.)

NOVATION — STATUTE OF FRAUDS — REVIEW ON APPEAL.

1. Novation, in the law of contracts, implies the substitution of a debtor, of a creditor, and of a new contract. It is never presumed, but must always be proved.

2. *Held*, that the statute of frauds does not apply to a case of novation, where the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay the same to the creditor. The new promise is still to pay his own debt, but to a substituted creditor, and works a complete novation.

3. When a question of fact has been submitted to a jury, who saw the witnesses, observed their manner, and could best judge of the truthfulness of their testimony, and apply its meaning to the facts in dispute, and the law court, from a reading of the evidence, cannot say that the finding by the jury is erroneous, *held*, that a new trial will not be granted.

(Official.)

Action by Fred O. Hamlin against Frank Drummond on an account annexed. Judgment

for defendant. Motion by plaintiff to set aside verdict. Overruled.

Harvey D. Eaton, for plaintiff. S. S. & F. E. Brown, for defendant.

HASKELL, J. Assumpsit for the service of a stallion, \$35, "to warrant." The evidence seems to justify the finding of a compliance with the warranty, so that the amount charged "for service" became due and payable from the defendant.

The defendant sets up "novation." He says that plaintiff agreed to take another man as paymaster, in consideration that he (defendant) should exchange his mare, then with foal, for a horse then owned by the other, who, in consideration thereof, promised to pay defendant's debt to the plaintiff. He did so exchange, and the jury found a novation.

1. It is contended by plaintiff that the stranger received no consideration for such promise, if he made one, and therefore it was not binding upon him, and could not work a discharge of the defendant's debt to plaintiff; and that such promise would be void under the statute of frauds as a promise, not in writing, to pay the debt of another.

"Novation" is a word foreign to the common law, and has its natural meaning only in the civil law. It implies the substitution of a debtor, of a creditor, and of a new contract. It is never presumed, but always must be proved. The most frequent novation is the substitution of a new debtor, and his promise to pay the debt must be a valid and binding promise to work a discharge of the old debtor; and, were it not for the statute of frauds, it would seem that the discharge of the old debtor would be a sufficient consideration to make valid the new promise; and it would logically follow that if the new promise be in writing, so as to comply with the statute of frauds, such promise would be valid. But, where the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay the same to the creditor, the statute does not apply, for the new promise is still to pay his own debt, but to a substituted creditor, and works a complete novation. *Dearborn v. Parks*, 5 Me. 81; *Brown v. Attwood*, 7 Me. 356; *Rowe v. Whittier*, 21 Me. 545; *Cutler v. Everett*, 33 Me. 201; *Maxwell v. Haynes*, 41 Me. 559; *Perkins v. Hitchcock*, 49 Me. 466; *Goodwin v. Bowden*, 54 Me. 424; *Stewart v. Campbell*, 58 Me. 439; *Heaton v. Angier*, 7 N. H. 399; *King v. Hutchins*, 28 N. H. 580; *Winslow v. Locke*, 60 N. H. 580; *Crowfoot v. Gurney*, 9 Bing. 372.

So in the case at bar. If the defendant owed the plaintiff \$35, and he accepted a stranger as a substituted debtor, who engaged to pay the debt, in place of boot that he was to pay the defendant in the exchange of horses, he (the stranger) thereby really engaged to pay his own debt due the defendant, by paying it to the plaintiff for the defendant's use, so that it was

a valid promise, not to pay the debt of another, but his own debt, that worked the discharge of defendant's debt to the plaintiff. It was a perfect novation.

2. Whether such contract was made is a question of fact, and has been submitted to a jury, who saw the witnesses, observed their manner, and could best judge of the truthfulness of their testimony, and apply its meaning to the facts in dispute; and the jury found that a novation had been proved. We cannot say to the contrary from reading the evidence. The plaintiff denies the novation. Both the other parties swear to it. The jury has settled the fact, and we dare not disturb the verdict.

Motion overruled.

(91 Me. 221)

LORD v. LANGDON.

(Supreme Judicial Court of Maine. Jan. 5, 1898.)

FENCES — UNNECESSARY HEIGHT — PRIVATE NUISANCE.

1. By the common law, a man may build a fence on his own land as high as he pleases, although by so doing it may obstruct his neighbor's light and air.

2. But, by statute, "any fence or other structure in the nature of a fence, unnecessarily exceeding eight feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

3. The gist of an action against a party for maintaining such a structure is that it is "maliciously kept and maintained." The plaintiff must show that malevolence was the dominant motive.

(Official.)

Action by Samuel O. Lord against Henry Langdon. Verdict for plaintiff, and defendant moves for a new trial. Overruled.

Frank E. Southard, for plaintiff. Geo. H. Hughes, for defendant.

FOSTER, J. This is an action brought under chapter 188 of the Laws of 1893, to recover damages for maliciously keeping and maintaining a structure in the nature of a fence for the purpose of annoying the plaintiff.

The verdict was in favor of the plaintiff, and the case comes up on motion for a new trial.

The parties occupy adjacent lots, on which their respective houses stand, on the east side of High street, in the city of Bath. Some time in 1894 the defendant built a structure entirely on his own land, about 2 feet from the division fence separating the two lots and 4 feet from plaintiff's house. It was 8½ feet high on the west end, and 14 feet on the east end, conforming to the grade of the lot, level on top, and as high as the top of the plaintiff's windows.

By the common law a man may build a fence on his own land as high as he pleases, although by so doing it may obstruct his neighbor's light and air. But by the statute "any fence or other structure in the nature of a

fence, unnecessarily exceeding eight feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

The gist of the action consists in the fact that the structure is "maliciously kept and maintained." To entitle the plaintiff to recover, it must be shown that malevolence was the dominant motive, and without which the fence would not have been built or maintained. So, if the height above eight feet is shown to be necessary, there can be no liability, no matter what may be the motive of the owner in erecting it. *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390.

Under instructions from the court to which no exceptions are taken, the jury found that the controlling, dominant motive of the defendant was malicious, and that the erection of the fence was done for the purpose of annoying the plaintiff. The evidence satisfies us that the jury were justified in the conclusions to which they arrived, and that the verdict ought not to be disturbed.

Motion overruled.

(91 Me. 222)

RHOADES v. VARNEY et al.

(Supreme Judicial Court of Maine. Jan. 5, 1898.)

NEGLIGENCE—MASTER AND SERVANT—ASSUMING RISK.

1. Although between joint employers, one of them takes upon himself the function of a workman, the relation of master and servant nevertheless continues to subsist.

2. Where a defendant standing in the relation of master knows, or by the exercise of ordinary care ought to know, that the plaintiff is in a place of danger, it is the duty of such defendant, therefore, to exercise ordinary care on his part, so as not to expose the plaintiff to perils that might by the exercise of such care have been avoided.

3. The servant, though employed in a place of more or less danger, has a right to expect the exercise of due care on the part of his employer.

4. The servant, in assuming the ordinary risks of an employment, does not assume a risk which is the consequence of the employer's negligence.

(Official.)

Action by John A. Rhoades against Isaac Varney and others. Verdict for plaintiff for \$1,200. Defendants move for a new trial. Overruled.

E. P. Spinney and J. O. Bradbury, for plaintiff. G. C. Yeaton, for defendants.

FOSTER, J. The plaintiff was employed to attend the "tall stock" in defendants' sawmill, and, while so doing, his leg was broken by being caught between a projecting point, or head block, of the retreating log carriage, and the frame supports of wooden rollers set in the floor, and designed to facilitate handling the lumber as it came from the carriage. One of the defendants was the sawyer, stationed near the saw, whose duty it was to operate the car-

riage; and the negligence which the plaintiff alleges consisted in his "carelessly, negligently, and without notice, starting the machinery operating said carriage" while the plaintiff was in the act of removing the log from the carriage.

The verdict being for the plaintiff, the case comes before this court on the defendants' motion to set the verdict aside, because it is not supported by the evidence, and because it is excessive in amount.

The gravamen of the plaintiff's complaint is that his injuries were received through the defendant's negligence in starting the machinery without due warning or notice to the plaintiff, so as to enable him, while in the proper performance of his duty, and with reasonable care on his part, to avoid the peril and escape the injuries which he received.

The plaintiff was 25 years old, and had had ample experience in the duties and dangers of his occupation, and had been at work about 6 weeks in the performance of the same duties in which he was engaged at the time of the accident; and, as the evidence shows, during all that time it had been the practice of the defendant to start the carriage back as soon as it was relieved of the log or lumber upon it.

The logs were placed upon the carriage in the rear of the saw, then run past, and, if deemed suitable, sawed into box boards; otherwise, taken off and cut into shingle bolts. When the plaintiff was injured, a log of the latter character had been placed upon the carriage, run past the saw, and the plaintiff was attempting to remove his end of it from the carriage, when the carriage was started back at a velocity of from three to four hundred feet a minute. The contention of the defendants is that the log had been removed when the carriage was started. This is the principal question of fact upon which the parties are at variance.

It is strenuously asserted in defense that the defendant did not know where the plaintiff's leg was when the carriage was reversed and started back; and that, if he did know this, the defendant was warranted in assuming that the plaintiff himself also knew, and that his experience enabled him to appreciate, the danger of the situation, and to seasonably remove his leg to some safer standing ground.

The evidence is uncontradicted that the defendant was looking at the plaintiff at the time he started the carriage. There is no suggestion that any warning was given, or any other communication between them. The defendant knew, or by the exercise of ordinary care ought to have known, that the plaintiff was in a place of danger; and it was his duty thereupon to exercise ordinary care on his part, so as not to expose the plaintiff to perils that might, by the exercise of such care, have been avoided. Even though the plaintiff was in a position which was more or less dangerous from the very nature of the work and the machinery which was being operated, and demanding care and vigilance on his part, yet he had a right to expect the exercise of due care on the part of his employer. From him he was entitled to expect the care

and attention which the superior position and presumable sense of duty of the latter ought to command. And although, by an arrangement between the joint employers of this plaintiff, one of them saw fit to take upon himself the function of a workman, the relation of master and servant nevertheless continued to subsist. *Ashworth v. Stanwix*, 3 El. & El. 701.

True, the plaintiff, in engaging in the employment of the defendants, assumed the ordinary risks of such employment or those of obvious peril. *Haggerty v. Granite Co.*, 89 Me. 118, 35 Atl. 1029. But it is the duty of the employer, implied from the contract of employment, to exercise ordinary care in view of the circumstances of the situation, so that the servant shall not be exposed to dangers that may be prevented by the exercise of such care. Whenever the employer fails in this duty, it is negligence, and he is liable to the servant who has been injured in consequence of such failure of duty, and who is without fault on his part; for the servant, in assuming the ordinary risks of the employment, does not assume a risk which is the consequence of the employer's negligence. This doctrine is sustained by numerous authorities, and the principal difficulty arises in the application of the rule to the facts of each particular case. *Mayhew v. Mining Co.*, 78 Me. 100, 108; *Buzzell v. Manufacturing Co.*, 48 Me. 113; *Shanny v. Mills Co.*, 66 Me. 420.

The question of negligence, even in cases where the facts are undisputed, but where intelligent and fair-minded men may reasonably arrive at different conclusions, is for the jury. *Elwell v. Hacker*, 86 Me. 416, 30 Atl. 64; *Nugent v. Railroad Co.*, 80 Me. 62, 70, 12 Atl. 797. This is not a case where there is not evidence of sufficient legal weight to sustain a verdict, as was the case of *Elwell v. Hacker*, *supra*, where the plaintiff sustained injuries by the fall of a staging which he had built from materials of his own selection, and where there was no evidence that either of the defendants had personally superintended its removal. Nor like the case of *Nason v. West*, 78 Me. 253, 259, 3 Atl. 911, where the plaintiff sought to recover for injuries received in entering an oven which fell upon him, the nature and construction of which he was as well acquainted with as the master himself.

Here the defendant was personally operating machinery which was of a dangerous character. He knew, or ought to have known, the danger to which the plaintiff was exposed in the situation in which he was at that moment engaged, and in which he saw him. It was a duty he owed the plaintiff to look, to perceive, and ascertain when it was proper to recall the carriage. He acted upon his own judgment, not from any signal communicated to him from the plaintiff. The facts do not warrant us in holding that the plaintiff, by his contributory negligence, is precluded from maintaining this action.

Nor do we think the verdict should be reduced. The plaintiff's injuries were severe, the bones of his leg being broken in three places.

The injury was such that the fractured limb is somewhat shorter than the other, and this injury is permanent. We do not feel that any reduction in the amount of the verdict is called for in this case.

Motion overruled.

(91 Me. 214)

GOULD et al. v. BOSTON EXCELSIOR CO.
(Supreme Judicial Court of Maine. Jan. 5, 1898.)

INCOMPLETE CONTRACTS—PAROL EVIDENCE—LOGS
—SCALER.

1. When the written memorandum of an agreement for the cutting, hauling, and driving logs or wood is silent as to the scale and the scaler, and does not import upon its face to contain all the stipulations of the parties as to the subject-matter, oral evidence may be received of an additional verbal stipulation as to the scale or the scaler.

2. Such a stipulation does not add to, nor subtract from, nor in any way vary, the liability of either party under the written memorandum.

(Official.)

Exceptions from supreme judicial court, Piscataquis county.

Action by Almond H. Gould and another against the Boston Excelsior Company. Verdict for plaintiffs, and defendant excepts. Overruled.

This was an action of assumpsit to recover the sum of \$1,821.47 for driving 3,235 cords of poplar from Ship Pond stream to Milo boom, at 75 cents per cord.

Plea, the general issue.

The plaintiffs introduced in evidence a written contract signed by themselves; also a written contract signed by the defendant's agent,—of the following tenor:

"Boston Excelsior Company.

"Manufacturers and Dealers in Excelsior and Upholsterers' Supplies.

"Julian D'Este, Treas. 26 Canal Street.

"Boston, Mass.

"Sebec, Me. Mar. 29, '94.

"We, the undersigned, do hereby agree to take the poplar cut and peeled for the Boston Excelsior by Hoxie Bros. now on landing at Ship Pond stream, and drive and deliver the same in their boom at their dam in Milo Village, Me., in the spring of 1894, for 75 cts. per cord.

"We do further agree to deliver all poplar delivered in booms to the Boston Excelsior Co. from other parties on Sebec Lake to the Boston Excelsior Co. at their boom in Milo Village, Me., in the spring of 1894, for 25 cts. per cord.

"We further agree to deliver and yard on the landing at Ship Pond stream (what poplar was left in the woods peeled by Hoxie Bros.) during the summer of 1894, for \$1.00 per cord.

"We also agree to cut and peel 2,000 (two thousand) cords of poplar, if there be that amount, on land known as the 'Quarry Tract' owned by S. & J. Adams, of Bangor, Me., and drive and deliver the same to the dam of the

Boston Excelsior Co., in Milo Village, Maine, in the spring of 1895; cutting, peeling, and delivering the same at landing on Ship Pond stream for \$1.50 per cord, and 75 cents per cord for driving the same to the dam of the Boston Excelsior in Milo Village, Maine.

"A. H. Gould.

"J. C. Dean."

"Boston Excelsior Company.

"Manufacturers and Dealers in Excelsior and Upholsterers' Supplies.

"Julian D'Este, Treas. 20 Canal Street.

"Boston, Mass., Mar. 29, '94.

"We, the undersigned, agree to pay Gould & Dean the sum of \$500.00 (five hundred dollars) when the poplar now landed in Ship Pond stream is driven out into Sebec Lake (to pay men with), and pay them the balance when the rest of the poplar is in the Milo boom. We further agree to advance money to pay men for peeling and yarding poplar on Ship Pond stream, to be cut as agreed upon land known as the 'Slate Quarry Tract,' owned by S. & J. Adams. Also to advance money to pay men for yarding upon Ship Pond stream such poplar as was left in the woods by Hoxie Bros. in their operation, when same is yarded on stream.

"Boston Excelsior Co.,

"By Julian D'Este, Treas."

The evidence tended to show that both contracts were signed and delivered at the same time. The plaintiffs introduced evidence tending to show that a few days prior to the making and signing of the contracts the plaintiffs met Julian D'Este, treasurer and agent of the defendant corporation at Milo; that the trade so made at said Milo is embodied in the contract first above. The plaintiffs offered evidence of certain conversations between themselves and said Julian D'Este, made at the time that the trade was made that was embodied in the contract first above, tending to show that there was an agreement made as to how and by whom the poplar was to be scaled. The plaintiffs claimed that such talk as to the scaler constituted an independent agreement. The defendant introduced evidence tending to show that the contract first above embraced the whole contract made at Milo between the parties.

Upon this branch of the case the presiding justice gave the jury the following, among other, instructions:

"The plaintiffs claim to recover a balance of \$1,821.47 for services alleged to have been performed under a written contract in driving certain logs on Sebec waters into Milo for the benefit of the defendant corporation. They claim that they drove 1,025 cords of the Hoxie lumber and 2,210 cords of the new lumber; while the defendant claims that there were 848 cords of the Hoxie lumber and 1,745 cords of the new lumber,—making a difference of 177 cords of the Hoxie lumber and 465 cords

of the new lumber, a difference of considerable importance to the parties; and, as I have observed before, whether the amount be large or small, of course the parties are entitled to your best judgment on the facts which they present to you. * * *

"If a written instrument is silent in relation to any material point, it is competent for them [the parties] to show that they have made outside of that an independent agreement in relation to some matter which does not contradict, vary, or modify the written contract.

"The plaintiffs seek to avail themselves of this familiar principle of law.

"A written contract has been introduced signed by the parties, specifying what was to be done by the plaintiffs with reference to the Hoxie lumber and the new lumber in respect to the cutting, peeling, hauling, landing, and finally driving into Milo. It is not in controversy that this was the understanding, and that it was done without fraud or mistake on either side, and contracts have been signed.

"But the plaintiffs say that those contracts were prepared, or signed, at all events, by the defendant company in Boston, and that there was an independent and important understanding and stipulation between them which was not embodied in this written instrument, and that is with reference to the manner in which and the person by whom the number of cords should be ascertained; in other words, the agreement upon the scaler. And the plaintiffs say that there was such an independent agreement; that it was well and fairly and fully understood between them and the defendant company that not, indeed, the name of the scaler, but that the person that should be designated and furnished by the Adamases, of Bangor, should be the scaler. The plaintiffs both, as I remember, testify that when the inquiry was raised as to who should be the scaler, or how the scale should be made, the agent of the defendant corporation, Mr. D'Este, replied, in substance, that there would be no trouble about the scale, that Adams would send up and furnish the scaler; and the plaintiffs say that that proposition was acceded to by the plaintiffs, if not expressly in words at that time, by saying, 'That will be satisfactory to us,' or 'We accept your proposition that the scaler furnished by Adams shall be the scaler agreed upon;' nevertheless that you ought to infer and must infer as fair-minded men that by their conduct they did accept the proposition, and did act upon it; and when Mr. Adams, or the Adamases, were notified, they sent up the scaler, and he entered upon the discharge of his duties at the several landings where the poplar was being hauled.

"Now this is the position of the plaintiffs. They say, in other words, that there was a fair agreement upon the person who should scale the lumber; that that person was furnished, as understood and agreed upon, by

Adams; that he was in fact, if that inquiry should be opened, a competent person; that he entered upon his duties, and discharged them fairly and honestly in the exercise of his best judgment; and therefore they claim that the results of his scale are conclusive upon the parties.

"Well, gentlemen, I may as well say here that there is no dispute between counsel in relation to the law upon that branch of the case. It is familiar and well settled that the scale of a scaler is conclusive upon the parties, who have agreed upon him, in the absence of fraud or manifest mistake."

After verdict for the plaintiffs, the defendant was allowed exceptions to the admission of the evidence introduced by the plaintiffs, showing how and by whom the poplar was to be scaled.

W. E. Parsons and J. B. Peaks, for plaintiffs. H. Hudson and F. E. Guernsey, for defendant.

EMERY, J. The defendant had purchased some poplar cut upon the land of Adams, and desired to have it driven down the streams to its mill. It also desired to have other poplar on Adams' land cut, peeled, and driven. To this end, its agent had some conversations with the plaintiffs with reference to their doing the cutting, peeling, and driving. As a result of these conversations, the plaintiffs gave the defendant a written memorandum, signed by them only, and the defendant at the same time gave them a written memorandum, signed by its agent only. These memorandums are printed in full supra.

The plaintiffs did cut, peel, and drive more or less poplar for the defendant under these memorandums, and the amount, or number of cords, was the only question before the jury.

It will be noticed that in neither memorandum was it stated by whom the poplar should be scaled, or that it should be scaled at all. The plaintiffs offered to show by parol evidence that during the conversations prior to the exchange of the memorandums it was orally agreed by both parties that the poplar should be scaled by a scaler to be sent by Adams, the landowner, and that his scale should control. Was such parol evidence admissible for that purpose under these circumstances?

It is difficult to reconcile the various decisions upon the general question of when parol evidence of other and oral stipulations may be received where some stipulations are expressed in writing. The cases cited in the majority and minority opinions of the court in *Neal v. Flint*, 88 Me. 72, 33 Atl. 600, are evidence of that difficulty.

We think, however, that a safe rule, decisive of this case, may be readily deduced from the great majority of the decisions, viz.: Where the writing or writings, by rea-

son of their brevity, informality, or skeleton nature, do not of themselves import that all the stipulations between the parties with reference to the subject-matter were intended to be expressed in them, and where the particular stipulation is of such nature that the omission to express it in the writing does not indicate that it was not agreed upon, and it in no way conflicts with any written stipulation, and does not increase the burdens of either party, parol evidence of such stipulation is admissible. We do not say that all the above conditions must exist before the parol evidence can be received. We only say that where they do exist the parol evidence is admissible. The justices of this court have been unanimous in support of at least this latter proposition. *Bonney v. Morrill*, 57 Me. 368; *Neal v. Flint*, 88 Me. 72, 33 Atl. 639.

In this case there was no formal draft of a contract containing reciprocal stipulations signed by both parties. There were only informal memorandums exchanged relating to time, place, and price, and making certain the things usually most in debate, and most desirable to have made certain. The poplar, under such memorandums, would require to be scaled. It would be natural to provide for a scaler. The omission to name him in the memorandum does not indicate that the parties agreed to do without a scaler. The alleged oral agreement that Adams, the landowner, should send the scaler, does not add to, subtract from, nor in any way vary, the duties of either party. It was equally for the benefit of both parties. It was competent for either party to prove the stipulation by parol evidence, notwithstanding the writings.

Exceptions overruled.

(91 Me. 208)

**THOMPSON v. LEWISTON DAILY SUN
PUB. CO.**

(Supreme Judicial Court of Maine. Jan. 4,
1898.)

LIBEL—PLEADING—COLLOQUIUM.

1. In order to render words actionable in a suit for libel, it is not necessary that there should be the same precision and certainty in the language employed to make the charge as in the allegations of an indictment for the same offense.

2. If the defamatory words, taken in their natural and ordinary signification, fairly import a criminal charge, it is sufficient to render them actionable.

3. But, upon demurrer to the declaration, words alleged to be libelous cannot be pronounced actionable by the court unless they can be interpreted as such with at least reasonable certainty.

4. In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the law requires the pleader to make the meaning certain by means of proper colloquium and averment.

5. *Held*, that the statement in the defendant's newspaper, "He has a wife living in the West," construed with reference to all the oth-

er averments in the declaration, imputes with reasonable certainty to the plaintiff the crime of bigamy or polygamy.

6. When the manifest purpose of such statement is to suggest criminal conduct with respect to the plaintiff's marriage relations, and considered in connection with the averment in the colloquium that "he had been married to Helen M. Thompson, with whom he was then living as his lawful wife in the town of Monmouth," *held*, that it must be regarded as imputing to the plaintiff the crime of bigamy.

7. The article complained of in this case related to the arrest of the plaintiff upon the charge of murder. *Held*, that the allusion to the "divorce of the second wife, now living in Auburn," is calculated to present a contrast between her legal status and that of "a wife now living in the West," and that the entire article was apparently designed to exhibit his previous record in such a light as to suggest the probability of the truth of the charge upon which he had been arrested.

(Official.)

Exceptions from supreme judicial court, Kennebec county.

Action by Edgar L. Thompson against Lewiston Daily Sun Publishing Company. Demurrer to declaration overruled, and defendant excepts. Exceptions overruled.

H. M. Heath and C. L. Andrews, for plaintiff. G. W. Heselton and L. T. Carleton, for defendant.

WHITEHOUSE, J. This is an action of libel for defamatory matter published in the newspaper of the defendant company concerning the plaintiff. The defendant filed a general demurrer to the declaration. The presiding judge overruled the demurrer, and the defendant brings the case to the law court on exceptions to this ruling.

The more material parts of the published article, comprising the special matter alleged to be libelous, with the innuendoes as they appear in the declaration, are as follows:

"The announcement in yesterday's Sun of the Thompsons' (meaning the plaintiff and his brother) arrest for the murder of J. Augustus Sawyer caused a surprise to many people in this section of the country, as many people supposed no solution would come. Words of praise were heard for the Sun's enterprise in ferreting out the mystery which has caused so much talk. A resident from near Monmouth remarked that the Sun had done a big thing for that place. 'Why,' said the gentleman, 'my folks were afraid, even to this day, to go out of doors alone nights for the fear of being molested.' * * *

The Thompsons' (meaning the plaintiff and his brother J. Albert Thompson aforesaid) records (meaning their past conduct or actions) are not of a Sunday school order (meaning that their conduct in the past has not been in accordance with the rules of morality and virtue, but has been immoral and in violation of law). Edward Thompson (meaning the plaintiff), whose true name is Edgar Thompson, had lived an eventful life, and the authorities (meaning the prosecuting officers of Kennebec county

aforesaid) have evidence which will not put him in an enviable light. It is said from other sources that Edward or Edgar Thompson (meaning the plaintiff) has a wife living (meaning that he, the plaintiff, had committed the crime of bigamy, and that a person who was then his wife, and from whom he has never been divorced; was then still alive, and that the said Helen M. Thompson, with whom he is now and was then living, is not and was not then his legal wife, but that he is and was then living with her unlawfully) in the West, who will probably be secured (meaning that she will be brought to Augusta) as a witness (meaning that she will be summoned to testify as to the character of the plaintiff at the trial of said plaintiff on the said charge of murder). 'Ed' Thompson (meaning the plaintiff) was divorced by his second wife (meaning the said Abbie E., his first wife, from whom he was divorced as aforesaid), and she is now living in Auburn."

In the colloquium of his declaration the plaintiff avers "that he is, and for a long time prior to December 20, A. D. 1895, had been, legally married to his wife, Helen M. Thompson, with whom he is now and for several years prior hereto has been living as his lawful wife in said town of Monmouth; that previous to such marriage he was married to one Abbie E. Merriman, and on the 16th day of November, previous to his marriage to said Helen M. Thompson, he was legally divorced from her, the said Abbie E. Thompson, and that she, the said Abbie E. Thompson, is now living in Auburn, in the county of Androscoggin and state of Maine; that he has never been married to any other person or persons than the said Abbie E., his first wife, and the said Helen M., his second wife; that he has never committed the atrocious crime of bigamy; that he, said plaintiff, was on the eighteenth day of December, A. D. 1895, arrested, and, in company with his brother, J. Albert Thompson, on the 20th day of December, A. D. 1895, arraigned before A. G. Andrews, Esq., judge of the municipal court of the city of Augusta, within and for said county of Kennebec, on a charge of murder of one J. Augustus Sawyer, and on the said preliminary hearing thereon was discharged as innocent thereof."

It is contended in behalf of the plaintiff that the words, "he has a wife living in the West," construed with reference to all the other averments in the declaration, are not only capable of imputing, but do clearly impute, to the plaintiff the crime of bigamy or polygamy. On the other hand, the defendant argues that as there is nothing in the published article to negative the exception found in the statute (Rev. St. c. 124, § 4) of "one legally divorced" and "one whose husband or wife has been continually absent for seven years, and not known to be living," the words fall short of charging the

crime of bigamy, and cannot be declared defamatory without magnifying their true meaning.

It is not necessary, in order to render words actionable, that there should be the same precision and certainty in the language employed to make the charge as in the allegations of an indictment for the same offense. If the defamatory words, taken in their natural and ordinary signification, fairly import a criminal charge, it is sufficient to render them actionable. *Gibbs v. Dewey*, 5 Cow. 503; *Miller v. Miller*, 8 Johns. 74. Written or printed language, alleged to be defamatory, is in law capable of the same sort of modification by explanatory evidence as oral language; and where, upon trial, the question depends upon evidence to be introduced in connection with the publication, it is properly left to the jury to say whether the language is libelous or not, the same rule prevailing as in similar cases of slander. *Odgers, Sland. & L.* p. 94. Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court. What meaning the words did convey to the readers is in such a case a question of fact for the jury. It is not the intention of the writer, or the understanding of any particular reader, that is to determine the question. It is rather the effect which the language complained of was fairly calculated to produce, and would naturally produce, upon the minds of readers of reasonable understanding, discretion, and candor, after it has been examined and considered in connection with all other parts of the writing, and in the light of all the facts and circumstances known to them.

But, upon demurrer to the declaration, words alleged to be libelous cannot be pronounced actionable by the court "unless they can be interpreted as such with at least reasonable certainty. In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the rule requires him to make the meaning certain by means of proper colloquium and averment." *Wing v. Wing*, 66 Me. 62.

In the case at bar it is the opinion of the court that when the statement, "He has a wife living in the West," is considered in the light of the context and of the spirit and purpose of the entire article, and construed with reference to all the facts stated in the colloquium and admitted by the demurrer, it is fairly calculated to convey, and must be held to convey, the meaning which the plaintiff attaches to it. When thus examined, and interpreted according to the natural and popular signification of the words, it clearly imports a charge of bigamy. The communication relates to the arrest of the plaintiff upon the charge of murder. It was published by a newspaper claiming in the

same article to have exclusive information in regard to the plaintiff's life and character, and to be entitled to the credit of "ferreting out" a great mystery. It declares that the plaintiff's record is "not of a Sunday school order"; that "Edward Thompson, whose true name is Edgar Thompson, has lived an eventful life"; and that "the authorities have evidence which will not put him in an enviable light." In the same paragraph follows the gravamen of the matter: "It is said that he has a wife living in the West who will probably be secured as a witness. 'Ed' Thompson was divorced by his second wife, and she is now living in Auburn." The popular, as well as the lexical, meaning of "wife" is "a woman who is united to a man in the lawful bonds of wedlock." The allusion to the divorce of a former wife is calculated to present a contrast between her legal status and that of a "wife now living in the West," and the entire article was apparently designed to exhibit his previous record in such a light as to suggest the probability of the truth of the charge upon which he had been arrested. The fact that he had been divorced from a wife in the West would have no such tendency. The manifest purpose of the statement was to suggest criminal conduct with respect to his marriage relations; and when it is considered in connection with the averment in the colloquium that he "had been married to Helen M. Thompson, with whom he was then living as his lawful wife in the town of Monmouth," it must be regarded as imputing to him the crime of bigamy "with reasonable certainty."

Exceptions overruled.

(91 Me. 200)

TOOLE v. BEARCE et al.

(Supreme Judicial Court of Maine. Jan. 5, 1898.)

APPEAL—BILL OF EXCEPTIONS—PRESUMPTIONS—
AFFIRMATIVE SHOWING—INSTRUCTIONS—
—ASSUMPTIONS OF FACT.

1. When the presiding justice unqualifiedly allows a bill of exceptions which does not disclose that the exceptions were not seasonably noted, the presumption is that the exceptions were seasonably noted, in accordance with the rule.

2. When the bill of exceptions does not affirmatively show that, but for the rulings excepted to, the finding of the jury might reasonably have been different, the excepting party does not show that he is aggrieved, and hence his exceptions must be overruled.

3. The presiding justice in his instructions may properly assume even a disputed proposition of fact to be established, if all the evidence thereon can lead to no other reasonable conclusion.

4. Unless it appears from the bill of exceptions that there was substantial evidence against the proposition of fact assumed by the presiding justice to be established, the exceptions to such ruling or assumption must be overruled.

(Official.)

Exceptions from supreme judicial court, Penobscot county.

Action by Christopher Toole against Samuel R. Bearce and others. Verdict for plaintiff. Defendants except. Exceptions overruled.

This was an action on a contract to recover for certain granite claimed to have been delivered by the plaintiff's assignor to the defendants under a contract, and for damages for the breach of the contract by the defendants, and for prospective profits. The writ contains two counts. The first count sets out specifically a definite, certain, and completed contract made between the parties. The second count is the ordinary omnibus count, with specifications and quantum meruit. The defendants pleaded the general issue, with a brief statement to the effect that the defendants attempted to enter into a contract with the plaintiff's assignor, one Cyrus F. Stackpole, but that in fact the contract was never actually entered into. The contract set out in the plaintiff's declaration provided that all measurements of said granite were to be made after it had been constructed into said walls, head gates, and other improvements. There was evidence tending to show that a certain amount of granite was delivered by the plaintiff's assignor at the Bangor Waterworks pumping station, the place of the delivery specified in the contract set out. It was contended for the plaintiff that he was entitled to recover for the granite actually delivered, for that in process of delivery, and for damages for the defendants' breach of the contract, and for prospective profits.

It was contended for the defendants that no actual contract was ever entered into, and that, if they were liable at all, they were liable only for such granite as had been actually delivered to them at the pumping station; and that, in determining the amount of granite delivered for which they might be liable, the granite was to be measured, not as if in the wall, but as it actually measured out of the wall, the point not being raised except as appears in the charge. There was evidence that the measurement of the stone would be some 10 or 15 per cent. greater when measured in the wall than when measured roughly out of the wall. Upon this point the presiding justice instructed the jury as follows: "In considering the agreements as to price, \$2.75 were to be paid for the dimension; and then you may add to that, if you please, either ten or fifteen per cent. for the enlargement of it when measured in the wall, because the agreement of the parties was \$2.75 measured in the wall, and they all say it amounts to as much as ten per cent. better when measured in the wall than when measured roughly, and the defendants' witness estimated it about fifteen per cent."

To this ruling and instruction the defendants excepted.

There was a verdict of \$826.49 for the plaintiff.

G. H. Worster and P. G. White, for plaintiff.
D. J. McGillicuddy, F. A. Morey, and J. F. Robinson, for defendants.

EMERY, J. 1. The plaintiff contends that this bill of exceptions should be rejected by the law court without consideration of its subject-matter, because it is not affirmatively stated in the bill that the exception to the instruction complained of was noted before the jury retired with the case. He invokes court rule 18 and *McKown v. Powers*, 86 Me. 295, 29 Atl. 1079, in support of this contention.

It does not affirmatively appear, however, from the bill, that the exception was not seasonably noted under the rule as expounded in the case cited. The presumption, therefore, is that it was seasonably noted. *Ellis v. Warren*, 35 Me. 125. Frequently in the trial of a case it will be tacitly understood by the presiding justice and the parties that certain legal points are contested, and that any adverse ruling upon them is to be regarded as excepted to, without a formal noting on the record at the time. If the presiding justice signs a bill of exceptions without qualification or any intimation that the exception was not seasonably reserved, the law court will assume that he and the parties understood it to be seasonably reserved, and will proceed to consider the bill of exceptions if it be in proper form,—if the exceptions are presented in a "summary manner"; that is, "stated separately, pointedly, and concisely." *McKown v. Powers*, supra, p. 295. The statement in this bill makes the point of the exception sufficiently clear.

2. The plaintiff's assignor negotiated with the defendants for a contract to deliver to them certain stone for a wall. A written memorandum of such contract itself was drawn up, but not signed, and the contract itself was found by the jury not to have been perfected. This memorandum specified the price per cubic yard, the measurement to be of the stone after it was placed in the wall. After the preparation of this memorandum, and in expectation of its being signed and made a formal contract, the plaintiff's assignor actually delivered to the defendants some stone of the kind contemplated in the memorandum and at the place therein specified. This stone the defendants accepted. The stone was measured by the defendants in the heap before being placed in the wall, and it was admitted that the same stone in the wall would measure some 10 or 15 per cent. more than it had measured in the heap.

The presiding justice practically told the jury that there was not sufficient evidence of the completion of the proposed contract, and the jury found that the stone had been accepted. The only other questions for the jury were the quantity and price of the stone actually delivered and accepted.

The presiding justice in his charge plainly and amply instructed the jury that the plaintiff could not recover upon the supposed contract, but only upon a quantum meruit, and that what was a reasonable price was a question for the jury to determine from the evidence. The written memorandum had been admitted in evidence upon this question of reasonable price, and it is not questioned that it was proper evi-

dence to be considered by the jury. It does not appear from the bill of exceptions that there was any other evidence upon that question. It does not appear that during the trial the defendants questioned that the price named in the memorandum and based upon a measurement in the wall was a fair, reasonable price, in case the defendants had accepted the stone. Indeed, the bill of exceptions seems to intimate affirmatively that the price was not disputed until the presiding justice delivered his charge.

Under these circumstances the presiding justice called the jury's attention to the price named in the memorandum as being based upon a measurement to be made in the wall, and to the undisputed fact that the delivered stone had only been measured in the heap; and to the further undisputed fact that the same stone measured in the wall would measure 10 or 15 per cent. more than in the heap. He then instructed them they could, "if they pleased, add [to the measurement in the heap] ten or fifteen per cent. for the enlargement of it [the stone] when measured in the wall." The exception is to this instruction, and upon the ground that it took away from the jury more or less of the question of reasonable price.

It must be evident that the defendants do not show by their bill of exceptions that they were prejudiced by this instruction. They do not show that there was in the case any evidence from which a jury could have found a different price based upon any other measurement than that named in the memorandum. Unless there was such evidence, we must assume that the jury would be governed by the only disclosed evidence, the memorandum. Upon that assumption it was clearly right to instruct them they could, when computing the entire amount to be paid, enlarge the measurement in the heap to its equivalent in the wall, according to the uncontradicted evidence.

It is lawful, and often expedient, for the presiding justice, in his instructions to the jury, to assume undisputed propositions of fact to be established, and even to assume disputed propositions of fact to be established, when all the evidence in regard to them can lead to no other reasonable conclusion. Such a course will often greatly simplify the issue, and enable the jury to concentrate their attention more completely and effectually upon the real dispute to be determined by them. If a party feels aggrieved by such an assumption, and wishes it set aside, he should show in his bill of exceptions that there was, at least, some evidence against the proposition assumed. The excepting party is always held to show in his bill of exceptions that, but for the ruling complained of, the verdict or judgment might properly have been different. If that does not appear, or if it does appear that in the end the judgment must be against the excepting party, it cannot be truly said that the excepting party has been prejudiced, and his exceptions must be overruled.

In this case, had the instructions complained of been withheld, it does not appear that the

jury could have adopted any other price or measurement. Their duty was the same, with or without the instructions.

Exceptions overruled.

(91 Me. 193)

TAYLOR et al. v. PORTSMOUTH, K. & Y.
ST. RY.

MARSHALL v. SAME.

(Supreme Judicial Court of Maine. Jan. 8,
1898.)

NUISANCE—INJUNCTION—STREET RAILWAY—PUBLIC USES—DAMAGES—CORPORATIONS.

1. Equity will not enjoin a public nuisance on the application of an individual, either in his own behalf, or in behalf of himself and others of like interest who either do or do not join in the application, unless some special damage to the individual, not suffered in common with the public generally, has been sustained.

2. The public may regulate by law the use of its public ways in such manner as the legislature may think will best serve the public interest. The kind of use that may be permitted is of no consequence to the abutting landowner. He has been paid his damages for the creation of the way, so that the public controls its use, and he must take his chance with the rest of the community in which he lives of any inconvenience suffered by reason of the use that the public may see fit to permit.

3. Where the plaintiffs, as abutting proprietors and owners of the fee in a public way, sought to enjoin the location of a street railway within the limits of a public way, *held*, that the railway company is allowed to share with the public its right of transit over the same, and its location does not create any additional servitude.

4. Also, that the plaintiffs have suffered no damage from the defendant's occupation in common with the public of some share in the easement acquired by it upon the creation of the way; so that they have no cause for complaint on account of the construction of defendant's railroad, not common to the public in general, and therefore have suffered no special damage, and can have neither an action at law nor relief in equity.

5. In considering such use of public ways for surface transit, the court holds that it matters not what the motive power used may be, nor whether the transit be the carriage of passengers, of freight, or the transmission of intelligence, by telegraph or telephone, or of water, gas, or sewage. All these are public uses that the public may permit, regardless of the individual, so long as they do not infringe the statute which defines what the public use may be.

6. Whether a corporation created by special act of the legislature, instead of being organized under the general law, as provided in article 4, § 14, of the constitution of Maine, is a violation of the constitution, is a question that does not arise in this proceeding. *Held*, that the state only can inquire into the validity of the charter of the defendant company, it appearing to be a *de facto* corporation, at least, acting under a charter from the legislature.

7. *Held*, in this case, that the municipal officers had properly approved the location of the street railway.

(Official.)

Report from supreme judicial court, York county.

Bills in equity by James Taylor and others, and by Edward S. Marshall, respectively, against the Portsmouth, Kittery & York Street Railway, heard together, upon bills

and proofs, in the court below, upon prayers in the bills for a preliminary injunction, to restrain the defendant from constructing its road over and upon the highway leading through York harbor, where it was alleged the construction of the same would interfere with the plaintiffs' rights as abutting owners and owners of the fee to the center of the highway. The preliminary injunction having been denied, the cases were reported to the law court for full and final hearing. Bills dismissed.

G. M. Seiders, F. V. Chase, Frank D. Marshall, and James T. Davidson, for plaintiffs.
H. M. Heath and C. L. Andrews, for defendant.

HASKELL, J. Bill in equity by the abutting owners of land on a public way to enjoin a railway company from use of the way because such use creates a public nuisance.

Nothing is better settled in this state than that equity will not enjoin a public nuisance on the application of an individual, either in his own behalf or in behalf of himself and others of like interest who either do or do not join in the application, unless some special damage to the individual, not suffered in common with the public generally, has been sustained. Pom. Eq. Jur. § 1349, and cases cited. Equity supplements the law, and there is no need of remedy where there are no damages at law. Staples v. Dickson, 88 Me. 362, 34 Atl. 168; Holmes v. Corthell, 80 Me. 31, 12 Atl. 730.

The bill also seeks an injunction because the plaintiffs are not only abutters, but owners, of the fee of the way subjected to the servitude incident to public ways, and that the defendant's use is an additional servitude, for which they are entitled to compensation, that must first be paid before the servitude may be enjoyed; and this is the main controversy in the cause, for, if the defendant's use of the way be no additional servitude, then the plaintiffs' right in the way and its use are merged with those of the public, and the public alone, by its laws, must define, control, and regulate such use.

What servitude, then, does the public acquire by the taking of land for a public way? It is the right of transit for travelers, on foot and in vehicles of all descriptions. It is the right of transmitting intelligence by letter, message, or other contrivance suited for communication, as by telegraph or telephone. It is the right to transmit water, gas, and sewage for the use of the public. It is a public use for the convenience of the public, to be molded and applied as public necessity or convenience may demand, and as the methods of life and communication may from time to time require. Society changes, and new conditions attach themselves. The change evolves new ways of doing things, new methods of communication, new inventions for travel. When the

way is constructed, the landowner has his compensation, not only for the land taken, but for the damages sustained, although usually benefits are conferred rather than injury inflicted. These damages are assessed as compensation for a surrender of his land to the public use for travel and transit, not only by the methods then applied, and for the volume then existing, but for all time and for such future use as the exigencies of the time may develop.

When the way has been created, the public controls its use, and regulates its repair by laws that the legislature shall enact. Under these laws, the use must be governed, for the people have a right to say what use will best subserve their interests. They have now said that ways shall be maintained "so as to be safe and convenient for travelers with horses, teams, and carriages." That is now the criterion, and a use that infringes upon that rule becomes an unlawful use, and may be prohibited by public prosecution. That rule may be changed, for the public, by law, may regulate the use of its public ways in such manner as the legislature may think will best serve the public interest.

This doctrine allows the public to control the use of public ways for travel and communication, as it may be pleased, from time to time, to do. The kind of use that may be permitted is of no consequence to the abutter. He must take his chance with the rest of the community in which he lives. Some cases may seem to work hardship, but it is better so than to embarrass the convenience of the people, and cripple and annoy enterprises which the present and future may recognize as necessary for the good and happiness of society.

No matter whether the way be used by the lone traveler on foot or on his wheel, by the two-horse chaise or four-wheeled carriage, by the dray, cart, or coach, or by cars that may be permitted to run in the street, whether propelled by beast, steam, electricity, or any other agency that may be discovered suitable for the purpose. No matter whether the vehicle carries passengers or freight, or passes intelligence along its contrivance. All these are public uses, and, so long as they do not infringe the laws that regulate the use of highways, they cannot be prohibited either by the individual or public prosecutor. Ways must be "safe and convenient." When they are not, by reason of any incumbrance or permitted use, then ample remedy may be had by public action, and such incumbrance or use may be removed or prohibited.

The servitude complained of in this cause, therefore, is a public servitude, and lawful, so long as it does not infringe the laws of the state regulating the use of ways. It gains no hold upon the soil of itself, but is allowed a share of the public use. Should that use be extinguished, its rights would be

extinguished also. It must exist or fall with the servitude of the public; otherwise, the doctrines of this opinion would be illogical. If it gained any vested right in the soil that the public could not extinguish, then, manifestly, it has created an additional servitude, and taken land without compensation to the owner.

These doctrines have been discussed in the numerous courts of this country with varied results. It will not be profitable to review them, for we think best to declare a doctrine best suited to the convenience of our people, and most consonant with the laws under which we live. We have persistently maintained the right of "free fishing and fowling," free and unobstructed navigation of our rivers, the free taking of ice upon them, the right of eminent domain over and in the waters of great ponds; and we now assert the right of the people to control the use of their public ways as shall best meet their necessities, without vexation from the landowner, whenever growth and discovery show the convenience of applying new methods for public transit. Let a public way once constructed be free for the public use and control as it may choose. Let it be free as the ocean is free, as our rivers are free, and as our great ponds and lakes are free, for the use of all the people.

If the reverse of this doctrine be held, the numerous street railways now operating in our state would be crippled, if not destroyed. If every abutter could enjoin their operation unless his damages were paid, there would be no end of litigation and confusion. Moreover, it is now too late to invoke such doctrine. We have already decided that a street railway propelled by electricity creates no additional servitude. *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47. Relying upon that doctrine, electricity has become the principal motor for all our street railroads; and it would be unjust to now overturn it, if we were inclined so to do. On the contrary, we deem it best, and most consistent with our laws and polity, to affirm it, and, further, that neither motor nor kind of traffic to be engaged in makes any difference, so long as the use does not violate the requirements of the statute, concerning which we are not called upon to decide at the instance of an individual.

Now, it may be said that the location of a street railway, by authority of the legislature, should give it a vested right to remain after the discontinuance of the way. But it must be remembered the legislature only gave a right to share the public easement, and, when that shall be extinguished, all the granted right will be extinguished. It may be that the act of the legislature granting a share in the easement gives a vested right therein, that can only be extinguished by the consent of the grantees, or by authority of the legislature granting it. Of this we have no occasion to decide.

The doctrine of this opinion must not be extended too far. Perhaps the fair inference will be that the taking of land for a way only con-

templated surface transit. We do not decide otherwise. When elevated systems of transit are introduced, the permanence of their structure and the annoyance and injury may, perhaps, seem fairly to contemplate a further servitude. Of this, too, we have no occasion to decide.

It must be remembered that the use of ways for street-car transit can be enjoyed only by the act of the people themselves. Their ballots control; and, if they share their use with others who aid in serving the use common to both, it is a public use, after all. The public grant the privilege, and control its enjoyment. The exercise of such power best serves our people, who are intelligent enough to understand their necessities and comforts.

But the plaintiffs say that the charter of defendant company is void for constitutional reasons. This contention is not open in this cause. The defendant is acting under a charter from the legislature. It is a de facto corporation, at least. The state only can inquire into the validity of the charter. But, if the contention were open to the plaintiffs, it could do them no good. They have impleaded the defendant as a corporation, and joined no other persons. If it has no corporate existence, who shall be enjoined? The only prayer in the bill is that defendant corporation be enjoined. If there be no corporation, how can it be enjoined? Suppose plaintiffs had sued a dead man; could they have relief?

It is also contended that the proper approval of the location of the road has not been obtained from the municipal officers of the town. We think the evidence shows the reverse. There is no occasion to review it.

How, then, does the cause stand? The plaintiffs, as abutters and owners of the fee of the way, have suffered no damage from the defendant's occupation in common with the public of some share in the easement acquired by it upon the creation of the way, so that they have no cause for complaint on account of the construction of defendant's railroad, not common to the public in general, and therefore have suffered no special damage, and can have neither an action at law nor relief in equity.

Bill dismissed, with costs.

(185 Pa. St. 12)

MEAS v. JOHNSON.

(Supreme Court of Pennsylvania. March 7, 1898.)

LIBEL AND SLANDER—WORDS ACTIONABLE PER SE.

The words, "You are a first-class fraud, and of the first water," contained in a letter to a business man, are libelous per se, where the whole letter shows a coarse attack on his business character.

Appeal from court of common pleas, Lehigh county.

Action by Alexander Meas against George Johnson for libel. From a judgment of compulsory nonsuit, plaintiff appeals. Reversed.

On the 17th day of September, 1895, said defendant, Johnson, wrote a letter to plaintiff, Meas, of which the following is a copy: "Catasauqua, Pa., September 17th, 1895. Alex. Meas, Esq., Bethlehem, Pa.—Dear Sir: I am in receipt of your favor stating that you have shipped me all the finished and unfinished bills, also note that you are sorry that you can't ship me the 575 knives. In reply, would say I herewith inclose you my check for \$9.02 to balance our account in full for all work done as per my statement of the 11th, and would further state that I will just give you twenty-four (24) hours to either ship me the knives as directed in my letter of the 14th, or bring them here to my house, or I shall take legal steps to put you in a hole you ought to have been in a good while ago; and I want you to understand you are not playing with any schoolboy. You have turned out to be just what I took you for, and I will take care of you in good shape. I want you to understand that I know nothing of your partnership business, and the check I am herewith inclosing pays for everything received up to date. All the work you have done since you claim to have taken in a partner was accepted by you prior to any outside interference, and I have all the proof I need of this fact; and I herewith return all the bogus bills that have been mailed me, and I would here state that, in the event of any work being returned owing to poor workmanship in plating, I shall hold you responsible for. I note that you say you never consented to plate the bells for $\frac{3}{4}$ c. each. I would say, in reply, I have all the evidence necessary to convince any jury that you took them at the figure named, and all I want is to have a good chance to show you up. You are a first-class fraud, and of the first water. I would like you to state what you agreed to plate the knives (you think you are going to hold) for. You first agreed to plate them for one (1) cent each, and then came crying around like a damned baby, and I agreed to give you two (2) cents each; and on top of this, after you made a botch of them, and they had to be done over again, I said I would allow you one (1) cent, each, more; and then only 420 were found fit to send away, and the party says he is going to return some of them, and, to top the matter off, you claim you are going to hold them until I send you a check to cover what you claim an old balance. I am just waiting to see how long you will hold them; and I would here give you a pointer, —don't come within my reach. * * * You surrender * * * little you will remember talking over the matter of your plating the lot of bells, termed 'sample bells,' and we agreed that a fair price would be $\frac{3}{4}$ c. for the smallest sizes and $1\frac{1}{2}$ c. each for the largest size; and I herewith return your bill, in which you charge more than the actual price of most of them. The twenty-four (24) hours will expire on Wednesday, the 18th, at nine

(9:00) a. m. Yours, most respectfully, Geo. Johnson."

John D. Hoffman, for appellant. John Rupp and A. N. Ulrich, for appellee.

DEAN, J. Plaintiff carried on the electroplating business at Bethlehem, Pa. Defendant resided at Catasauqua. They had business transactions, wherein plaintiff, by alleged dilatoriness and disregard of contract obligations, seems to have provoked defendant. Thereupon the latter, on September 10, 1895, in a letter showing irritation in every line, applied to plaintiff this epithet: "You are a first-class fraud, and of the first water." Plaintiff, alleging the letter was libelous, brought suit for damages, filing statement under the procedure act of 1887. At the trial in the court below, defendant admitted the writing and publication of the letter. The only question raised was whether it was libelous, and that was for the court. As is said by the present chief justice in *Collins v. Publishing Co.*, 152 Pa. St. 187, 25 Atl. 546: "Where words are of dubious import, the plaintiff may aver their meaning by innuendo, and the truth of the innuendo is for the jury; but the quality of an alleged libel, as it stands upon the record, either simply or as explained by averments or innuendoes, is purely a question of law for the court; and in civil cases the court is bound to instruct the jury as to whether the publication is libelous, supposing the innuendoes to be true." And it is further held, in *Hayes v. Press Co.*, 127 Pa. St. 642, 18 Atl. 331, that "if the common understanding takes hold of the words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is unnecessary." The averment in the statement here is that defendant published, willfully, maliciously, and falsely, of and concerning the plaintiff, that he was "a first-class fraud, and of the first water"; meaning that, in conducting his business, plaintiff cheated and deceived his patrons for purposes of gain, and that defendant thereby brought plaintiff into public ridicule, hatred, and contempt, to his damage in the sum of \$5,000. This is the substance of quite an unnecessarily elaborate statement, and, though somewhat vague, the pleader, in the wealth of words, has not succeeded in obscuring averments essential to sustain a verdict under the act of 1887. The learned trial judge decided the writing was not libelous, in view of the circumstances and surroundings of the parties at the time it was written and published; that, taking the latter as a whole, it did not tend to bring plaintiff into ridicule, contempt, or hatred, nor did it charge him with being a man of low or bad character. Accordingly, the jury was instructed to find a verdict for defendant. Plaintiff now appeals, assigning for error the peremptory instruction.

This particular case is not a very grave one, and defendant, possibly, from the method of

publication, was more unmannerly than malicious. Nevertheless, we are of opinion that, on the settled law, the court's interpretation was erroneous. The whole letter shows a coarse attack on the business character of a tradesman,—one that, necessarily, tended to degrade him in the opinion of the public. If it had been inserted in a widely circulated newspaper, all who read it would have suspected the honesty of plaintiff, and some would have been convinced of his dishonesty in his business dealings. True, the charge of fraud does not always impute an indictable offense, but it always does impute a violation of moral or statute law; generally both. This is the common understanding when applied to a course of conduct; and the later perversion of the term, as here, to designate a person, instead of a thing, does not mitigate the essential gravity of the charge. If the words had been spoken, they would not of themselves necessarily have imported an indictable offense, or one of infamous character; hence would not have been actionable. But, as is conceded, being written and technically published, we hold they necessarily tended to degrade the business character of a business man in the estimation of the public and of his neighbors. This being so, the uniform course of decisions for centuries has been that such a charge is *per se* libelous. The last one, out of many, by this court, in the same line, is *Wood v. Boyle*, 177 Pa. St. 620, 35 Atl. 853.

We are not disposed to relax a well-settled rule of law, adopted to repress malicious publications, affecting injuriously the reputation of private persons, even though the damage in the particular case, by reasons of the restricted publication, is but trivial. A departure from a well-established and sound precedent would, in all probability, lead to very undesirable results. While special damage in this case was neither averred nor proven, nevertheless plaintiff was entitled to go to the jury on the question of general damages, for the wrong done him in reputation, which last our "Bill of Rights" puts in the same class with life, liberty, and property. The judgment is reversed, and a *v. f. d. n.* is awarded.

(184 Pa. St. 629)

COMMONWEALTH ex rel. ATTORNEY GENERAL v. CALHOUN et al.

(Supreme Court of Pennsylvania. Feb. 28, 1898.)

DEDICATION—NOTICE TO PURCHASER.

1. Presence of three irregular shaped lots on a plat in the middle of streets, which apparently were intentionally shaped and located as they were, and intended for different purposes than the numbered lots, is sufficient to put an intending purchaser on inquiry that would disclose that they were dedicated to public use.

2. Announcement, on sale under execution against C., simply that certain lots did not belong to him, is not sufficient to put purchaser on inquiry as to dedication thereof by C. to the public.

Appeal from court of common pleas, Delaware county.

Bill by the commonwealth of Pennsylvania, on relation of the attorney general, to enjoin William Calhoun and others from exercising any ownership in three certain lots of ground. Decree for complainant. Defendants appeal. Affirmed.

The report of the referee is as follows:

"The three lots of ground mentioned in the bill of complaint in this case are parts of a large tract of land which was owned by John Cochran in 1872 and 1873. The particular part of this tract in which these three lots are located was purchased by him from Thomas H. Gesney, by deed dated April 1, 1873, duly recorded. Mr. Cochran was a well-known and successful real-estate operator. He at once laid out this large tract of land in building lots, with streets and alleys. A plan was made in usual form, showing the location of the lots, etc., including the three lots of ground mentioned in this bill, which, for convenience, we shall hereafter designate as the 'park lots,' the name by which they have been known at Norwood. Prior to this time this tract of land had been used as farm land, and was surrounded by farms. These park lots were intended by Mr. Cochran for public use as parks. No deed of dedication was then made, nor has one been made since. As soon as the tract had been properly laid out, public sales were held, at which these lots, other than the park lots, were offered for sale. At these sales, printed plans of the tract, showing the streets, etc., and these lots, were distributed with a lavish hand. There appear to have been at least three plans made of this tract, differing only as to minor details. In all of them the park lots appear without change of shape, dimensions, or location. There were a number of public sales held, and at all of them it was announced by Mr. Cochran that these park lots had been dedicated to the public for use as parks. This announcement was made repeatedly, and was generally understood. The first sale was held on May 28, 1873. Many lots were sold at these public sales, and many were sold at private sale. To the purchasers at private sale the same information was given by Mr. Cochran as to the dedication of these park lots. So that it became a matter of public information at Norwood that these park lots were for public use as parks. These sales were extensively advertised in Philadelphia and Delaware county papers, and by handbills. Prior to these sales, trees had been planted along the sidewalks, as laid out, and trees, evergreens, and shrubs on the park lots. It does not appear that trees were planted elsewhere. These park lots were used for Fourth of July celebrations, occasionally for fairs and church festivals. This, of course, was only in the summer, and not often in a single season. No

public improvements were made on these park lots. No walks were laid. The grass was not kept cut, except by vagrant cattle. In these things they differed little in appearance from the many unimproved lots lying around them. The shrubs were destroyed: the evergreens and maples remained. The public character of the park lots was recognized by the township assessors, who made no assessment of them for purposes of taxation. No copy of any of the plans made was recorded until April 5, 1880, when the plan, a copy of which is hereto annexed, was recorded in Deed Book T, No. 4, page 619. The land scheme failed. In April, 1878, John M. Broomall obtained judgment against John Cochran for \$2,000; and this judgment, obtained on a judgment note, was marked to the use of George Broomall. A *fi. fa.* was in due course issued on this judgment; and the park lots, *inter alia*, condemned. In the condemnation proceedings they are described as follows: 'Also, all those three certain irregular lots or pieces of ground laid out, and designated in the aforesaid plan of Norwood as grass plots,' etc. On June 11, 1883, these park lots, *inter alia*, were sold under an execution on said judgment as the property of John Cochran, and were purchased by George Broomall, the plaintiff in the execution, who, with counsel, was present at the sale. Prior to the sheriff's sale, a number of the citizens of Norwood, alarmed at the danger of losing the park lots, having learned of the execution, held a meeting or more, and organized for the purpose of protecting the rights of the public in the park lots. William Calhoun, one of the defendants in this case, took an active part in these meetings, and contributed to the fund raised to employ counsel. Competent counsel was employed, who prepared a notice of the claim of the public to the use of these park lots, which notice was read at the sheriff's sale by Mr. Galloway, and prior to the sale of the park lots. This notice was not produced at the hearing, nor does it appear what it contained, except it was a notice that John Cochran did not own the lots. Mr. Calhoun had full knowledge of the dedication of these park lots to the public, and had himself, when endeavoring to sell lots, pointed them out to prospective purchasers as for public use. A short time prior to the sheriff's sale, George Broomall had visited these park lots with his counsel. As stated, William Calhoun had full knowledge of the dedication of the park lots prior to his purchase from George Broomall. A deed for these park lots, *inter alia*, was delivered by the sheriff to George Broomall, on June 11, 1883. In this deed the park lots are described as 'three irregular lots or pieces of ground, laid out and designated on the aforesaid plan (referring to the plan of Norwood), for grass plots.' Deed Book T, No. 4, page 619. On September 15, 1891, George Broomall sold these same three lots to William Calhoun,

above mentioned; and on September 15, 1893, the said William Calhoun sold a part of one of them to Charles Lynch, B. Mitchell Newbold, and Charles K. Swift, trustees, all of which deeds were duly recorded. Prior to the sale, Mr. Galloway gave notice of the public right to Mr. Lynch, one of the trustees of the church for which the purchase was made. Mr. Lynch said they were going to get the title insured.

"The legal principles governing this case are simple enough. Their application, however, is not so simple. That the judgment of George Broomall bound only the actual interest of John Cochran in the lots in dispute; that, as far as the sheriff's sale was concerned, he stood in no different relation to the property than any other purchaser by reason of his judgment; that a purchaser buys subject to all equities of which he had notice; that whatever puts a party upon inquiry amounts to notice, provided the inquiry becomes a duty, and would lead to the discovery of the requisite facts, by the exercise of ordinary diligence; and that inquiry becomes a duty from such circumstances as would cause a reasonably prudent intending purchaser to make it,—these are well established and familiar principles governing the matters in question. On the finding of the referee as to the dedication of these lots, and that they were dedicated, was not denied by the defendants. The only questions to be decided are: Had George Broomall notice of such dedication prior to his purchase; or had he such knowledge or information as to put him on his guard, and impose upon him the duty of making inquiry as to the uses and purposes of these lots? Such legal notice or knowledge as he had, as far as the evidence shows, came from three sources: (1) The papers on file in the recorder's office; (2) the location and appearance of the lots themselves; (3) the notice given by Mr. Galloway at the sheriff's sale of the park lots.

"By legal inference, he was familiar with the recorded papers. As a fact, he actually viewed the lots a short time before the sale. Do the plans or the lots themselves indicate their uses, or is there that about them to put an intending purchaser upon inquiry? That these lots were of a character different from the other lots the plan clearly shows. Their shape was unadapted for building lots, because of their peculiar location in the middle of the street. Indeed, they may well be taken to be a part of the streets, from the fact that, in front of all the numbered lots on the plan filed, there appears to be a sidewalk, lined with trees in most instances. No such markings appear on these lots, which, as far as the plan shows, might well indicate that these park lots are a part of the streets in which they are located. Winona avenue lies on both sides, or, more correctly, on all sides, of two of these lots, and Huron avenue on both sides of the other. They

seem to be a part of the streets in which they are located. Such lots are common in towns, and are usually used for public purposes. A visit to the lots themselves added very little information to the intending purchaser. No one was in possession of whom to make inquiry. While the public uses to which they were put might indicate the public understanding as to their character, there was little about their use to warn an inquirer. For nine months in the year the lots were not used at all for park purposes. Open lots were plenty. These would grow in importance as the open lots were built up. Eventually they might become necessary. Trees had been planted on these lots, maples and evergreens and also shrubs; maples only on the sidewalks. It does not appear that trees had been planted at all except upon these park lots and the sidewalks. After all, therefore, a visit would show little more than an inspection of the plan; no evidence of care, no seats, no fountain, no protection from stray cattle, not even the familiar 'Keep off the grass' sign; simply neglected open lots in the middle of the streets.

"Now, was the plan and the fact that the lots were laid out on the ground in conformity thereto sufficient to put a reasonably prudent purchaser upon inquiry, or to suggest that they might be intended for public use? While the public use probably tended to establish the fact of an acceptance of the dedication, it was too intermittent to warn any one of the fact. That no taxes had been levied on them might go to show their acceptance by the public authorities. It would be no notice to a purchaser unless brought home to him. There was evidence, too, as to the meaning of the curves and marks on these park lots as indicating a public use, as being marks used by engineers for that purpose. The evidence, however, was not satisfactory. It certainly was not convincing to the referee. To the referee the general appearance and location of these lots indicates clearly, as stated, that they were intended for different purposes than the numbered lots. Such lots very often, if not usually, appear on the plan of large tracts, thrown open for improvement, and are usually intended and marked for parks for public use or public enjoyment. The fact that they are located in the middle of the streets would indicate that they might be intended for a use of similar character. In *Schuchman v. Borough of Homestead*, 111 Pa. St. 48, 2 Atl. 407, the court says: 'It is reasonably certain that the homestead company dedicated the land to the public use, and that a number of persons purchased lots, expecting to enjoy the resulting advantage. However, nothing in the plan or in the course of title, or on the ground, was a warning of such dedication;' and therefore the purchaser acquired good title. A reference to the plan in this case shows the lots in dispute in the case cited, and there is certainly nothing to indicate a public use at all different from that

to which the other lots were devoted. The appearance on the plan of the park lots in the case in hand is very different from that of the disputed lots on the plan in the case cited.

"If the names of the streets did not appear on the plan filed, would it be said that, therefore, there was nothing on it to indicate that these long narrow strips were dedicated to public use if no lots had been sold? As a fact, the plan shows a short strip running from Seminole avenue to Winona avenue, not named as a street on the plan. He would be a foolish man who would buy this strip without inquiry as to its use, if no lots had been sold on it. And so with all the alleys on the plan; not an alley is so marked; nothing to indicate their use except the general appearance, location, and relation to the lots. Yet who would buy them because they are not marked as alleys, where no lots had been sold as abutting thereon? If these park lots had been merely odd places left by the laying out of streets by public authority, or on a private plan for that matter, a different conclusion might be reached, as in that case their position and odd and irregular shape would be the result of the street plan, and would be accounted for. They would be bounded by different streets, would not be in the middle of a street, not a part of a street. It is apparent that these park lots are placed designedly; that their peculiar shape and position were matters of intention; and that the streets at the points where they are situated were made to conform with them and accommodate them. They are clearly marked for a special purpose, and their location in the middle of a street, as a part of the street itself, clearly intended for public travel, might well indicate a public purpose for the lots as well.

"For the reason stated, the referee is of the opinion that the facts shown by the plan and the lots themselves were sufficient to put an intending purchaser upon inquiry, and that proper inquiry would have disclosed the fact that the lots had been dedicated to public use. The question is not as to the sufficiency of the plan and the location of the lots to prove a dedication to public use; only to their sufficiency to suggest it, to provoke inquiry. 'Where there is an apparent dedication of land to public use, the purchaser of the legal title could not defeat the right of the public.' *Schuchman v. Borough of Homestead*, 111 Pa. St. 55, 2 Atl. 407. In this case there was nothing on the plan or on the ground to warn the intending purchaser. In the case in hand the referee is of opinion, as stated, that the location of the park lots on the plan, and as actually laid out on the ground, as in the middle of the streets, or as a part of them, the planting of trees on them, their peculiar shape and position, indicated dedication to public use. While it is true there was no one in possession of whom to inquire, inquiry might have been made of John Cochran, or of the public authorities of the township, or of neighboring owners. Any of these would have

given all the information needed. The right of the public once suggested, the inquiry should have been made, and could have been made easily, in a direction likely to elicit the desired information. It may well be that the reasons given would fall far short of the evidence necessary to prove a dedication, but they certainly indicate it, just as much as the unnamed street and unnamed alleys indicate a street and alley. Although, as naively said by the counsel of the purchaser at the sheriff's sale, who, with his client, visited these lots a short time before the sale by the sheriff, 'they were not looking for equities,' it was nevertheless his duty to look for them, at least he should not have shut his eyes to them. It is the purchaser who must beware. He cannot stick his head in the sand, and then say he did not see the thing he would have seen had he looked about him.

"The third source of notice to George Broomall, of the equity of the public, was the notice given by Mr. Galloway at the sheriff's sale. While, as a matter of fact, this notice probably contained a full and complete statement of the claim of the public to these park lots, having been prepared by competent counsel, and would, if fully proved, be an end to this case of itself, as proving notice of the public use, we cannot put more into it than it was proved to contain, according to the testimony of Mr. Galloway, the only witness of the plaintiffs on this point, who said the notice was that 'John Cochran did not own these lots.' A notice could not well contain less, nor did it necessarily follow that a good title would not pass, as John Cochran might have conveyed the lots after the entry of the judgment; nor was it strictly true, in point of fact, as John Cochran did own the lots, subject to the public use as parks. Of the many cases on the sufficiency of notice contained in the reports, the referee can find none containing so little information or warning as this. The case that came nearest to it, perhaps, is that of *Barnes v. McClinton*, 3 Pen. & W. 69. The notice in this case contained the name of the adverse owner, and contained the significant statement that the purchaser would buy a lawsuit.

"The notice of Galloway contained no such ingredients, so far as proven, and so far as we can deal with it. The notice was purely negative. It did not give the name of the adverse claimant, nor the nature of the claim, and, as stated, might well be true, and still not affect the title of the purchaser. The referee is therefore of opinion that the notice at the sheriff's sale, as proven, was not sufficient to put the purchaser on inquiry. In the deed from the sheriff to George Broomall, the lots in question are described as three irregular lots or pieces of ground laid out and designated on the aforesaid plan of Norwood for grass plots. None of the other lots conveyed by this deed are described as grass plots; they are simply described as lots. This falls in line with the view of the case herein taken,

that there was that about these lots, as marked on the plan and laid out on the ground, that they were intended for different uses than the other lots. Mr. Broomall or his counsel thought they were intended for use as grass plots when he prepared his description of them for the sheriff in the writs issued on his judgments. It does not seem that it would have been exercising a superabundance of caution to have inquired if they were laid out and designated as grass plots for public or private use, when their peculiar situation in the middle of the streets is considered and their other features hereinbefore remarked upon. While the trustees had notice before their purchase had been completed, and while William Calhoun had full knowledge of the right of the public in the park lots before he purchased, their title, of course, hangs upon that of George Broomall, who could convey to them just as good a title as he owned. The right of William Calhoun to assert an absolute ownership of the park lots after he had represented them to be public parks, to persons to whom he was endeavoring to sell lots, was not considered at the hearings, probably because this suit is not at the instance of the purchaser to whom representations were made. The referee, being of opinion, as stated, that the location, general appearance, etc., of the park lots on the plan filed and on the ground, were sufficient to put an intending purchaser upon inquiry as to the rights of the public in the park lots, recommends that the prayer of the complainants be granted, and that the defendants be restrained from use or occupation of said lots that will interfere with the right of the public to use the same as public parks, and that the costs of this proceeding be paid by said defendants."

W. B. Broomall, for appellants. Edward P. Bliss, for appellee.

PER CURIAM. The decree of the court below in this case is affirmed, on the findings of fact and conclusions of law contained in the report of the referee.

(184 Pa. St. 640)

IN RE THOMAS' ESTATE.

(Supreme Court of Pennsylvania. Feb. 28, 1898.)

ACCOUNTING BY EXECUTORS—BILL OF REVIEW.

A review of partial accounts of executors will be denied, in the absence of new matter, or after-discovered proof, or errors in law apparent on the face of the record; it not being enough that the accounts suggest that business was conducted, expenses incurred, and payments made of an irregular and questionable character, such as, on proper and timely exceptions and proof of loss to estate and disadvantage to exceptor, might have deprived accountants of some credits.

Appeal from orphans' court, Chester county. Petition of Anna H. Thomas for review of the first and second partial accounts of the execu-

tors of William P. Thomas, deceased. Demurrer to petition was sustained, and petitioner appeals. Affirmed.

The opinion of the court below is as follows: "The petition avers neither new matter nor after-discovered proof. Indeed, it was conceded on the argument that the demurrer must be sustained unless errors in law appear, as specified in the petition, upon the face of the accounts, upon the body of the decree. Russell's Adm'r's Appeal, 34 Pa. St. 258. We are satisfied that the petitioner's specifications fail to point out any such errors. It may be that the accounts suggest that business was conducted, that expenses were incurred, and that payments were made of a somewhat irregular and questionable character, such as, upon exceptions having been interposed at the proper time, and proof having been made of loss incurred by the estate, and disadvantage suffered by the exceptor, might have deprived the accountants of some of the credits claimed. It is probable that, if exceptions had been taken to the credits claimed for payments in full to creditors of the estate, and it had been made to appear that there were other creditors, and that there was reason to doubt whether the estate would pay in full, the accounts might have been modified. However this may be, we are satisfied that none of the matters specified in the petition constitute error in law apparent on the face of the record. They are matters not void, but voidable, at most, only on proof of extrinsic facts. It may further be noted that the petition fails to aver that the accountants have not paid out the items since the confirmation under the adjudicated accounts. This in itself would seem to be fatal under the authority of Russell's Adm'r's Appeal, *supra*. Aside from the consideration adverted to, we are convinced that at this late day—more than four years after the confirmation of the first account, and more than three years after the confirmation of the second account, without any allegation of fraud or concealment; counsel on argument having stated that the petitioner waited in part, at least, because she thought the estate would prove solvent, and pay her in full—the petitioner cannot justly ask for the opening of the decrees, but to the extent that the adjudications may affect her rights must be content, and must be satisfied with such rights as remain to her. See *Mullin v. Railroad Co.*, 125 Pa. St. 189, 17 Atl. 478, and cases cited on page 203, 125 Pa. St., and page 479, 17 Atl. It is not at all clear that the confirmation of the accounts containing claims for credits for payment in full to certain creditors will prevent the petitioner from holding the accountants responsible, upon a deficiency of assets, for her pro rata share of the assets distributed or distributable to creditors. Furthermore, if there be matters in these accounts which have no place in an account, and it be true, as argued by counsel for the petitioner, that as to such matters the decree of confirmation is not binding, then, as to such matters, the petitioner has no need to have the

decree opened, and does not require the relief she here seeks. The demurrer is sustained."

R. T. Cornwell, John J. Gheen, and Gibbons Gray Cornwell, for appellant. J. Frank E. Hause and Alfred P. Reid, for appellees.

PER CURIAM. The reasons given in the opinion of the learned court below for sustaining the demurrer in this case, and refusing a bill of review, are quite sufficient to sustain the action of the court, and we affirm the decree upon the opinion filed. We do not mean, however, to deny any rights of the petitioner which she may have by reason of a devastavit, or upon exceptions to the third or any subsequent account which may be filed. Upon those subjects we decided nothing except that all the rights of the petitioner are reserved. Decree affirmed.

(20 R. I. 338)

REGAN et al. v. SHERMAN et al.

(Supreme Court of Rhode Island. Feb. 9, 1898.)

MUNICIPAL CORPORATIONS — DEBT LIMIT—DEDUCTIONS.

Under Pub. Laws 1894, c. 1342, § 1, exempting a certain town from the provisions of Pub. St. c. 34, § 17, prescribing the debt limit, in so far as its existing indebtedness and the amount expended for public sewers were concerned, the bonded indebtedness of such town, its expenditures for sewers, and the amount of a note for current expenses, to be paid out of the annual tax, were properly deducted, in computing its indebtedness, for the purpose of ascertaining whether it was within the limit prescribed by Gen. Laws, c. 36, § 21, as such right was preserved by Gen. Laws, c. 298, § 3, providing that the repeal of Pub. St. c. 34, § 17, should not affect any right accruing or accrued.

Bill by Patrick E. Regan and others against Alfred E. Sherman and others for an injunction. Bill dismissed.

Bassett & Mitchell, for complainants. James Harris and Messrs. Tillinghast, for respondents.

MATTESON, C. J. This is a bill for an injunction. The case is as follows: On September 2, 1897, at a town meeting specially called, the town council of Lincoln were authorized to appoint a commission to select a site for a town house, and to erect a town house at a cost not exceeding \$10,000, and the town treasurer was authorized to hire money for that purpose. The town council, in pursuance of the authority conferred on them, appointed commissioners, who have selected and negotiated for a site, and have adopted plans for a town house, and have also negotiated for its building. The complainants, who are taxpayers of the town, allege that the action of the town meeting and of the commissioners is illegal and void, because the indebtedness attempted to be created by the resolution is in excess of 3 per cent. of the taxable property of the town, and in violation of Gen. Laws R. I. c. 36, § 21, which provides as follows: "No town shall, without special statutory authority therefor, incur any debt in

excess of three per centum of the taxable property of such town, including the indebtedness of such town on the tenth day of April, one thousand eight hundred seventy-eight, but the giving of a new note or bond for a pre-existing debt, or for money borrowed and applied to the payment of such pre-existing debt, is excepted from the provisions of this section, and the amount of any sinking fund shall be deducted in computing such indebtedness." The testimony shows that on September 2, 1897, when the town meeting was held, the floating indebtedness of the town was \$123,500, and its bonded indebtedness was \$61,180, making a total of \$184,680. The valuation of the property in the town for its tax for the fiscal year 1897-98 was \$3,992,680, 8 per cent. of which amounts to \$119,780.40. The excess of indebtedness of the town over the 3 per cent. on its valuation on September 2, 1897, was therefore \$64,900. The assessment of the tax for the fiscal year 1897-98, made in August, 1897, amounted to \$43,919.48. Besides this tax, the income of the town for the year from liquor licenses and other sources amounted approximately to \$8,000. The appropriations made at the annual town meeting in June, 1897, amounted to \$54,248.70, which covered the entire receipts of the town for the fiscal year. The testimony further shows that prior to the division of the town of Lincoln, by which the city of Central Falls was created, there had been expended by the town for sewers in the present town \$9,700, and since that date \$3,441.88, making a total of \$13,141.88. And it also appears that \$10,000 of the \$123,500, the floating indebtedness of the town on September 2, 1897, was represented by a note of that amount, which had been given to raise money for current expenses of the town, and was to be paid out of the annual tax as it was collected. The respondents refer to Pub. Laws R. I. c. 1342, of June 12, 1894, § 1, which enacts that "the town of Lincoln is hereby exempted from the provisions of section 17, c. 34, of the Public Statutes, in so far as its present indebtedness and the amount that has been and may be expended for public sewers is concerned." Pub. St. R. I. c. 34, § 17, referred to in Pub. Laws R. I. 1894, c. 1342, § 1, was precisely like Gen. Laws R. I. c. 36, § 21, except that it did not contain the words "without special statutory authority therefor," and was repealed by Gen. Laws R. I. c. 298, § 1; but by section 3 of chapter 298 it is provided that the repeal of the acts referred to or enumerated in the chapter shall not affect "any right accruing or accrued or acquired or established." The respondents contend that by reason of these statutory provisions there should be deducted from the indebtedness of the town, in ascertaining whether it has exceeded the limit of indebtedness allowed by law, its bonded indebtedness, \$61,180, and the amount expended for sewers, \$13,141.88, making a total of \$74,321.88, and also the \$10,000 note given for current expenses, the payment of which is provided for by the tax for the current year, which, added to the \$74,321.88, makes \$84,321.88; that, de-

ducting this sum from \$123,500, the total indebtedness on September 2, 1897, and the balance is \$39,178.12; that as 3 per cent. of the valuation of the town for the current fiscal year, to wit, \$3,992,680, amounts to \$119,780.40, it is apparent that the town has not exceeded the statutory limit in its resolution appropriating the \$10,000 in question. We think that these contentions of the respondents are correct. The right of the town to treat its bonded indebtedness and expenditures for sewers as exempt from the operation of the statute, in computing its indebtedness for the purpose of ascertaining whether it was within the limit prescribed by Gen. Laws R. I. c. 36, § 21, was preserved to it by Gen. Laws R. I. c. 298, § 3; and the note of \$10,000, given for current expenses, provision for the payment of which was made out of the annual tax, was also properly deducted. *Read v. Atlantic City*, 49 N. J. Law, 558, 9 Atl. 759; *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588. We are of the opinion, therefore, that the bill should be dismissed.

(91 Me. 234)

GRAFFAM v. RAY.

(Supreme Judicial Court of Maine. Jan. 8, 1898.)

PROBATE COURT—JURISDICTION—DEVASTAVIT—SUITS FOR LEGACIES.

1. The probate court has exclusive jurisdiction, subject to appeal to the supreme court of probate, of the estate of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal representative.

2. The supreme judicial court, as a common-law court, does not have jurisdiction in a common-law action of negligence brought by a residuary legatee against a former executor for wasting the assets of the estate.

3. A residuary legatee alleged a devastavit by the defendant, executor of the will, in failing to collect and account for certain debts due the estate, and claimed to recover their amount of the defendant in an action at common law in this court sitting below. *Held*, that the action cannot be maintained.

4. Also, that the plaintiff's remedy, if the defendant is in fault as claimed, is in the probate court, and not by suit at common law. The fact that the executor has rendered his final account in probate, and resigned, does not change the result. He may still be cited into the probate court.

5. The statute right to sue for a legacy does not confer a right upon a residuary legatee to sue for a devastavit for his private benefit.

(Official.)

Exceptions from supreme judicial court, Cumberland county.

Action by Daniel S. Graffam against Fabius M. Ray. From a rule of judgment sustaining a demurrer to the declaration, plaintiff excepts. Overruled.

S. L. Bates, for plaintiff. J. H. & J. H. Drummond, Jr., for defendant.

STROUT, J. Plaintiff is residuary legatee under the will of Elias S. Dodge. Defendant was executor of that will. He has filed his final account in probate court, and resigned his

trust. Plaintiff claims that he was guilty of a devastavit while in office as executor, in that he failed to collect certain choses in action existing in favor of Dodge, and permitted them to become barred by the statute of limitations. He seeks to recover the amount of these rights and credits in this action at common law to his own use. The case comes here upon exceptions to a ruling of the court below sustaining a general demurrer to the declaration.

Assuming the defendant to be in default, as we must do on the question as now presented (though the fact is denied in argument), can this action be maintained? We think not.

The probate court has exclusive jurisdiction, subject to appeal to the supreme court of probate, of the estates of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal representative. If a devastavit exists, it is the duty of that court to compel the executor to account for the amount lost to the estate by his fault. The executor is bound to act in good faith, and with reasonable diligence, in husbanding all the assets of the estate. But he is not required, nor would he be justified, in rushing into injudicious suits, where recovery is doubtful, or its expense in excess of the amount to be realized. If a devastavit is alleged, a hearing upon that question should be had in the probate court, on settlement of the executor's account. On such hearing, he would not necessarily be charged with the full amount of the uncollected claims. They might be doubtful, or subject to set-off, or denied by the assumed debtor. In such case, the uncertainty of recovery, or the expense of suit, might be so disproportionate to the amount of the claim that it would be unwise to institute suit and subject the estate to the expense; or the executor might not have funds of the estate sufficient to carry on the litigation. All these questions would be determined by the probate court, and the executor charged for such amount as in equity and under the rules of law he was liable for. All these matters are within the exclusive jurisdiction of the probate court, and cannot be passed upon by a common-law tribunal. The probate court is invested with ample power in these respects.

Notwithstanding the resignation of the executor, he can still be cited into the probate court, and required to account for the matters claimed, if liable therefor. *Robinson v. Ring*, 72 Me. 143. It can only be done in that court. *Potter v. Cummings*, 18 Me. 58; *Judge v. Quimby*, 89 Me. 576, 36 Atl. 1049.

There is no allegation in the writ that the debts and general legacies have been paid, nor that the amounts now claimed will not be needed for that purpose, nor that the estate is solvent. For aught that is disclosed by the writ, there may be nothing for the residuary legatee, in any event. There is no allegation that the present claim of plaintiff to charge the executor with these uncollected sums was not made, heard, and disallowed by the probate court on settlement of the executor's account.

If it were, and that court rejected the charge, its decree to that effect, unappealed from, is final, and cannot be impeached or inquired into here, as the matter was entirely within its jurisdiction. *Gilbert v. Duncan*, 65 Me. 477; *Sturtevant v. Tallman*, 27 Me. 78; *Pierce v. Irish*, 31 Me. 254; *Simpson v. Norton*, 45 Me. 281; *Decker v. Decker*, 74 Me. 467; *Harlow v. Harlow*, 65 Me. 448.

If the defendant is guilty of a devastavit, as plaintiff claims, the liability is to the estate of Dodge, and not to this plaintiff personally. The funds may be needed to pay debts or general legacies, or administration expenses. The plaintiff is entitled only to so much of the estate as may remain after these superior claims are satisfied; but nothing till then. This court, as a common-law court, has no power to marshal the assets, and determine what amount, if anything, remains for the plaintiff. It is true, the statute authorizes any legatee, specific or residuary, to sue for his legacy; but before suit it is necessary that the amount shall have been ascertained, as a basis for the suit. If the legacy is specific or definite in amount, the will affords the necessary basis for suit; if residuary, it should be ascertained by the probate court in the first instance, and by appeal to the supreme court of probate, if desired, after payment of all superior claims. Until this is done, the residuary legatee ordinarily has no right of action. Till then it is uncertain whether there will be any residue. In *Hanscom v. Marston*, 82 Me. 205, 19 Atl. 461, this court said: "Heirs and residuary legatees have no claim against the estate. Their time does not come till the claims have been so far paid, and the estate so far administered, that the court declares a balance to exist for distribution." *Jones v. Irvine*, 23 Miss. 361.

But the statute right to sue for a legacy by no means confers a right upon a residuary legatee to sue for a devastavit for his private benefit. This suit is not for a legacy. It is an attempt to charge the executor in damages for negligence in the execution of his trust; not for the benefit of the Dodge estate, but for the personal benefit of this plaintiff. No case has been cited, and we have found none, which holds that such an action can be maintained.

In *Waterman v. Dockray*, 78 Me. 141, 3 Atl. 49, it is said that an administrator de bonis "has no recourse against his official predecessor for devastavit or maladministration, the remedy therefor being reserved to the creditors, legatees, and distributees directly." This language is not authority for the maintenance of an action like the present. The parties aggrieved must pursue their legal remedy before the proper tribunal, which is the probate court; and, if successful, the amount charged against the executor goes to the estate, to be administered by that court according to law. It cannot be recovered by suit at common law, by a creditor or any legatee, for his personal use and benefit.

In *Smith v. Lambert*, 30 Me. 137, a residuary legatee was allowed to recover, although the executor's account had not been fully settled,

but administration had proceeded far enough to show an amount to which the residuary legatee was entitled. No question of malfeasance of the executor was involved in that case.

To sustain this action, the court would be obliged to reopen the executor's account, hear evidence upon the question of devastavit or not, and to charge the executor, if found liable, with the amount he should have been charged with in his probate account. All these matters are within the exclusive jurisdiction of the probate court. If such hearing could be had in this suit, and if defendant should be held liable to the estate for part or all of the amounts claimed, a judgment for that amount would withdraw it from the estate, and its administration in probate, and give it to plaintiff personally, possibly to the detriment of other parties. Such result cannot be permitted.

If allowed, it is doubtful if it would bar the probate court from citing the defendant, and charging him with the same amounts, to be paid to the administrator de bonis non.

Exceptions overruled.

(91 Me. 240)

STATE v. ACHESON.

(Supreme Judicial Court of Maine. Jan. 8, 1898.)

INDICTMENT—ELECTION—INSTRUCTIONS—APPEAL—PRESUMPTIONS.

1. In the trial of an indictment, containing but a single count, the state introduced competent proof of the assault alleged to have been committed on the 3d day of January, and more specially identified the occasion as the evening of the second Sunday after Christmas, when the defendant's wife was at church. The complainant was then permitted, against the defendant's objection, to give testimony to prove three other subsequent assaults upon her by the defendant. *Held* that, before this testimony of other assaults had been heard, it was not error for the presiding judge to refuse the defendant's request that the prosecuting attorney be compelled to elect upon which assault he would rely, especially as rulings upon such requests are ordinarily within the domain of judicial discretion.

2. It did not appear, however, that at any later stage of the trial the state expressly elected, or was required to elect, upon which one of the four separate assaults it would rely to substantiate the charge in the indictment. *Held*, that under these circumstances, in justice to the defendant, the state should be deemed to have elected by implication to rely upon the first assault proved, which was alleged to have been committed January 3d, and identified as the one intended to be described in the indictment.

3. Evidence of other crimes of a precisely similar nature to that charged, and not connected with it, though deemed inadmissible to prove the commission of the act involved in the substantive charge, is yet uniformly received for the limited and specific purpose of aiding to determine the quality of the act, and the legal character of the offense, by illustrating the intent with which the act was committed. But, in this case, the evidence of other assaults appears to have been received, not simply for the secondary purpose of showing the nature and intent of the first one, but as proof of other substantive offenses, upon each one of which a conviction might have been had; and in this state of the evidence the jury were instructed

that, if they were satisfied that on any date while the complainant lived in the defendant's house he was guilty of the charge, it was their duty to convict him. *Held*, that under this instruction, upon evidence showing four independent assaults, some of the jury may have been satisfied that an assault was committed on one of the occasions specified, and others of an assault on a different occasion, and thus a verdict rendered without unanimity respecting either of them.

4. *Held*, that the ruling admitting evidence of other similar assaults without explanation of its limited purpose and effect, and the foregoing instruction to the jury upon that state of evidence, were erroneous.

(Official.)

Exceptions from supreme judicial court, Washington county.

William E. Acheson was convicted of an offense, and he brings exceptions. Sustained.

W. T. Haines, Atty. Gen., and F. I. Campbell, Co. Atty., for the State. C. B. Rounds, G. M. Hanson, and R. J. McGarrigle, for defendant.

WHITEHOUSE, J. This is an indictment for an assault with "attempt" to ravish and carnally know a female child under the age of 14 years. There is but one count in the indictment, and the offense is there alleged to have been committed on the 3d day of January, 1897. In support of the charge the complainant gave testimony tending to show that such an assault was committed upon her on Sunday evening, the second Sunday after Christmas, which was the 3d day of January, while the defendant's wife was "at meeting." The government then offered to show another independent assault, of the same nature, committed on the complainant four or five days later. The defendant's counsel objected to this testimony, and the following colloquy took place between the court and the counsel:

"Court: What is the ground of the objection?"

"Counsel: The ground of the objection is that in this indictment the allegation is of the assault on the 3d day of January, which has already been described. There is no allegation of any other offense at any other time. I simply say this story has been told three times under oath, and an election has been made, at a former time, entirely different from this. * * * We ought to be warned by the indictment what we are to defend. I don't think they should be permitted to put in an accumulation of offenses without the allegation being made that those offenses were meant. * * * Now, one has already been sworn to. I don't think we are to answer to other dates; and, as the county attorney states in his opening, the most important assault was away on, at some other date.

"The Court: Well, the testimony that the county attorney has detailed in his opening has already been gone over. You heard her testify to it before.

"Counsel: That ought not to be the essential in this trial.

"The Court: If that be true, I don't think it can surprise the defendant any.

"Counsel: Yes; but we ask it upon another ground, that it is an election,—what would be the attempt, perhaps, to prove another assault,—and he accumulates a mass of assaults.

"The Court: Yes; but he cannot have but one.

"Counsel: Then let him elect.

"The Court: He must tell you before he gets through which one.

"Counsel: Ought he not to tell now, so we can be prepared?

"The Court: No; I will admit the evidence in this case and reserve for you an exception. The county attorney offers evidence of assaults subsequent to this one already detailed, and I admit the evidence.

"Counsel: To all that I wish now to object.

"The Court: Yes; but subject to the modification which I shall give before the case closes.

"Counsel: I wish to object to the whole."

Thereupon the complainant was permitted to give testimony tending to prove the commission of three other similar assaults upon her by the defendant on different days specified by her, following January 3d, and all within a period of about two weeks. But the report of the case does not disclose that there was any subsequent modification by the court of the ruling under which this testimony was admitted. Neither does it show that at any later stage of the trial the government expressly elected, or was required to elect, which one of the four separate assaults thus identified by the complainant's testimony it would rely upon to prove the substantive charge set out in the indictment. Nor does it appear that there was any further allusion to this question, before the close of the trial, except in the following instruction to the jury in the charge of the presiding judge:

"Now, in this case the charge is laid on the 3d of January last. I have already ruled, and I do now rule to you, that that date is immaterial, and I say to you that, if you are satisfied as I have told you, that the defendant is guilty of this charge at any time during the period when this little girl lived in the family of Mr. Acheson, that will be sufficient. I do not require you to fix the date, nor is it necessary for the state to fix the precise date. If the state has satisfied you by evidence, beyond a reasonable doubt, that on any date while this little child lived in defendant's house, he was guilty of this charge, then it is your duty to convict him."

To this instruction, and to the rulings of the presiding justice admitting evidence of assaults upon other occasions than that alleged in the indictment, and refusing to require the prosecuting attorney to elect upon which one he would rely as the act charged, the defendant has exceptions.

It is an elementary principle in the law of evidence that, when a respondent stands charged with the commission of a particular criminal act, evidence that he did a similar thing

at some other time is generally deemed irrelevant and inadmissible. The considerations of justice underlying this rule are sufficiently obvious. The admission of such collateral facts in evidence would tend to place the defendant's whole life in issue on the charge of a single act, and oppress him with irrelevant matter of which he had received no notice and which he could not be prepared to meet. Proofs of numerous other crimes similar to that charged may indeed have a tendency to show the accused to be devoid of all moral restraint, and "fatally bent on mischief," and thus, in a moral sense, increase the probability of his guilt with respect to the particular offense set out in the indictment; but such evidence does not, for that reason, become legally admissible when there is no question in regard to the nature of the act charged. Evidence that the defendant's general reputation is bad with respect to that element of character involved in the crime charged, or bad generally as a man of moral worth, might also tend in some degree to lay the foundation for a presumption of guilt; but the rule is firmly established and unquestioned that such evidence cannot be received until the accused has opened the door by introducing evidence of his good reputation.

But evidence of other crimes of a precisely similar nature to that charged, and not connected with it, though deemed inadmissible to prove the commission of the act involved in the substantive charge, is yet uniformly received for the limited and specific purpose of aiding to determine the quality of the act and the legal character of the offense by illustrating the intent with which the act was committed. "To prove intent," says Mr. Wharton, "similar evidence is pertinent. One blow given to A. by B. may be accidental. Few counsel would have the audacity to claim accident for eight or ten blows given to A. by B. at successive intervals, under varying conditions. One letter sent by A. to B. demanding money may be ambiguous. It may cease to appear so if seen in the light of a series of prior letters demanding money, with threats whose purport is unmistakable." 1 Whart. Ev. §§ 31, 32. "The proof of criminal intent and of guilty knowledge," says Mr. Bishop, "not generally admitting of other than circumstantial evidence, may often be aided by showing another crime attempted or perpetrated, and when it can be it is permissible." 1 Bish. Cr. Proc. § 1126. Familiar illustrations of the doctrine are found in cases of successive cheats and forgeries, and in passing counterfeit money to different persons. So, when the respondent stands indicted for a single act of adultery, evidence of other acts of adultery complained of is admitted to prove the mutual disposition of the parties, and to illustrate the nature of the intimacy shown by their conduct on the occasion in question; "the reception of such evidence to be largely controlled by the judge who tries

the cause, and the evidence to be submitted to the jury with proper explanation of its purpose and effect." State v. Witham, 72 Me. 531.

In 2 Bish. Cr. Proc. § 970, the author says: "On a trial for assault with intent to commit a rape, an English judge rejected evidence that on a previous occasion the defendant had taken liberties with the same woman. The contrary to this, believed to be the better law, has been adjudged with us,"—citing *Williams v. State*, 8 Humph. 585; *State v. Neely*, 74 N. C. 425; *State v. Walters*, 45 Iowa, 389. In the latter case the respondent was indicted for an assault with intent to commit rape, and the complainant was allowed to give evidence of a number of other assaults of the same character, "some of which occurred some time prior to the finding of the indictment," and the court say: "To the introduction of this evidence we believe there can be no valid objection. In an indictment for an assault with intent to commit a rape, evidence of previous assaults on the prosecutrix is admissible to show the intent with which the act was committed."

In the case at bar the complainant had given clear and positive testimony of an assault on the 3d day of January, and further identified the occasion of this first assault by reference to the fact that it was the second Sunday after Christmas, and to the circumstance that it was on the evening when the defendant's wife was "at meeting." Assuming that evidence of the three assaults on subsequent occasions was admissible for any purpose, it was not error for the presiding judge to refuse to grant the defendant's request for an election by the prosecuting attorney before the evidence was admitted. Aside from the fact that rulings upon requests for an election are ordinarily within the domain of judicial discretion, it was not practicable to make an election before it was shown that more than one assault had been committed. But though reminded by the court that, if evidence of other assaults was received, he must elect upon which one he would rely before resting the government's case, the prosecuting attorney failed to give notice of any such election, and no election appears to have been made by him except that implied by his conduct of the trial. He had introduced competent evidence of the substantive charge of an assault laid on the 3d day of January, and more specially identified the occasion as the Sunday evening when the defendant's wife was absent at church. As Mrs. Acheson only attended church once during that month, it was, of course, immaterial whether that occasion was on the 3d or the 10th or the 17th of January. It was the occasion of the first assault committed upon her, and was manifestly the occasion of the assault intended to be described in the indictment.

Under these circumstances, and in the absence of any notice from the prosecuting at-

torney that he would rely upon any other assault, in justice to the defendant the state should be deemed to have elected by implication to rely upon the first assault, alleged to have been committed on the 3d day of January, and shown by the complainant's testimony to have been on the Sunday evening stated. 1 Bish. Cr. Proc. §§ 461, 462, and authorities cited. Indeed, some courts go further, and hold that, when the prosecutor has introduced direct evidence of one act for the purpose of procuring a conviction upon it, that particular act then becomes the act charged, and that, when he has thus made his election, he cannot elect again. *People v. Jenness*, 5 Mich. 305. Under our procedure, however, it is doubtless within the discretion of the court to permit another election at any time before the defendant is required to introduce his evidence, and if it can be done without injustice to the accused any time before the case is submitted to the jury. But this judicial discretion must, of course, be exercised with reference to the special facts of each case. 1 Bish. Cr. Proc. § 461.

In the case at bar, if public justice required a conviction upon each of the four assaults proved by the state's evidence, it was only necessary to frame an indictment with four counts, setting out the several independent acts relied upon. The difficulty now is that, after the state had proved the particular assault upon which it elected by implication to rely for a conviction under the single count in the indictment, it appears to have introduced evidence of three other similar assaults, not simply for the secondary purpose of showing the nature and intent of the first one, but as proof of other substantive offenses, upon each one of which a conviction might have been had. This evidence was received and remained in the case without any explanation of its limited tendency and purpose. In this state of the evidence, the jury were instructed in the charge that if they were satisfied "that on any date while this little child lived in the defendant's house he was guilty of this charge" it was their duty to convict him. This would have been a correct and appropriate instruction, if only one assault had been proved. But, as applied to evidence showing four independent assaults on different days, there is ground for apprehension that it was inadequate and misleading. Under this instruction and upon this evidence some of the jury may have been satisfied that an assault was committed on one of the occasions specified, and others of an assault on a different occasion, and thus a verdict rendered without unanimity respecting either of the occasions described in the testimony. It is therefore the opinion of the court that the ruling admitting evidence of other similar assaults without explanation of its purpose and effect, and the foregoing instructions to the jury upon that state of the evidence, must be deemed erroneous.

Exceptions sustained.

(91 Me. 247)

HOPKINS v. MAXWELL.

(Supreme Judicial Court of Maine. Jan. 19, 1893.)

CONDITIONAL SALES—RECORD.

1. Where a written agreement dated August 23, 1894, was a conditional sale of personal property, operating a transfer of title if the payments specified in it were made, and, until payment was made, the vendor retained the title, no note having been given for the purchase money, nor any express promise of payment made, *held*, that the agreement was not required to be recorded under the statute existing at its date (Rev. St. c. 111, § 5, as amended by St. 1891, c. 11).

2. *Held*, that under St. 1895, c. 32, an instrument like the above would not be valid, except as between the original parties, unless recorded. (Official.)

Report from supreme judicial court, Lincoln county.

Action by Solomon E. Hopkins against Noble Maxwell. Judgment on report for plaintiff, with interest from date of verdict.

L. M. Staples, for plaintiff. C. D. Newell for defendant.

STROUT, J. The rights of the parties depend upon the true construction of the following paper:

"Cooper's Mills, Aug. 23, 1894.

"Know all men by these presents, that I, S. E. Hopkins, this day leased to Weston Darling two team horses, about 13 hundred lbs., color one dark bay, the other red, valued at one hundred and twenty-five dollars. The condition of this lease is such that said Darling is to keep said horses in good condition, and is to have said horses providing he pays said S. E. Hopkins one hundred dollars and interest, twelve dollars, every week in cash or grain, at the going or market price, until the whole sum is paid in full. If said Darling fails in making his payments or any of them, said Hopkins may take said horses, and said Darling forfeits what he has paid or may pay; and said Darling is not to dispose of said horses in any way until this lease is satisfied. Furthermore, if said Darling fails in keeping and using said horses well, said Hopkins may take said horses without trespass.

"Weston Darling."

Darling sold the horses to defendant, and the plaintiff brings trover. The purchase price was not paid. The jury returned a verdict by consent for \$82.60, and the case was reported to this court for a construction of the paper. It was not denied that defendant converted the horses to his own use.

Defendant claims that the agreement is within Rev. St. c. 111, § 5, which, as amended by chapter 11 of the Laws of 1891, provides that "no agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee until the note is paid, is valid, unless it is made and signed as a part

of the note; and no such agreement, although so made and signed, is valid, except as between the original parties to said agreement, unless it is recorded like mortgages of personal property." The paper was not recorded.

The statute applies only to cases where a note is given for the purchase money, or an express promise of payment, equivalent to a note. This transaction was a conditional sale, to operate a transfer of title, if Darling made the payments as specified. No element of a note appears. Darling made no promise of payment. No action could be brought against him for the purchase money. He had the option to pay the price and acquire title to the horses, or not. If he did not pay, he never would acquire title. He was not bound to make the payments. True, no rent was reserved; but as Darling was to keep the horses, and lost all right of possession if he failed to make his weekly payments, Hopkins ran little or no risk. No title was to pass to Darling until he had made full payment. This agreement was not within the statute. No record was necessary. *Morris v. Lynde*, 73 Me. 80. There is nothing in *Rogers v. Whitehouse*, 71 Me. 222, cited by defendant, in conflict with this. In *Hill v. Nutter*, 82 Me. 190, 19 Atl. 170, the agreement contained an express promise of the purchaser to pay the price, and it was rightly held to be within the statute. So, in *Nichols v. Ruggles*, 76 Me. 25, the agreement contained an express promise to pay. This element is wanting in the case at bar.

Under chapter 32 of the Laws of 1895, an instrument like this would not be valid, except as between the original parties, unless recorded. But this later statute does not apply to this case.

According to the agreement of parties, there must be:

Judgment for plaintiff for \$82.60, and interest from date of verdict.

(91 Me. 300)

SPAULDING et al. v. NICKERSON.

(Supreme Judicial Court of Maine. Jan. 4, 1898.)

TRIAL JUSTICE—ACTION COMMENCED BY HIMSELF
—CONVERSION BY OFFICER—EVIDENCE.

1. It is provided by statute in this state that no trial justice shall hear or determine any civil action commenced by himself, and every action so commenced shall abate. Rev. St. c. 83, § 32.

2. In an action of trover against a constable for attaching the plaintiffs' goods, the officer justified under a writ issued by a trial justice, and proof that on the return day of the writ the suit was settled, and that the goods were released, and turned over to the debtor. The plaintiff in this action claimed that the writ was void under the statute, because it was made by the trial justice before whom the action was commenced; and also denied that the officer had the writ in his possession at the time he took the goods. Upon this last issue the jury made a special finding in favor of the plaintiffs, and returned a general verdict in

their favor. On motion of the defendant to have the verdict set aside as against evidence, the court holds that the case does not present an exigency which justifies a new trial. Among other reasons sustaining this conclusion the court observes that the plaintiff in the trial justice writ testifies that he did not make out the bill attached to that writ until the month following the attachment, and that he was present at the time of the seizure of the goods by the constable, and knew that the goods were not taken on his writ.

(Official.)

Action by Walter S. Spaulding and another against Hanover S. Nickerson. Verdict for plaintiffs. Defendant moves for a new trial. Overruled.

Besides the facts stated in the opinion, it appeared that the defendant claimed that the parties in the trial justice writ settled before the return day, and the debtor agreed to take and move his goods from the store, the rent for which was, as the defendant claimed, the cause of action set forth in the writ. Thereupon the defendant claimed that this settlement by the plaintiffs was a waiver of any action they might have against the defendant for attaching their goods, even if the defendant constable did not have in his possession the writ in question when he seized the goods.

The plaintiffs, on the other hand, urged that, if the goods had been properly taken upon such a writ, they had nothing to waive; and, further, that as a waiver, to be effectual, must be based on a full knowledge of all the facts, there could be no waiver here, because the plaintiffs did not know until after the settlement that the writ was made by the trial justice before whom the action was commenced.

J. W. Manson and G. H. Morse, for plaintiffs. Forrest Goodwin, for defendant.

WHITEHOUSE, J. This was an action of trover, brought by the plaintiffs, Spaulding and Thompson, part owners of certain goods, for the alleged conversion of them by the defendant.

The defendant pleaded the general issue, with a brief statement of three special matters of defense, viz.:

(1) That the defendant was a constable, and attached the goods on a writ dated October 9, 1895, issued by a trial justice in favor of one Connor for rent of the store, and against the plaintiff Spaulding, returnable December 7th; and that on the return day the suit was settled, the goods released from attachment, and turned over to Spaulding.

(2) The defendant justified under an execution issued against the plaintiff Thompson in 1894.

(3) The defendant claimed that when he attached the goods on the writ in favor of Connor, Spaulding told him to hold the goods until Connor got his rent.

But the justification under the old execution against Thompson appears to have been aban-

done, and the ground of defense mainly relied upon at the trial was the alleged attachment of the goods on the Connor writ.

It appeared that this writ was made by the trial justice before whom it was returnable, and the statute (Rev. St. c. 83, § 82) declares that "every action so commenced shall abate." The plaintiffs accordingly argued that, even if the defendant held the Connor writ at the time of the seizure of the goods, it would afford him no protection; but contended, as a matter of fact, that it was not issued until November of that year, more than a month after the seizure was made. Upon this issue of fact the jury made a special finding that the defendant did not hold the trial justice writ in favor of Connor at the time he took possession and control of the goods, and returned a general verdict in favor of the plaintiffs. The defendant moves to have the verdict set aside as against the evidence.

Upon the principal issue of fact submitted to the jury the testimony was sharply conflicting, and all efforts to reconcile it are attended with difficulty; but, after a careful examination of all the evidence, and the arguments of counsel, it is the opinion of the court that the case does not present an exigency which justifies a new trial. Connor, the plaintiff in the trial justice writ, testifies that he did not make out the bill attached to that writ until November, that he was present at the time of the seizure of the goods by the defendant, and knew that the goods were not taken on his writ, because it had not been made. The plaintiffs both testify that at the time of the seizure the defendant stated that he was taking the goods on the old execution against Thompson, and never made any mention of the Connor writ until long afterwards. On the other hand, the trial justice who made and issued the writ testifies that it was made on the day it bears date, October 9th, and the defendant testifies that he had the writ in his possession on that day, and took possession of the goods by virtue of an attachment on it. They are corroborated to some extent by Mr. Hovey, who states that on the day of the seizure, or the day the goods were moved out, Connor came to his office to have a writ made on his bill for rent, but that he declined to make it, and did not personally know when it was made.

But the result reached by the jury did not necessarily require them to believe that the Connor writ was antedated, for there was sufficient evidence to authorize them to find that the defendant took possession and assumed control of the goods on the 7th day of October, two days before the date of the Connor writ.

The defendant's evidence tending to show a final settlement of the entire controversy, and a waiver on the part of the plaintiffs of any wrongdoing by the defendant in taking the goods without authority, is not so clear and definite, and, when compared with the plaintiffs' evidence, is not so conclusive as to

warrant the court in disturbing the verdict on that ground.

Motion overruled.

(11 Me. 178)

STETSON et al. v. ADAMS et al.

(Supreme Judicial Court of Maine. Jan. 8, 1898.)

DEEDS—BOUNDARIES—MONUMENTS—PLANS—SURVEYS.

1. Of monuments in deeds. The lines of a survey, if ascertainable, govern plans.

2. It is well settled in this state that a survey once placed upon the face of the earth must control a plan that is made from it, although the plan, when placed upon the earth, would locate the line elsewhere.

3. The plaintiffs and defendants were owners of adjoining townships, and the controversy was over the dividing line between them. The plaintiffs contended that it should be located where the plan by which these townships were conveyed would locate it when placed upon the face of the earth. The defendants contended that the line was not where the plan would now locate it, but where it was in fact located by an actual survey from which the plan was made, and the jury found in favor of the defendants' contention. Upon a motion for a new trial, *held*, that the law makes the line where the survey marked it upon the ground, and therefore the verdict ought not to be disturbed.

4. Exceptions to a refusal of the court to give instructions to the jury substantially declaring a doctrine adverse to the rule laid down above will be overruled.

(Official.)

Exceptions from supreme judicial court, Piscataquis county.

Action by Edward Stetson and others against Sprague Adams and others. Verdict for defendants, and plaintiffs move for a new trial and exceptions. Motion and exceptions overruled.

This was a real action tried to the jury in Piscataquis county, and involved the question of the division line between township 4, range 8, and township 4, range 9. The jury returned a general verdict for the defendants, and also, under the direction of the court, made the following special findings:

"Questions for the Jury.

"(1) Did Samuel Weston, acting under his instructions from the committee for the sale of eastern lands in 1794, run or cause to be run upon the surface of the earth a line across the territory within the east and west boundaries of the two townships 4, as and for the range line between range 8 and range 9?

"Answer. Yes.

"(2) From all the evidence in this case, does it appear to the jury where, across said territory, the said western line, if any, was run?

"Answer. Yes.

"(3) At what distance from the present north line of the ninth range (measuring south on the west line of township 4 in said range) did the said western line cross the west line of township 4 in said range?

"Answer. Five miles two hundred and ninety-five rods."

Plaintiffs' exceptions: The plaintiffs' counsel requested the justice presiding to give to the jury the following instructions, which were not given except as appears in the charge itself:

"First. The rule that monuments govern is not, however, inflexible, but, like other rules, it must yield to exceptions. The only reason given, or which can be given, why monuments are to control the courses and distances in a deed, is that the former are less liable to mistakes. If, then, it appears that no mistakes can reasonably be supposed to have been made in this case, no reason remains for the application of the rule.

"Second. Where lines are laid down on a map and plan, and are referred to in a deed of land, the courses, etc., on such plan are to be regarded as the true description of the land, as if they were expressly recited in the deed.

"Third. Line to be run straight unless otherwise described.

"Fourth. Monuments govern only when certain or can be made so.

"Fifth. As the deeds of the plaintiffs and the deeds of the defendants both called for and referred to the Rose & Holman plan, which plan was made by the authority of the legislatures of the commonwealth of Massachusetts and the state of Maine, under the act of separation, through the services of the commissioners specially appointed by the legislature of said states to make a plan, and report as to where the dividing lines between ranges 8 and 9 were north of the Waldo patent, the decision of said commissioners appointed by said legislature in ascertaining, determining, and marking upon the face of the earth the common line between townships in the eighth and ninth ranges north of the Waldo patent is conclusive, as shown by the plan and report of such commissioners, and the line actually adopted by them.

"Sixth. If the line run from the Million-Acre purchase to the Penobscot river, or so far as it was run from the Million-Acre purchase toward the river by O'Neil, was never adopted by Weston as the true line on the face of the earth as dividing the eighth and ninth ranges north of the Waldo patent, then the spots made by O'Neil in 1794 on the line he (O'Neil) run are of no binding force, and the plaintiffs are entitled to recover in accordance with the line laid down on the Weston plan of 1794, and referred to in his letter of May 1, 1801, and in accordance with the line adopted by Rose & Holman in their report and plan made under the act of separation in 1822."

The case is stated in the opinion.

Among other instructions to the jury touching the evidence arising from surveys and plans, the presiding justice said:

"A man may have a lot of land and lay it out with a surveyor, running lines, laying out streets, putting down stakes, making roads and parks, and then afterwards endeavor to make a plan of them from what has been done. It is a picture of what has been done. Now, the plan is the picture; it is the guide; it is the finger post. But what controls is what was done real-

ly upon the surface of the earth,—the lines as they were run; the stakes as they were put down. The bounds as they were made are the controlling bounds, even though they may vary from the plan, and even though the plan may have been accurate in locating them. What is the reason of this? It is for certainty, gentlemen,—in order to have certainty in regard to boundaries; that they be not continually changing; that there shall not always be disputes arising as to where they are. Where the boundaries are first,—especially where the lines are first run,—there they stay. You see at once, taking this tract, with your knowledge of affairs, that it would be almost a miracle if two men should start at different times to run a line across a broken country, through a forest, and should run exactly the same course, and make the same distance. A third surveyor might go on and try it, and he would perhaps make the distance a little longer or a little shorter or a variation in the course; so that we cannot have, and the law does not permit that there shall be, a continual running or re-running of lines, but says where it is first run, if that can be found, that shall stand, and all subsequent purchasers must be bound by that. Plans are very useful in showing us what was done, but they are only evidence, and not conclusive. The real question is, if there was a previous work, where was that work done? But, gentlemen, I should say this: I think, that sometimes we may be satisfied that the plan was intended to represent, and does represent, what was done before; that it represents lines that were actually run. But we find it impossible to now tell where they were run. All the marks, all the evidence, everything has been swept away, and we do not have enough to indicate to us anything about where it was run, and we cannot tell. It does not appear where it was run. We are without information. Now, in such cases, gentlemen, we must do the best we can. All we have left is the plan, and the plan must then control. We must act as if nothing had been done at all, and endeavor ourselves to take the plan, and run out a new line; the old one, if there was one, having completely disappeared. In such case the first line afterward run is the controlling line.

"* * * If nothing had been done before the plan was made, and if the plan was to indicate only what is to be done hereafter, or after the plan was made, and we were now to do it for the first time, as the plaintiffs contend, then it is conceded, I believe, that a line midway between the north line of the ninth range and the south line of the eighth range would be south of the line in dispute, and would throw this land into plaintiffs' township. But, gentlemen, defendants contend that the plan indicates that it was made from surveys theretofore made, and, as I have said, I think the evidence will compel us to so find. Then the question is, can we find out what surveys were theretofore made, and can we find out where they were made across this township, if they were made? We have evidence in this

case of a survey made by one Samuel Weston in 1794. It is conceded, I believe, that Samuel Weston had instructions from the committee of Massachusetts. You may remember that the commonwealth of Massachusetts had a committee appointed, having entire charge of eastern lands, and under its direction surveys were made and lands sold. It is conceded, I believe, that Samuel Weston, by a commission dated May 1, 1794, was directed to proceed to this territory, and to lay off three ranges between the east line of the Million Acres and the Penobscot river, north of the Waldo patent, and he was instructed by that, as you will see, to lay off the three ranges, and to run out the range lines and the township lines. It is conceded, I also understand, that he in fact did—not personally going over the ground himself, but through his agents and employés, he being the managing man, and having authority, of course, to appoint others under him—cause to be run under this commission a line from the Million Acres to the Penobscot river, now known as the north line of range nine; that he did that through his brother. It also, I think, is conceded that he did run a line from the Million Acres to Penobscot river, now known as the south line of range eight, and also that he ran, or caused to be run, more or less of the lines between the townships; that he ran these, or caused them to be run, on the surface of the earth,—actually sent men with the proper instruments over the surface of the earth to run the lines, and mark them out upon the surface of the earth. But, gentlemen, did Samuel Weston, under that commission in 1794, run or cause to be run upon the surface of the earth the range line between range nine and range eight, and did he run it, or cause it to be run, on the surface of the earth, across township four? Did he run that line, or cause it to be run, in 1794, across township four; a line as and for the range line between the townships? That will be the first question for you, and, instead of asking you to return a general verdict at first, I shall ask you to answer some questions.

"That line, if run, and if we can tell where it was run, and to-day find where it was run, controls. Therefore, as I have said, there are three questions: First. Was the line run across that township? Second. Can we now tell where it was run? because, if we cannot, then it is as though never run. And, third, how far from the north line of range nine was that line run?

"I will say again, to make it clear, what I have already said in another connection, that, although we may be satisfied that a line was run, yet, if we cannot tell now where it was run, it is as if it never had been run, so far as we are concerned; because the duty of the defendants will be to show, not only that it had been run, but to show where it had been run,—show us the place. I will consider these questions together largely in going over the evidence.

"Starting with the conceded fact that West-

on ran some lines in that neighborhood, and that he was there to run out the ranges and the townships, we would look first to his field notes to see whether or not he ran this range line between eight and nine, and where he ran it,—that is, what he says he found, and what he did in the way of making monuments as he went along; but, unfortunately, gentlemen, we have not those field notes. All we have from Samuel Weston are two documents: First, a plan that he made; and, second, a letter that he wrote in 1801 to the commissioners, or to somebody, in relation to this survey. That is all we have from him. His plan indicates one thing in favor of the defendants, and that is that a line was run, because we find upon his plan a line drawn between ranges eight and nine from the Million Acres to the Penobscot river. That line appearing upon his plan is evidence that a line was run, the presumption being that he put down what he did. On the other hand, gentlemen, it seems to afford a bit of evidence in favor of the plaintiffs, in that it indicates a line which runs parallel with the north line of range nine and the south line of range eight, coming out at the river at a place that has been described to you upon the plan where there are three islands marked. But you must understand that the plan is only evidence either way. * * *

"To resume for a moment, the defendants do not profess to show you any of the old spots of Weston on that township, and they have undertaken to tell you why they would not appear there; but they say that the existence of the spots to the west of the township and of the spots to the east of the township should show you, not only that Weston did cross that township, but that he crossed in that line,—in a line that would range with the spots on either side. To repeat my illustration, if you had the problem to determine whether a man walked across a piece of bare ice where he left no tracks, if you followed his steps through the snow down to the bare spot, and directly opposite you find his steps in the snow on the other side, defendants argue that you should infer from that that he walked across in that line between the two tracks; and they ask you to infer here that not only did Weston's man cross the tract, but that he crossed it in that line; and they claim that that line is now marked on the west line of the township by a stake that you have heard described. * * *

J. B. Peaks, P. H. Gillin, and C. P. Stetson, for plaintiffs. F. H. Appleton, H. R. Chaplin, and H. Hudson, for defendants.

HASKELL, J. Writ of entry tried upon the general issue. The verdict was for defendants, and plaintiffs move for a new trial, because it is against law and evidence. Plaintiffs and defendants are owners of contiguous townships, and the controversy is over the dividing line between them. Plaintiffs own township 4 in the ninth, and defendants township 4 in the eighth, range of

townships, said ranges extending west from the Penobscot river to the "Million Acres" on the Kennebec. Range 6 having already been surveyed, Massachusetts commissioned Samuel Weston, in 1794, to survey three ranges north thereof, divide them into townships of six miles square, and run and spot the lines. On the 7th of the following November, Weston returned to the secretary's office a plan of his work, showing the line between ranges 8 and 9 to intersect the Penobscot at "Three Islands." His field notes have not been preserved. The plaintiffs contend for the range line as shown upon the plan, but the defendants assert that the survey placed it a mile or more further north.

Nothing is more firmly established in this state than that, in such case, the survey must govern when its location can be shown. When it cannot be, then the plan may locate it. *Bean v. Bachelder*, 78 Me. 184, 3 Atl. 279.

The controverted range line from the Million Acres to the Penobscot is some 60 miles in length, and is or intended to be straight, and appears to have been run from west to east. The western end of the line is not in dispute. The eastern end is. On this line, between the second and third tiers of townships divided by it, east from the Million-Acre tract, the evidence discloses two ancient beeches, bearing surveyors' marks. One lay upon the ground, and bore a surveyor's seal and 1794. Running south, 84° east, the growth is old; and, not far on, a spot from a spruce was cut out, and is produced in court, showing by its age to have been made in 1794. Continuing six miles, the line is well marked, sometimes by ancient spots. A poplar bears surveyors' marks, and there are indications of a north and south line. Continuing on for some four miles, ancient spots as well as later ones mark the course where a section from a cedar was cut out and is produced. It had four spots upon it of the age of 73, 55, 37, and 31 years, respectively. For nearly a mile further the old growth remained, and both ancient and new spots mark the line. One was cut from a maple showing 102 years' growth, or as made in 1794. That was within three-quarters of a mile of the Katahdin Iron Works Railroad. From there to the railroad the forest had disappeared, and no spots were found. For quite a number of miles further not much remained to bear the ancient mark of a surveyor, although records of more recent surveys were seen. Crossing Schoodic Lake, the marks of surveyors, of comparatively recent date, show a line, and a hemlock bore a spot that was cut out and is produced showing a spot made in 1794. Fifty rods further on, a spot was cut from a spruce, and produced, made in 1794. Then, across Endless Lake, a spot made in 1794 was cut from a spruce, and is produced. Further on, across east branch of Seboeis, a spot made in 1794 was cut from a beech, and is produced. The last four spots were cut east of the township in controversy. The

surveyor who cut these spots testifies that by reversing his course, and running north, 84° west, he struck the two ancient beeches first named, and, continuing a short distance, found old trees well blazed. He cut out a spot from a hemlock, and produced it, made in 1794. In a short distance further on he cut from another hemlock, and produced it, a spot made in 1794. Further on he cut, and produced, a spot made from a hemlock made in 1794, and, still further, a yellow birch, well blazed, but illegible, and a stone post. Then came old growth and ancient marks clear through in places to the end of the line.

There was more evidence concerning the cross lines of townships, and all the evidence was much more in detail than here given, but only enough has been recited to show its general trend and significance. This territory had never been surveyed before Weston in 1794, and the living records of time, written in nature, tell of work done that year that cannot be ascribed to any other hand than his. From the Million-Acre tract on a course south, 84° east, across and far beyond the townships owned by these parties, his line had been marked, and has been preserved by nature herself, so there can be no mistake as to where he run his line, although seemingly buried under the moss of a century. That none of Weston's marks exist upon the line within the limits of the townships owned by these parties for want of trees old enough to preserve them, or from the destruction of trees upon which they were made, cannot shake the certainty that the well-known line, both east and west of them, continues across them, although that section of it may have been lost, and although a continuance of the marked line may not strike the Penobscot at Three Islands, or may not have actually been surveyed further east than the last spot found. The jury cannot be said to have erred in finding the Weston survey to have been placed upon a marked line across these townships. But the plaintiffs contend that other considerations overthrow any actual survey that may appear to have been made.

1. Plaintiffs contend that Weston made a mistake in his survey of the line between ranges 8 and 9, and base their contention upon the following facts: Township 4, in range 7, was granted to Bowdoin College, and, some uncertainty having arisen about its north line (that is, the range line between 7 and 8), Massachusetts, in 1801, ordered Weston to make a survey of township 4, range 7, and in his letter of explanation, so far as material to this case, says that he employed his brother to run the north line of range 9, and one John O'Neil to run the south line (that is, the line between ranges 8 and 9), "with particular instructions where to leave the Million-Acre line"; that he surveyed from the northeast corner of township 1 in the sixth range up river, marking the corners of townships as he went, to the northeast corner of township 1 in the ninth range, and awaited the

arrival of his brother on the north line of range 9, and that the brother struck the river with his line within six rods of the corner that he had made for him. He says that he came away before O'Niel reached the river, as he met with "so many obstacles from low swampy land and ponds on the line"; that when O'Niel came down river he gave "an account of his voyage," and says that "I rather concluded he had struck the river above my station made for him to come out at." He says O'Niel was a practical surveyor, and a man of ability and good understanding, and, if anything, "rather too nice and curious to have the work performed just so"; that absolute exactness cannot be expected in so broken a country as that is; that so many obstacles from ponds, with all their arms, legs, inlets, and outlets, swamps, bays, thickets, morasses, mountain cliffs, and gullies in so close a succession, render it much more difficult to close lines that might often be wished for. The line between ranges 8 and 9 was not re-run, and O'Niel's survey was left as he made it, striking the river further north than the point fixed for him to strike. Nevertheless, there was his survey, marked upon the ground, and there the law makes the line. The resurvey of township 4 in the seventh range does not move the located lines between ranges 8 and 9.

2. Plaintiffs contend that Massachusetts, in 1820, resurveyed by Greenwood the east half of township 3, range 8, the town next east of defendants, and conveyed the same accordingly; that the survey fixed the northeast corner to the south of the Weston line, and where it should have been to strike Three Islands on the Penobscot. But that does not change the Weston survey, and does not purport to. It simply puts the Weston plan upon the earth, puts it where O'Niel did not put it, and therefore cannot change the location of his survey between other townships. Nor can the survey by Gilmore of the other half of township 3, in 1831, ordered by the land agent of Maine, change the O'Niel line, any more than the Massachusetts survey in 1820 can do so. Plaintiffs contend that O'Niel abandoned his line before he reached the Penobscot. Suppose he did. The survey, so far as he did make it, must stand. Weston adopted it. Weston says, in his letter to Massachusetts in 1801, that O'Niel reached the river, and above the station, so far as he could judge from O'Niel's account, and excuses the inaccuracy of the result from natural causes, but he nowhere repudiates the survey.

3. Plaintiffs contend that the survey of Silas Holman, in 1822, by authority of the commissioner appointed under the act of separation, providing for a division of lands between Maine and Massachusetts, adopted the Weston plan, and must control. The parties took their titles under the Holman plan, which is

referred to in their respective deeds,—the defendants from Massachusetts, in 1834; the plaintiffs from Maine, in 1863. The deed bounds the defendants northerly by the plaintiffs' township, and the plaintiffs take township 4, range 9, according to survey and plan "in ¹⁷⁹⁴~~1822~~ by Weston and Lewis and Holman, surveyors." The plaintiffs must recover, if at all, upon the strength of their own title. That title is according to the survey and plan ¹⁷⁹⁴~~1822~~ by Weston and Lewis and Holman. The Holman—or Holman & Rose plan, for there is but one—purports to have been made from former surveys made by Massachusetts, and by order of the commission, in 1822. The only surveys by Massachusetts were Weston's in 1794, and Greenwood's in 1820. The only survey by the commission was Holman's in 1822. The plan was composite. It was compiled from two surveys, so that Weston's survey must stand, unless superseded by Holman's. Was it? Holman surveyed from the northwest corner of 1 in the eighth to the Penobscot, coming out, not where O'Niel's survey struck the river, but where it ought to have struck it; and, if Holman's survey be produced westerly, according to the Weston plan, across township 2, it would become coincident with Greenwood's survey between the east half of township 3 in 8 and 3 in 9, and also coincident with the surveys made by Gilmore between the west half of these townships in 1831. At the easterly line of plaintiff's land, all the surveys subsequent to Weston's stopped. None of these surveyors found the O'Niel line, because they did not look north far enough to find it. They supplanted it from the Penobscot westerly across townships 1 and 3 only. From there on, Weston's survey, the O'Niel line, can be traced to the Million Acres, and that, being the only survey, must stand so long as its location can be found. Of course, this view does not give a straight line from the river to the Million Acres. It is straight to the west line of township 3, and then is set over to the north, where O'Neil ran through, and then goes straight westerly to its end. Unless the doctrine that a survey shall govern the plan be overturned, no other solution can be given to this case, so long as the verdict stands fixing the O'Niel line upon the face of the earth.

4. Plaintiffs have six exceptions, but 5 and 6 only have been argued, and need only be considered. The fifth is to a refusal of a requested instruction, in substance, that the Rose & Holman plan is conclusive. Of course, it is not, against a former survey, as already stated.

The sixth contains a recital of facts that do not fit the case, and was properly withheld. No exceptions as to the conduct of the jury have been allowed, but are waived.

Motion and exceptions overruled.

51 Me. 229)

HASTINGS v. STETSON.

(Supreme Judicial Court of Maine. Jan. 8, 1898.)

NEGLECT—MALPRACTICE—DAMAGES—REPEATING OF INSTRUCTIONS.

1. Upon a motion for a new trial in a case where the jury returned a verdict against the defendant, a surgeon, for alleged malpractice in treating the plaintiff's dislocated shoulder, the court holds that the plaintiff has established, by a fair preponderance of the evidence, that the defendant did not exercise the care and skill which the law requires in diagnosing the injury; and that the long delay before the dislocation was reduced was the proximate cause of the paralysis, from which the plaintiff suffers, and that the defendant is in fault for that delay.

2. In estimating damages for such an injury, much must be left to the sound judgment of the jury and in this case the court is unable to say that the jury erred.

3. Where a requested instruction that is sound has already been given, and its repetition at the close of the charge, instead of aiding, is likely to mislead, *Acid*, that it may be properly refused.

(Official.)

Exceptions from supreme judicial court, Lincoln county.

Action by Frank G. Hastings against Edwin F. Stetson. Verdict for plaintiff. Defendant moves for a new trial on exceptions. Motion denied, and exceptions overruled.

C. E. & A. S. Littlefield, for plaintiff. W. H. Hilton and O. D. Baker, for defendant.

STROUT, J. This is a suit for alleged malpractice, as a surgeon. Plaintiff was thrown from his carriage in the afternoon of November 6th, and suffered a subglenoid dislocation of his right shoulder. The defendant, a practicing physician and surgeon, was called, and was in attendance within a very short time thereafter,—examined the patient that evening and the next morning. He then complained of pain in the shoulder and arm, and thought his arm was broken, or out of joint, and so told defendant. The defendant attended the plaintiff till November 18th. On the twelfth day after the injury Dr. Stetson says he discovered that the shoulder was dislocated. He then told the plaintiff that he "had got to give him ether and see what the trouble with the arm was and fix it." The testimony of several surgeons called in the case is that the subglenoid dislocation is easy of detection; that there is no difficulty in its diagnosis. In that dislocation the head of the bone is out of its socket, and rests in the axilla. The effect is a flattening of the deltoid muscle, easily discerned by touch, and the head of the humerus can readily be felt by the hand in its unnatural position. If the defendant had exercised the care the law requires of a surgeon, he could and ought to have ascertained the fact of dislocation before the lapse of 12 days. The evidence justified the jury in its finding that defendant was guilty of negligence in the case. But he is responsible only for the consequences of that negligence.

The dislocation was reduced on November 20th, by another surgeon. Nearly complete paralysis of the arm and hand had resulted before the reduction. The plaintiff claims that this was caused by the head of the humerus resting upon and pressing the brachial plexus, a network of nerves in the armpit, for 12 days; and that the defendant's negligence in failing to reduce the dislocation for that length of time caused the paralysis. The defendant says the head of the humerus, in that kind of dislocation, does not and cannot rest upon the brachial plexus; and that the paralysis was the result of the blow which dislocated the shoulder,—the head of the bone, in its progress from the socket, lacerating the nerves of motion and sensation which supplied the arm. This contention is the most serious one in the case.

Many experts in surgery and nerve troubles were examined. Some of them say that, in a subglenoid dislocation of the shoulder, the head of the humerus cannot rest upon or press injuriously the brachial plexus; that it is an anatomical impossibility; that an experiment upon a dead body demonstrates this,—while others say that in that dislocation the head of the humerus would rest upon the brachial plexus. All admit that pressure upon a nerve, if of sufficient force and continued for a sufficient time, will produce paralysis of that nerve; that it might result from one day's pressure,—quite certainly in a week. The experiment upon a dead body is not satisfactory. There must be a difference in the action of a living, sensitive muscle from that of a dead one. It is common knowledge that, in any disturbance of the joints, the muscles have a potent and active action. If one muscle is injured and weakened, an opposing muscle in full power may draw the misplaced bone into a different position from that it would be in, if all the muscles acted with normal force. Some of the experts called by defendant, who have had large and long experience, say that in a subglenoid dislocation of the shoulder the head of the humerus does not ordinarily rest against the brachial plexus; but they admit that it sometimes does, but not frequently. They give the opinion that the paralysis in this case was caused by the original blow,—an injury to the nerves then received; while others, of equal experience, attribute the paralysis to the long-continued pressure of the bone upon the brachial plexus, before reduction of the dislocation. All agree, however, that if the original blow caused the injury to the nerves which resulted in paralysis, that result would be immediate upon the injury, or within an hour after it. The preponderance of the evidence is that the paralysis in this case was not immediate. It appears to have shown itself to some extent a day or two after the injury, and to have progressed from that time forward. Since the reduction of the dislocation, it has improved to some extent. As we understand the experts, the theory that the original blow caused the paralysis is based upon the development of paralysis immediately thereafter. If it was developed several days after, that theory would not be entertained by them,

but some other cause must be found. In such case, the diagnosis would indicate pressure upon the nerves continued long enough to produce the result. The experts say that "dislocation is comparatively rarely accompanied by nerve injuries," and that paralysis rarely results from a dislocation of this kind. They all agree that the dislocation should be reduced as soon as possible. It is only in extreme cases of effusion of blood, or great inflammation, that delay is excusable. One of the experts says he had seen "three cases where considerable paralysis was experienced from the dislocation being unreduced." Another expert of large experience says he had not seen such a case.

The question appears to be incapable of demonstration. It must rest upon professional opinion, based upon anatomical learning and experience. The experts differ in opinion as to the cause of the paralysis. Those of them who attribute it to the original blow, base their opinion upon the assumed fact that the paralysis immediately followed the injury; but we think the evidence shows that it came on gradually for several days after the injury. If so, some other cause than the original blow must be found. This is in accordance with the opinion of the experts.

Without reviewing the testimony further, the court is of opinion, after a careful examination of all the evidence, that the plaintiff has established, by a fair preponderance of the evidence, that the defendant did not exercise the care and skill which the law requires in diagnosing the injury, and that the long delay before the dislocation was reduced was the proximate cause of the paralysis from which the plaintiff suffers, and that the defendant is in fault for that delay.

We cannot say that the verdict, which was for \$1,741.66, is too large. The medical witnesses express the opinion that there will probably be an improvement in the use of the arm, but give little encouragement of a restored use. The plaintiff is 51 years old. The right arm is the one paralyzed. The injury occurred on November 6, 1895. To this time he has no efficient use of the arm and hand. He can flex the fingers, and partially lift the arm. It is extremely doubtful if he will ever regain an important, practical use of the arm or hand. In estimating damages for such an injury, much must be left to the sound judgment of the jury. Their judgment is entitled to respect. In view of all the facts, we are unable to say that the jury erred.

The motion for a new trial must be overruled.

Upon the exceptions. At the close of the charge, defendant requested that the jury be instructed "that if the plaintiff's own experts admit that the violence of the original accident could account for the plaintiff's paralysis and all the results now upon him equally well with the delay in setting the bone, then the plaintiff has failed upon that branch of the case, and the plaintiff could not, in any event, recover damages for the plaintiff's paralysis." The presiding judge declined to give the instruction as requested, saying: "That will only complicate

it. I think I will not add anything more. I do not refuse that, excepting that it is not necessary. The jury will remember the testimony of the experts and all the testimony in the case."

The request is faulty in limiting it to the testimony of plaintiff's experts, when it should have included that of all. Careful instruction was given to the jury upon the question whether the paralysis was caused by the original blow, or resulted from the delay in reducing the dislocation and a pressure of the head of the humerus upon the brachial plexus. They were instructed that the plaintiff could not recover damages for the paralysis if it was caused by the original blow; that the burden was upon the plaintiff to satisfy them, by a preponderance of the evidence, that the fault and neglect of the defendant was the cause of the paralysis. Their attention was called fully to the testimony of the experts upon each side; their various opinions and reasons therefor; and it was submitted to the jury in a peculiarly lucid manner, to determine the fact. The rights of both parties were carefully preserved. So far as the requested instruction was sound, it had already been given. Its repetition at the close of the charge, instead of aiding, was likely to mislead. It was properly refused.

Motion and exceptions overruled.

(68 N. H. 518)

BROWN v. CONCORD & M. R. R.

(Supreme Court of New Hampshire. Merrimack. July 31, 1896.)

INJURY TO EMPLOYEE—DEFECTIVE APPLIANCE.

In an action for personal injuries, there was evidence that plaintiff, who had never seen the circular saw which he was directed to use in the sawing of a board which he needed in his work, ran the board through on one side of the saw, which sawed it unevenly. *Held*, that plaintiff was not guilty of contributory negligence, as a matter of law, in attempting to run it through again, whereby he was injured by the defects in the saw.

Exceptions from Merrimack county.

Action by Samuel P. Brown against the Concord & Montreal Railroad. Judgment for plaintiff, and defendant excepts to the overruling of his motion for a nonsuit. Judgment on the verdict.

The plaintiff introduced evidence tending to show that he had never seen the saw till the time of the accident; that he was directed to use it for the sawing of a board which he needed in his work; that he ran the board through on the right side of the saw, and found it was sawed badly and crooked; that he then ran it through on the left side of the saw; that the saw caught the board just after it had got by the cutting part, and threw it over, and threw his hand on the saw, which caused the injuries; and that the catching of the board was on account of the defective condition of the saw, causing it to run unevenly. The defendant's motion for a nonsuit was refused.

Sargent & Hollis and J. H. Albin, for plaintiff.
F. S. Streeter and J. M. Mitchell, for defendant.

BLODGETT, J. The motion for a nonsuit was properly denied. Manifestly, it cannot be held, as matter of law, that, merely because the board "was sawed badly and crooked" upon the plaintiff's first attempt to run it through on the right side of the saw, he was guilty of contributory negligence, and assumed the risk of the resulting injury, in changing the board to the other side of the saw, and attempting to run it through again. Not only has the determination of such questions in this jurisdiction been relegated to the decision of the jury, under proper instructions of the court, by a long and unbroken line of decisions, but, in addition, it may properly be observed that, if this case were one of new impression, nothing appears which would justify the granting of the defendant's motion under the circumstances attending the plaintiff's injury. The defendant's exceptions to evidence, not having been insisted upon at the argument, have not been considered. Judgment on the verdict.

CLARK, CHASE, and WALLACE, JJ., did not sit. The others concurred.

(90 N. H. 123)

JEWELL v. CLEMENT.

(Supreme Court of New Hampshire. Grafton.
March 12, 1897.)

**EASEMENT—RIGHT OF WAY—RIGHT TO MAINTAIN
BARS—QUESTION OF FACT—FINDINGS
OF REFEREE.**

1. Whether the erection of bars on a right of way was a proper use of the premises, the reservation in the deed being silent, is a question of fact.

2. In determining whether a right of way is subject to bars, the necessity or convenience of the bars to the one, and their inconvenience to the other, and all surrounding circumstances, are to be considered.

3. A finding by a referee that bars were an unreasonable obstruction to defendant's right of way was a finding that they were not reasonably necessary to plaintiff, and his right to maintain them will not be inferred.

Exceptions from Grafton county.

Case, by Levi F. Jewell against Mary O. Clement, for removing the plaintiff's bars, whereby cattle were admitted to his field, and destroyed his crops. Facts found by a referee, who made a general finding for the defendant. Plaintiff excepted. Overruled.

The parties own adjoining farms. July, 7, 1854, Robert E. Merrill, then the owner of both farms, conveyed to the plaintiff the farm owned and occupied by him, reserving therein a passway described as follows: "Said Robert E. Merrill, his heirs and assigns, has a right at all times to pass and repass on the north side of said Jewell's house over said land from the highway to the bridge over Berry's brook." The passway as then and afterwards used extended from a

point in the highway a few feet from Jewell's house, over the land conveyed to him to Merrill's remaining farm, which, together with the right of way, is now owned by the defendant. After Merrill's conveyance, the passway was staked out by the parties, and there is no controversy about its location at the point of the alleged trespass. About four years prior to the date of his writ, the plaintiff put up sliding bars across the entrance to the passway from the highway, and has ever since maintained them more or less of the time while his crops were growing. In using the passway, the defendant, her tenants and servants, were obliged to slide back the bars or otherwise remove them, and they seldom put them up again. There was no evidence tending to show that they were ever taken or left down by the defendant or any person for whose conduct she was responsible, except at times when she or they were making a proper use of the passway. It is for removing them, and not replacing them, on such occasions, that the plaintiff complains. The referee found, so far as it is a question of fact, and ruled so far as it is a question of law, that the defendant was entitled, under the deeds, to an unobstructed passway from the highway to the bridge over Berry brook, and that the bars erected by the plaintiff on the highway at the entrance of the passway were an unreasonable and unlawful obstruction thereof. The court ordered judgment on the report for the defendant, and the plaintiff excepted.

George B. Cox and N. J. Dyer, for plaintiff. S. B. Page, for defendant.

WALLACE, J. The question is whether the parties to the deed did or did not intend that the passway should be subject to bars. The reservation is silent on the subject. From the creation of a way by deed in general terms, without a provision giving the owner of the land over which it passes the right to erect gates or bars, neither a grant nor a denial of that right is necessarily to be implied. *Bean v. Coleman*, 44 N. H. 539, 547; *Garland v. Furber*, 47 N. H. 301. But the right to erect them cannot be implied if they constitute an unreasonable obstruction to the reasonable and proper use of the way. Neither party could have intended or understood that the reserved way was to be subject to any unreasonable obstruction. Whether the erection of the bars by the plaintiff was a proper use of his premises, compatible with the defendant's reasonable enjoyment of the easement, or was an unreasonable obstruction of the way, is a question of fact. In determining the question, the necessity or convenience of the bars to the one, and their inconvenience to the other, and all other surrounding circumstances affecting either party, are to be considered (*Joyce v. O'Neal*, 64 N. H. 91, 6 Atl. 33; *Gardner v. Webster*, 64 N. H. 520, 15 Atl. 144); and presumably they

were considered by the referee. The finding that the bars were an unreasonable obstruction of the defendant's way is, in effect, also a finding that they were not reasonably necessary to the plaintiff. In view of this finding, a right in the plaintiff to maintain them cannot be inferred. Exceptions overruled.

CARPENTER, C. J., did not sit. The others concurred.

(88 N. H. 134)

HALLETT et al. v. PARKER et ux.

(Supreme Court of New Hampshire. Grafton. March 12, 1897.)

EQUITY—DOWER—CLOUD ON TITLE—REMOVAL.

1. The wife of one who, at the time he received title to the land, executed a bond to convey same, and who had no interest independent thereof, acquires no right of dower.

2. When the facts showing the invalidity of a dower right in land do not appear upon record, it may be removed by decree.

Exceptions from Grafton county.

Bill by H. K. Hallett, as an administrator of George Farr, deceased, and another, against Ira Parker and wife. From a decree for plaintiffs, defendants bring exceptions. Exceptions sustained.

Bill in equity, praying that the defendants, Ira Parker and his wife, Mandane A. Parker, be required to convey to the plaintiffs the Oak Hill House. On March 7, 1894, Ira received a deed of the Oak Hill House property, and on the same day he gave a bond to George Farr and Eliza C. Farr to convey to them the same premises upon certain conditions, which have been fulfilled. Mandane did not sign the bond. A decree was made directing Ira to make conveyance of said premises to the plaintiffs by good and sufficient deed of warranty, with the said Mandane joined as grantor in said conveyance, as the wife of said Ira, for the release of all her rights of dower and homestead and any other rights she might have in the same. To this decree the defendants excepted on the ground that Mandane, not being a party to the contract, is under no obligation to join in the deed.

Bingham, Mitchell & Batchellor and Drew, Jordan & Buckley, for plaintiffs. George H. Bingham, for defendants.

WALLACE, J. The only question raised is whether Mandane should have been required by the decree to join her husband in the conveyance of the land described in the bond to the plaintiffs. He executed and delivered to the plaintiffs the bond to convey the land to them at the same time he received the deed. The reception of the deed and the giving of the bond were simultaneous acts and parts of the same transaction. He never owned the land when he was not under an equitable obligation to convey it. He never had any interest in it independent

of the agreement to convey embodied in the bond. His wife has no more interest in the premises than she would have in land of which her husband's seisin was instantaneous or which he was under obligation to convey at the time of marriage. *Adams v. Hill*, 29 N. H. 202; *Hunkins v. Hunkins*, 65 N. H. 95, 18 Atl. 655. Ira held the land in controversy in trust for George Farr and Eliza C. Farr, to be conveyed to them upon the performance of the condition of the bond. The widow of a trustee does not have dower in the lands held in trust by her husband. *Hopkinson v. Dumas*, 42 N. H. 296, 306; 1 Washb. Real Prop. 204; 1 Perry, Trusts, § 322. Mandane has no inchoate right of dower or other interests in the lands in question. There is therefore no necessity for her to sign the deed which her husband is required to give the plaintiffs. Her apparent right is, however, a cloud on the plaintiffs' title, from which they are entitled to relief, as the facts which show its invalidity do not appear upon record, but must be shown by other evidence. *Eastman v. Thayer*, 60 N. H. 408, 413; *Perham v. Fiber Co.*, 64 N. H. 2, 3 Atl. 312. As she is a party to the suit, the cloud can be removed by a decree declaring her claim invalid and enjoining her from ever asserting it. The decree will be modified in accordance with the views here expressed. Exceptions sustained.

PIKE, J., did not sit. The others concurred.

(88 N. H. 171)

PERKINS v. ROBERGE.

(Supreme Court of New Hampshire. Strafford. July 30, 1897.)

CONTRACT—WITNESS—CROSS-EXAMINATION—DISCRETION—REMARK OF COUNSEL.

1. When plaintiff built an oven under contract, in accordance with plans furnished by defendant, and it did not work in a satisfactory manner, on account of the fault of the plans, he is entitled to recover the contract price.

2. To what extent a witness should be contradicted on a collateral issue, to affect his credibility, is for the trial term.

3. How far the cross-examination of a witness should be allowed to affect his credibility is for the trial term.

4. A remark of counsel, "This is a pretty serious matter, when a man testifies to what is not true in a matter of as great importance as this," is not ground for setting aside the verdict.

Exceptions from Strafford county.

Assumpsit by Moses S. Perkins against Etienne Roberge to recover a balance claimed by the plaintiff to be due on a written contract. Trial by the court. Verdict for the plaintiff, to which defendant excepted. Exceptions overruled.

Edgerly & Mathews, for plaintiff. W. S. & D. R. Pierce, for defendant.

WALLACE, J. The plaintiff agreed in writing with the defendant to build a baker's

oven and furnace in a workmanlike manner, in accordance with a plan and specifications furnished by the defendant. The oven was built by the plaintiff in accordance with the contract. It did not work in a satisfactory manner on account of the fault of the plans. The failure of the oven to work in a satisfactory manner being attributable to the defects in the plans furnished by the defendant, and not to the failure of the plaintiff to perform his contract, he is entitled to recover the contract price for the performance of his undertaking.

The defendant, on cross-examination, and subject to his exception, testified he had put his real estate out of his hands before he went into the bakery business, and about two months before the contract was made, and also that he conveyed certain personal property to his wife since the making of the contract. Upon rebuttal, the plaintiff, subject to the defendant's exception, introduced a copy of the defendant's deed conveying away his real estate, for the purpose of showing the date. The object of introducing the deed was to show that the defendant, being mistaken or untruthful as to its date, would be more likely to be unreliable in other particulars. This was contradicting him on a collateral issue. To what extent this should be carried for the purpose of disparaging the credibility of a witness, or how far the cross-examination of a witness should be allowed to go for a like purpose, are questions of fact to be determined at the trial term. *Gutterson v. Morse*, 58 N. H. 165; *Manufacturing Co. v. Head*, 59 N. H. 332; *Merrill v. Perkins*, Id. 343; *Perkins v. Towle*, Id. 583.

The plaintiff's counsel, after inquiring particularly as to the condition of the oven at a certain time, and after counsel for the defense had protested that his inquiry upon this point had been clearly answered, remarked, "This is a pretty serious matter, when a man testifies to what is not true in a matter of as great importance as this, and I don't want him, or his counsel either, to say that he did not understand the question," to which the defendant's counsel excepted. The remark of the plaintiff's counsel, although reprehensible, affords no ground for setting aside the verdict. Exceptions overruled.

PIKE, J., did not sit. The others concurred.

(69 N. H. 99)

STATE v. MOORE.

(Supreme Court of New Hampshire. Hillsboro. March 12, 1897.)

FRAUDULENT ISSUE OF STOCK.

The treasurer of a company, who, on surrender to him of certificate of stock No. 57, issues in place thereof No. 111, cannot be convicted under Pub. St. c. 273, § 12, of falsely and fraudulently issuing No. 111, though at the time of issuing it he intended not to retire No. 57, but to reissue it, and thereafter did reissue it.

Joseph C. Moore was indicted for knowingly, falsely, and fraudulently issuing a certificate of stock of the Union Publishing Company to R. G. Sullivan, and verdict was rendered against him. Verdict set aside.

J. P. Tuttle, County Sol., E. G. Eastman, Atty. Gen., and R. J. Peaslee, for the State. Streeter, Walker & Hollis, J. W. Fellows, and C. H. Burns, for defendant.

BLODGETT, J. The indictment in this case is under section 12, c. 273, Pub. St., which enacts that: "If any officer, agent, or servant of a corporation, or any other person, shall knowingly, falsely, and fraudulently issue a certificate for any stock of the corporation, or shall fraudulently sign any such certificate in blank or otherwise with the intent that it shall be so issued by himself or any other person, he shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding five years." The specific charge against the defendant is that while and as treasurer of the Union Publishing Company, a corporation duly established by law, and having its place of business at Manchester, in our county of Hillsboro, he knowingly, falsely, and fraudulently issued, on the 1st day of February, 1895, at Manchester aforesaid, a certificate numbered 111, for 20 shares of the capital stock of said corporation to one R. G. Sullivan. At the trial it appeared that by divers votes of the corporation its treasurer was authorized to issue capital stock to the amount of \$150,000, and the claim of the state was that said certificate 111 was not only in excess of that amount, and without right, but that the defendant issued it knowingly, falsely, and fraudulently, as charged in the indictment. Upon these issues the claim of the defense, so far as it need now be considered, was that No. 111 was not in excess of the authorized amount, but that, whether it was or was not, it was issued in place of a valid certificate for the same number of shares of which the defendant at that time was the owner, and which was held by Sullivan as collateral to the defendant's indebtedness to him upon certain notes, which were substantially paid by the new certificate. Whether 111 was so issued and received, thus became one of the vital questions to be determined by the jury, and upon it they were instructed as follows: "Did he [the defendant] retire a certificate of stock, and issue this in place of it? The defendant's counsel claim that he did, and the state, on the other hand, says he made no such arrangement with Sullivan; but, whether he made any such arrangement or not with Sullivan, he has done nothing of the kind. The state says to you, and would have you to understand, that the certificate of stock which was in Sullivan's hands was No. 57; that that was a valid certificate, but that the defendant did not retire that certificate, and issue this in place of it, but,

instead of that, issued this as a false certificate, and parted with his title to the old one to some other person,—that is, that he did not retire that and issue this in place of it. Now, that is the question for you to determine; that is the vital question in this case. * * * Of course, you are not confined to certificate No. 57. Is there any other certificate which he retired and issued this in place of? Of course, in determining whether there was or not, you are to say whether, from all the evidence, there was any such certificate or not. It would not be enough that he [the defendant] should make an arrangement with Sullivan to retire this certificate. If he did not carry out this arrangement, but issued the certificate to some one else, that would not be retiring it, and issuing this in place of it." To the latter part of the instruction, beginning, "It would not be enough," etc., the defendant excepted, and we think the exception must be sustained. In any aspect of the case, the inquiry most favorable to the state could only be, not what the defendant agreed to do in respect of retiring the surrendered certificate, nor what he actually did in this regard, but what his purpose was at the time the transaction between Sullivan and himself was consummated; or, in other words, whether he did or did not then intend to retire such certificate. But, in either event, and whether the certificate was surrendered to him in his official capacity as treasurer or in his individual capacity as owner, it was his legal duty to retire it, and this duty could not be made dependent upon any arrangement or agreement with Sullivan. And so, too, if the defendant did not retire such certificate, but, either in his official or individual capacity, reissued it by transferring it to some third party, it would only be evidence for the consideration of the jury as to his intent to reissue it at the time 111 was issued, and might be far from decisive. But, even the question of his then existing intention was not alluded to by the court nor submitted to the jury in this connection. On the contrary, the jury might well have understood, and presumably did understand, from the instructions given, that the subsequent transfer of the surrendered certificate by the defendant would of itself warrant his conviction. The true inquiry, however, may not have been one of the defendant's intention when 111 was issued. If, as is claimed in his behalf, 57 was surrendered to him in his official capacity as treasurer, it was his lawful right as well as his duty to issue 111 in its place; and, if this be so, his intention in making such issue would apparently be immaterial upon the charge made against him by the indictment, which, it must be borne in mind, is not that the issue of 111 was part of an unlawful scheme or plan on his part to effect a false and fraudulent overissue of stock of the corporation, but solely that he falsely and fraudulently

issued that particular certificate. But the intent with which a lawful act is done cannot make the act itself unlawful. The exercise by one man of a legal right cannot be a legal wrong to another. Injury, in its legal sense, means damage resulting from an unlawful act, not a lawful one. Indeed, these propositions are axiomatic. If, then, it were conceded that at the time 111 was issued the defendant's intention was not to retire, but to reissue, 57, and that, in accordance with such intention, he subsequently did reissue it, both of these admissions would be alike immaterial under the indictment, because in the case supposed the defendant's offense plainly would not be the issue of 111, but the reissue of 57; and for that he was not on trial.

Objections to the sufficiency of the indictment, to the admission of testimony, and to the refusal to charge as requested, have not been considered. It is unnecessary, and would be useless, to go further. However correct, as an abstract proposition, the instruction as to retiring the old certificate may have been, it was confusing and misleading in the connection in which it was given, and manifestly tended to the defendant's prejudice. Verdict set aside.

WALLACE, J., did not sit. The others concurred.

(63 N. H. 432)

KENNETT v. WOODWORTH-MASON CO.
(Supreme Court of New Hampshire. Hillsboro.
March 13, 1896.)

CORPORATIONS—INSOLVENCY PROCEEDINGS—JURISDICTION.

The county in which is located the manufactory of a corporation, having in another county the office of its clerk, where nothing is done save the holding of stockholders' meetings and the making and preserving of records of their proceedings, and making its sales and collections in another state, is the county in which is its "principal place of business," to the probate court of which Pub. St. c. 201, §§ 1, 48, give jurisdiction of insolvency proceedings against it.

Appeal from probate court, Hillsboro county.

Proceedings in insolvency against the Woodworth-Mason Company. From decree of judge of probate declaring defendant insolvent, a nonpetitioning creditor appeals. Reversed.

Facts found by the court: By an agreement dated September 1, 1892, duly recorded in the offices of the city clerk of Manchester and the secretary of state, five citizens of Massachusetts associated themselves together to form a corporation, to be known as the Woodworth-Mason Company, "for the purpose of manufacturing lumber into boxes, and the sale of the same; to lease, purchase, and convey real estate, to buy and sell personal property, and to do all acts incident to the purposes above set forth." The agree-

ment stated that the office of the corporation shall be in Manchester, and that "there will also be an office at Boston," Mass. The clerk of the corporation resides and has an office in Manchester. All other officers reside outside the state. The corporation has no office or place of business in this county except that it uses the clerk's office for holding stockholders' meetings, and as a depository of the clerk's records. Its business is the manufacture and sale of boxes. It has a factory at Conway, N. H., where it manufactures the boxes from lumber purchased for the purpose. It has an office in Boston, where sales of the boxes are made, accounts kept, collections and disbursements made, and all its other business transacted except that done at Manchester and Conway. Upon a petition of creditors, the judge of probate for this county decreed the corporation to be insolvent, and the plaintiff, a nonpetitioning creditor, appealed from the decree, assigning as a reason that the judge had no jurisdiction.

Josiah H. Hobbs and George B. French, for appellant. Arthur G. Whittemore, for appellee.

CHASE, J. The articles of association do not state the place in which the business of the corporation is to be carried on, as required by the statute. Pub. St. c. 147, § 2. The statement that the office of the corporation shall be in Manchester is not sufficient. The office referred to evidently was that of the clerk, who is a mere recording officer. Id. c. 148, § 11. The holding of stockholders' meetings in his office does not make it the place where the corporation's business is carried on. The action of such meetings relates to the organization and general conduct of the business of the corporation. Action in reference to the business is limited to the formation of general plans, and the provision of means and agencies for doing business. The execution of the plans is intrusted to the directors and other officers and agents (Id. c. 149, § 3); and the business is carried on where the plans are executed. If nothing was done except to hold stockholders' meetings and make records of their proceedings, the corporation would not carry on the business for which it was formed. The statute gives the judge of probate of the county in which "the principal place of business of a corporation is located" jurisdiction of insolvency proceedings instituted by or against the corporation. Id. c. 201, §§ 1, 48. Generally, the creditors of a corporation reside near its place of business, especially those who furnish labor and materials for carrying on the business; and the statute locates the proceedings in the same vicinity, so that the creditors may obtain their rights, under them, with as little expense and trouble as possible.

The defendant's business was the manu-

facture and sale of boxes. The manufacturing was done in Conway, and the sales and collections were made in Boston. Nothing was done in Manchester save the holding of stockholders' meetings, and the making and preservation of records of their proceedings. Their "principal place of business"—in fact, their only place of business—within this state was in Conway; and, if they were a corporation, notwithstanding the failure to comply with statutory requirements in the formation of it (Saunders v. Farmer, 62 N. H. 572; Jewell v. Gilbert, 64 N. H. 13, 18, 5 Atl. 80; Larned v. Beal, 65 N. H. 184, 23 Atl. 149), the judge of probate of Carroll county had jurisdiction in respect to it, instead of the judge of probate of Hillsboro county. If they were not a corporation, as neither of the persons forming the company resided in Hillsboro county, the judge of probate of that county had no jurisdiction of the matter. Pub. St. c. 201, § 42. Decree of the judge of probate reversed.

WALLACE, J., did not sit. The others concurred.

(1 Pen. 367)

ROE v. STEVENSON.

(Superior Court of Delaware. Kent. November 2, 1897.)

REFERENCE—COSTS.

Where referees in an action for illegal distraint find no cause of action, they cannot tax the costs against defendant.

Action by Hughlett Stevenson against Frank R. Roe. From a judgment for plaintiff, defendant brings a writ of certiorari. Reversed.

Richard R. Kenney and Arley B. Magee, for plaintiff in error.

PER CURIAM. Certiorari to John S. Jester, a justice of the peace in and for Kent county. The record of the justice disclosed that the plaintiff below brought an action of debt against the defendant below for illegal distraint; demand, \$5. Both parties demanding trial by referees, the same were appointed by the justice. The record then continues: "August 4, 1897, plaintiff and defendant both appear ready for trial, and also the above-named referees, who, after hearing the allegations of the parties and their proofs, made a report signed by all the referees, that they found for the plaintiff for fourteen dollars and fifty-two cents for costs. And now, to wit, judgment is hereby given against the said Frank R. Roe, the defendant, in favor of the said Hughlett Stevenson, the plaintiff, for the sum of fourteen dollars and fifty-two cents costs, with interest from August 4, 1897." Counsel for plaintiff in error filed, among others, the following exception to the record of the justice, viz.: "For that the referees, not finding the defendant below (plaintiff in error) indebted to the said plaintiff below (defendant in error) in any amount, should have reported to the said justice that they

found no cause of action, and should have left the costs to be made up by the said justice, and which should have been against the plaintiff below (defendant in error)." Judgment reversed.

(1 Pen. 47)

WATSON v. HASTINGS.

(Superior Court of Delaware. Sussex. Oct. 14, 1897.)

ASSAULT AND BATTERY—EVIDENCE—FIRST ASSAULT—SELF-DEFENSE—PROTECTION OF PROPERTY—DAMAGES.

1. Under the plea of son assault demesne, in an action for damages for assault and battery, defendant can show, where such was the fact, that a particular wound was made in some other way than by his act.

2. In an action for damages for assault and battery, the plea of son assault demesne, with the replication of *de injuria thereto*, made it necessary for defendant to show that plaintiff committed the first assault, and that what was thereupon done on his part was in the necessary defense of his person.

3. A person attacked by another has the right to defend himself, and may use sufficient force to repel such attack; but such resistance must be no more than that required for such purpose.

4. One who has been assaulted has not the right to follow up his assailant, and attack him, when in the act of retreating from the scene of the affray.

5. A person entering the house of another after being ordered by the owner not to enter, or persisting in remaining after being ordered to depart, would become a trespasser; and the owner would have the right to eject him therefrom, and prevent his re-entering, employing for such purpose no more force than was necessary.

6. Exemplary damages, in addition to damages as compensation for injuries received, may be awarded to the victim of an assault, where it was not only unlawful, but also willful and aggravated, in its character.

Action of trespass *vi et armis* by Isaac Watson against Levin Hastings. Defendant's pleas were, not guilty, son assault demesne, and the statute of limitations.

After proving by several witnesses that the defendant committed an assault and battery upon the plaintiff by striking him over the head with an ax helve at the defendant's store, in Delmar, Sussex county, on the evening of October 8, 1895, the physician who had dressed the wound alleged to have been produced thereby was called to the stand to prove the nature and extent of the same. In cross-examination, Mr. White asked the physician the following question: "Could those incisions on the head have been produced there by falling upon a flat substance with a little rise in it?" Mr. Richardson objected, on the ground that the defendant's plea of son assault demesne admitted the assault as laid in the declaration of the plaintiff, and he was therefore estopped from proving that it was done in some other way.

John M. Richardson and C. W. Cullen, for plaintiff. R. C. White, for defendant.

PENNEWILL, J. The court think the evidence admissible. The plea of son assault

demesne only admits the assault and trespass. It does not admit the infliction of any particular wound; and there were more than one alleged to have been inflicted in this case. Suppose there had been a dozen wounds inflicted, all of which affected this plaintiff; we think the defendant should be allowed to show, if he can, that a particular wound was made in some other way than by his act. Or suppose this wound in fact did result from some other cause; the defendant would be permitted to show it if he could. We think this is admissible. The witness can answer the question.

PENNEWILL, J. (charging jury). This is an action brought by Isaac Watson against Levin Hastings for a forcible and unlawful trespass, called in law a "trespass *vi et armis*." In this case the plaintiff, Isaac Watson, has charged the defendant, Levin Hastings, with having on the 8th day of October, 1895, committed upon him an assault and battery, whereby he, the said Watson, was severely injured; and, because of such injuries, he suffered, and still does suffer, much pain, and has lost to a large extent the use of the thumb on his left hand, and also the sense of smell. He claims that by reason of said injuries he is incapacitated to a considerable extent from pursuing his usual avocation, *viz.* that of baker; and he therefore demands from the defendant damages sufficient to compensate him for his pain and suffering, loss of time, and capacity in conducting his business, and also for such pain and suffering and loss of time and capacity as may hereafter be caused or ensue by reason of the injuries complained of. It appears from the record of the case that there were several pleas entered by the defendant, but the one relied on is known as the "plea of son assault demesne"; and such plea, together with the replication of *de injuria*, which the plaintiff has made thereto, makes it necessary for the defendant to show that the plaintiff actually committed the first assault, and also that what was thereupon done on his part was in the necessary defense of his person. And such in fact is the position taken by the defendant, he contending that the plaintiff made the first assault, and that he himself used no more force than was necessary to repel the attack of the plaintiff and defend himself. In brief, gentlemen, the question before you is this: Was Levin Hastings, when he made the assault and battery on Isaac Watson on the 8th day of October, acting only in necessary self-defense?

Whenever a person is attacked by another, he has the right to defend himself, and may use sufficient force to repel the attack in order to save his life or protect himself from bodily harm. But the resistance must be no more than is necessary to accomplish this. If it be greater than is required for such purpose, it becomes in law excessive, and without excuse or justification, making the party a tres-

passer and wrongdoer from the beginning. Nor can a person, even when assaulted, follow up his assailant, and attack him when in the act of retiring or retreating from the scene of the affray. Such a course would not be in self-defense or justifiable on any ground. And we will also say to you that mere words, however insulting or offensive, cannot excuse an assault and battery; but if a person should enter the house of another, after being ordered by the owner not to enter, or should persist in remaining after he is ordered to depart, he would become a trespasser, and the owner would have a right to use enough force to eject him from such premises, and to prevent his re-entering. But the same rule applies as in self-defense, and no more force can be employed than is necessary to effect the eviction of the trespasser. Now, gentlemen of the jury, this is the law as we understand it governing this case, and it is your duty to apply the law to the facts as you have heard them from the witnesses. With such facts we have nothing to do. The consideration of the facts and the evidence, the injury inflicted, whether it was wrongful, and the extent of it, are for you, and you alone. The weight and effect of the testimony, and the credibility of witnesses, are for you to determine. We will only say in this connection that, if you find the testimony conflicting, you must reconcile it if you can, and arrive at a just conclusion; but, if you cannot reconcile it, you may accept such evidence as from all the circumstances seems most worthy of credit, taking into consideration the relative position of the parties with regard to the occurrence, their connection therewith, their means of knowledge, as well as their interest. In this case, as in all civil cases, the law requires that the plaintiff should establish his case by a preponderance of the testimony; and, unless he has done that to your satisfaction, your verdict should be in favor of the defendant. If, after a careful consideration of all the testimony, you should find that the assault and battery in this case was committed by the defendant, Levin Hastings, upon the plaintiff, Isaac Watson, without justification, and not in self-defense, but wrongfully and unlawfully, your verdict should be for the plaintiff, and for such a sum as will reasonably compensate him for the injuries shown by the evidence to have been received by him, having regard to the suffering and loss that he may hereafter sustain by reason of said injuries as well as that already sustained.

We have been asked by the counsel for the plaintiff to charge you that, if you believe the assault was an aggravated one, you should award exemplary damages in addition to damages in the way of compensation for the injuries received. The following language was used by the court in the case of *Jefferson v. Adams*, 4 Harr. 321: "In actions for willful injuries, the jury might, if they thought the case required it, give damages by

way of punishment, and beyond a mere compensation of the actual injury. It was for the jury to say whether there were circumstances of aggravation in this case which ought, in their judgment, to require a departure from the general rule of compensatory damages, and which called on them to add anything by way of public example or punishment." And we say to you in this case, it is for you, and you alone, to say whether there is anything proved in this case which requires that such damages should be awarded. To justify such damages, you must be satisfied that the assault was not only an unlawful and wrongful one, but willful and aggravated in its character. In conclusion, gentlemen, we will say that if you believe, however, from the testimony in this case, that the defendant, Levin Hastings, committed the assault and battery in self-defense, and was justified in doing what he did because of the attack made by Watson on him, your verdict should be for the defendant.

Verdict for plaintiff for five dollars.

(1 Pen. 61)

In re ISAACS et al.

(Court of General Sessions of Delaware. Oct. 21, 1897.)

HIGHWAYS—NOTICE—PAROL EVIDENCE—PROOF OF SERVICE.

1. Oral proof may be given that a person who was inadvertently omitted in the affidavit of service of notice on the landowners through whose property a public road was petitioned for was served with notice.

2. Proof of service of notice on the landowners through whose property a public road is proposed to be run must be made before the order to lay out the road is granted.

Petition by H. J. Isaacs and others for a commission to lay out a public road. An offer of oral proof allowed.

A petition was filed at the April term, 1897, praying for the appointment of a commission to lay out a public road in Nanticoke hundred, and the matter was continued to the October term, 1897. An affidavit, made by Joseph H. Isaacs, was filed with the petition, setting forth that he had served the usual legal notice upon the various landowners, naming them, through whose property said road was to be laid out. The name of one of the said landowners was, however, inadvertently omitted from said affidavit. Mr. White offered to prove orally by the affiant that he had actually served the proper notice, copy of which was produced, upon Minos Isaacs, the party whose name was omitted in the affidavit filed with the said petition. This was objected to by Mr. Richardson, who contended it was not the practice to allow oral proof in such cases, and that the parties were confined to the affidavit filed.

Edward D. Hearne and R. C. White, for petitioners. John M. Richardson, for defendants.

LORE, C. J. You may call the witness to prove the fact. The usual mode of proving the

service of notice upon owners or holders of land on the line of a proposed road is by the affidavit of the person making such service, filed with the petition when the order is applied for. This has been the practice, and should be followed for the convenient dispatch of such applications. There is, however, no statute or rule of court precluding the court from hearing oral proof where such service has already been made, and accidentally omitted in the affidavit, as in this case. Such proof, however, must be made before the order to lay out the road is granted.

(1 Pen. 76)

STATE v. LOCKWOOD.

(Court of General Sessions of Delaware. Oct. 27, 1897.)

ASSAULTS—EXPULSION OF GUEST—HEAD OF FAMILY.

1. An assault is an attempt with violence to do an injury to another, with the means at hand of carrying such purpose into execution.

2. Where a mere guest at the dwelling house of another, who was liable to be dismissed at pleasure, failed to leave such house when ordered to do so by the head of the family, such head of the family had the right to use so much force, and only so much, as was necessary to eject him.

3. The fact that the dwelling house occupied by a family was the property of the wife did not affect the rights or powers of the husband as the "head of the family."

George Lockwood was indicted for assault with intent to commit murder, on one Asbury Cannon, in May, 1897, at the house of defendant, in Milford. The evidence showed that the said house occupied by the defendant and his wife and family was owned by the wife; that the prosecuting witness (who was the brother of Mrs. Lockwood) had been permitted by her to live in the house as one of the family for a number of months, without paying anything towards the support of the family; that Cannon was told by Lockwood to leave the house, which he refused to do, but took a chair, and assumed a threatening attitude; that Lockwood then assaulted him with a pitchfork, which was taken from him by his son, and later with a stick or club; that a fight then ensued between the two. Before going to the jury, the attorney general withdrew the charge of assault with intent to commit murder, and urged conviction of assault only. The state prayed the court to charge the jury that where one is occupying a room or a house lawfully, and the owner or tenant of the house seeks to eject him, he must first request him to leave. If he refuses to do so, he must first use moderate means to eject him, and, after that, he must use only such means as are necessary to accomplish his purpose; but if he uses more force than is necessary to accomplish that purpose, or uses force before he has made the request to remove, then he becomes an aggressor, and is guilty of an assault.

Defendant's Prayers: "Defendant's counsel prayed the court to charge the jury as follows: First. That where a man is in his

own dwelling, and is there attacked by another in such a manner that he is led to believe that great bodily harm may befall him, in that case he is justifiable in using whatever force may be necessary to protect himself against his assailant. State v. Talley, 9 Houst. 425. Second. That the court charge the jury as to the extent of the right of an individual to defend his person and his house, called in law his "castle," and his right of defense when assaulted in his own house by a stranger. Third. That, even if the wife was the owner of the house, the husband was still the head of the family, and had the right to eject therefrom any person whose presence he did not desire. Fourth. That if the jury believe that George Lockwood had the right to order Asbury Cannon to leave his house, and Cannon refused so to do, it made him a trespasser ab initio."

R. C. White, Atty. Gen., for the State. Arley B. Magee, for defendant.

LORE, C. J. (charging jury). George Lockwood, the prisoner at bar, is indicted for assault with intent to commit murder. The state in this case only asks, however, that the prisoner shall be found guilty of an assault. You are therefore relieved from any deliberations as to any intent to commit murder, if an assault was committed. An assault is an attempt with violence to do an injury to another with the means at hand of carrying that purpose into execution. The facts of this case are before you. You are the exclusive judges of the evidence, and are to say whether or not an assault was committed in this case. If, in your judgment, from the evidence, no assault was committed upon the prosecuting witness Cannon by George Lockwood, your verdict should be not guilty. Even if you believe an assault was committed upon the evidence, we have been asked to charge you as to the law in certain phases of such assault. If the prosecuting witness, Asbury Cannon, was a mere guest at the house of Lockwood, liable to be dismissed at pleasure, then whenever the head of the family, which is the husband, ordered him to go out of that house, and he failed to do so (it being the dwelling house of the husband and the wife and children), the head of the family, the husband, had a right to use so much force as was necessary to eject him. If that was the condition, and George Lockwood only used so much force as was necessary to eject Cannon, then we say to you that he would not be guilty of an assault in contemplation of law.

Again, we have been asked to charge you that this being the house of the wife, although Cannon might be there as a guest, yet the husband could not eject him. We are not prepared to go to that extent. This house was the dwelling in which the husband and the wife lived together with their children as one family; and while the laws

of this state confer upon the wife the right to control and dispose of her own property, in many respects as if she were a feme sole, yet that fact does not affect the rights or powers of the husband as the head of the family. He is still the head of the family, and, so far as the family relation is concerned, the law has not inverted the order, and made the wife such head. The husband represents the head of the family still, with all the rights appertaining thereto, not otherwise modified by law. *Com. v. Wood*, 97 Mass. 229. So that if you believe that they were dwelling in this house as man and wife, and this prosecuting witness was a mere guest, and failed to go out of the house at the bidding of the husband, the latter had a right to use all the force necessary to eject him, but no more. He had no right to use undue force. If a man is attacked in his own house or the house of another, he has a right to use so much force as is necessary for his own protection. You have all the facts in the case before you. It is for you to say whether this defendant is guilty of assault, or not guilty.

Verdict: Not guilty.

(1 Pen. 63)

STATE ex rel. WHITE, Atty. Gen., v. GREEN.
(Superior Court of Delaware. Kent. Oct. 27,
1897.)

COURTS—INTERPRETATION OF OPINIONS—PRESUMPTIONS—STARE DECISIS—JURISDICTION—TRANSITORY ACTIONS—QUO WARRANTO.

1. A judge of the court of errors and appeals writing an opinion deciding a case on a different ground than that appearing in another opinion is presumed to have concurred on a ground in the latter to which he made no reference, where his opinion is not inconsistent with it.

2. Where the report of a case decided by the court of errors and appeals does not show that one of the judges expressed any opinion, the superior court will presume that he concurred on the grounds on which the writer of the opinion based the decision, though its members know that he afterwards entertained different views.

3. The superior court is bound by a decision of the court of errors and appeals, though it conflicts with one of its own former decisions.

4. The superior court, sitting in a certain county, cannot issue a writ of quo warranto to one wrongfully holding an office in another county.

Grubb, J., dissenting.

Action by the state, upon the information of Robert C. White, attorney general, against John W. Green. A rule was granted to show cause why a quo warranto should not issue, and defendant moves that it be discharged. Motion sustained.

The attorney general filed the following information: "The information of Robert C. White, attorney general of the state of Delaware, respectfully sheweth, and gives the court here to understand and be informed, that one John W. Green, late of North West Fork hundred, in the county and state aforesaid, was, on the Tuesday next after the first Monday in November, A. D. 1894, duly elected a levy court

commissioner for the hundred of Seaford, in and for Sussex county, for the term of four years, commencing on the first day of February, A. D. 1895, and ending on the thirty-first day of March, A. D. 1899; that on the first day of April, A. D. 1897, the said John W. Green removed from the hundred of Seaford, and ceased to be a freeholder and resident of Seaford hundred from thence thereafter, and the said office of levy court commissioner for Seaford hundred then and thereby became vacated and remained vacated until the fifth day of August, A. D. 1897; that on the said fifth day of August, A. D. 1897, Ebe W. Tunnell, Esq., governor of the said state, duly appointed and commissioned Willard H. Handy to be levy court commissioner for said Seaford hundred for and during the term from thence to the thirty-first day of March, A. D. 1899, next ensuing; that the said John W. Green does unlawfully and wrongfully, and without color of right, continue to usurp and hold the said office of levy court commissioner for Seaford hundred, in the county aforesaid, contrary to the provisions of the statute in such case made and provided, and against the rights of the said Willard H. Handy. Wherefore your relator prays that a rule issue out of this honorable court requiring the said John W. Green to appear on some convenient day before this honorable court, and show cause, if any he hath, why he hath as aforesaid usurped and assumes to act as a levy court commissioner for Seaford hundred aforesaid, and as in duty bound your relator will ever pray," etc. Defendant moved that the rule be discharged, and the information quashed, on the ground that the superior court of Kent county had no jurisdiction, the cause of action being local to Sussex county.

R. C. White, Atty. Gen., and John M. Richardson, for the State. Walter H. Hayes and Joseph L. Cahall, for defendant.

LORE, C. J. After conference, a majority of the court think that the rule should be discharged. There is but one reported case directly upon the point raised in this case in this state. That is the case of *Knight v. Ferris*, 6 *Houst.* 283. Messrs. Bradford and Higgins, who represented the defendants in error, presented this point: That the court below sitting in Sussex county had jurisdiction to issue the writ of mandamus against a public officer in New Castle county, and that it was so held in the court below. 6 *Houst.* 146. Chancellor Saulsbury, who in his opinion directly considered this point,—no other opinion appearing in conflict with it,—on page 314 of sixth *Houston*, as appears by the report of the case, uses this language: "In considering this case, I shall confine myself to two questions: First, had the superior court of this state sitting in Sussex county jurisdiction to award a writ of mandamus in this case?" Thus the point was directly raised and passed upon by the chancellor. Then, on page 323 of the same Report, he uses this language: "There were many causes of error assigned to the record and

proceedings below. I have considered only two, and express no opinion with respect to the others." One of those points was whether or not this was a local action; and the chancellor there distinctly took the position that it was a local action, and on page 318 uses this emphatic language: "No one ever supposed that a purely local action, or one arising in a particular court of the state, and which could not have arisen elsewhere, could be heard and determined by the court in another county, although the process of the court, necessary and proper to be issued in the case, might, in the language of the constitution, be issued out of the court in the county in which the suit or controversy was pending in either county into every county." Judges Comegys and Wootten sat with the chancellor. Judge Wootten delivered an opinion, but it does not antagonize in any way the opinion of the chancellor. It certainly is not inconsistent with the position taken by the chancellor. Judge Comegys seems to have expressed no opinion. Therefore, upon the face of the report, this seems to have been the opinion of the court of errors and appeals. This is the decision of the court of highest jurisdiction in this state. It may be true, as Judge Grubb has stated, that in Sussex county this question came up afterwards before the superior court, and that there Chief Justice Comegys—one of the judges who sat above—expressed a different view, and the court were unanimously with him. That case, however, is not reported. In any event, there seems to be conflict; and where conflict exists, one case being reported and the other not, one case being in the court of errors and appeals of the state and the other in a subordinate court, a majority of the court think we ought to follow the ruling of the court of errors and appeals until it shall be overruled by competent authority. Expressing no opinion whatever as to whether the action is local or not, yet, as the court of highest jurisdiction has expressed an opinion that it is a local action, we think that opinion should prevail until it is otherwise determined. In the case of *Hastings v. Henry*, 2 Del. Term Rep. 30, cited by the attorney general, this precise question was not passed upon in the opinion. That was a case where the action was brought in Sussex county against a registration officer of Sussex county, and, as a matter of course, the question was not properly before us, and any opinion thereon necessarily would have been obiter dictum.

GRUBB, J. (dissenting). I stated here this morning to Mr. Hayes, counsel in the case, in the main, my objection to granting his motion, thinking that probably it would be withdrawn on the ground of what I considered sound policy for this court to pursue; that is, where the superior court has formerly made a decision upon a point which was fairly and unequivocally presented and fully argued on both sides of the question regularly raised before the court, and then deliberately considered by the court and solemnly declared to be the law by the superior court, my position is that this superior court

should not undertake to override or disregard its former decision. In other words, that it should stand by the time-honored and almost uniformly observed—in this state—doctrine and practice of *stare decisis*; that is, of adhering to a former decision of the court, when the question was formally raised before it, fully argued, and deliberately considered, and the law solemnly declared.

Therefore it is on that ground that I differ with my brethren mainly, because I do not want to see the new practice adopted, that this court as now constituted shall overrule, disregard, and repudiate the former decisions of this court. To do so will leave not only the court itself in a state of uncertainty, but will leave the bar, who have to advise their clients, and the people of the state, who have to act, uncertain as to what the law of the state may be; which is a very embarrassing situation, and will prove very injurious to the interests of the people at large as well as very embarrassing to the bar who have to advise them.

Suppose this court to-day overrules the decision, which I will soon show was made by the superior court of Sussex county, with Chief Justice Comegys presiding, and Judge Houston and myself sitting with him, upon this very question; where will we stand? Sooner or later those who sit here to-day will not sit here. Others will follow in the superior court, and suppose they should be of the opinion that the decision of the majority of this court as expressed to-day is not so good as that expressed by the unanimous court presided over by Chief Justice Comegys in Sussex county a few terms ago; then they will disregard the decision made to-day and the other one will prevail. In the meantime the bar have advised their clients, and they, and the public, without advice, who are intelligent enough to know our decision, —and many of them are,—will have acted to their misfortune, solely upon the decision of to-day. It may be repudiated, and the decision which we have just overruled to-day will be the law of the state, and then they will have been advising against what was really the law of the state, as it turns out. Then another court will come along, probably, after that, and reverse what the court following us have done. Then where will you be?

I have taken my position in Sussex county recently, where the same thing has been done, because I fear the consequences, and I shall take the same position to-day, and when I sit in New Castle county I shall take the same position there, and announce my reasons for it, if the necessity arises, as I have a right to do. Then I will stop giving my reasons, but will continue to dissent as long as I am on the bench.

Now, when a unanimous decision of this court, which was undoubtedly made about five years ago in Sussex county,—because I was there and know it,—is to be repudiated by a mere majority of this court, the conse-

quences will be serious. If the decision of the superior court of Sussex county upon this question is not right, we should nevertheless adhere to that decision, and should go on and hear this case to-day, and then let it be taken up to the supreme court, for when the supreme court decides it it will then be binding upon the superior court. Then no uncertainty can arise, and there can be no seesawing of one court against another,—the one repudiating the other, and another in turn re-establishing the repudiated decision.

The answer my brethren have made to this is that there has been, as they allege, a decision of the court of errors and appeals upon this question, being the highest court in this state, and the opinion of Chancellor Saulsbury in the case of *Knight v. Ferris*, 6 *Houst.* 283, has been cited to show this. I think I know better what has been decided in that case than my two brethren on the bench, because I was there and they were not. I was counsel in that case, and I know what questions were raised by the exceptions to the judgment below, because I am the man who raised them; Messrs. Bradford and Higgins, counsel for the defendant in error, did not. It is true they anticipated that the question might be raised in my argument, and therefore it was in their printed argument. As a matter of fact, they never read their printed argument in the court. They put it in print, but they never uttered it in open court. I know that as a fact. But, even if they had, they merely anticipated that I would do what I did not. I appeared to make the effort to have the judgment reversed, and I made the effort successfully, and it was reversed by the court of errors and appeals; Chancellor Saulsbury delivering his opinion in the case in my favor on a jurisdictional ground I did not raise, and Judge Wootten, who sat with him, delivering his opinion in my favor on the ground I did raise as to jurisdiction, viz. that the superior court could not take jurisdiction because the legislature had placed exclusive and final jurisdiction in another tribunal. Judge Wootten in his opinion, which is published in the report of that case in 6 *Houst.*, decided it on the ground I put it on, as a ground of exception to the judgment. The chancellor in his opinion put it on a ground which I did not present or urge either on the record or in my argument; and Messrs. Bradford and Higgins could not present an exception or make an argument for me, because they were not on my side, but on the opposite side, and they could not raise that question, because it takes two sides to raise a question, and I did not argue it or present it and it was not raised.

So that the point I make first is that in this case of *Knight v. Ferris*, which my brethren have cited, I did not present that question or raise it; and, unless I did, it could not be raised. Therefore it was not

raised; and, not having been raised, the court could not have considered it in the court of errors and appeals; for we have an invariable rule in the court of errors and appeals that the court will not consider and pass upon any ground that is not raised by the counsel representing the parties on one side or the other. So that if Chancellor Saulsbury did put it in his opinion, and although the unanimous court had adopted his opinion, yet they would have had no right to put it on that ground and pass upon it, because I never raised that ground. That is my understanding of it. And if both of the other judges in the court of errors and appeals who sat with the chancellor had separately written opinions, and expressly concurred in every word of the opinion of Chancellor Saulsbury, each of them in the same language as in the opinion of Chancellor Saulsbury, it would not be the law of this state, because the question was not raised, was not presented to them, and therefore they had no right to pass upon it, and, if they did, it would have been obiter, and would not have been an adjudication of that question of law for this state and binding upon this superior court.

Secondly, in corroboration of what I say that that was Chancellor Saulsbury's individual opinion, and not the opinion of either Judge Comegys or Judge Wootten, I cite Judge Wootten's own opinion as it appears in the report of this case of *Knight v. Ferris*, in which he puts it on my ground, and not that of Chancellor Saulsbury, that the superior court sitting in Sussex county could not hear a mandamus case respecting an officer belonging to New Castle county. Judge Wootten, I say, put it on my ground, which was that the legislature had fixed a tribunal for the case then in question, whose decision should be final and conclusive and should not be contested. I argued that that tribunal was the sole and exclusive tribunal, and that, therefore, neither the superior court nor the court of errors and appeals could consider it and take jurisdiction. Judge Wootten having written a separate opinion, and not having referred to Chancellor Saulsbury's opinion, neither concurring with him nor dissenting, it may be presumed that Judge Wootten was expressing his own grounds that he chose to put it on, and be responsible for, and was not allowing Chancellor Saulsbury, who wrote his own opinion, to put words in his mouth or to put responsibility on him that he did not expressly agree to incur. Chief Justice Comegys in that case was overruled, he having delivered the opinion below, and he dissented from the decision above. Judge Houston's report of the case is perplexingly confused, and also does not show that Chief Justice Comegys dissented. Chief Justice Comegys, to my knowledge, did not concur, and my recollection is that he did not stay in the court room to hear the opinions read.

The question now before us here came up in the superior court in Sussex county, where application was made for a mandamus in the case of State of Delaware ex rel. Alex. H. Cloud et al. against the President and Council of Wilmington, which related to the election of a municipal officer in Wilmington. The counsel in the case opposing the mandamus took the ground that is taken here to-day by our learned and able friend Mr. Hayes. The opinion of the chancellor in the case of Knight v. Ferris was cited against granting the mandamus, and, when it was cited as the unanimous opinion of the court in that case, I stated to the court and counsel in that case that it was not, but that it was only the individual opinion of the chancellor. Chief Justice Comegys who had sat in the Knight v. Ferris Case, both in the court below and in the court of errors and appeals, was then presiding in the superior court in Sussex county, and heard me make that declaration, and he certainly knew better than my brethren here whether that was Chancellor Saulsbury's individual opinion or not. Judge Houston sat in that case in Sussex with Judge Comegys and myself. He was also the reporter who sat in the court of errors and appeals, and actually reported the case, and he certainly knew whether that was the chancellor's individual opinion or that of the whole court. At the conclusion of the argument in Sussex county, Chief Justice Comegys, who was one who sat in the case cited, Judge Houston, who was the reporter who sat in the case and reported it, and myself, having been counsel in the case, had a conference, the result of which was that we considered that the opinion of Chancellor Saulsbury was not the unanimous opinion of the court of errors and appeals upon that point, but was his individual opinion, and not binding upon the superior court. Therefore we three judges, sitting as the superior court of Sussex county, deliberately decided that that was not the opinion of the court of errors and appeals from our own personal knowledge of that case, and that we would entertain the case from New Castle county; and we did entertain it, and, after hearing the main argument, finally decided to discharge the application on other grounds than that of jurisdiction.

So, from what I have stated, the reasons for my dissent are: First, I know from the facts in the case of Knight v. Ferris that the opinion of the chancellor in that case was his individual opinion, and was not an adjudication of the question, and therefore is not binding upon me to-day as a decision of the court of errors and appeals; second, that this question now before us has been adjudicated by the superior court sitting in Sussex county in the case I have mentioned.

Having established the fact that it was not an adjudication of the court of errors and appeals, and therefore not binding upon me and this court, and second, that this

court has regularly adjudicated it, as it therefore had a right to do, this question is consequently *res adjudicata* and binding upon the superior court as a regular decision of this same court. That being so, *stare decisis*, the doctrine which the old lawyers of this state have faithfully observed, ought not now to be departed from. I have looked through the decisions of our courts,—for such departure was before us and taken by the majority of this court in Sussex county at the recent October term, against my dissent,—and I have failed, after a careful examination, to find a case in which the superior court in this state has ever overridden, disregarded, or squarely repudiated, as is being done to-day, a former decision of the superior court made upon a question that was fairly and squarely raised by the facts and the law in the case before the court, after argument on both sides of the question, and after a deliberate consideration and adjudication of the question so raised. I find where Chief Justice Thomas Clayton questioned a case, and intimated that while the court did not believe it to be the law, still it should be so considered by them, because it was a former decision of the court, and it would not do for this court to overrule it, for that was the province of the court above. There may be such cases, but it is my opinion that it has only been done where the question was not squarely presented (as it is to-day in this case and as was done in Sussex at the last term) and fairly argued and considered. If we shall adopt the new policy of disregarding a former decision of the court, instead of sending it to the supreme court, which is the final and conclusive arbiter, we may expect the mischievous consequences which I have referred to. It may have been done in some courts, but I doubt whether we have done it in the state of Delaware. Our courts have restricted a former decision to the facts belonging particularly to that former decision. They have distinguished a case where they could from the facts upon which the former decision was made; but I cannot find that they have ever done as this court—a majority of it—has done in Sussex, and will do here to-day, where the question has been fairly raised whether we shall embark upon what I consider a very mischievous policy, and one that will come back to plague the bar and the court. I do not believe that we can find a case of that kind in all the records of the reported cases of the state of Delaware.

Therefore I deem it my duty to dissent, and call the attention of the bar, as well as the members of the court, to the serious nature of the consequences which will follow, solely with the object of preventing the adoption of that as a settled practice and policy of this court. It is for that reason, and not merely because of the bearing it may have upon this case. The court is

very well satisfied to be relieved of the hearing of cases, and my personal inclination, aside from my sense of duty, would be to hear in Kent county only the cases that belong to this county, and not those that could be heard in Sussex county. But believing the law in this state to be to-day as it was declared by the decision of Chief Justice Comegys, Judge Houston, and myself,—for I believe that is the law of this state until it is reversed and declared to be otherwise by the supreme court, the highest court in this state,—therefore it is not with reference to this case alone, but with reference to future cases and the consequences that will follow, that I have dissented and have expressed the grounds of my dissent.

PENNEWILL, J. (concurring). The Chief Justice has very clearly stated the position of a majority of the court, but I think it only proper that I should very briefly give the reasons for the position I have taken. I cannot agree with the contention that the position taken by the majority of the court is not tenable because it would overrule one of its own decisions. I contend rather that such position simply recognizes as a controlling authority a decision of the court of errors and appeals, the highest court in the state. That the question of jurisdiction was distinctly passed upon by the court of errors and appeals in the case of *Knight v. Ferris*, 6 Houst. 328, there can be no doubt. There is no question in my mind that it was properly before the court, and that the opinion delivered by the chancellor on that point was not obiter dictum, because, in the first place, the very first assignment of error, as reported, is in this language: "That the court below had no such jurisdiction of the matter mentioned in the petition as would authorize it to afford or apply thereto any form or manner of specific remedy whatsoever;" and, in the second place, the chancellor says in the conclusion of his opinion: "There were many causes of error assigned to the record and proceedings below. I have considered two only, and express no opinion with respect to the others." The two questions that he considered were: (1) Had the court jurisdiction? and (2) if it had, was the writ awarded in substance proper and sufficient in law? If the question of jurisdiction was not properly raised by the assignments of error in that case, I am at a loss to understand, not only the language of the first assignment of error which I have quoted, but also the clear and positive language of the chancellor to which I have referred. I feel that I must be controlled by the case as reported, and I do not know of any safer rule to follow.

But it is insisted that the opinion of the chancellor was not the opinion of the court in that case. Such is not my conclusion. The chancellor unquestionably delivered the judgment of the court, and certainly there

was no other opinion given in the case which conflicted in any way, or was in the least inconsistent, with the opinion of the chancellor. It is true that Judge Wootten delivered an opinion upon another ground, but in no particular did the opinion that he gave question the correctness or soundness of the opinion of the chancellor. Chief Justice Comegys was the other member of the court, but he said nothing, and therefore I must assume that he agreed with the chancellor in the opinion he delivered.

Again, it has been urged that there has been a case decided in the superior court in Sussex county in which this question now before us was before the court there, and in which Chief Justice Comegys, who sat in the case of *Knight v. Ferris*, held a different position from that which Chancellor Saulsbury announced in the latter case. But the case referred to in Sussex county is not reported, and, while I have no doubt of the correctness of the statements made as to the facts, opinions, and decision in that case, still I do not think it would be a wise rule or good policy to accept an unreported case as an authority binding on us, particularly when there has been a prior decision of the same question in a higher court of the state diametrically opposed to the ruling and decision in the unreported case. I think it would be a bad precedent to establish. Moreover, the case referred to in Sussex county was heard in the superior court, which is not our highest court, and, if we should be controlled by the decision in that case, we would be obliged to absolutely ignore, disregard, and set at naught an adjudication of our highest court,—the court of errors and appeals.

Allusion has been made also to the case of *Hastings v. Henry*, 2 Hardesty, 39, 40 Atl. —. But it will be observed that the cause of action in that case arose in Sussex county, and was heard by the court in the same county. Any expression, therefore, as to the character of the action,—whether it was local or transitory,—was purely obiter dictum; and, besides, that question was not mentioned in the opinion delivered by the court in that case. I admit that there may be an exceptional case—as there was, according to my judgment, in Sussex county at the last term of this court—in which the superior court might disregard a decision of the same court, where it believed that the decision in the prior case was manifestly wrong, and that the court might in such a case correct its own error. But I cannot take the extreme position that the superior court can reverse or disregard a decision of the court of errors and appeals, or the supreme court, the highest court in the state. That, I believe, would result in utter and absolute confusion as to what is the law of the state, and, in that event, I fear the bar would, indeed, be unable to say, with any degree of certainty, what would be held to be the law in any case. While expressing no opinion as to

whether this would be regarded as a local or transitory action if the question were a new one, I base my opinion now upon this fact: that this question has been decided by the highest court of this state, and I must therefore regard this action as local, and not transitory. There is certainly no reported case which holds that a decision of the court of errors and appeals, or supreme court, may be overruled by a decision of the superior court.

LORE, C. J. Let the rule be discharged.

(1 Pen. 53)

QUILLEN v. BETTS.

(Superior Court of Delaware. Sussex. Oct. 18, 1897.)

TRESPASS—PLEA—ISSUES—EVIDENCE—BOUNDARIES
POSSESSION—PARTITION FENCE—TREES—COURSES
AND DISTANCES—RECITALS IN DEEDS—DAM-
AGES.

1. In trespass to real property, the plea "not guilty" puts in issue, not only the fact of trespass, but also the possessory title of plaintiff.

2. In trespass, defendant can prove title in himself under plea of not guilty.

3. Claiming certain lines as boundaries of land indicates an act of ownership thereof.

4. In trespass, license or privilege cannot be proved under a plea of not guilty.

5. To support trespass, plaintiff must prove that, at the time alleged, he had the actual possession of the land, by himself or his servant.

6. In a case of possession of land in common, the law adjudges the rightful possession to him who has the legal title.

7. When persons have common possession of land, and one of them has the legal title, no length of holding of the others can give title by possession, as against the owner of the legal title.

8. A partition fence is presumed to be the common property of both, until the contrary is shown.

9. A tree standing directly on the line between adjoining owners is the common property of both.

10. In ascertaining boundaries from title papers, he who has the oldest title is entitled to take his courses and distances, go where they may.

11. When a deed calls for natural and known boundaries, they govern, to the exclusion of courses and distances.

12. When a deed gives courses and distances, they govern, disregarding the quantity of acres.

13. In trespass, if the recitals in the deeds in defendant's title, together with long possession and other controlling circumstances, show that there must have been a conveyance, which would supply the missing link in defendant's paper title, such fact may be found, provided such recitals, possession, and circumstances are of such character that they can be accounted for only on the assumption of such conveyance.

14. In trespass, if defendant went on plaintiff's land without leave or license, plaintiff is entitled to nominal damages, though no special damages be proved.

Action of trespass by Ebe D. Quillen against Thomas W. Betts. Verdict for defendant.

Action of trespass quare clausum fregit, to recover damages for trespass by defendant upon plaintiff's land, located in Baltimore hundred, Sussex county, consisting in the cutting down of certain trees, the tearing away of a

fence, the filling up of a ditch on one part, and the opening of a ditch on another part, of said land. The defendant's pleas were "not guilty" and "statute of limitations." Under said pleas the defendant sought to introduce evidence tending to show that the title to the said land was in the defendant, and not in the plaintiff. This was objected to by counsel for plaintiff, on the ground that under the plea of not guilty such proof was not admissible, and could only be given under the plea of liberum tenementum.

C. W. Cullen and C. M. Cullen, for plaintiff
Charles F. Richards, R. O. White, and R. H. Richards, for defendant.

LORE, C. J. In 1 Ch. Pl. *501, *503, we find the rule laid down as follows: "In trespass to real property, this plea formerly not only put in issue the fact of the trespass, but also the possessory title or right of the plaintiff, because the declaration, as before shown, states the plaintiff's title to the close, by the allegation that it was the close of the plaintiff, a matter which is plainly denied by the general issue 'not guilty of the said trespasses,' etc. It followed that before the recent rules—and we are not under those—any title, whether freehold or possessory, in the defendant, or a person under whom he claimed, might be given in evidence under 'not guilty,' if such title showed that the right of possession, which was necessary in order to support trespass, was not in the plaintiff, but in the defendant or the party under whom he justified. * * * There are some instances in which, although it was not heretofore essential, yet it might be judicious to plead specially the defendant's title or the title of the party under whom he had authority to commit the acts complained of." The rule could not be expressed more tersely than Chitty puts it. Under that authority, we are bound to admit this evidence. The defendant can show any title, either a possessory or freehold right, and can show a superior right to the party plaintiff. In other words, he can prove title under the plea of not guilty.

C. W. Cullen (questioning one of the witnesses): "Did the plaintiff show you a line on the southern end of his land?"

(Objected to by defendant's counsel, as calling for a statement, and not an overt act of ownership on the part of plaintiff.)

LORE, C. J. We think any act of ownership by plaintiff, indicating any line or corner of the land in dispute, would be admissible for what it is worth. It must be a claim, not a mere statement. Pointing out the boundaries of his land indicates an act of ownership.

The defendant was questioned by Mr. Richards as to the removal of the alleged division fence between the plaintiff's and defendant's land, and asked why the rails were removed. The defendant proceeded to state: "Mr. Quillen told me right there, in the presence of witnesses, to tear the old fence out; that it was

ne good; that it might do to patch up with, or, to haul up and burn. He said, 'Tear the old fence out, and throw my half of the rails over in my field.' He pointed out the old ditch, and said, 'I might cut a new ditch on that line.'"

O. W. Cullen, for plaintiff, objected to the above line of testimony, on the ground that it tended to show license or privilege to remove the fence and cut the ditch, when there was no plea of license entered by the defendant.

LORE, C. J. We recognize the correctness of your position, but it seems to us that the application is a little too close. As to this fence and this line, they have been spoken of on both sides, and they are intermingled, and are almost inseparable in this case; and the statements about the dealings as to the old ditch and the new ditch and the old fence are so mixed up that we cannot make it any one man's land as a matter of license; and it must go in under the testimony that has been put in, so far as it relates to the location of the line.

LORE, C. J. (charging jury). Ebe D. Quillen, the plaintiff in this action, complains of Thomas W. Betts, the defendant, of a plea of trespass quare clausum fregit. The plaintiff claims that, at divers times during the year 1893, Betts, the defendant, trespassed upon his land, and there cut down his trees growing thereon, tore down and removed his fence, and dug a ditch or ditches, whereby he has sustained injury, and asks for such damages as he has proved. The defendant contends that he did not commit any trespass; that the fence he tore down was a line fence; the ditch dug was on the line, as recognized by the plaintiff; and that what he did was done with the knowledge and consent of the plaintiff. It is for you to ascertain by your verdict whether a trespass has been committed or not. The case grows out of a dispute as to the correct boundary or division line between the adjoining lands of the plaintiff and the defendant. To support this action, the plaintiff must show by a preponderance of evidence that, at the time the alleged trespass was committed, he had the actual possession of the land by himself or his servant. You should therefore be informed as to what is such a possession as will support this action. In a case of common possession by two or more persons, the law adjudges the rightful possession to him who has the legal title; and no length of holding in such case can give title by possession against such legal title. *Bartholomew v. Edwards*, 1 *Houst.* 17. If the fence which was torn down and removed was a partition fence between the land of these two adjoining owners, it is presumed to be the common property of both, unless the contrary is shown. If it is proved to have been originally built upon the land of one of them, it is his; but if it were built equally upon the land of both, though at their joint expense, each is the owner in severalty of the

part standing on his land. 2 *Greenl. Ev.* § 617. So, if a tree stands directly upon the line between adjoining owners, so that the line passes through it, it is the common property of both, whether it be marked as a boundary or not. 2 *Greenl. Ev.* § 617; *Griffin v. Bixby*, 12 *N. H.* 454. Therefore, if you believe that a line tree was cut down and taken away by the defendant, or that the fence torn down and removed was a division fence in joint possession, or was wholly or partly on the land of Quillen, or that the ditch was cut entirely or partly on the land of Quillen, without his consent, in either case your verdict should be for the plaintiff, inasmuch as there was no plea of license on the part of the defendant in this case, and therefore no evidence of a license or of the consent of Quillen was or could be properly given; and all such evidence, if any there be, must be disregarded and thrown out of the case in ascertaining your verdict. In ascertaining boundaries from title papers, he who has the oldest title is entitled to take his courses and distances, go where they may. Where a deed calls for natural and known boundaries, you are to go to those boundaries, disregarding courses and distances. If the deed gives courses and distances, and not known boundaries, you are to go by courses and distances, disregarding the quantity of acres. *Hunter v. Lank*, 1 *Harr.* (Del.) 10.

If the recitals in the deeds from Solomon Evans to Abram Daisey, from Elijah Evans to Solomon Evans, and from Purnal Johnson, sheriff, to Ebe Walter, produced in defendant's title, together with long possession and other controlling circumstances in the case, satisfy you that there must have been a conveyance of the land now owned by Thomas W. Betts to Thomas Drury, or that Drury owned the land, and by this means supplies the missing link in defendant's paper title, you may so find, provided such recital, possession, and circumstances are of such character that they can be accounted for only on the assumption of such conveyance, or that such possession otherwise would have been unlawful, or could not be satisfactorily explained. 1 *Greenl. Ev.* § 46; *White v. Loring*, 24 *Pick.* 322. In trespass to real property, the plea of not guilty puts in issue not only the fact of trespass, but also the possessory right of the plaintiff, because the declaration states the plaintiff's title to the close by alleging that it was the close of the plaintiff,—a matter that is plainly denied by the general issue "not guilty." It follows that any title, whether freehold or possessory in the defendant or person under whom he claims, might be given in evidence under "not guilty." 1 *Chit. Pl.* 501. This notwithstanding he had withdrawn the plea of "liberum tenementum."

Applying the principles of law as we have stated them above to the facts in this case, it is for you to say whether, under the evidence in this case, the defendant did or did

not commit a trespass. If he did, your verdict should be for the plaintiff. If he was present aiding or abetting in the committing of the trespass, or if he ordered, incited, or advised the party who afterwards committed the trespass, he would be equally liable as if he committed it in person. It is not necessary for the plaintiff to prove that the act was done by the defendant with any wrongful intent; it is sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake. 2 Greenl. Ev. § 622. If you believe from the evidence that any trespass was committed by the defendant, as alleged, the plaintiff will be entitled to your verdict, and for such damages as he may have proved. If it be proved that the defendant went upon the plaintiff's land without leave or license, the plaintiff would be entitled to nominal damages, though no special damages be proved. No such leave or license could be proved, because there was no plea under which such evidence could be admitted.

Verdict for defendant.

(70 Conn. 290)

NEW YORK, N. H. & H. R. CO. et al. v.
CITY OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. March
2, 1898.)

**RAILROADS—GRADE CROSSINGS—CONSTRUCTION—
POWERS OF CITY.**

1. Under Gen. St. § 3481, requiring that, when a new highway or a new portion of a highway should thereafter be constructed across a railroad, it should pass over or under the railroad, a grade crossing could not be constructed, or a partially constructed crossing be completed, though the highway had been previously laid out across the tracks, and the crossing thus made had been used to some extent for purposes of public travel, but had not been completed so as to be passable by vehicles.

2. New Haven City Charter, § 31 (9 Sp. Laws, p. 287), gives the common council exclusive control of its streets, and exclusive power to lay out and repair highways. Gen. St. § 3489 (enacted after the passage of section 31, supra), requires railroad companies to guard the rails of their tracks by planks at grade crossings, and provides that, in case of their failure to do so, the railroad commissioners shall, on application, make such order as may be necessary to enforce the act. At the time of the enactment of section 31, there were public statutes in force giving the railroad commissioners control over all highways at grade crossings. *Held*, that the provisions of section 3489, in so far as they conflict with section 31, must control.

3. Under Gen. St. § 3490, requiring railroad companies to guard the rails of their tracks by planks at grade crossings, and providing that, if the mayor of any city shall represent to the railroad commissioners that any company has failed to comply with such requirement in regard to any highway in the city, such commissioners shall make such order as may be necessary to enforce the requirement, city authorities have no power to require a railroad company to construct or repair crossings by planking the rails or to perform such work by their agents, but their only remedy is by application to the railroad commissioners.

Appeal from superior court, New Haven county; A. T. Roraback, Judge.

Suit by the New York, New Haven & Hartford Railroad Company and others against the city of New Haven to restrain defendant from constructing any crossing upon the roadbed of the plaintiffs at certain streets in the defendant city. The case was tried to the court upon the plaintiffs' demurrer to the defendant's second defense. The court sustained the demurrer (following a ruling of Thayer, J., in sustaining a similar demurrer at an earlier stage of the cause), and rendered judgment for plaintiffs, and the defendant appealed. No error.

The complaint contained three counts, and alleged that within the limits of the city two certain ways, known, respectively, as "Ivy Street" and "Hazel Street," run up to and abut upon the layout of the railroad where its tracks are constructed, and which is owned in fee by the New Haven & Northampton Railroad Company, of which company the New York, New Haven & Hartford Railroad Company are lessees; that said ways have never been constructed across the rails and layout of the plaintiffs; that the portions of said ways within the limits of the layout of the railroad have long since been abandoned and discontinued, and have been impassable in vehicles, by reason of ditches and embankments within the former lines of said ways, and by reason of the absence of planking or other means for making said crossings passable; that in September, 1896, the boards of aldermen and councilmen of New Haven passed an order "that the board of public works should, by grading and planking, construct crossings within the lines of the layout of said Ivy street and Hazel street, so as to make a way over the tracks of said railroad at grade passable for vehicles and travelers"; that said city, through its board of public works, threatens to open said streets and construct the same over and across the property of the plaintiffs, and thereby establish two dangerous grade crossings, contrary to the policy and the statutes of the state; and that the defendant, through its officers and agents, threatens unlawfully to enter upon, plank, timber, and otherwise construct a crossing and passageway across the layout and rails of the plaintiffs at said places. In one of its answers, the defendant alleged that said Hazel and Ivy streets were, and for more than 30 years had been, highways, and, as such, had existed across the railroad tracks of the plaintiffs, and during all that period had been open to public travel, and been used by the public for the purposes of travel. The plaintiffs demurred to this answer, upon the ground that it did not appear that said city had the right to construct or order the construction of a passageway across said layout. This demurrer was sustained by the court. The defendant also filed a second defense to all the counts

of the complaint, which was as follows: "(1) Said Hazel and Ivy streets are and have been highways for more than thirty years; and, as such, have existed across the railroad tracks of the plaintiffs, and during all of said period they have been open to public travel, and, as such, have been used for the purposes of public travel." "(2) The defendant admits the passage of the order referred to in paragraphs 4 and 5 of the plaintiffs' first and second counts." "(3) It is the duty of the plaintiffs to plank said crossings, and said city intends to take all legal steps to compel the planking of said crossings; and it is admitted that said city did intend to place planks between the rails on said crossings within the limits of the said highways, taking all necessary precautions for the safety of the public and those traveling on the trains of the plaintiffs, in case the plaintiffs failed to fulfill their duty." The plaintiffs demurred to this answer, upon the ground that "even if Hazel and Ivy streets, respectively, are highways, and it is the duty of said plaintiffs to plank said crossings, it does not appear that the city has the right to construct or order the construction of a passageway across said layout, or to place planks between the rails on said crossings within the limits of said highways, even though, in so doing, it take all necessary precautions for the safety of the public and those traveling on the trains of the plaintiff the New York, New Haven & Hartford Railroad Company, until it shall first have exhausted all legal means for compelling said plaintiff the New York, New Haven & Hartford Railroad Company to construct said passageways as aforesaid." The court sustained this demurrer, and rendered judgment permanently restraining the defendant from entering upon the roadbed of the plaintiffs for the purpose of laying any plank or placing any substance between the rails or upon the ties of the railroad tracks or roadbed of the plaintiffs. The sustaining of these demurrers, and the rendering of said judgment in favor of the plaintiffs, are the reasons of appeal assigned by the defendant.

William H. Ely, for appellant. George D. Watrous and Edward G. Buckland, for appellees.

HALL, J. The complaint alleges that neither Ivy nor Hazel street has ever been constructed across the layout and rails of the plaintiffs, and that that portion of each of said streets within the limits of the layout of the railroad is, and for a long time has been, impassable in vehicles, by reason of ditches and embankments and the absence of planking. The defendant answers that said streets for more than 30 years have been highways, and, as such, have existed across the railroad tracks of the plaintiffs, open to public travel, and used for the purposes of public travel. The plaintiffs demur to this answer. There

seems to be some doubt from the pleadings whether grade crossings have ever been constructed over the plaintiffs' tracks at the places in question, nor is it entirely clear from the record what the contention of the defendant is as to the power of the city of New Haven in the construction of these crossings. The order of the court of common council of New Haven, which the answer admits to have been passed, directs the board of public works, "by grading and planking," to "construct crossings within the lines of the layout of said Ivy street and Hazel street, so as to make a way over the tracks of said railroad at grade passable for vehicles and travelers." If it be the defendant's claim that because Ivy and Hazel streets were laid out as highways 30 years ago across the plaintiffs' tracks, and that though the crossings have at no time been actually completed across the rails of the plaintiffs' railroad, and have never been constructed so as to be passable by vehicles, yet because those streets have been open across the tracks, and have been used to some extent for the purposes of public travel during that period, the city may now construct grade crossings at these points, or may, by grading and planking, complete the partially constructed crossings, so as to render them passable in vehicles, such claim is, in our opinion, untenable. Section 3481 of our General Statutes prohibits the construction of a highway or a new portion of a highway across a railroad at grade. This section does not mean that highways which have been laid out as such across the tracks of a railroad at grade before the passage of the act can, after the enactment of the law, be constructed across the rails at grade. It is not the laying out, but the construction, of the highways across a railroad, which is required by statute to be over or under the railroad. *Smith v. Town of New Haven*, 59 Conn. 203, 210, 22 Atl. 148.

Even though these highways were laid out across the plaintiffs' tracks many years before the passage of the act of 1883, and though the construction of the highways across the tracks had been partially finished, and so as to admit of their use in some of the ordinary methods of public travel, but not in others, —as for foot travelers, but not for vehicles, —neither the court of common council nor the railroad commissioners had authority, after this law had gone into operation, to order the completion of the construction of the crossings at grade. If such partial construction of the highway is to be completed, it must be over or under the railroad, as may be directed by the railroad commissioners. This court, in the case of *New York & N. E. R. Co. v. City of Waterbury*, 55 Conn. 19-24, 10 Atl. 163, in speaking of the purpose of this act, said: "It means that although a highway may have been previously laid out, partially constructed, and even built upon, if it has not actually been completed for public use across the rails of the railway, such crossing shall not thereafter be made." And again: "If it [referring to the highway then under discussion] had been le-

gally laid out, the construction of any portion of it across the plaintiff's railway at grade became illegal before it was accomplished." But the record before us does not furnish a complete history of the construction of these crossings, nor full information as to their present condition. We must therefore consider the case in another of its possible aspects. Let us assume that the construction of these crossings had been fully completed for public travel in all its ordinary forms before the passage of the act of 1883, but that at the present time, in order to render public travel across the railroad at these points safe and convenient, it is necessary that the rails should be protected or guarded by planks or timbers placed between and immediately outside of the tracks; may the agents of the city, under an order of the court of common council, enter upon the layout of the railroad, and construct or repair the crossing by laying such planks and timbers? We think it clear that they cannot, and that the city can neither do this work by its own agents, nor authoritatively order it to be done by the railroad company, even after the refusal of the latter to perform it. This work, though for the benefit of those who use the highways, should be performed, so that neither the act nor the method of construction will unnecessarily interfere with the operation of the plaintiffs' railroad, and so as in the least degree possible to endanger life and property. Manifestly, it can best be so performed by and under the direction of the experienced employes and officers of the railroad company. Section 3490 of the General Statutes expressly requires this work to be done by the company operating the railroad crossed by such highway. The city of New Haven would not be liable for an injury to person or property caused by the unprotected and unguarded condition of these railroad tracks. Section 2673 of the General Statutes, providing an action for injuries sustained by reason of defective roads and bridges, enacts "that, when the injury is caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor." The tracks of a railroad are a structure, within the meaning of this provision. *Lee v. Town of Barkhamsted*, 46 Conn. 213, 218.

It is claimed by the defendant that section 31 of its charter, giving the court of common council sole and exclusive authority and control over all streets and highways within the limits of said city, and sole and exclusive power to lay out, make, or order and repair such highways (9 Sp. Laws Conn. p. 287), empowers the city to construct these crossings. The plaintiffs contend that, under section 3490 of the General Statutes, this work must be done by the railroad company, and not by the city, and that, upon the refusal or failure of the railroad company, its performance can be compelled only by the order of the railroad commissioners. By the law of this state, the railroad commissioners, and not the municipal authorities, have sole original jurisdiction of

questions relating to changes in highways at grade crossings, when the determination of such questions affects the safety of the public. *State's Attorney v. Selectmen of Branford*, 59 Conn. 402-411, 22 Atl. 336. In view of the public statutes giving the railroad commissioners the control over highways at grade crossings, which were in force at the time of the passage of the act of 1881, amending the defendant's charter, and of the public laws upon that subject which have been since enacted, the language of section 31 of the city charter should not be interpreted literally. It must be construed with reference to these general laws; and the general laws concerning the control of highways at grade crossings, in so far as they conflict with the provisions of section 31, must control. The subject of the relative powers, over highways at railroad crossings, of the court of common council of New Haven, as defined by section 31 of its charter, and those of the railroad commissioners, under the general laws of the state, has been recently considered by this court in the cases of *Cullen v. Railroad Co.*, 66 Conn. 211, 33 Atl. 910, and *Tallmadge v. Railroad Co.*, 66 Conn. 222, 33 Atl. 910.

It is our conclusion that the city authorities of New Haven have neither the power to order the railroad company to construct or repair these crossings by planking or timbering them, nor to perform this work of construction or repairing by the agents of the city; that if this work may now be lawfully done, and this crossing be made passable at grade, the only remedy of the city, upon the refusal or neglect of the railroad company to perform the duty imposed upon it by statute, is by application to the railroad commissioners, under the provisions of section 3490 of the General Statutes. There is no error. The other judges concurred.

(70 Conn. 380)

WILDMAN v. MUNGER et ux.

(Supreme Court of Errors of Connecticut. March 2, 1898.)

COSTS—APPEALABLE ORDER—STATUTE—WHEN DEFENDANT ENTITLED TO COSTS.

1. An order denying a motion for costs, on the ground that the cause had been withdrawn before the return day, and before it had been entered upon the docket of the court, is a final judgment, and is appealable.

2. Under Gen. St. § 990, providing that "upon the withdrawal of any civil action, after it has been returned to court, and entered upon the docket and after an appearance has been entered for the defendant, a judgment for costs, if claimed by him, shall be rendered in his favor, but not otherwise," where a cause is withdrawn before the return day, and before it had been entered on the docket of the court, defendant is entitled to costs, provided he enters in time and claims costs.

Appeal from court of common pleas, Fairfield county; Howard J. Curtis, Judge.

Action by Alexander Wildman against Edmund D. Munger and wife for an injunction, brought to the court of common pleas

for Fairfield county. Temporary injunction granted and dissolved in vacation. Suit withdrawn by plaintiff before return day. Entry of defendants for costs, and motion for costs before Curtis, J. Motion denied, and appeal by defendants. Reversed.

The material facts in the case are the following: On September 3, 1897, the plaintiff procured the issuance of a writ and complaint against the defendants, setting forth an equitable cause of action, and praying only for an injunction returnable on the first Tuesday of October, 1897, to said court of common pleas. On the day the writ was issued a temporary injunction was granted *ex parte*, and duly served on the defendants. On the 11th of September, 1897, upon motion of the defendants, and after a hearing in vacation, the temporary injunction was dissolved. The writ was returned to court prior to September 20, 1897, and on that day the defendants filed a written notice of withdrawal, and the case was withdrawn. The case was not entered on the docket until October 6, 1897, when, at the request of the defendants, the clerk entered it on the docket with the following entry: "Oct. 6th, '97. Defendants enter case for costs." The defendants on the same day filed a written claim for costs with the clerk. The defendants thereafter made a motion to the court for a judgment for costs, "and the court, in the exercise of its discretion, if lawful, would have allowed costs to the defendants to the extent of their disbursements, and \$10 in addition; but the court held that, under the circumstances detailed above, it had no jurisdiction, and no authority to exercise its discretion in favor of the defendants." The defendants claimed that the court had jurisdiction and power to exercise its discretion in granting costs in the case, but the court overruled the claim, and denied the motion for costs. The reasons for the court's action are stated as follows: "Section 990 of the General Statutes provides under what circumstances costs may be awarded upon the withdrawal of a civil action. The statute can have but one construction, to wit, that it is only after a case has been duly returned to court and entered on the docket, and an appearance entered for the defense, that such costs can be allowed. This must mean that no costs can be allowed upon a withdrawal before the return day, before which day a case cannot be considered as properly docketed and an appearance properly entered."

Howard W. Taylor, for appellants. Henry A. Purdy, for appellee.

TORRANCE, J. Upon the argument before this court the plaintiff claimed that no appeal would lie in this case, because there had been, as he claimed, no final judgment, and, indeed, no judgment at all, rendered in the case. But if the case was properly before the court at all, if the defendants were entitled to costs under the circumstances, the decision or de-

termination of which they complain put an end to the suit and to their claim for costs, and, if they are entitled to any redress at all, they can have it only by way of appeal, as here, or by writ of error; and they can have redress in neither mode, unless the action of the court below can be regarded as a final judgment, within the meaning of the statute allowing an appeal of this kind or a writ of error. In *Main v. School Dist.*, 18 Conn. 214, it was held that an order of the superior court remanding a cause to the county court could be reviewed upon writ of error, because the appellant would be otherwise remediless; and in *Woodruff v. Bacon*, 34 Conn. 185, an order erasing a cause from the docket was held to be a final judgment, which could be reviewed upon a motion in error. In *Fayerweather v. Monson*, 61 Conn. 431, 23 Atl. 878, it was held that a judgment dismissing an application for a writ of prohibition was a final judgment, from which an appeal lay. The reasoning of the court in these cases is applicable in the present case, and, if the law is so that the defendants were entitled to costs, then we are of opinion that the appeal was well taken.

Whether the defendants were entitled to costs depends upon the construction of section 990 of the General Statutes, which reads as follows: "Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, if claimed by him, shall be rendered in his favor but not otherwise; but such judgment shall not be rendered after the expiration of six months from the date of such withdrawal; and no costs shall be allowed, which accrued after actual notice, in writing, of the withdrawal, was given by the plaintiff to the defendant or his attorney; unless good reasons therefor shall be shown to the court." The court below held that this section, allowing a judgment for costs, applied only to cases where the withdrawal takes place after the return day, and not to cases where it takes place before that day. The language of the statute, read as it stands, certainly favors such a construction, but we think it is not the correct construction. The matter of withdrawing actions in vacation seems to have been regulated by statute for the first time in 1848. By chapter 7 of the Public Acts of that year it was provided in three sections, in substance, as follows: (1) That the plaintiff in any civil action returnable to the superior court or county court, and returned to said court or to the office of the clerk, might withdraw it on giving the notice prescribed; (2) that the clerk should enter the action so withdrawn on the docket of the court at the next term, "in the same manner as though it had not been withdrawn," with a note of its withdrawal, etc.; (3) that if the defendant within the first three days of said term entered for costs, then the plaintiff should be liable to pay costs accrued at the

time of the entry, "in the same manner as though the action had been withdrawn in open court." Under a statute like this, the defendants in the case at bar would certainly be entitled to costs. This statute, in the form in which it was passed, was embodied in the Revision of 1849 as sections 53-55, p. 83. It appeared in identically or substantially the same form in the compilation of 1854, p. 66, and in the Revision of 1866 (sections 68-70, p. 15). Between 1866 and 1875 the provisions of this statute were made applicable to courts of common pleas and district courts, but no change was otherwise made in it till the Revision of 1875. In that Revision the three sections were consolidated into one (section 14, p. 418), and certain additions were made, which provided, in substance, as follows: (1) that the plaintiff in any civil action returnable to the superior, common pleas, or district courts, and returned to its clerk or to his office, might withdraw it in vacation, by filing in such office the prescribed notice; (2) that the clerk should enter the action upon the docket of the court at its next term, with a note of the withdrawal and of its date; (3) "if such term be that to which such action was originally brought, and the defendant shall, within the first three days of said term, enter his claim for costs, or if it be not the first term, and he had already appeared to defend, a judgment of nonsuit shall be thereupon entered against the plaintiff; but no costs, except for travel and attendance, shall be allowed which accrued after his giving the defendant or his attorney notice of the withdrawal in writing; unless good reason therefor shall be shown to the court." This section clearly contemplates a withdrawal both before and after the return day, and the appearance of the defendant in the cause, and that costs, under certain conditions, should be due to him in either case. It also provides for a judgment of nonsuit against the plaintiff in either case. Section 11, p. 446, of that Revision, further provided as follows: "Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, unless waived by him, shall be rendered in his favor." By chapter 98, Pub. Acts 1881, the words, "except for travel and attendance," in section 14 of the Revision of 1875 aforesaid, were stricken out by way of amendment. In 1882 (Pub. Acts 1882, c. 90) the following law was passed:

"Section 1. Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, if claimed by him, shall be rendered in his favor, but not otherwise; but such judgment shall not be rendered later than the term of court following the term or the vacation when such action was withdrawn.

"Sec. 2. Section 11, chapter 14, title 19, of

the General Statutes (page 446), and so much of section 14, chapter 5, title 19, of the same (page 418), as is inconsistent herewith is hereby repealed."

Thus the law stood upon this matter until the Revision of 1888. In that Revision the law as it was in section 14, page 418, of the Revision of 1875, and in chapter 90 of the Public Acts of 1882, except so far as it may have been changed in the work of revision, is embodied in sections 989 and 990.

Now we think it is quite clear that just prior to the Revision the law was so that a defendant, in a case like the one at bar, would have been entitled to costs, either under section 14 or chapter 90 aforesaid, separately, or under the two combined; and the question is whether the legislature changed or intended to change the law so as to deprive defendants of costs in cases like the one at bar. In 1889 (Pub. Acts 1889, c. 11), section 989 was amended by inserting after the word "vacation," in the third line, the words, "or at any time before the day on which the action is made returnable." Reading sections 989 and 990 in the light of previous legislation upon this matter, we can discover no indications that the legislature, in adopting the Revision, intended to make any such change in the law. On the contrary, the indications are the other way. In a case like the one at bar it is clearly made the duty of the clerk, under section 989, to enter the action upon the docket of the court, with a note of the withdrawal and of its date. To what end is this to be done if the court has nothing further to do with the case, and the entry can avail the defendant nothing? We think section 990 is to be construed as if it read thus: "Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, a judgment for costs shall be rendered in favor of the defendant, after an appearance has been entered for him and he claims costs but not otherwise." So far as we are aware, the practice has ever been in accordance with this view of the law. We are therefore of opinion that section 990 applies to cases withdrawn before as well as after the return day, and that, in the former as well as in the latter class of cases, the defendant is entitled to costs, provided that in the former class he enters in time, and claims costs. There is error in the decision complained of, and it is set aside, and the cause remanded, to be proceeded with according to law. The other judges concurred.

(70 Conn. 411)

BUCKLEY v. KELLY.

(Supreme Court of Errors of Connecticut'
March 2, 1898.)

PARTNERSHIP ACCOUNTING—DISSOLUTION.

1. Where the pleadings in an action for an accounting between partners refer only to a partnership relation beginning at a certain time and existing thereafter, a prior partnership agreement cannot be considered.

2. A partner who, upon dissolution, holds the property of the firm to wind up its affairs, is chargeable with interest on his co-partner's share, as between himself and the co-partner, after a

reasonable time for settling the affairs has elapsed, if he mingles partnership assets with his own property, or unreasonably neglects or refuses to settle.

Appeal from superior court, New Haven county; A. T. Roraback, Judge.

Action by Joseph H. Buckley against Daniel F. Kelly for partnership accounting. From an order sustaining a demurrer to defendant's remonstrance to the acceptance of the report of the committee, and from a judgment for plaintiff, the defendant appeals. **Affirmed.**

Action for an accounting, referred to a committee, who found and reported the facts. Remonstrance by defendant to the report of the committee, and demurrer to the remonstrance. The court sustained the demurrer, found the remonstrance insufficient, accepted the report of the committee, and rendered judgment for the plaintiff. Appeal by defendant for alleged errors in the rulings of the court. The complaint, in substance, alleged that the plaintiff and defendant had been partners in the plumbing business, under a written agreement, from May 28, 1880, to May 31, 1882, when the partnership was dissolved; that most of its assets remained in the defendant's hands after the dissolution; that its business and affairs were still unsettled; and prayed for an account. The answer admitted the existence and dissolution of the co-partnership as alleged; that a portion of its assets, after dissolution, had remained in the defendant's hands; denied that defendant had used them for his own benefit; alleged that he had substantially settled its affairs, and was, and always had been, ready to account. The reply denied all the allegations of the answer "in so far as they are not admissions of the statements contained in the complaint." The defendant also filed a cross complaint, setting up certain facts in relation to the co-partnership business carried on between May 28, 1880, and May 31, 1882, which he claimed entitled him to the allowance of the sums named in his cross complaint, in his favor in the accounting. The answer to this was, in substance, a denial of the matters therein set up. The material facts found are, in substance, as follows: The plaintiff and defendant formed a partnership, under written articles of agreement, on the 28th of May, 1880, to carry on the plumbing business. They carried on said business as partners from that date until the 31st day of May, 1882, when the partnership was dissolved. During said period the defendant drew out of said firm, over and above his advances, \$1,932.99, while the plaintiff during the same time drew out over and above what he advanced \$1,655.70. On the 1st of April, 1882, plaintiff notified defendant that he should withdraw from the firm on June 1, 1882; and about May 1, 1882, an attempt was made by the partners to settle their accounts, but they were unable to agree. In May, 1882, both parties made demand upon each other for an accounting, and since that time no de-

mand has been made by either party. At the time of the dissolution, the assets and liabilities of the firm were as follows:

Assets.	
Stock of plumbing materials.....	\$1,048 00
Cash on hand.....	375 39
Book accounts afterwards collected..	729 90
	<hr/> \$2,153 29
Liabilities.	
Accounts payable	504 46
Balance of assets over liabilities...	<hr/> \$1,643 83

After the dissolution, all of the books, accounts, assets, and property of the firm remained in the possession of the defendant, who assumed the settlement of the business of the firm. Between June 1, 1882, and January 1, 1883, he collected accounts of the firm to the amount of \$653.78, and paid all the debts of the firm,—\$504.46. He continued to carry on business as a plumber on the premises which had been occupied by the firm, and the partnership property in his hands were used by him as his own, in his private business, no account being kept of the same. He thus used stock of the firm of the value of \$749.66. Between June 1, 1882, and January 1, 1883, the plaintiff collected firm accounts to the amount of \$76.12, which he appropriated to his own use. In striking the account between the partners, the committee charged both plaintiff and defendant with interest on partnership property, actually used by them in their private business, from and after January 1, 1883. The amount of firm property thus used by the defendant was \$1,274.37, and interest was charged to him on that amount from January 1, 1883, to the date of the committee's report, amounting to \$1,113.93; while the amount of the firm property used by the plaintiff was \$76.12, and interest upon that sum after January 1, 1883, to date of report, amounting to \$66.53, was charged to him. It was found, as the result of the accounting, that the defendant owed the plaintiff \$1,261.47.

On the hearing before the committee, evidence was offered by the plaintiff, and objected to by the defendant, and received, some of it subject to, and some of it without, objection, concerning the affairs of a partnership that had existed between the plaintiff and defendant under a verbal agreement, between February 1, 1880, and May 28, 1880. If such evidence was admissible, the committee found with reference to said prior partnership as follows: The plaintiff and defendant did enter into such a co-partnership, and continued it for the period above named, when they entered into the written agreement of May 28, 1880. No settlement of the affairs and business of this prior co-partnership was made, nor of the accounts of the partners, nor has any been made since, and none was ever asked for by either party. All the assets of this prior partnership went into the new partnership under the written agreement, and all its liabilities were assumed by the new firm. No evidence was offered of the

amount of the assets or liabilities of the old firm. The committee found, however, that the accounts of the plaintiff and defendant with the prior firm, at its close, were as follows: Balance of credits over debits in favor of defendant, \$1.16; balance of debits over credits against plaintiff, \$229.33. The defendant, having withdrawn all objection to the evidence on this point, insisted, on argument before the committee, that the accounts between the parties prior to May 28, 1880, should be considered by the committee, while the plaintiff claimed that the same were not in issue in the case.

To the report of the committee the defendant filed this remonstrance: "The defendant objects to and remonstrates against the acceptance of the committee's report in the above-entitled case because: (1) It appears that the committee has allowed interest against the defendant, Kelly, for all material used by the defendant since the dissolution of the partnership from the 1st day of January, 1883; and it does not appear that said Kelly ever used any of the assets of said company or co-partnership until long after said date. (2) It appears and is found that there was always a question between the plaintiff and defendant as to the amount due between them, and no balance was ever struck between said partners until this report of the committee was filed. (3) Because the accounts between said partners were never liquidated or determined, and the committee has allowed interest from the 1st day of January, 1883. (4) It appears in evidence, and is uncontradicted, that a large amount of the materials left in the possession of said Kelly after dissolution was used in fulfilling contracts, the amount of which is charged to the defendant, Kelly, as cash received. (5) It appears that there is still property belonging to the co-partnership, and no final accounting can be had until said property is disposed of. (6) The committee has improperly made up their account between the plaintiff and defendant, and has figured the account in an improper manner, because, instead of finding the property belonging to the parties, he has figured and based his conclusions upon the amount drawn out by either party. Wherefore said defendant asks that said report be referred back to said committee, that he may correct said account in these respects." To the remonstrance the plaintiff filed this demurrer: "The plaintiff demurs to the remonstrance of the defendant to the acceptance of the report of the committee: (1) Because the defendant, having converted the funds and property of the firm to his own use, is properly charged with interest. (2) Because the defendant, having so converted the funds of the firm, and having failed to account for the same, or show the time of the conversion, is chargeable with interest from the time the property was received by him, and is not aggrieved by the charge of interest from January 1, 1883. (3) Because it is not found that interest has been charged upon balances between the parties, or upon any sum not actually received by defendant, and used by him in his business as his own. (4) Because the court has

not jurisdiction to review the findings of the committee on a question of fact. (5) Because the fact that there is still property unsold does not present any objection in law for refusal to accept the report of the committee, who could only report facts as they are, and has no power to control the sale of the property remaining; and because such fact does not in any way prevent the court from proceeding to final judgment on the report of the committee after such property has been sold by its order. (6) Because the committee has proceeded legally and without prejudice to the defendant in ascertaining the share of each in assets of the firm, and, in so doing, has properly considered the amounts drawn out by each of the parties. (7) Because each and every of the allegations in said remonstrance is insufficient in the law." The court sustained the demurrer for the reasons set forth in paragraphs 1, 2, 3, 4, and 5 thereof, overruled the remonstrance, and accepted the report. After this the defendant claimed to the court (1) that no interest should be allowed upon any part of the sums found due to the plaintiff; (2) that, in deciding upon the amount due from the plaintiff to the defendant, the entire account between the plaintiff and defendant from February 1, 1880, should be considered; (3) that the costs should be divided between plaintiff and defendant. These claims the court overruled. The errors assigned are the following: "(1) The court erred in sustaining the plaintiff's demurrer to the defendant's remonstrance. (2) The court erred in overruling the defendant's remonstrance, and accepting the report of the committee. (3) The court erred in allowing interest to the plaintiff in any of the accounts on the facts found by the committee. (4) The court erred in ruling upon the facts found by the committee in not considering the entire account between the plaintiff and defendant from the time they commenced business."

William H. Ely, for appellant. William L. Bennett, for appellee.

TORRANCE, J. Upon this appeal, the defendant claims, in substance, that the court below erred (1) in not considering the partnership matters between plaintiff and defendant prior to May 28, 1880; and (2) in overruling the remonstrance, and accepting the report. We think there was no error in refusing to consider the facts found with reference to the affairs of the prior co-partnership, because these facts were outside of the issues raised by the pleadings. From the pleadings it nowhere appears that any co-partnership or other relation had ever existed between these parties prior to May 28, 1880. All the allegations, admissions, and denials contained in them relate entirely to the affairs of the co-partnership after May 28, 1880, and contain no allusion or hint of any prior relationship between the parties, or of any prior unsettled accounts between them, or of any claim for an accounting for anything

prior to May 28, 1880. All the relief and remedy which the parties, by the pleadings, sought in favor of or against each other, related solely and entirely to the unsettled business of the new firm. Under the circumstances, we think the court below was justified in refusing to consider that part of the report pertaining to the affairs of the old firm.

The principal question raised by the remonstrance, and substantially the only one orally argued before us, relates to the allowance of interest against the defendant. The defendant claims that, upon the facts found by the committee, he ought not to be charged with interest. The committee finds that at the date of the dissolution of the firm, in May, 1882, "all the books, accounts, assets, and property of the firm remained in the possession of the defendant, who assumed the settlement of the business of the firm." From the facts found, it is clear that the defendant, since the 1st of January, 1883, has had the use of the cash on hand at the dissolution, amounting to \$375.39, and of the balance of accounts collected after paying the debts, amounting to \$149.32, and has used the same as his own in his business. It is also clear that he has used, in his own business, stock of the co-partnership, of the value of \$749.66, and there is nothing to show that he had not used this amount of stock prior to the 1st day of January, 1883. He thus appears to have had the use, and to have used in his business, since January, 1883, money or its equivalent belonging to the partnership, amounting in all to the sum of \$1,274.87. He assumed the settlement of the co-partnership affairs, and had and assumed substantially the sole and entire settlement of them; and there is nothing to show that they could not have been settled completely and finally prior to and certainly by the 1st of January, 1883. Under these circumstances, it was clearly his duty to have settled them within that time, and to have accounted to his co-partner for the share of the latter in the surplus. An accounting had been demanded of him in 1882, and in August of that year this suit was brought to enforce it. It was his duty to render it within a reasonable time after the dissolution, and the remainder of the year 1882, after the dissolution, might properly be regarded by the committee as a reasonable time for the performance of this duty. Upon the facts found, it is difficult to see why the defendant, after January 1, 1883, was not wrongfully withholding from his co-partner money rightfully due to him from the defendant, or why, under such circumstances, the defendant should not be charged with interest. Ordinarily, interest on the balance found due to a partner at the dissolution of a partnership will be allowed from the date of the dissolution, or from such a date as would afford a reasonable opportunity to close up the partnership business. *Allen v. Woonsocket Co.*, 13 R. I. 147. A partner who, on the dis-

solution of the partnership, holds the assets and property of the firm, and is intrusted with the duty of winding up its affairs, is chargeable with interest, as between himself and co-partner, if he mingles the money of the firm with his own, or neglects unreasonably to settle his accounts. *Dunlap v. Watson*, 124 Mass. 304; *Crabtree v. Randall*, 133 Mass. 552; *Robbins v. Laswell*, 58 Ill. 203. The principles laid down in the following cases in our own reports clearly warrant the allowance of compensation in the nature of interest by way of damages, for the use and wrongful detention of money in a case like the one at bar. *Woodruff v. Bacon*, 35 Conn. 97-104; *Regan v. Railroad Co.*, 60 Conn. 124-142, 22 Atl. 503; *Healy v. Fallow*, 69 Conn. 228, 37 Atl. 495. We are of opinion that interest was properly allowed in the case at bar. There is no error. The other judges concurred.

(70 Conn. 386.)

CANTONI et al. v. BETTS.

(Supreme Court of Errors of Connecticut.
March 2, 1898.)

CITY COURT OF DANBURY—JURISDICTION—AMOUNT IN CONTROVERSY.

1. In an action by a judgment creditor to foreclose his lien, and to set aside a mortgage as fraudulent, the matter in demand is a lien on the land to the amount of the mortgage, within Sp. Acts 1899, p. 1019, § 83, limiting the jurisdiction of the city court of Danbury to cases where the matter in demand does not exceed \$500.

2. The question of jurisdiction is not affected by Gen. St. § 809, providing that, in actions for the redemption or foreclosure of title to property claimed to be subject to a mortgage or lien, the amount of the debt or liability secured by such mortgage or lien, as described in the mortgage or certificate of lien, is the amount in demand.

3. The fact that the action, as against the mortgagee, was in aid of a foreclosure of the judgment lien, of which said court had jurisdiction, did not render immaterial the amount of the matter in demand.

4. Where a plea was filed showing the amount in controversy, which was beyond the jurisdiction of the court, and the reply admitted that such sum was the amount involved, the court erred in not thereupon dismissing the action, regardless of the fact that the plea was subsequently withdrawn.

Appeal from superior court, Fairfield county; Milton A. Shumway, Judge.

Action by James A. Betts against Joseph Cantoni and others, commenced in the city court of Danbury, and taken on error by defendants to the superior court. Facts found, and judgment rendered for plaintiffs in error, reversing the judgment of the city court in part. Defendant in error appeals. Affirmed.

James A. Betts, the defendant in error, had a judgment lien on land in Danbury belonging to Joseph Cantoni, one of the plaintiffs in error, for \$180.70. The land became subject to this lien January 16, 1896. January 6, 1896, and before the judgment lien accrued, Joseph Cantoni mortgaged the land to one Antonia Badoracco, to secure a promissory note for \$1,920; and on the same day Badoracco assigned the note and

mortgage to Louise Cantoni (wife of Joseph), the other plaintiff in error. June 22, 1896, Betts brought an action to the city court of Danbury against Joseph Cantoni, Antonia Badoracco, and Louise Cantoni, setting forth his ownership of the judgment lien, and the existence of the prior incumbrance in the hands of Louise Cantoni (but without specifying the amount of the mortgage note); alleging that the mortgage note was given without consideration, and for the purpose of defrauding the plaintiff and other creditors of Joseph Cantoni; and claiming (1) a judgment that said mortgage be postponed to, and be decreed to be junior and inferior to, the judgment lien; (2) a foreclosure of said judgment lien; (3) possession of the premises. The defendants pleaded to the jurisdiction, alleging that the mortgage sought to be set aside was given to secure the payment of \$1,920, and was executed and recorded before the judgment lien accrued. To this plea the plaintiff demurred, because jurisdiction of the court was determined by the amount of the judgment lien, and the amount of the mortgage was immaterial. The city court sustained this demurrer. The defendants, after a vain attempt to have the complaint amended so as to state the amount of the mortgage, answered, alleging that the mortgage was given to secure a bona fide debt for \$1,920, evidenced by a promissory note for that amount, and that the whole amount of said note is still due and unpaid, and denying the charges of fraud. The reply of the plaintiff admitted the amount for which the mortgage was given, but denied its good faith. The judgment file recites the complaint, the appearance of the parties, the plea to the jurisdiction and demurrer, the sustaining of the demurrer, the defendants' attempt to secure an amendment of the complaint, the filing of an answer and the reply, and the default of the defendants on June 12, 1897, and then finds the allegations of the complaint true, and renders judgment as prayed for. The plaintiffs in error brought a writ of error from this judgment of the city court to the superior court. The defendant in error pleaded "nothing erroneous," and the superior court found error except as to that part of the judgment of the city court which adjudged a foreclosure of the judgment lien, and adjudged that the remainder of the city court judgment be reversed and set aside. From this judgment of the superior court, the defendant in error appealed, claiming the judgment to be erroneous on the face of the record.

John F. Cuff and Aaron T. Bates, for appellant. Howard W. Taylor, for appellees.

HAMERSLEY, J. The party seeking foreclosure may cite in an incumbrancer prior in date for the purpose of contesting his title, and of asking a cancellation of the deed, or that it may be declared fraudulent and postponed as to him. The right, however, to have a prior mortgage set aside on the ground of fraud, constitutes a distinct cause of action, which a plaintiff may or may not

join with his foreclosure suit. *De Wolf v. Manufacturing Co.*, 49 Conn. 282, 307. The judgment of the city court was therefore divisible into (1) a judgment of foreclosure against Joseph Cantoni, the owner of the equity, and (2) a judgment against Louise Cantoni, adjudging her prior mortgage to be fraudulent and void, and postponed as to Betts, the owner of the judgment lien. The mortgage held by Louise Cantoni was given to secure a note for \$1,920, and the matter in demand in an action to set this mortgage aside is a lien upon the land to the amount of \$1,920. The fact that the validity of the mortgage is contested does not affect the amount as a test of jurisdiction. *Schunk v. Moline, M. & S. Co.*, 147 U. S. 500, 505, 13 Sup. Ct. 416. The jurisdiction of the city court is limited to cases "where the matter in demand does not exceed five hundred dollars." *Sp. Acts 1889, p. 1019, § 83.* Its judgment, therefore, against Louise Cantoni, was void. The infirmity appears on the record. The plea to the jurisdiction alleged the amount of the prior mortgage sought to be set aside, and this was admitted by the demurrer. The answer alleged the amount of the mortgage, and this allegation was admitted in the reply. The judgment file refers to the plea to the jurisdiction and demurrer, and also to the answer and reply; so that the judgment itself, by reference to other parts of the record, shows that it was rendered in a matter outside the jurisdiction of the court.

It is claimed that when Mrs. Cantoni withdrew from the case, and suffered a default, she also withdrew her pleadings; but, were this so, she could not withdraw from the court its judicial knowledge. The error of the city court lay in not dismissing the action as against Louise Cantoni the moment it was advised of the amount of the mortgage. *Denison v. Denison*, 16 Conn. 84, 38; *Fowler v. Bishop*, 32 Conn. 199, 206; *Denton v. Town of Danbury*, 48 Conn. 363, 372. Section 809, Gen. St., provides that, "in actions for the redemption or foreclosure of title to property claimed to be subject to a mortgage or lien, the amount of the debt or liability secured by such mortgage or lien, as described in the mortgage or certificate of lien, shall be deemed to be the amount of the matter in demand." This act does not, as claimed by the defendant in error, affect the question before us. The action against Louise Cantoni does not come within the provisions. The claim made that, because the action is in aid of a foreclosure of which the court has jurisdiction, therefore the amount of the matter in demand is immaterial, cannot be maintained. The equitable powers of the city court are limited by the statute fixing its jurisdiction, and it cannot extend them as if it were a court of general jurisdiction. As a court of equity, the city court may take cognizance of subordinate controversies when appropriate to the full

disposition of the main controversy before it; but, as a court of limited jurisdiction, it can take cognizance of no controversy, whether subordinate or not, where the matter in demand exceeds \$500. In other words, the limitation of its jurisdiction controls its exercise of equity power. Any other construction would practically annul the statute, and vest in the city court of Danbury an unlimited equity jurisdiction. There is no error in the judgment of the superior court. The other judges concurred.

(70 Conn. 298)

STATE v. KALLAHER.

(Supreme Court of Errors of Connecticut.
March 2, 1898.)

LARCENY—EVIDENCE.

1. Evidence that one accused of larceny threatened, between 9 and 12 o'clock at night, to burn the prosecuting witness' house with his family, who were sick in bed, if he was not paid a certain amount of money, and that he refused to consent to a delay, and that at about 12 o'clock the money was paid, is admissible to show that the money was parted with because of a reasonable fear of immediate injury.

2. Although obtaining money by threats of a civil action to compel its payment cannot constitute larceny, still evidence of such threats is admissible as a part of the conversation in which threats of bodily harm were made to enforce the payment, and as introductory thereto.

3. On trial for larceny by means of threats, an instruction that where money is obtained by deception or fraud, and converted to the use of the taker, the jury would be justified in finding that it was with felonious intent, was not objectionable, where the court, in an instruction immediately preceding, charged that, if the title as well as possession was obtained by fraud, it would not be larceny, and that threats of a civil suit would not constitute larceny, but that if defendant, without right to the money and by a threat to endanger the lives of the family of the prosecutor, induced him, through fear, to pay over the money, he would be guilty.

4. Where the court, in a prosecution for larceny, which is the only crime charged in the information, correctly states the elements of the crime in its charge, and the facts necessary to a conviction, a charge that larceny is included in robbery, and that the evidence is not sufficient to prove robbery, is irrelevant and harmless error.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

J. Thomas Kallaher, alias Thomas J. Kallaher, was convicted of theft, and he appeals. Affirmed.

The information contained three counts; the first charging the theft, on February 23, 1897, of \$200 from Ellen F. Munson; the second, the theft, on the 8th day of March, 1897, of \$800 from Ellen F. Munson; and the third, the theft, on the 8th of March, 1897, of \$800 from George O. Munson. At the conclusion of the testimony, the attorney for the state disclaimed a conviction on the first and second counts, and claimed a conviction upon the third count only. The jury found the accused guilty on the third count, and not guilty on the first and second counts.

Upon the trial of said cause, the state offered evidence to prove, and claimed to have

proved, that in June, 1896, said Munson employed the accused as a farm hand; that he continued substantially all of the time in the employ of said Munson as such farm hand from that time until the 21st of February, 1897, when he was discharged on account of his intemperate habits; that in August and September, 1896, there was some talk between the accused and Munson and his wife about going into the chicken business together, but the parties never arrived at any agreement; that the accused, at the time he was discharged, in February, 1897, claimed that Munson was indebted to him for his work; that Munson did not in fact owe the accused anything at that time, and so stated to the accused; that the accused thereupon threatened said Munson and his wife that if they did not settle with him, and pay him what he demanded, he would cause everything they had to be attached and taken from them, but offered to settle with them in full for \$200, and give a receipt in full. The accused continuing to threaten more or less if they did not settle with him, and pay the \$200, on February 23, 1897, the said Mrs. Munson gave him \$200 in full settlement of all claims whatsoever, but the accused never gave a receipt in full, and would not do so. Thereupon the accused left, but again returned, and on the 3d day of March, for the first time, spoke to Mrs. Munson about having a further claim upon her and her husband, by reason of their failure to go into the chicken business with him, and that they must pay him, to settle such claim, the sum of \$800, and that, if they did not do so, he would cause all of their property to be attached and taken from them, and their house to be burned and destroyed, so there would be nothing left but chimneys to tell the tale. He came again to the Munson house about 9 o'clock in the evening of March 11th. In a somewhat intoxicated condition. At that time Mr. and Mrs. Munson and their two children were ill, and unable to leave the house. The accused renewed his claim for the \$800, informing her that he knew they had the money in the house, and threatening at first that, if they did not pay the money to him immediately, he would cause everything they had to be attached, saying that he had been to New Haven that afternoon, and seen his lawyer; that the papers had been drawn, and were in the hands of Sheriff Spiegel, who would be out there the first thing in the morning to attach everything they had, but that, if they paid him the money that night, he could stop it; and latterly, however, threatening that, if they did not pay over the money to him immediately, he would burn and destroy their house, and that there would be no one left to tell the tale. Mrs. Munson inquired of him: "What do you mean? That you will burn us up with it?" He replied that he did. He repeated these threats until after 11 o'clock, and Mrs. Munson was crying during the time of the threats and because of them, and finally she called her husband

down from upstairs, and told him, in the presence of the accused, what he had been saying to her; and thereupon the accused repeated the threats in the presence of Mr. Munson, also remarking, referring to his courage and ability, that, "if he was in a crowd, he didn't care for anything but a knife; he would cut his way through." During the time of the threats as aforesaid, Mrs. Munson had endeavored to persuade him to wait until morning, but he refused to consent to any delay, but insisted that he must have the money then, that night; and finally Mr. Munson, through fear of his (the accused's) burning and destroying life, as he had threatened, took \$800 from his safe, and handed it to his wife, in the presence of the accused, that she might count it; and thereupon the accused took it from Mrs. Munson's hands, and remained in the house about 15 minutes, when he left, it then being about 12 o'clock midnight. Thereupon the accused left the house with the money, and went to New Haven.

The defendant offered evidence to prove, and claimed to have proved, that, while working for said Munson, he was dissatisfied with his position, and told the said Munson that he should leave; that thereupon Munson, about September 1st, represented to him that, if he would stay, he (Munson) would go into the poultry business with him that winter, and give him an interest therein; that thereafter the defendant remained with said Munson until about February 18, 1897, and that during said time he rendered services, negotiated for the purchase of materials, and assisted in the construction of a building for the said Munson, in preparation for the carrying on of said business agreed upon; that about the 18th day of February, 1897, said Munson refused to carry out the agreement to go into business with the defendant; that the defendant thereupon threatened to bring suit against said Munson, and to attach his property for failure to carry out said agreement, and that thereupon said George and Ellen F. Munson promised the defendant at that time that said George Munson would pay him \$1,000 damages for the breach of his contract to go into said business aforesaid; that on the 23d day of February, 1897, the said George and Ellen F. Munson paid the defendant \$200 in partial settlement of the claim which he had against them aforesaid, and that on said day the defendant gave to the said Ellen F. Munson a simple receipt for said \$200, but refused to give a receipt in full, though requested to do so; that on the 1st day of March, 1897, the defendant came to the house of the Munsons, to collect the additional \$800 agreed on, intending to go to Hartford that night; that the said George and Ellen F. Munson promised him then that he should be paid the \$800 the following Thursday if he would stay over with them, and he assented; that thereafter the defendant was taken sick, and the

said Ellen F. Munson became sick, and it was agreed that the payment of said sum of money should be postponed until Tuesday, the 11th of March; that thereafter, on the evening of the said 11th day of March, the defendant demanded said sum of \$800, and stated that, if the sum was not paid immediately, suit would be brought by him, and the property and house of the said Munson would be attached, and stated that the papers in the lawsuit had been placed in the sheriff's hands, which last statement the accused admitted was untrue; that influenced by fear through said statements of the defendant, and in order to prevent their property and the house from being attached, the said George Munson handed the sum of \$800 to the said Ellen F. Munson, who, in his presence, immediately delivered it to the defendant.

During the trial of the case, Ellen F. Munson, a witness in behalf of the state, was asked the following question with reference to the occurrences of the evening of March 11th: "Now, state what happened there about that time." The witness answered: "He demanded the eight hundred dollars, and I told him I had not got it. He said: 'It is in the house. If you don't give it over, the sheriff will be here and attach.' He said if we didn't there would be nothing but chimneys left to tell the tale. I asked him if he meant the building would be burned, and he said, 'Yes.' " Said witness was thereupon asked this question: "You may state if before this evening, as to which you have testified, the accused said anything to you in regard to what he would do if you didn't give over the eight hundred dollars,—about the buildings." The witness answered: "He did, on the 3rd day of March." She was then asked to state what he said, and answered: "He asked me if I was going to give him the eight hundred dollars. I told him I hadn't got it. He spoke then: 'Then there will be nothing but chimneys left, and no one to tell the tale.' And I asked him if he meant he would burn us up, and he said, 'Yes.' " To this evidence counsel for the accused objected, "unless the threat to burn was expected to be carried out immediately if the money was not paid," and that threats were only admissible if made at the immediate time that the money was paid. To the ruling of the court admitting this evidence counsel for the accused excepted. The same witness, and also George O. Munson, as witnesses in behalf of the state, testified that at the time the \$200 was paid, and at the time of the payment of the \$800, the accused threatened to bring a civil suit, and attach the property of the said Munsons, and threatened that, if they did not pay said sums, the sheriff would be there and attach all their property. To this evidence counsel for the accused objected, upon the ground that a threat to enforce a claim by civil suit is nev-

er ground to support a conviction for theft or for robbery. To the ruling of the court admitting this evidence, counsel for the accused excepted. These rulings are among the alleged errors assigned in the appeal to this court.

The appellant further alleges that the court erred in stating the following in its charge to the jury: "If the possession of property of another to which the taker has no claim be obtained openly, but by deception, artifice, or fraud, designed by the taker to secure the possession of the goods of another to which he has no claim, and no honest belief in such a claim, and they be subsequently converted to the use of the taker, the jury would be justified in finding that the taking was with felonious intent, and the crime of larceny committed;" and in stating in its charge to the jury the following: "It has been said to you that, if this case presented before the jury is anything, it is a case of robbery; but the crime of larceny, gentlemen, is necessarily included in the crime of robbery, so that, if it were true that this case presented upon the evidence were a case of robbery, the jury would be justified upon such proof in finding the accused guilty of larceny. But the evidence seems to me clear enough to warrant me in saying to you I do not think that the proof would admit of a conviction of robbery in this case." In its charge to the jury, the court made the following statements: "While the felonious intent may be found from a secret taking, it may be found from an open taking, provided, for instance, that it may be by deception, artifice, or fraud. If the title to the property as well as the possession of the property be obtained by deception, artifice, or fraud, this will not be larceny, because the owner parted with the title as well as the possession. The crime may be obtaining goods under false pretenses, but it is not larceny. If the possession of property of another to which the taker has no claim be obtained openly, but by deception, artifice, or fraud, designed by the taker to secure the possession of the goods of another to which he has no claim, and no honest belief in such a claim, and they be subsequently converted to the use of the taker, the jury would be justified in finding that the taking was with felonious intent, and the crime of larceny committed. * * * Threats which will be regarded as effective in the eye of the law to cause a degree of fear depriving the owner of property of his consent to its taking will be threats of personal violence,—either danger to life or great bodily harm. * * * The compulsion of the payment of a valid claim, or one believed to be valid, by threat to bring civil suit and attach, thus causing fear; and inducing as a result of the fear the payment of the money, is not larceny. The compulsion of the payment of money not owed, and which the taker knows is not owed, by threats to bring civil suit and attach, caus-

ing fear, under the influence of which the money is paid, is not larceny. The threat made which induced the fear which caused the money to be paid must be a threat which it was apprehended would speedily be put in execution, and, under the influence of a fear of its speedy execution, the money was paid over. The money must have been paid under the influence of fear of great bodily harm to be speedily caused by the taker." "To summarize, gentlemen, some of these claims, and perhaps the vital ones: If the jury find that Kallaher secured this money having an honest claim to it, or honestly believing he had such a claim, he should be acquitted. If the jury find that Kallaher secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was the only threat, no matter whether he believed in his claim or not, he should be acquitted. If the jury find that the threat was to do great bodily harm to the Munsons, and that this caused fear on their part, if the fear was not that the threat would be speedily or immediately executed, Kallaher should be acquitted. If, on the other hand, the jury find that the evidence establishes beyond a reasonable doubt that Kallaher secured this money as claimed without a right to it, and without believing that he had a right to it, and by a threat to endanger the lives of the Munsons or to do them great bodily harm, which threat the Munsons believed would be speedily executed, and induced fear on their part, and, under the influence of that fear that the threat would be speedily executed during that night, they paid over the money as charged, then the accused would be found guilty of the crime as charged. * * * It is for the jury to determine as a question of fact what the threat was. Was the fear of the Munsons, if there was fear on their part, that there would be a speedy or immediate execution of this threat by Kallaher? That the jury must determine as a question of fact from the evidence. * * * It has been said to you that, if this case presented before the jury is anything, it is a case of robbery; but the crime of larceny, gentlemen, is necessarily included in the crime of robbery; so that, if it were true that this case presented upon the evidence were a case of robbery, the jury would be justified upon such proof in finding the accused guilty of larceny. But the evidence seems to me clear enough to warrant me in saying to you I do not think that the proof would admit of a conviction of robbery in this case."

R. S. Baldwin, Edward J. Maher, and Martin Conlon, for appellant. William H. Williams, State's Atty., and Alfred N. Wheeler, for the State.

HALL, J. (after stating the facts). The only objection to the admissibility of the evidence

offered by the state in proof of the threats of the accused to burn the house of the Munsons which seems to be urged by counsel for the accused in their brief submitted to us is that it should not have been received "unless the threat to burn was expected to be carried out immediately." The record shows that evidence was offered by the state to prove that these threats made by the accused when he was somewhat intoxicated, to Mr. and Mrs. Munson, in their own house, between 9 and 12 o'clock at night, when both they and their children were ill, Mrs. Munson being too ill to leave the house, were that, if they did not pay over the money to him immediately, he would burn and destroy their house, and that there would be no one left to tell the tale, and that he meant to burn them up in it; that he refused to consent to any delay, but insisted that he must have the money then, that night; and that, finally, Mr. Munson, through fear that the accused would burn and destroy life, as he had threatened, paid him the \$800. To constitute the crime of larceny, the taking must not only be felonious, but without the consent of the owner. But a felonious taking with the consent of the owner, when the giving of such consent is not a voluntary act, but is the result of actual fear induced by threats calculated to excite a reasonable apprehension of bodily injury, is, in the eye of the law, a taking without the owner's consent. 1 Whart. Cr. Law, §§ 850-852, note 5; 2 Bish. Cr. Law, § 1169; 2 Greenl. Ev. (13th Ed.) § 193. Whether such apprehension of danger existed, and, if so, whether it was a reasonable apprehension, are questions of fact, and must be determined in each particular case by the language or the menaces of the accused, his actions, and the circumstances surrounding the person who thus parts with his property. *Morris v. Platt*, 32 Conn. 75-83. Clearly, the evidence offered by the state of the threats made by the accused in the present case tended to prove that Munson parted with his \$800 because of a reasonable fear of immediate injury to himself and to his family. It was for that reason admissible. The jury were instructed by the court that, if the fear was not that the threats to do great bodily injury to the Munsons would be speedily or immediately executed, the accused should be acquitted. The threat of the accused that he would bring a civil suit, and attach all the property of the Munsons, was a part of the statement in which he threatened to burn the building and its inmates. It was admissible as a part of that conversation, and is introductory to the proof of a more serious threat. It nowhere appears upon the record that the court held that the obtaining money by threats to commence a civil action, and to attach property could constitute larceny. On the contrary, the court distinctly charged the jury that if they found "that Kallaher secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was

the only threat, no matter whether he (Kallaher) believed in his claim or not, he should be acquitted."

It is claimed by counsel for the accused that the following statement made by the court in its charge to the jury was irrelevant and harmful to the defendant: "If the possession of property of another, to which the taker has no claim, be obtained openly, but by deception, artifice, or fraud, designed by the taker to secure the possession of the goods of another to which he has no claim, and no honest belief in such a claim, and they be subsequently converted to the use of the taker, the jury would be justified in finding that the taking was with felonious intent, and the crime of larceny committed." The court, in this part of its charge, was instructing the jury how a criminal intent might be proved, and not as to what constituted a taking without the owner's consent. The state was required, not only to prove that the accused obtained this money by threats of personal violence, but with a felonious intent which existed at the time of the unlawful taking. The language quoted must be read in connection with that which precedes and follows it, and, when so read, it will be seen that the court was pointing out to the jury that, when the taking was without the consent of the owner, the jury would be justified in finding that it was with felonious intent, even though it was not secret, but open, if the accused, without having any claim to the property, had thus openly obtained possession of it by deception, artifice, or fraud. In this case there was no claim that the owner had, by deception or fraud, been induced to part with the mere possession of the money, independently of the ownership, as was claimed regarding the note in the case of *State v. Fenn*, 41 Conn. 590. When Munson parted with the \$800, he did so, not because he supposed he was asked to part with the possession of the bills only; he understood fully that the accused demanded, not the mere possession of the money, but the money itself.

The portion of the charge complained of, when considered by itself, is open to the criticism that the jury might have understood from this language that if they found that the accused had no just claim to this money, nor an honest belief in the claim which he made to it, and that Munson parted, not with the possession only, but with the ownership of the \$800, because of the false and fraudulent representations of the accused that he had commenced a civil action against Munson, and that the papers were in the hands of the sheriff to attach all his property, they might, upon those facts, not only find a taking with felonious intent, but a taking without the consent of the owner, and convict the accused of the crime of larceny. But, when we regard the entire charge of the court, we think the jury could have placed no such construction upon this language. In the two sentences immediate

ly preceding the one under discussion, the court said to the jury: "If the title to the property, as well as the possession of the property, be obtained by deception, artifice, or fraud, this will not be larceny, because the owner parted with the title as well as the possession. The crime may be obtaining goods under false pretenses, but it is not larceny." Again, in its final summary to the jury of the questions of law involved in the case, the court, as has been before observed, said: "If the jury find that Kallaher secured this money by a threat to bring a civil suit, or by representations that the papers had been placed in the hands of the sheriff, and this was the only threat, no matter whether he believed in his claim or not, he should be acquitted." The court concludes its discussion of the questions of law by stating upon what facts the jury might convict the accused of larceny, namely, upon proof that Kallaher secured the money "without a right to it, and without believing he had a right to it, and by a threat to endanger the lives of the Munsons, or to do them great bodily harm, which threatens the Munsons believed would be speedily executed, and induced fear on their part, and, under the influence of that fear that the threat would be speedily executed during that night, they paid over the money as charged." It seems to us clear that no jury of ordinary intelligence could have understood from the charge of the court that they might convict the accused of larceny upon finding that he obtained the money in question by false and fraudulent representations, and without finding it proved that he made the alleged threat of great bodily injury to the Munsons, and that, therefore, the accused was not prejudiced by the language of the court in this part of the charge.

The last claim made in the brief of counsel for the accused is that the court erred in stating to the jury that the crime of larceny was included in the crime of robbery, but that, in the opinion of the court, the proof in this case would not admit of a conviction of the crime of robbery. The ground of the defendant's complaint seems to be the remark of the court that the evidence would not warrant a conviction of robbery. The court correctly stated to the jury the elements of the crime of larceny, which was the only charge in the information, and what facts were required to be proved to support a conviction of that offense. The duty of the jury to convict or acquit depended upon the proof or the failure to prove these facts, and not upon the question of whether such facts, if proved, were sufficient to sustain the charge of robbery. That inquiry was irrelevant. We have only noticed those reasons of appeal which are discussed by counsel for the accused in their brief. There is no error. The other judges concurred, BALDWIN and HAMERSLEY, JJ., with hesitation.

(87 Md. 183)

STATE, to Use of PRICE et al., v. CUMBERLAND & P. R. CO.

(Court of Appeals of Maryland. Feb. 10, 1898.)

RAILROADS—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

Where one driving a buggy, while nearing a crossing, saw a train coming, and, in attempting to cross in front of it, his horse balked, and he was killed, he was guilty of contributory negligence.

Appeal from circuit court, Allegany county.

Action by the state of Maryland, for the use of Ellen M. Price and others, against the Cumberland & Pennsylvania Railroad Company, to recover for death of Thomas C. Price. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, PEARCE, and BOYD, JJ.

Clayton Purnell and Ben A. Richmond, for appellant. Robert H. Gordon and Ferd. Williams, for appellee.

BOYD, J. This is an action brought in the name of the state of Maryland, for the use of the widow and daughters of Dr. Thomas C. Price, against the Cumberland & Pennsylvania Railroad Company, founded on the alleged negligence of the company's agents, resulting in the death of the doctor. At the conclusion of the testimony offered by the plaintiff, the court below instructed the jury that there was no evidence legally sufficient to entitle the plaintiff to recover, and directed a verdict to be rendered for the defendant. That action of the court presents the only question for our review. There were only two witnesses to the accident examined, and their testimony is very unsatisfactory in reference to most of the material facts involved in the case. The accident happened at a point where a county road crosses the railroad on what is called a "Y" track. The railroad, in order to get to Frostburg by a practicable grade, runs westerly to a point near Borden Mines, and then easterly for some distance, and then westerly again towards Frostburg, thus gradually ascending the hill. The train with which we are concerned was composed of an engine and coal cars, and, after stopping at a coal tipple which is near the westerly terminus of the main track, was backing up the Y track, when the collision with Dr. Price's buggy took place on the crossing above spoken of. He had been to Allegany, a neighboring village, to see a patient, and was on his way to Frostburg, where he resided, when his buggy was struck by the train, and he died almost immediately after the accident. The witnesses who testified seem to have had no definite idea of the distance between the points spoken of in their testimony, or even the length of the train. There was a plat used at the argument, which, although not shown in the record to have been proven to be correct, we understand to have been conceded to be so in this court. Assum-

ing it to have been correctly made according to the scale marked on it, the distance from the coal tipple to the point where the Y track leaves the main track is about 400 feet, and from the latter point to the county road about 600 feet. The witnesses who saw the accident were Mrs. Frank Devore and Joseph Malooley. It is impossible to tell from the record with any precision where the former was, as the points she speaks of are not located on the plat, but she said she was on what we have called the "main track," by which we mean the part of the track before entering the Y, and that is from three to four hundred feet from the county road at the nearest points, as laid down on the plat. Malooley was on the car that struck Dr. Price's buggy, being the rear car of the train, or, as it was being pushed backward up the grade, the first car to reach the crossing. Mrs. Devore thought the accident happened about 6 o'clock in the evening, October 26, 1896, but she said she could see the train and Dr. Price plainly. She described with some detail what occurred at the crossing, even to the number of times the doctor struck his horse. So, whatever the hour was, it was still sufficiently light for any one to see the train moving. As Dr. Price reached the railroad, his horse balked, and remained on the track long enough to let the buggy in which he was riding be caught by the train, although the horse escaped.

Suits for damages resulting from collisions with railroad trains by persons crossing the tracks have been so numerous in this state that there is no longer much difficulty about the general principles of law applicable to them, and it is usually only necessary to examine carefully and critically the facts in any particular case to ascertain the extent of the liability of the defendant. Our statute which authorizes suits to be brought for the death of a person caused by the wrongful act, neglect, or default of another limits the right of recovery to such act, neglect, or default as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, and hence the test in this case is whether Dr. Price could have recovered if he had survived the injuries sustained by him. To do so, it would have been incumbent on him to prove that the action was caused entirely by the negligence or default of the defendant's agents or agent, and it must not have appeared from the evidence that his want of ordinary care and prudence directly contributed to cause the accident. *Burns' Case*, 54 Md. 113. To put the company on defense, it was not sufficient to prove negligence of its agents, but also that such negligence caused the injury. If, in attempting to prove those essentials, the evidence disclosed the fact that the accident really happened as a result of the doctor's own negligence, then the plaintiff is precluded from recovery, because the defendant cannot be made responsible for results caused by the fault of the one whose injuries are the basis of the suit. So long as there is any reasonable doubt on that question, the jury must resolve it; but when the fact

is so clearly established by the evidence as to leave no room for rational minds to differ, without entering into the realms of speculation and conjecture, then it is the duty of the court to determine it. The legal sufficiency of the whole evidence to sustain a verdict is as clearly for the court as is the weight or credibility of the testimony for the jury when the facts are in dispute. Of course, when the court is called upon to pass upon the legal sufficiency of the evidence, it must assume it to be true. These general propositions have been so frequently announced by this court that we deem it unnecessary to cite authorities to sustain them, and we only refer to them because it is proper that they should be borne in mind as the facts in the record are considered and the law applied.

The negligence relied on by the plaintiff consists of the alleged failure of the defendant's agents to give any signal of the approach of the train. Mrs. Devore swore she did not hear the whistle blow or the bell ring, although she was close enough to have heard them. It is true that she did not notice that there was another train on the main track, the engine of which did whistle, according to the witness Malooley; but it must be admitted that there was some evidence that the engine of the train that caused the accident did not whistle and the bell was not rung. It is also claimed by the plaintiff that there was neither light nor trainman on the first car, as it approached the crossing, to give warning of its approach. It is apparent, however, that a light would have been of no service, as it was not dark enough to require it. Mrs. Devore said: "It was light enough; I could see everything plain;" and we have already seen the distance she was from the crossing when the accident happened. Nor is there any positive proof that there was not a trainman on the car. Mrs. Devore's evidence as to that was as follows: "Q. Mrs. Devore, did you see anybody on the end of the train? A. I did not see anybody on the end of the train. Q. I mean the rear end of the train. A. I never took no notice. Q. You never took no notice? A. No, sir; I was too excited." Malooley was asked: "Were there any brakemen on the end of the train? A. I do not know whether there was or not. Q. Was anybody on the end of the train? A. They might have been on there, and I not seen them." So the only evidence tending to show negligence was the failure to ring the bell or blow the whistle, if those omissions be conceded to be negligence. But there is no evidence from which it could be properly inferred that the omission to do either of those acts in any way misled Dr. Price or caused the accident. The only possible object in giving such signals is to warn persons using the county road of the approach of trains. It was the duty of Dr. Price to look and listen as he approached the crossing to ascertain whether a train was coming, and the failure on the part of the agent of defendant to blow the whistle or ring the bell did not exonerate

him from the exercise of that reasonable precaution. *Neubour's Case*, 62 Md. 391. We see nothing in the record that would have justified the jury in finding that there was any difficulty in his seeing the train as he approached the railroad. It is true that the evidence showed that there was a rail fence along the side of the county road, and some locust and maple trees growing on the fence line; but it is not shown that they would prevent any one driving in a buggy, as Dr. Price was, from seeing the railroad. Indeed, it does not appear whether the foliage was still on the trees on the 26th of October, when the accident happened. Then, too, the evidence of Mrs. Devore shows she had no difficulty in seeing the doctor as he drove along the road, and he could certainly have seen a train, even if he could not have heard it as it was pushed up that grade. But, if his view of the railroad was obstructed so as to prevent him from seeing whether a train was approaching, it was his duty to stop, look, and listen before attempting to cross. And if a party neglect these necessary precautions, and receive injury by collision with a passing train, which might have been seen if he had looked, or heard if he had listened, he will be presumed to have contributed, by his own negligence, to the occurrence of the accident; and, unless such presumption be repelled, he will not be entitled to recover for any injury he may have sustained. *Hogeland's Case*, 66 Md. 149, 7 Atl. 106.

But it was argued with great ingenuity and ability by the counsel for the appellant that the accident was caused by reason of the fact that the train was standing still when Dr. Price started to cross the track, but started suddenly, and without warning, overtaking him before he could escape from the track, thereby causing the accident, and that there was, at least, sufficient doubt about that to require its submission to the jury. The evidence, however, does not sustain that contention, and it would have been impossible for the jury, in the face of the testimony in the record, to have reached that conclusion by any method short of mere conjecture. It is true that the train had been standing still, but just when it started, and exactly where he was when it did start, are not shown, but that he was not on the crossing at the time the train started is conclusively shown by the two witnesses who saw the accident. Mrs. Devore, in answer to the question how far the rear end of the train (meaning the end nearest the crossing) was from the crossing when the train was standing still, said she could not tell exactly, but finally said, on being asked whether it was the length of the court room of the circuit court for Allegany county, where the case was being tried, that it was not that far away. Then followed this portion of her testimony: "Q. Then you saw it standing there? A. Yes, sir. Q. And you saw the horse on the crossing? A. No, sir. Q. Coming up to the crossing? A. He

was not on the crossing. He was a good way from the crossing when the train was standing still, but, as he came towards the crossing, the train started to come up." The witness Malooley had a good opportunity to see how the accident happened, as he was on the car that struck the buggy on the side of it next to Dr. Price, as he approached the track. He was not in the employ of the railroad company, but was riding home from the mines where he worked. He gave this account of the accident: "Q. You were on the side of the car coming up the hill. Which way were you looking? A. I was looking right towards where the doctor was driving up towards the train. Q. Now, how far was your car from the crossing when it was standing still? A. I could not say. Q. You cannot say. Now, when the train started, where were the doctor and the horse? A. Why, the doctor was driving. When I took notice to him, the doctor was driving right up. Q. Now, tell the jury you saw the doctor drive up. Tell the jury. A. I saw the doctor drive up towards the hill. His horse stopped and balked on the crossing. Q. His horse balked on the crossing? A. Yes, sir. Q. Then what happened? A. He tried to get the horse across the crossing, and he refused to go. He tried to pull him back, and he refused to come back. He clapped his lines, and I heard him hollow, 'Get up,' twice, and when the train drew close the horse jumped out, and it caught the buggy. Q. You saw the doctor coming up to the track? A. Yes, sir; saw the horse on the track. Q. And the doctor would have gotten across if the horse had not stopped? A. If he had not balked. Q. And he got on the track,—the horse and buggy,—and the doctor slapped the lines, and told him to get up? A. Yes, sir; and as the train came up it hit the buggy." On cross-examination he said he could see Dr. Price coming towards the crossing, and he thought he could see him the length of the court room from the crossing, and then testified as follows: "Q. Well, then, Dr. Price could have seen the train that far away? A. I saw Dr. Price see the train. Q. You saw Dr. Price see the train? A. Yes, sir. Q. How do you judge that? A. He was looking at it. He was looking towards me, anyway. Q. How far was the train from the doctor when the doctor tried to make the crossing? Do you know? A. I could not say how far he was at all." The evidence, therefore, shows conclusively that the train was moving before Dr. Price reached the crossing, and that he saw it coming. Mrs. Devore said she saw him hit the horse three times, and the horse jumped back three times; that "the horse pulled towards Frostburg, and the horse balked in the middle of the track, and I saw him whip him again, and he balked back, and he stayed there until the cars ran over him." The approach on the county road to the railroad is described as very steep, and the plat shows it is at such an angle that a horse moving up the hill might well be fright-

ened by a train coming from the direction this one was. That was probably the cause of the horse's balking; but, however that may be, we think it is apparent from the testimony that the train did not start to move after Dr. Price had driven on the railroad, but that he saw it coming, and endeavored to cross the track ahead of it. Had it not been for the unfortunate fact that this trusted animal failed its master on that momentous occasion, he would doubtless have gotten over safely, but that was a risk he assumed. We know of no law that would permit a recovery under such circumstances. Indeed, it was conceded in the argument that, if the train was moving when he attempted to cross, the plaintiff could not recover. As the evidence convinces us that such was the case, and that there was no conflict on the subject, and nothing from which the jury could properly infer the contrary, the judgment of the court below must be affirmed. Judgment affirmed, with costs.

(37 Md. 161)

BROWN v. MCGILL et al.

(Court of Appeals of Maryland. Feb. 10, 1898.)

MARRIED WOMEN — SEPARATE ESTATE — CONTRACTS.

A woman, in contemplation of marriage, conveyed all her property to a trustee, the income to be paid during life into her own hands, for her sole use, without power of anticipation. After the marriage she borrowed money by giving a note under an agreement that it should be payable out of her separate estate, whether held in her own name or by a trustee. *Held*, that the income in the hands of the trustee was liable for the satisfaction of the note.

Page, J., dissenting.

Appeal from circuit court of Baltimore city.

Bill in equity by Alexander Brown against Sarah G. McGill and others. From a decree dismissing the complaint, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Wm. L. Marbury and Henry J. Bowdoin, for appellant. Bernard Carter, Stewart Brown, Arthur Geo. Brown, and F. W. Brune, for appellees.

BOYD, J. This is an appeal from a decree of the circuit court of Baltimore city, dismissing the bill of complaint filed by the appellant against Sarah G. McGill, Carroll S. McGill, her husband, and James McEvoy, trustee. The bill alleges that on the 16th day of September, 1895, Sarah G. McGill gave the appellant her note for the sum of \$2,000, which she borrowed from him with the understanding and agreement that it should be payable, when demanded, out of her separate estate, whether held in her own name or by the intervention of her trustee, James McEvoy, and that it was her intention and purpose to bind and charge her separate estate with the payment thereof. On the 10th day

of September, 1894, which was a day or two before Mrs. McGill, who was the widow of George B. Graham, deceased, was married to Carroll S. McGill, she executed a deed of trust by which she assigned and conveyed to James McEvoy, trustee, all property which she had derived from the estate of George B. Graham, and which she might receive from her daughter, Isabella Brown Graham, in trust, "to collect, receive, and, after making all proper deductions for taxes and other charges thereon, to pay over, the net rents, profits, dividends, interest, and income of all said property, real, personal, and mixed, to her, the said Sarah G. Graham, during her natural life, into her own hands, and not to another, whether claiming by her authority or otherwise, for her sole and separate use, and upon her separate receipts, without power of anticipation, and excluding all right or interest in, or power over, the same of any husband she may have, or any liability for his debts, contracts, or engagements." It then provides for the disposition of the property after her death. It is conceded that the debt was contracted by Mrs. McGill with direct reference to her separate estate, and that it was her intention to charge the same. The testimony on that point is ample, under the decisions of this court, to charge any separate estate she had with this debt, unless there be other reasons for its exemption.

It is contended, and the learned judge below so held, that, by reason of the provisions in the deed of trust above quoted, she had no power to charge or pledge the property held by James McEvoy, trustee. That being her only separate estate, so far as disclosed by the record, we are necessarily called upon to determine the effect of those provisions. Cases involving the right to place restrictions upon the alienation of property have been numerous, and have resulted in a great diversity of opinions between the courts that have passed upon the question. In England it has been persistently and steadfastly held that a gift or grant of a beneficial fee simple or life estate, whether legal or equitable, carried with it the right of the donee or grantee, other than a married woman, to alienate the estate, and charge it with his debts; and that all attempts to restrict these incidents belonging to such estates, by forbidding payment of the income to any one other than the donee or grantee, or prohibiting anticipation, were nugatory and without effect, except by way of cesser or limitation over of the estate. We will have occasion to consider the exception in favor of married women later on. In 23 Am. & Eng. Enc. Law, 5, there is a very excellent note on the subject of "Spendthrift Trusts," where it can be seen how widely the courts of this country have differed on the main question. But it would serve no good purpose to enter into a discussion of those cases, as this court held in the case of *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, and 15 Atl. 92, that the founder of a trust may lawfully

provide, in direct terms, that his property shall go to his beneficiary to the exclusion of the alienees and creditors of the latter; and accordingly it was determined that the rents and profits held by the trustee in that case, which the testator directed should be paid into the hands of his son, and "not into the hands of another, whether claiming by his authority or otherwise," could not be reached by his creditors, either at law or in equity, before such rents and profits were paid to him. It was conceded that the English cases, as well as many in this country, were opposed to the views adopted by this court; but it was held that the reasons on which was founded the rule that the right to sell and dispose of property is a necessary incident to the ownership of it do not apply to the transfer of property in trust. It was said that "the donor or devisor, as the absolute owner of the property, has the right to prescribe the terms on which his bounty shall be enjoyed, unless such terms be repugnant to the law. * * * The creditors of the beneficiary have no right to complain because the founder of the trust did not give his bounty to them." By the will before the court in the case of *Reid v. Trust Co.*, 86 Md. —, 38 Atl. 899, the testator left his property to trustees, who were succeeded by the appellee in that case, with directions that they should pay the net proceeds, from time to time, to his wife during her natural life, "and especially so that the same shall not be liable for the debts or contracts of any future husband, or in any manner subject to his control, or to be taken in execution or attachment, or otherwise howsoever, and so that she shall not pledge or anticipate said property or said net proceeds of income, or any part thereof." We held that, by virtue of those provisions, the net income from the property in the hands of the trustee was not liable for her debts, and that the testator had full power to make such provisions, under the decision in *Smith v. Towers*.

But whether one who is the owner of property can thus place it beyond his own control and power of alienation, especially beyond the reach of his creditors, presents another question. The case of *Warner v. Rice*, 66 Md. 436, 8 Atl. 84, goes very far towards denying such right. George Warner and others conveyed to a trustee certain property which had been left them by their father by a deed in which certain trusts were declared by the grantors. The property of George Warner, sought to be made liable to attachment in that case, had by the deed been made subject to a declaration of trust, as follows: "In trust for the use and benefit of said George Warner and his immediate family, free from liability for any of his debts, contracts, or engagements; and when, if so by said trustee found requisite, by him deemed proper, to apply the uses, rents, income, and profits to the support and maintenance of said George and his said family, during his (said

George's) life," etc. This court held that the exemption attempted to be conferred upon the use of the property by that declaration was void and without effect, being contrary to law, and held the rents from Warner's equitable estate in the ground rents attached liable for the plaintiff's debts. It was said in that case that a beneficial legal estate in fee or for life could not be conveyed or devised to a person with a provision that it should not be alienated or subject to the debts of the legal owner, and it was also stated that, as a general principle, equitable estates cannot be effectually created with such provisos, except in the case of trusts created for the protection and benefit of married women. In *Baker v. Keiser*, 75 Md. 332, 23 Atl. 735, the cases of *Smith v. Towers* and *Warner v. Rice* were discussed, and it was said that in the latter case this court "emphatically declared that it was wholly against the policy of the law to allow property, whether legal or equitable, to be fettered by restraints upon alienation; and, generally, the court said, whenever property is subject to alienation by the owner, it is subject to his debts." It was stated in that opinion that the majority of the court concluded in *Smith v. Towers* that there was nothing in the decision of *Warner v. Rice* "which should restrain this court from saying that the founder of the trust could, by sufficiently clear language, create a trust for a beneficiary without the power of alienation"; but the opinion concluded by saying that "this court went as far as it could in *Towers' Case* to effect the intention of the testator, which was so expressly declared, but proper adherence to the policy of the law in the state will not allow the extension of the doctrine of the *Towers Case* beyond the limitations of that decision, nor to a case not falling clearly within its reasons and reasoning." But the case of *Warner v. Rice* is clearly distinguishable from that of *Smith v. Towers*, and of *Reid v. Trust Co.*, inasmuch as in that case there was an attempt of the owner of the property to place it beyond the reach of his creditors, and yet retain the enjoyment of it during his life, while in the other two cases the testators were creating trusts in favor of third persons. The theory upon which courts have held restraints upon alienation, etc., valid, is that the cestui que trust only has what the donor has given him,—is the recipient of his bounty; and therefore, if the donor has not given him the right to alienate the property or made it subject to the payment of his debts, no one has the right to complain. As is well said in *Bank v. Adams*, 133 Mass. 170: "Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of the trust, and take more than he has given." This is well illustrated in the Missouri cases. In *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780, and in *Partridge v. Cavender*, 96 Mo. 452, 9 S. W. 785, the doctrine had been dis-

tinently announced that by the use of apt terms a testator could forbid the alienation of property in trust, and could place it beyond the reach of the creditors of the beneficiary; but in *Bank v. Chambers*, 96 Mo. 459, 10 S. W. 38, a husband who had released his curtesy in his wife's estate, accepting in lieu thereof an income given him by her will, was regarded as a purchaser of such income, and not a mere recipient of his wife's bounty, and therefore the income was held to be subject to the claims of his creditors, notwithstanding the provisions in the will to the contrary. In referring to *Lampert v. Haydel* that court said that it, "and the class to which it belongs, rest in a large part upon the distinct ground that a creditor is not defrauded, and therefore has no cause of complaint, because the owner of the property in the free exercise of his will, so disposes of it that the object of his bounty, who parts with nothing in return, has a sufficient income provided for and applied to his life support." Even that class of cases should be carefully guarded, and courts should not be inclined to exempt property from its usual incidents of the right of alienation and liability for debts unless the language of the donor be free from doubt. But it is going too far, and is too violently assaulting the policy of the law of this state, as indicated above, to permit a person to convey property owned by him to a trustee, and still retain full enjoyment of the income and revenues from it, through the instrumentality of the trustee, and yet have the interest he retains for himself, worth, it may be, thousands or tens of thousands of dollars per annum, so fettered by his own act that it cannot be disposed of or be reached by his creditors. It is true that our land records are open to the public, and, in contemplation of law, what is properly recorded therein is presumed to be known by all; yet the fact remains that if a person has once owned property, and continues to occupy it or use it just as he has always done, it would occur to but few persons, if any, at least in ordinary transactions, that he must inquire, perhaps employ counsel to ascertain, whether there had been any change in the legal status of such property. It may be argued that this may happen in the cases we have already said are lawful in this state, where the bounty is bestowed upon third persons, and to some extent that may be true, but in those cases persons dealing with them may perhaps be expected to ascertain what the party receives,—what interest in the property was given to him; but in the case before us he would not only have to find out what property he owned in the beginning, but from time to time examine the records to see whether the former and still ostensible owner of it continued to retain any interest that was liable for his debts. It cannot be denied that property is deprived of some of its greatest value to the community in which it is held or located when beyond the power of

alienation or reach of the creditors of its present owners. To hold that a grantor can retain all the use and enjoyment of his property for life, "free from the incidents of property, and not subject to his debts, would be a dangerous and startling proposition to sanction." We do not think it can be sustained by reason or authority. So far as we are aware, the authorities are the other way. *Warner v. Rice*, supra; 4 Kent, Comm. 311; *Mackason's Appeal*, 42 Pa. St. 330; *Ghormley v. Smith*, 139 Pa. St. 584, 21 Atl. 135; *McIlvaine v. Smith*, 42 Mo. 45 (approved as to this point in *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780); *Bank v. Windram*, 133 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342.

But, conceding this to be the law as to those who are *sui juris*, how far does it apply to married women or to a deed made by one in contemplation of marriage? That is the important and most difficult question before us. The doctrine of the separate estate of a married woman was purely a creature of equity, and worked a radical change in the principles of the common law applicable to the marital relation, as affecting the rights of property between husband and wife. In *Buckton v. Hay*, 11 Ch. Div. 645, the master of the rolls said that "it was considered that to give it to her without restraint would be practically to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation"; and in *Tullett v. Armstrong*, 4 Mylne & C. 377, Lord Chancellor Cottenham said: "The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together." And again: "It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation." In other words, the reason that the English courts permitted these restrictions on property of a married woman, although they had denied their validity as against the property of persons *sui juris*, was that her right to hold property free from her husband's control was created for her by courts of equity, and the chancellors thought she was not sufficiently protected from her husband without this restraint. It was very reluctantly done, and only because it was deemed necessary for the protection of wives from their husbands, as a study of the English cases will show. What we have said above in regard to these restraints imposed by third persons will, of course, apply to a married woman when she is the recipient of the bounty of another; but we cannot consent to the establishment of a doctrine in this state which will enable a mar-

ried woman, or a woman in contemplation of marriage, to place her property that would be otherwise responsible for debts contracted with reference to it beyond the reach of her creditors, and still enjoy the use and benefit of it as fully and completely as she had done before. We do not mean to intimate that she cannot so settle her separate property as to place it beyond the control and reach of her husband and his creditors, but when the rights of her creditors are involved, and the property in question be of the character that would be liable to such creditors but for such restraints, she should not be permitted to escape the payment of her just debts by reason of her own declaration that such property should not be liable for her debts, or that the income should be paid to her alone and not to another, notwithstanding it is made a matter of record before the debts are contracted. There is no necessity to establish such a doctrine for her protection against her husband, as, under the laws of this state, she has ample protection against him and his creditors, and we do not "assume that husbands will be constantly endeavoring to wrest their wives' property from them, and devote it to their own uses." *Cooke v. Husbands*, 11 Md. 505; *Olivet v. Whitworth*, 82 Md. 262, 33 Atl. 723. Separate estates were created in equity because married women could hold no other. As the husband at common law became the absolute owner of the wife's personal property and of the rents and profits of her real estate during coverture, she was not liable for debts, or, to speak more accurately, she could not contract them. When, therefore, chancellors created an estate that she could hold and dispose of, and which was liable for her debts, if contracted with reference to it, by going a step further, and permitting restraints on alienation and anticipation, they did not place the property in a worse position, so far as the debts of married women were concerned, than it was before the equitable separate estate was created. But, under our laws, a married woman may not only have an equitable separate estate, but by statute she may acquire property by purchase, gift, grant, devise, bequest, descent, in course of distribution, or, as amended in 1892, in any other manner, and, however obtained, it is protected from the debts of her husband. Such property she holds for her separate use, with power of devising it as fully as if she were a feme sole, and she may convey it by joint deed with her husband. It is not necessary for her to have a trustee to secure her the sole and separate use of her property, but, if she desires it, she can appoint one by deed, her husband joining with her, or she can apply to a court of equity, and have one appointed. The husband and wife may jointly charge her statutory separate property in the same way that she could charge her equitable separate estate, even by a parol contract, and courts of equity have the power to enforce the one as well as the other. *Wingert v. Gordon*, 66 Md. 106, 6 Atl. 581, and cases there cited. She may be sued at law, on a note, bill of exchange, single bill,

bond, contract, or agreement, executed jointly with her husband. Property earned by her skill, industry, or personal labor, as well as the income therefrom, is held by her to her sole and separate use, with power as a feme sole to dispose of it, and it is liable for debts incurred by her about such business. In short, the tendency of our legislation is to greatly enlarge both her powers and liabilities, although it carefully protects her property from her husband and his creditors, so that now many of the reasons for decisions rendered in the past century, or the early part of the present one, can no longer have much force under our changed conditions. This particular question was not passed upon by this court when we still had the conditions to meet that originally influenced the English courts, and as we are now called upon for the first time to decide it, at a time when the policy of the state is so radically different in its dealing with married women from what it formerly was, we do not feel called upon to be governed by reasons no longer applicable, and make an exception in favor of married women, or those in contemplation of marriage, especially as it might result in creating a privileged class, which would not reflect credit upon the law that created it nor the state that fostered it. Property is too easily transferred from husband to wife to permit her to do what he is prohibited from doing, because it is contrary to the policy of the law, calculated to tempt his honesty, and to impose upon and deceive those dealing with him. If the wife is at the mercy of and under the absolute control of the husband, as seemed to be the moving cause of the English courts when they supported the validity of the prohibition against alienation in her favor, then he can with great facility make use of her to do what he himself cannot do, if we hold she can place such restraints on her property. He would only be required to convey the property to her, and let her place such restraints on it as he desired, to make it impregnable against the assault of creditors, although he could not do it himself as long as the property was his own, because he was *sui juris*. Would not the result of such a decision be that a married man who wanted to have such restraints on his property could convey it to his wife, and thus accomplish indirectly, through his wife, what he could not do directly?

Without meaning to say that the facts and reasoning are in all respects applicable, the Massachusetts and Pennsylvania cases are more in accord with our views of the proper doctrine to establish as the law of this state on this question than the English cases are. See *Bank v. Windram*, 133 Mass. 175, *Jackson v. Von Zedlitz*, 136 Mass. 342, and *Ghormley v. Smith*, 139 Pa. St. 584, 21 Atl. 135, in which the courts of those states have passed on the general subject, as well as on the proposed exception in favor of married women. In the case of *Reid v. Trust Co.*, *supra*, this court, after referring to *Brandon v. Robinson*, 18 Ves. 434, *Buckton v. Hay*, 11 Ch. Div. 645, and *Tullett v. Armstrong*, 4 Mylne & C. 377, to show

the views of the English courts, said: "It thus appears that the exception in case of devises and settlements upon married women was deemed necessary only because of the general rule that restraints upon alienation and anticipation were always regarded as repugnant to the estate. But in Maryland this is not the general rule." And then, after quoting from *Smith v. Towers*, to show what the law is here, it was said: "In this state, therefore, where the law is as just stated, it is difficult to perceive why trusts in cases of married women do not stand on the same footing as other trusts of the same nature." Although this precise question was not involved in that case, we strongly intimated that we differed from the English decisions which applied a different rule in favor of trusts to married women from that applied to other trusts of the same nature, and we are of opinion that the rule which we have above laid down for persons who are sui juris is equally applicable to them. The income from the property in the hands of the trustee is therefore liable in equity to the payment of the debt due the appellant. We have not thought it necessary to advert to the fact that the deed was made when Mrs. McGill was single, as it seems to have been practically conceded that it was made in contemplation of marriage, or that her husband departed this life after the debt was contracted and after this suit was brought. The decree will be reversed, and the cause remanded, in order that the lower court may pass a decree requiring the trustee to pay out of income now in his hands, or that may hereafter come into his hands, the amount due on the note of Mrs. McGill, together with the costs in this court and the court below. Decree reversed and cause remanded.

PAGE, J., dissenting.

(98 Md. 689)

HARTLOVE v. DURHAM.

(Court of Appeals of Maryland. Jan. 14, 1898.)

SALE—ACTION FOR PRICE—BREACH OF CONTRACT.

1. When a seller, under a contract of sale, is prevented from completing a delivery partly made, by the buyer's wrongful refusal to accept more goods, or by other wrongful acts, the seller is entitled to recover for the goods already delivered and accepted.

2. When the testimony relating to an alleged breach of contract is conflicting, it should be submitted to the jury.

Appeal from superior court of Baltimore city. Action by John J. Durham against Asbury W. Hartlove. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before MCSHERRY, C. J., and BRYAN, PAGE, BRISCOE, BOYD, ROBERTS, and FOWLER, JJ.

Fred. C. Cook and John P. O'Ferrall, for appellant. John Gill, Jr., and James H. Preston, for appellee.

FOWLER, J. The plaintiff and defendant made contracts by which the former agreed to sell to the latter 2,500 cases of standard 3-pound tomatoes, at 55 cents per dozen, and the latter agreed to sell to the former 120,000 standard 3-pound cans, at \$1.75 per hundred, and 5,000 3-pound cases, at 8½ cents each. The goods sold by the defendant to the plaintiff were to be paid for by tomatoes as per contract. Each party proceeded to fulfill his contract, the plaintiff from time to time shipping tomatoes to the defendant, and the defendant shipping cans and cases to the plaintiff. But it was not long before differences and controversies arose between them, the result of which was that each charged the other with having violated their respective contracts. The plaintiff, claiming that he had fulfilled his contract, or that, if he had not so done, he had been prevented by the defendant, sued on the common counts, for a balance of \$647.46, on account of goods actually delivered and accepted by the defendant. He recovered a verdict for \$374.43. There was a motion for a new trial, which was overruled, and the defendant has appealed.

There is but one exception, and that relates to the ruling upon the prayers. By his first prayer the defendant asked the court to instruct the jury that, if they shall find that a special contract was entered into between the plaintiff and defendant on the 9th of July, 1896, and that it was never abrogated, abandoned, or annulled, the plaintiff is not entitled to recover on the common counts, and that consequently their verdict must be for the defendant. But it is apparent that this prayer is an erroneous presentation of the law, for, notwithstanding the fact that the contract may not have been abandoned or annulled, yet, if the plaintiff was prevented from fully complying with his part of the contract by the wrongful refusal of the defendant to accept any more goods, or by any other wrongful act of which there was evidence to go to the jury, then the plaintiff was entitled to recover, in an action on the common counts, the value of the goods delivered and accepted by the defendant. And so it has always been held. *Hannan v. Lee*, 1 Har. & J. 131; *Watkins v. Hodges*, 6 Har. & J. 98; *Denmead v. Coburn*, 15 Md. 29; *Manufacturing Co. v. Chambers*, 75 Md. 611, 23 Atl. 1024. There was ample evidence before the jury, if they believed it, to show that the defendant refused to accept some of the goods shipped by the plaintiff, and failed to ship cans in which to pack the tomatoes, and thus prevented the completion of the contract by the latter. This will appear by the letter of the 22d of September, 1896, and the evidence of the plaintiff. The same error was made in the defendant's second prayer. The third prayer of defendant, among other reasons, was properly rejected because it assumes that there was a breach of the contract of the 9th of July, 1896, the testimony upon that point having been conflicting, and it should have been, therefore, submitted to the jury. All three of the rejected prayers are open to other objections, but what

we have said is sufficient to show that they were properly rejected, and that, therefore, no error was committed by the rulings complained of. Judgment affirmed, with costs.

(87 Md. 726)

HERMANN v. MERTENS et al.

(Court of Appeals of Maryland. Jan. 21, 1898.)

MECHANICS' LIENS—COMPLETION OF BUILDING.

On October 6th, the owner of a building was notified by an employé of the contractor that his house was finished. He then made an entry in his book that the house was done, "all but transom glass," and later, "Transom glass put in Nov. 17th," by the contractor. The employé had no authority to make the statement, nor was he cognizant of the conditions of the specifications. *Held*, that the 60 days, after finishing the building, within which the notice of intention to claim a lien must be given (Code, art. 63, § 11), should be counted from the date the transom glass was put in, the building contract being entire, and not divisible.

Appeal from circuit court, Allegany county.

Bill in equity by F. Mertens' Sons against John L. Hermann. From a decree for plaintiffs, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, BOYD, and PEARCE, JJ.

R. H. Gordon and J. W. Thomas, for appellant. A. A. Doub, for appellees.

ROBERTS, J. The appeal in this case is from a decree of the circuit court for Allegany county, as a court of equity, directing the sale of certain property of the appellant in the city of Cumberland to satisfy a mechanic's lien. The facts, briefly stated, are that the appellant, on the 8th of May, 1893, entered into a written contract with a certain Otho H. Hewitt to erect in said city a building to be used as a storehouse, for which the appellant was to pay the sum of \$3,650. Shortly after the date of said contract, Hewitt purchased part of the material to be used in the proposed building from F. Mertens' Sons, who are lumber dealers in said city, and the appellees on this appeal. The amount of the bill for lumber and material furnished to said building by the appellees is the sum of \$1,148.48, subject to certain credits, leaving a balance of \$806.17, to secure the payment of which the appellees, on the 14th of December, 1893, filed their lien, having previously, on the 9th of December, 1893, given notice to the appellant of their intention to claim such lien. On the 14th of July, 1894, the appellees filed their bill to enforce said lien, whereupon the appellant filed his answer, denying nearly all of its material allegations. The appellant, by his answer, admits that at the time of furnishing said lumber and materials to said Hewitt he was the contractor and builder of the storehouse then in course of construction upon a lot of land owned by the appellant in said city. The payment of the lien is resisted by

the appellant, upon the alleged grounds: First, because there is no legally sufficient proof of the sale and delivery of the materials claimed to have been furnished to the appellant; second, because notice of an intention to claim a lien was not given within the time required by section 11, art. 63, of the Code.

The section of the Code just referred to reads as follows: "If the contract for furnishing such work or materials, or both, shall have been made with any architect or builder, or any other person except the owner of the lot on which the building may be erected, or his agent, the person so doing work or furnishing materials, or both, shall not be entitled to a lien unless, within sixty days after finishing the same, he, or his agent, shall give notice in writing to such owner or agent, if resident within the city or county, of his intention to claim such lien." The rule of construction which is to be applied to the section of the Code just quoted is found in section 41 of the same article, and reads as follows: "This article shall be construed and have the same effect as laws which give general jurisdiction, or are remedial in their nature." This court, in *Plummer v. Eckenrode*, 50 Md. 232, has defined the meaning of and placed certain restrictions upon this provision of the mechanic's lien law, where it has said: "While the forty-first section of the mechanic's lien law requires a liberal construction to be given to its provisions, it is nevertheless necessary that it should be substantially complied with, before a party, seeking to enforce an alleged mechanic's lien, can do so successfully either in a court of law or equity. *Hess v. Poulmey*, 10 Md. 237." With this brief reference to the law, we will examine the testimony contained in the record. As already stated, the contract between the appellant and Hewitt, the contractor, was executed on the 8th of May, 1893. Shortly thereafter Hewitt applied to the appellees to supply certain lumber and materials required in the construction of the building, which they agreed to do. From time to time orders were left by Hewitt with appellees for such lumber and materials as were needed in the progress of the work on the building, and the lumber and materials were loaded upon the appellees' wagons at their yards in Cumberland, and hauled away by their employés, whenever directed to haul the same to the appellant's building, then in course of construction. The building was completed, and no word of complaint was ever at any time made by the appellant, or by any person, of a failure on the part of the appellees to deliver the lumber and materials as they were needed, and had from time to time been ordered. Nor is there any substantial evidence, in fact or pretense, to be found in the record that the appellees had failed to fulfill their contract in supplying said lumber and materials. The pleadings as well as the proof offered demonstrate to our entire satisfaction that the lumber and

materials were furnished as they were called for, except in some minor particulars of very insignificant consequence, which have no probative force in the determination of the question of delivery.

The second contention upon which it is claimed the decree should be reversed is that notice of an intention to claim a lien was not given within the time required by law. It is claimed by the appellant that the building was finished on the 6th of October, 1893, and to establish this fact the appellant rests his contention almost exclusively upon the testimony of Mr. Forbeck, who, when asked, "Did you notify Mr. Hermann of the completion of the building?" responded, "Yes, sir; when I came down the stairway into the storeroom, I made the expression in a joke. I says, 'Johnny, your old house is finished.'" On cross-examination, when asked whether he knew the building was completed in accordance with the specifications, he answered that he could not tell; had not seen them, and could not tell what they called for. The witness doubtless thought the building was completed on the day he named, the 6th of October, but it is giving too much weight to his testimony to permit him to determine the effect of a contract about which he knew absolutely and confessedly nothing. When Forbeck informed the appellant that his house was finished, he (the appellant) made an entry in his book, which has been cut therefrom, and filed as an exhibit with his testimony, and reads as follows: "House done, all but transom glass, Oct. 6, 1893. Transom glass put in Nov. 17, 1893, by Charles and father" (meaning Hewitt and son). As we have said, it would be giving undue weight and importance to the testimony of Forbeck, who was but an employé of Hewitt, to allow him to terminate the contractual relationship existing between the appellant and Hewitt or the appellees, simply because he thought he had completed the building. If we are to accept the construction placed upon Forbeck's statement by the entry made by the appellant in his book, then the building was not completed until the transom glass was put in on November 17, 1893. Looking to the contract, which is entire, and not divisible, it is quite manifest that it required Hewitt to put in the transom, and the appellees contracted to furnish the same. It is very true that there was some delay in obtaining the glass for the transom, but it is in no sense properly attributable to the appellees, as it was occasioned by the desire of the appellant to have a certain kind of glass. Not succeeding in procuring such as he preferred, he was permitted to select the same. When obtained, it was charged to Hewitt, and on the 11th of November, 1893, the appellees credited Hewitt's account with the amount of the bill for the glass. This was the last item in the account for the materials furnished the appellant for the completion of his building,

and none were supplied by the appellees after the last-mentioned date. From a careful examination of all the proof contained in the record, we are of opinion that it clearly establishes the sale and delivery of the materials and lumber claimed to have been furnished the appellant by the appellees, and we entertain no doubt that the notice to claim a lien by the appellees was given within the time required by law. Finding no error in the decree of the court below, we affirm the same. Decree affirmed, with costs.

(87 Md. 204)

KNOWLES v. STATE.

(Court of Appeals of Maryland. Feb. 10, 1898.)

DENTISTS—CERTIFICATES.

The provision of Act 1896, c. 378, § 12, that the act which makes it unlawful to practice dentistry without obtaining a certificate from the state board shall not interfere with "persons holding certificates issued to them prior to the passage of this act," refers to certificates issued under Code, art. 82, of which the act of 1896 is simply a repeal and re-enactment, with amendments, and not to those of other states; section 7 providing that a temporary certificate, good till the next meeting of the board, may be issued to the holder of a diploma from the board of examiners of another state.

Appeal from criminal court of Baltimore city.

William H. Knowles appeals from a conviction. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, ROBERTS, BOYD, and BRISCOE, JJ.

A. S. J. Owens, for appellant. Atty. Gen. Clabaugh and Henry Duffy, for the State.

BRISCOE, J. The record in this case shows that the appellant was indicted and convicted in the criminal court of Baltimore city for unlawfully practicing dentistry without having obtained from the state board of dental examiners a certificate authorizing him to practice, as required by the act of 1896 (chapter 378). The question presented on the appeal involves a construction of this act, and arises upon a bill of exception taken to the ruling of the court in rejecting as evidence a certificate of qualification and registration issued by the board of dental examiners of the state of Ohio. The act of 1896 declares that it shall be unlawful for any person to practice dentistry in the state of Maryland without first obtaining a certificate as provided by the act. And by section 12 of the same act certain classes of persons are excepted from its operation. This section provides that nothing in this article shall be so construed as to interfere with the rights and privileges of resident physicians and surgeons, or with persons holding certificates issued to them prior to the passage of this act, and dental students operating under the immediate supervisions of their instructors in dental infirmaries or dental schools chartered by the

general assembly of Maryland. Now, it is admitted that the appellant did not have a certificate from the Maryland state board of dental examiners authorizing him to practice, but it is contended that he is within the exception of section 12 of the act, in that he holds a certificate duly issued to him by the dental board of the state of Ohio. Whether he can be considered to be within this exception depends upon the meaning and effect to be given to that part of the twelfth section which reads, "or with persons holding certificates duly issued to them prior to the passage of this act." And in reference to this we are of the opinion that it was the intention of the legislature to confine the act of 1896 in its application to certificates which had been issued by the dental board of this state, under article 32 of the Code of Public General Laws, and to save all certificates which had been previously issued thereunder, without giving the act any extra-territorial force. It also appears that the act of 1896 is simply a repeal and re-enactment, with amendments, of article 32 of the Code; and its language, taken in connection with the previous legislation on this subject, shows conclusively that the act refers only to certificates issued by the board of dental examiners of the state, and not to those issued by other states. And this construction, we think, is fully sustained by reference to the seventh section of the act itself, which provides that a temporary certificate for a specified time may be issued by the officers of the board to any applicant holding a regular dental diploma duly registered by a board of dental examiners created by the laws of any one of the United States, but no such certificate shall be issued for any longer time than until the next regular meeting of the board. It follows, then, that there was no error in the rejection of the testimony offered on the part of the appellant, and, for the reasons we have given, the judgment will be affirmed. Judgment affirmed, with costs.

(87 Md. 207)

**MARYLAND TUBE & IRON WORKS OF
HAGERSTOWN v. WEST END IMP.
CO. OF HAGERSTOWN, WASH-
INGTON COUNTY.**

(Court of Appeals of Maryland. Feb. 10, 1898.)
CORPORATIONS—BONUS TAX—FAILURE TO PAY—
CAPACITY TO SUE—OBJECTION.

1. Under Acts 1894, c. 114, § 88F, prohibiting a corporation from exercising corporate powers until a certain bonus tax is paid, a corporation not paying such bonus has no capacity to sue, though section 88H provides that the state may sue the corporation to recover the bonus.

2. Under Acts 1890, c. 536, § 88A, prohibiting corporations from exercising corporate powers until a certain bonus tax is paid, a person sued by a corporation not having paid such bonus may object that it has no capacity to sue.

3. A corporation having no capacity to sue because of its failure to pay the bonus tax required by Acts 1890, c. 536, § 88A, does not ac-

quire the right to continue the prosecution of a suit by paying the bonus after commencing the suit.

Appeal from circuit court, Washington county.

Bill by the Maryland Tube & Iron Works of Hagerstown against the West End Improvement Company of Hagerstown, Washington County. Decree for defendant, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BOYD, and PEARCE, JJ.

Hy. Kyd Douglas and F. W. Mish, for appellant. Alex. Armstrong, Norman B. Scott, Jr., and S. B. Loose, for appellee.

PEARCE, J. The bill was filed in this case September 19, 1892, by the appellant against the appellee, for the specific performance of an agreement to convey land, made in writing between the appellee on the one part and G. C. Knipe and others on the other part, who subsequently assigned all their interest in said agreement to the appellant, with the consent, as it alleges, of the appellee. The appellee answered the bill, admitting the execution of the agreement, but alleging various defenses to the bill, among which is a denial of the existence of the appellant as duly incorporated under the laws of Maryland, and a denial of its right to maintain this suit by reason of its failure to comply with the provisions of chapter 536 of the Acts of 1890. The general replication was filed, and a mass of testimony was taken, and the bill was dismissed by the court below (Judge Stake) on the ground that the appellant had no legal existence as a corporation, and was, therefore, not entitled to maintain the suit. Under the agreed statement of facts upon which this appeal was brought into this court, the sole question for review is the right of the appellant to maintain this suit without having first paid the tax of one-eighth of 1 per cent. on the capital stock of the company in the manner provided by Act 1890, c. 536. The statement of facts admits that both the appellant and the appellee are incorporated in Washington county under the laws of Maryland, and that the agreement sought to be enforced is correctly set forth in the record. It also admits that at the time the bill was filed the appellant had not paid, and had not been notified to pay, the first installment of bonus as per chapter 536, Acts 1890, but that it did on the 18th of May, 1893, pay the same to the comptroller of the state. The record does not show the date when this statement of facts was made or filed, but the reference therein to the opinion of the court dismissing the bill which was filed June 1, 1897, shows it was made and filed after that date. This is only important to show that the admission of appellant's due incorporation can only be regarded as an admission of incorporation at that date, June, 1897.

It will thus be seen the question before

the court is a narrow one. In the answer, the agreed statement of facts, and in the opinion of the court below, as well as in the argument in this court, the case was regarded as depending wholly upon the construction of chapter 536, Acts 1890, and, if this were the fact, there would be less difficulty in reaching a satisfactory conclusion. But the act of 1894 (chapter 114) deals with the same precise subject-matter, and if it can be said it does not repeal the act of 1890, it yet materially changes the law applicable to cases arising under the act of 1890, and we are required to consider and construe the act of 1894. It will be seen that the titles of these acts are in precisely the same words, except that the act of 1890 is, "An act to add a [one] new section to article eighty-one of the Code, * * * to be designated as section eighty-eight A," while the act of 1894 is, "An act to add six new sections to article eighty-one of the Code, * * * to be designated as sections eighty-eight," F, G, H, I, J; and that the word "corporation" is used in the title of the latter act where the word "company" is used in the title of the former. The act of 1894 specifically provides that no corporation incorporated prior to the date of the passage of that act shall in any manner, by that act, be relieved or released from the payment of any bonus due under the act of 1890; and this proviso, taken in connection with the repealing clause in section 2 of that act, clearly indicates the legislative purpose to repeal the future operation of the act of 1890, while saving all remedies and results by reason of the nonpayment of any bonus by any corporation incorporated prior to the passage of that act. It should be noted here that chapter 244, Acts 1890, adds five new sections to article 81 of the Code, to come in after section 88, and to be designated as sections 88 A, B, C, D, and E. These sections deal only with taxes on the assessed value of the shares of capital stock of corporations, and not with the bonus tax. Then came chapter 536, Acts 1890, which added one new section to article 81 of the Code, to come in after section 88, and to be designated 88A, so that under these two acts there were two sections each designated 88A. It is thus made evident that the draftsman of chapter 114, Acts 1894, with these two acts of 1890 before him, and intending to avoid the existing confusion arising from the designating of two sections as 88A, designed to repeal Act 1890, c. 536, and to substitute section 88A of that act for section 88A of the Act 1890, c. 536, leaving sections 88A-E, c. 244, Acts 1890, to stand in their regular order of precedence. *Montel v. Coal Co.*, 39 Md. 171, 174. The appellant was incorporated prior to May 18, 1893, since it paid the first installment of bonus tax on that date, but it appears from examination of the act of 1894 that the proceeding prescribed therein for the recovery of the bonus tax upon corporations, and the provisions setting forth

the result of nonpayment, are applicable as well to corporations created before as after the passage of that act, and that, if there is anything to be found in that act not contained in the act of 1890 which would sustain the appellant's right to maintain this suit, it is entitled to the benefit thereof. Comparing chapter 244, Acts 1890, with chapter 114, Acts 1894, it is evident that the draftsman of the act of 1894, overlooking the true theory and design of the act of 1890 (chapter 536), or deliberately intending to alter its true theory and design, substantially provided the same remedy and procedure for the recovery of the bonus tax as was, by chapter 244 of 1890, provided for the recovery of the tax upon the assessed value of capital stock; and it is now urged by the appellant, since the oral argument, that, as the act of 1894 subjects the corporation to suit by the state for the recovery of this bonus tax, it necessarily follows that the corporation has a legal existence for all purposes, and therefore full capacity to sue. But with this contention, however plausible and forcible the argument at first blush, we are not able, after full and careful consideration, to agree; and we are of opinion that, if the appellant would be held incapable of maintaining this suit under the act of 1890, it must be so held under the act of 1894. To hold otherwise, and to hold, as the appellant urges, that this act recognizes a corporation which has not paid the bonus tax when due as an existing, moving, active corporation for all purposes, would be to strike with absolute nullity the plain and imperative language of section 88F, which declares that no such corporation shall have or exercise any corporate powers until such bonus has been paid. It is settled law that charters or statutes conferring franchises on a corporation are to be construed in favor of the public, rather than the corporation; and to gratify this rule where the charter, as here, is under a certificate, the general law is to be read into the certificate. Every word, phrase, or sentence doubtful or ambiguous is to be interpreted in favor of the state. Thompson, in his work on Corporations (section 5660), says: "The rule is simple. That which the company may do by its charter it may do. Beyond that its acts are illegal."

In *Roland Park Co. v. State*, 80 Md. 448, 31 Atl. 298, Acts 1890, c. 536, and Act 1894, c. 114, were considered on another point, and it was said: "What we have to do is to discover the legislative intention, and to give it, when ascertained in accordance with established rules, full and complete effect; * * * and this intent may be gathered, not merely from the language of the enactment, but also from the causes or necessity which prompted its passage. A result which may flow from one construction or another of a statute is always a potent fact, and is sometimes in and of itself conclusive as to the correct solution of the question as to its meaning." One result which

might follow the establishment of appellant's contention would be that corporations defaulting under this act might not only continue in the full exercise of the prohibited powers for two years after such default, but might, before the expiration of that period, dispose of all their property, and leave the state a barren judgment for this bonus. Such a result could not have been within the legislative contemplation, and ought not to be permitted if it can be avoided by any sound construction of the whole act. It is a cardinal rule of construction that, where one part of a statute is susceptible of two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions and opposed to the other, that construction which will, under all clauses of the statute, be harmonious, must be adopted. *Magruder v. Carroll*, 4 Md. 348, 349; *Alexander v. Worthington*, 5 Md. 472. Sections 88F and 88H must be construed together, and by so doing section 88F must be taken to prohibit generally the having or exercising of any corporate powers before payment of the bonus, which would include generally suits by or against the corporation; and the office of section 88H is merely an exception withdrawing from the general purview and operation of section 88F the particular suit authorized for the recovery of the bonus tax by section 88H. Every corporation is the mere creature of the state, and where neither its charter nor any statute restricts the powers through which it maintains itself and responds to the discharge of its obligations, it may be conceded that the right to sue and the liability to respond to a suit are correlative; but the state, which creates the corporation, is sovereign, and, while withholding from the corporation or suspending the right to sue before compliance with a revenue measure, as the price of the exercise by it of corporate powers, may clearly, if it see fit, subject such corporation to suit by the state for noncompliance with such condition precedent; and we think the court below correctly and clearly stated the law when it said "the effect of the law is to hold in abeyance the right and remedy of the suing corporation," and we are of opinion that this proposition is as clear under the provisions of chapter 114, Acts 1894, as it is under chapter 536, Acts 1890.

The appellant contended that the validity of its incorporation is conceded in the agreed statement of facts, but, even if this would affect the result, we do not so understand the concession. It is expressly denied in the answer, and the agreed statement of facts was entered into after payment of the bonus, when its corporate power to sue was no longer held in abeyance, and when the right to sue was complete under the statute.

The next contention of the appellant is that the question of corporate power cannot be raised collaterally, or in any way except by a direct proceeding by the state to forfeit the charter. There is, of course, no doubt that mere causes of forfeiture cannot be taken advantage of col-

laterally, and that, where the right to sue has once become vested in the corporation by compliance with all conditions precedent thereto, it can only be divested by forfeiture in some legal mode of the charter. But this case does not come within that rule. We have carefully examined all the cases cited by the appellant, and it will be found that all of them are cases merely of irregularity, and not of nullity; cases in which the power to sue had become a vested power under the charter by a substantial compliance in good faith, with the requirements thereof, notwithstanding some irregularity in the proceedings thereunder. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 122, was the case of nonuser of corporate powers, and Chief Justice Buchanan was careful to say: "Where there is an existing corporation, capable of acting, cause of forfeiture can only be enforced by *scire facias* or *quo warranto*, issued at the instance of the government creating the corporation, and cannot be taken advantage of incidentally or in any other way by an individual, since the government, with which alone the contract arising out of the charter is made, may waive the breach of any condition of that contract, and cannot be made to enforce the forfeiture, whether it will or not." But here the state has, by the act of 1890, passed before the incorporation of the appellant, declared its will that, until compliance with the fundamental condition which was disregarded in this case, the appellant should have no other or greater corporate power than it would have had after forfeiture enforced; and this legislative limitation of power is as effective for the purposes of this case as a decree of forfeiture made prior to the suit. *Regents of the University v. Williams*, 9 Gill & J. 426, was a question whether one corporation was merged in another, and the court held that neither non-user nor misuser of corporate franchises would authorize granting the same franchises to others, before a forfeiture had been judicially declared, and Chief Justice Buchanan was again careful to say: "*Scire facias* is the proper process when there is a legally existing body capable of acting, but who have abused their power; and *quo warranto*, which properly applies where there is a corporate body *de facto* only, but who take upon themselves to act, though from some defect in their constitution or organization they cannot legally exercise their powers." So with *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. 346, where it was contended that the charter of the Planters' Bank, under one of its sections, by reason of the suspension of specie payments, became *ipso facto* null and void, without judicial inquiry upon the subject; but the court held proceeding by *scire facias* necessary. The following cases, cited by appellant: *Taggart v. Railroad Co.*, 24 Md. 596; *Busey v. Hooper*, 35 Md. 30; *Turnpike Co. v. Creeger*, 5 Har. & J. 122; *Hamilton v. Railroad Co.*, 1 Md. Ch. 107; *Keene v. Van Reuth*, 48 Md. 194; *Musgrave v. Morrison*, 54 Md. 166,—will all be found on examination to be governed by the principles applied in *Chesapeake & O. Canal Co. v. Baltimore*

& O. R. Co., 4 Gill & J. 1, and are all cases of legally existing bodies capable of acting, and which had in good faith attempted to comply with all legal requirements precedent thereto. On the other hand, the decisions in Maryland have always been that the legal existence of a corporation is always open to inquiry. *Agnew v. Bank*, 2 Har. & G. 493; *Lyons v. Railroad Co.*, 32 Md. 18, in which the court speaks of "conditions which, by the express provisions of the statute, are made conditions to be performed before and as a foundation of the exercise of powers and privileges under the charter. Also *Hammond v. Straus*, 53 Md. 12; *Smith v. Mining Co.*, 64 Md. 94, 20 Atl. 1032; *Bonaparte v. Railroad Co.*, 75 Md. 347, 23 Atl. 784; *Lord v. Association*, 37 Md. 325,—in which it is said (citing *Ang. & A. Corp.* § 83): "There is certainly no doubt that, where a corporation is created by statute, or under a general statute, as in this case, which requires certain acts to be done before it can be considered in esse, there those acts must appear to have been done, in order to establish the corporate existence." We find nothing in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, in conflict with the law laid down in the Maryland cases just cited; and in *Eaton v. Aspinwall*, 19 N. Y. 121, relied on by the appellant, the language of the act was not that 10 per cent. of the capital stock should be paid in "before it should be a corporation," but that, "where the certificate was filed, and ten per cent. of the stock paid in, it should be a body politic." But, even if it be conceded that the legal construction put by the appellant upon the language used is the correct construction, that case could not be accepted as controlling in the face of our own decisions, and when compared with other cases in New York. In *Williams v. Bank*, 7 Wend. 539, Chancellor Walworth said, "A contract made with a corporation by that name is neither an admission nor any evidence that it is entitled to one by that name as a corporation aggregate." And in *Canal Co. v. Hathaway*, 8 Wend. 490, Judge Nelson said: "When a corporation sues as such, if they have not the powers and privileges assumed in their dealings with one, it is their fault, and not his. Whether they had these powers must have been known to them, and not to defendant, and no act of his could legally add to or detract from them. Why, then, should he be estopped from denying their corporate capacity, or they be excused from establishing it by legal evidence, when they are endeavoring to enforce their rights in a manner and before a tribunal which can entertain their suit only upon proof or assumption that they are a corporate body, duly constituted by competent authority." In *Field v. Cooks*, 16 La. Ann. 153, it was held that the recognition of defendant as a company by the plaintiffs did not preclude them from showing that defendant had no legal existence as a corporation; and that, to produce an estoppel, there should be at least an admission that the company was entitled to exercise corporate powers. Thompson, in his work on Corporations (section 6586), while

admitting a regrettable conflict of judicial opinion upon this question, says that those decisions which hold that corporations can enjoy franchises while repudiating conditions upon which they are conferred unless the state is worried into a judicial proceeding to oust them "are inexcusable," and he says, in section 6587: "The sound doctrine is that, where a statute creating a corporation declares that, unless certain acts are propounded within a prescribed time, its corporate existence and powers shall cease, or its powers and franchises shall terminate, the statute executes itself, without the necessity of forfeiture by legislative declaration or in a judicial proceeding. In such case its legal existence is a fact in pais, to be ascertained in any judicial proceeding, direct or collateral." It is laid down in 2 *Mor. Priv. Corp.* § 778, that the doctrine of estoppel cannot be successfully invoked unless the corporation has a de facto existence; and Judge Cooley, in *Swartwout v. Railroad Co.*, 24 Mich. 392, says: "Where there is a de facto corporation, with no want of legislative power to its due and legal existence, in controversies between the de facto corporation and those who have entered into contract relations with it, where the questions suggested are only whether there has been strict compliance with the provisions of the law relating to incorporation, such questions should not be suffered to be raised." In *Johnson v. Hines*, 61 Md. 130, this court has said, speaking of the invalidity of a mortgagee's title derived from a trustee's deed made without ratification of the sale, but after ratification of an audit: "There is a marked and important distinction between nullities and irregularities. An irregularity may be waived; a nullity never can be waived." In recognition of this fundamental principle, the exact question raised here was decided in the recent case of *Jones v. Hardware Co.*, 21 Colo. 263, 40 Pac. 457. This was an action of replevin by the company to recover a stock of goods. The statute in that case provided that every corporation incorporated under any general or special law should pay the state a fee, to be graded according to its capital stock, to be due and payable upon the filing of the certificate of incorporation, and that no such corporation should have or exercise any corporate powers until such fee should have been paid; and it was held that an association, having failed to comply with the statute with respect to the payment of this fee, was neither a de jure nor a de facto corporation, and was not competent to maintain a suit as such. The court said: "The language of the act is plain and unambiguous. The doctrine of estoppel cannot be successfully invoked unless the corporation has at least a de facto existence. A de facto corporation can never be recognized in violation of a positive law. There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisites to the exercise of such powers." These principles were clearly recognized and applied in *Boyce v. Trustees*, 46 Md. 373, 374,

where the court said: "The statute law of the state expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law, clearly against its policy, and justified upon no sound principle in the administration of justice."

Nor can we agree that the subsequent payment of this bonus is equivalent to its payment before the commencement of the suit. We think it clear that the right of action must be complete before the action is brought, and the subsequent occurrence of a material fact will not avail in maintaining it. *Dean v. Railway Co.*, 119 N. Y. 545, 23 N. E. 1054; *Hollingsworth v. Flint*, 101 U. S. 596; *Baker v. Tillman* (Ga.) 11 S. E. 355. If the plaintiff is not itself incapacitated to sue, and yet cannot maintain the particular suit because the right of action did not accrue until after commencement of the suit, a fortiori should it be precluded from maintaining the suit where the inability is not a special one going to the particular suit, but a general inability going to the maintenance of any suit at that particular time. We find nothing in the authorities relied on by the appellant to overthrow the doctrine upon which this decision is placed, and we must affirm the decree appealed from. Decree affirmed.

(86 Md. 627)

RUCKLE et al. v. GRAFFLIN et al.
(Court of Appeals of Maryland. Jan. 4, 1898.)

RESIDUARY DEVISE.

Real estate acquired in fee by testatrix after publication of will passes by the residuary clause thereof, which, following bequests and devises to different persons, gives all the remainder of her "effects" to person designated.

Appeal from circuit court of Baltimore city.

William T. Ruckle and others filed exceptions to ratification of sale by Lewis F. Grafflin, committee of Thomas C. Ruckle, a lunatic, of 30 acres of land, as belonging to said lunatic. From decree overruling the exceptions, exceptants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

Beverly W. Smith and Jos. S. Goldsmith, for appellants. John Watson, Jr., for appellees.

BRYAN, J. The question in this case arises from the interpretation of the will of Elizabeth Ann Ruckle, deceased. The first clause of the will is as follows: "I give to my brother, Thomas C. Ruckle, all my interest in a lot on North Liberty street, for his own benefit, also my ground rents on Stockton street; my bank and road stock to the children of my brother, William H. Ruckle, to be divided equally between them." Then follow several clauses disposing of both real and personal estate. The residuary clause is in these words: "To Thomas C. Ruckle I give all the remainder of my effects, he spending some money in inclos-

ing and fixing up the lot in Mount Olivet Cemetery. I appoint my brother, Thomas C. Ruckle, my executor of this, my last will and testament." After the publication of the will, the testatrix acquired title in fee to 30 acres of land in Baltimore county; and the question to be decided is whether this land passed under the residuary clause of the will.

Under our statute, all land which the testatrix owned at the time of her death will pass under the will in the same manner that it would have passed if it had belonged to her when the will was executed. It is very certain that the testatrix did not intend to die intestate as to any of her property. After disposing of property, both real and personal, she gives away all the remainder of her effects; that is, she said, in substance: "I have given away some of my effects; now I will give away the remainder of them." It is thus seen that she applied the word indiscriminately to her real and personal estate, designating both kinds of property as her "effects." It was her purpose to dispose of all her property, and she certainly had no intention of leaving the residue to any one except the person named in the last clause of her will. There is no escape from the conclusion that she intended that he should have all that was not given to other persons. The will takes effect as if it had been executed immediately before her death, and it therefore operates on all the property which she then had, real and personal. We must give this construction to the will unless there is some rule of law which determines that real estate cannot be designated in a will by the word "effects." We shall consider this question.

The inquiry is not into the accurate or technical meaning of language, but into the intention which a testator had in a given case when he used it. And we find, on examination of the authorities, many instances in which land was devised by terms which would not ordinarily be understood to describe it. In *Doe v. Owings*, 30 Md. 447, it was said that, in order to create a fee, it was not necessary to use any technical terms, nor any particular form of words; but any words sufficiently showing the intention of the testator to dispose of his whole interest in the thing devised would have the same effect as a devise to one in fee simple or forever. It was also said that the words "estate" and "property" would carry a fee; and also the words "all I have," or "all I am worth," or "everything I die possessed of." And in the case then before the court, as the testator had shown an intention to dispose of his whole estate, it was held that a fee simple was given by these words: "All and everything that shall fall to me at my mother's decease." In 2 Jarm. Wills (5th Am. Ed.) p. 341, etc., many cases are collected in which the ordinary meaning of the words is reversed by the context of the will. For instance, when the intention of the testator required it, real estate was held to be comprehended by the word "legacy," by the word "ef-

fects," and even by the expression "personal estates"; and the appointment of a person as "residuary legatee" entitled him to all real estate not specifically disposed of in the will. It is needless to accumulate authorities on this point. Without stating in detail the proceedings in the court below, it is sufficient to say that the decision was made on the ground that Thomas C. Ruckle took a fee simple in the land purchased by the testatrix subsequently to the will. Order affirmed, with costs.

(37 Md. 1)

FARMERS' PACKING CO. OF TALBOT COUNTY v. BROWN et al.

(Court of Appeals of Maryland. Jan. 4, 1898.)

WAREHOUSE RECEIPTS—VERDICT.

1. Under Code, art. 14, § 1, declaring warehouse receipts negotiable; and article 2, § 3, declaring a person intrusted with or in possession of a bill of lading the owner of the goods, so as to give validity to his contract relative thereto,—the shipper of goods, though the owner, cannot claim them as against a warehouseman and the pledgee of the warehouse receipts, where the consignee receipts for the goods from the carrier, directs their storage in the warehouse, and gets a loan on the pledge of the warehouse receipts.

2. The jury may, before delivery and record of a verdict, correct it, to state separately, as required by Code, art. 75, § 111, the value of goods replevied, and the damages.

Appeal from superior court of Baltimore city.

Action by the Farmers' Packing Company of Talbot county, Md., against Alexander Brown & Sons. Judgment for defendants. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PEAROE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Thomas I. Elliott and Frederick T. Dorton, for appellant. Brown & Brune and George R. Willis, for appellees.

BRISCOE, J. This is an action of replevin, brought by the appellant, the Farmers' Packing Company of Talbot county, against the appellees, Alexander Brown & Sons, to recover 5,000 cases of canned corn, alleged to be the property of the appellant. The defendants pleaded property in themselves and property in the Baltimore Warehouse Company. To these pleas a replication was filed, and, upon issue joined, the case was tried, which resulted in a verdict for the defendants. At the trial there were eight exceptions reserved, and these form the basis of this appeal. We will pass upon them in their regular order, in so far as it may be necessary to the determination of this case.

The plaintiff is a corporation, engaged, among other things, at Easton, Talbot county, in canning and packing corn. The defendants are general agents, and engaged in the warehouse business, at Brown's wharf, Baltimore. It appears from the record that the appellant, during the month of Septem-

ber, 1894, shipped, by steamboat, to Baltimore, 5,000 cases of canned corn. When this corn reached Baltimore, Percival Le Roy & Co., who were dealers in canned goods and supplies, were notified, by a shipping ticket from the steamboat company, of its arrival. This ticket showed upon its face that Le Roy & Co. were the consignees of the corn. It was then taken to Brown's warehouse for storage, and, upon the faith of the tickets issued by the carrier (the steamboat company), the receipts of the warehouse company were issued in the name of Percival Le Roy & Co. And on the 29th of September, 1894, Le Roy & Co., the consignees, obtained from the Baltimore Warehouse Company a loan of \$5,000 upon these warehouse receipts, which had been previously issued in its name, and which were in its possession. The property now in dispute was replevied by the appellant on the 31st of October, 1894; and, the judgment below being for the defendants, the plaintiff has appealed.

Now, it is clear that since Act 1876, c. 262 (Code, art. 14, § 1), all warehouse, elevator, or storage receipts whatsoever, for goods, chattels, or commodities of any kind stored or deposited in any warehouse, are declared to be negotiable instruments and securities, unless it be provided in express terms to the contrary on the face thereof, in the same sense as bills of exchange and promissory notes and full and complete title to the property mentioned therein shall vest in each and every bona fide holder thereof for value, altogether unaffected by any rights or equities whatsoever between the original or any other prior holders of which such bona fide holder for value shall not have had actual notice at the time he became such. And by section 8 of article 2 it is provided that any person intrusted with and in possession of any bill of lading, storekeeper's or inspector's certificate, order for the delivery of goods, or other document showing possession, shall be deemed the true owner of the goods, wares, or merchandise described therein, so far as to give validity to any contract thereafter to be made by such person with any other person or body corporate for the sale or disposal of the said goods, or for the pledge or deposit thereof, as a security for any money or negotiable instrument advanced or given on the faith of such documents, provided that such person or body corporate shall not have notice, by such document or otherwise, that the person so intrusted is not the actual and bona fide owner of such goods, wares, and merchandise. These statutes have been recently before this court, and received its construction. *Tiedeman v. Knox*, 53 Md. 618; *Ruhl v. Corner*, 63 Md. 182; *Seal v. Zell*, Id. 356. Looking, then, to the law as settled by the decisions of this court, and as applicable to the facts and circumstances of this case, we are of opinion that it was correctly stated in the defendants' instruction, which was

granted by the court: "The defendants pray the court to instruct the jury that if they find from the evidence that the Farmers' Packing Company, the plaintiff, during the month of September, 1894, shipped from Easton, consigned to Percival Le Roy & Company, in Baltimore, the 5,000 cases of canned corn which were afterwards replevied in this suit; and if the jury find that the said goods were shipped in various lots, and received from the 15th to the 28th of September, inclusive, and that said goods reached Baltimore by water, and that, on the arrival of each shipment at the wharf of the respective steamers transporting the same, the said respective shipments were, by direction of Percival Le Roy & Company, the consignees, transported for delivery to Brown's wharf, and that on each delivery of said shipments of canned goods a receipt prepared in duplicate by the steamboat company delivering the same, for the goods so delivered, indicating thereon that Percival Le Roy & Company were the consignees of said goods, was presented to the wharfinger of defendants, to be signed on behalf of Percival Le Roy & Co., the consignees; and if the jury further find that said goods were so received and receipted for and by direction of Percival Le Roy & Company, were stored in Brown's warehouse, and that the warehouse receipts offered as evidence were issued for said goods to Percival Le Roy & Co., by defendants' warehouseman, on the faith of said shipment receipts, and without any notice to him or to the defendants, from said shipment receipts or otherwise, that Percival Le Roy & Co. were not the actual and bona fide owners of the goods, mentioned therein respectively; and if the jury further find that thereafter the Baltimore Warehouse Company, upon presentation and indorsement to it of the said warehouse receipts by Percival Le Roy & Co., in good faith, and without notice that Percival Le Roy & Co. were not the actual and bona fide owners of the goods specified therein respectively, advanced to the said Percival Le Roy & Co., on the faith of said warehouse receipts and of the goods specified therein, the sum of \$5,000; and if they further find that the said advance is still due and unpaid,—then the verdict of the jury must be for the defendants on the issue of property in the Baltimore Warehouse Company." It follows, then, from this view of the law, that there was no error in the refusal of the appellant's prayers, because they proceeded upon an entirely different view of the law, and were not supported by the facts of the case. They were also unnecessary, and calculated to mislead the jury, as the law of the case had been accurately submitted by the appellees' prayers.

There were four exceptions taken at the trial on the part of the appellant to the ad-

mission of evidence. We have carefully examined these exceptions, and discover no error of which the appellant has a right to complain.

As to the first exception, it is only necessary to say that it does not appear from the bill of exceptions that the evidence objected to was submitted to the jury.

The witness Brainard, who was freight agent of the common carrier, in answer to the question allowed by the court, seems only to have testified as to the usual course of business of his company, in reference to the receiving, carrying, and delivery of freight. There was no error in the admission of this evidence. The second exception was to the allowing of the following question to be asked the witness Brainard: "In reference to the goods, what directions did you receive from Le Roy?"—the answer being: "Well, in all cases of the Farmers' Packing Company, take them to Brown's wharf." This testimony, we think, was material and relevant, for the purpose of showing under what authority the canned corn had been delivered by the steamboat company to Brown's wharf, thus showing the possession of the goods by the appellees.

The third and fourth exceptions will be considered together. The first is an exception to the admission in evidence of the warehouse receipts issued by the appellees in the name of Percival Le Roy & Co., and the second to the admission of testimony as to the usual course of business between the appellees and Percival Le Roy & Co., the consignees. The warehouse receipts were clearly admissible under the plea of property in the Baltimore Warehouse Company. These receipts were in the possession of C. A. Foote, the president of the company, who testified that they were for the corn replevied in this case.

The testimony objected to in the fourth bill of exceptions was admissible under the rulings of this court in the cases of *Busby v. Insurance Co.*, 40 Md. 572, and *Levi v. Booth*, 58 Md. 312.

The remaining exception relates to the manner of taking the sealed verdict. It is objected that the sealed verdict, as found by the jury, did not ascertain separately the value of the goods and the damages, as required by section 111 of article 75 of the Code. But, assuming this to be true, it further appears that the verdict was properly corrected by the jury before its record, so, when delivered by the jury and recorded by the court, it fully complied with the statute. A verdict can be varied by the jury at any time before it is recorded. *Edelen v. Thompson*, 2 Har. & G. 31; *Gaither v. Wilmer*, 71 Md. 365, 18 Atl. 590. Finding no error, the judgment will be affirmed, with costs. Judgment affirmed, with costs.

(70 Vt. 62)

CHILDS v. VILLAGE OF NEWPORT.

(Supreme Court of Vermont. Orleans. Jan. 31, 1898.)

EMINENT DOMAIN — WATER PIPES — AMOUNT OF LAND TAKEN — CONDEMNATION PROCEEDINGS—ENTRY BEFORE—DAMAGES.

1. It is not necessary for a village, in entering on and using land for the purpose of laying and repairing its water pipes, to fix a specified width within which the right shall be exercised.

2. The commissioners appointed to assess the owner's damages occasioned by a village entering upon land to lay and repair its water pipes have also power to assess the damages for entry made before the condemnation proceedings were commenced, where no suit was instituted therefor prior to the commencement of such proceedings.

Exceptions from Orleans county court, Ross, Chief Judge.

Petition by Charles B. Childs against the village of Newport for reassessment of damages for land taken for the reservoir and pipes of petitioner's water system. Heard on the report of commissioners. Judgment pro forma that the petitioner recover the entire amount of the award and interest. The petitioner excepted. Affirmed.

Bates & May, for petitioner. C. A. Prouty and John Young, for petitionee.

MUNSON, J. This is a petition for a reassessment of the damages sustained by the petitioner through the taking of his property for the reservoir and pipes of the petitionee's water system. The petitioner insists that the report of the commissioners should be set aside because of its failure to fix the width of the land to be used in connection with the aqueduct. The enabling act authorized the village to enter upon and use, for the purpose of laying and repairing its aqueduct, any land through which it was desirable to locate it. The line of the aqueduct is fixed by a survey, but there is no limitation of the land to be used in laying and repairing it, otherwise than by placing the assessment upon the basis that the village have the right to maintain the aqueduct as now located, and repair the same when necessary, doing no unnecessary damage. The petitioner claims that the fixing of a specified width within which this right shall be exercised is required, both by the provision that such proceedings shall be had on application to the county court as are had in the case of highways, and by the general rule that property condemned shall be definitely ascertained. Among the general provisions relating to highways is one which requires that the description include a statement of the width. But we think the provision regulating proceedings in the county court was not intended to embrace this requirement. The difference in the use to which the land is subjected in the two cases clearly justifies this belief. In the case of a highway the rights of the public are such as almost entirely to deprive the owner of the use of his land.

In the case of a pipe line the occupancy of the owner is subject only to slight and occasional interruptions. In one case, a roadbed is constructed and maintained upon the surface; in the other, a pipe is buried in the soil, and the benefit is obtained without any use of the surface, except in the making of repairs. Nor do we think the rule of definiteness is one that can be satisfied only by the taking of a specified width. The method here adopted for determining the extent of the right is the same that has long been taken by landowners in the voluntary conveyance of like privileges. The experience of men in the use of covered pipes for the conveyance of water is such as to enable tribunals to fix with reasonable certainty the damage to which an owner is subjected by a right to lay and maintain. The petitionee's officers entered upon the petitioner's premises and commenced operations without moving for a condemnation of the land, believing that the damages could be agreed upon. Upon learning that the petitioner was dissatisfied with this course, they suspended operations and awaited the action of commissioners. After the petitionee had applied for the appointment of commissioners, the petitioner sued the officers in trespass. The assessment under review includes \$25 for what was done before the condemnation proceedings were commenced. The petitionee treats this as covering only what might lawfully have been done under the act, and concedes a further liability for whatever may have been done in excess of the authority conferred. Then, if the petitionee is entitled to have all the damages occasioned by such a taking, as the act contemplates, adjusted in this proceeding, the judgment should be for the assessment as made.

It is not necessary to consider what the rights of the petitioner would have been if the petitionee had failed to commence condemnation proceedings, and the petitioner had brought his suit in trespass in default of such action. The petitionee having applied for the appointment of commissioners before the petitioner brought his common-law action, it seems clear that all the damages arising from such a use of the land as is authorized by the act should be ascertained in the manner therein provided. It is not questioned but that the petitioner may recover in trespass for things not within the scope of the enabling act, whether done before or after the application for commissioners was made. As these actions stand, the only line of separation in assessing damages is the power conferred by the act. Whatever is done upon the land that is within the power conferred is really a part of the taking, and, as such, is properly within the jurisdiction of the commissioners. It may be true, as is often said, that one who enters upon the land before its condemnation is a trespasser. But it is held that one

who proceeds in advance of condemnation may perfect his right by subsequent proceedings; and it is evident that one who proceeds prematurely, under a right which may afterwards be perfected, is not a wrongdoer, in the sense applicable to one who has no right. When the one having this right proceeds to perfect it before the landowner has invoked his common-law remedy, the fact that a part of the work was unauthorized, in the particular sense indicated, ought not to prevent an adjustment of the entire damage of the taking in one proceeding, as the statute contemplates. We think that, when the municipality authorized to take the land has commenced proceedings under the statute, the landowner cannot, by the subsequent bringing of a suit, prevent an assessment of the entire damages occasioned by such taking, as was authorized by the act.

We do not understand the petitioner to claim that he would have been entitled to have his damages assessed by a jury if the condemnation had preceded the entry. We understand his claim to be that, inasmuch as the entry was unauthorized, and such as entitled him to maintain trespass, he became entitled to an inquiry by jury as to so much of his damages as accrued before the application for commissioners, and that the assessment of those damages cannot be drawn into this litigation without depriving him of a constitutional right. But, inasmuch as the legislature had power to authorize a taking of the property on the assessment of commissioners, and had conferred this authority on the petitioners, we think the petitioner cannot insist upon a jury trial for acts which were within the scope of the authority conferred, and which, therefore, became a part of the taking, although such acts were before commissioners were applied for. The question of costs was not raised in the county court, and will not be considered here. Judgment affirmed.

(70 Vt. 120)

DAVIS v. COTEY et al.

(Supreme Court of Vermont. Addison. Oct. 14, 1897.)

TRESPASS—CUTTING TIMBER—TREBLE DAMAGES—BURDEN OF PROOF—EVIDENCE OF VALUE.

1. In an action under V. S. § 5020, providing for the recovery of treble damages for cutting timber on the land of another, without leave, unless it appears that defendant acted through mistake, or had reason to believe that such timber was on his own land, such damages were recoverable, by force of the statute, in the absence of any showing either way respecting mistake or good reason to believe.

2. Instructions that defendants were presumed to be innocent of the charge so far as it related to treble damages, and that, to entitle plaintiff to treble damages, the jury must find, beyond a reasonable doubt, that such cutting was not done through mistake, nor with reason to believe that such timber was on the land of defendants, were properly refused, as the burden was on defendants, the alleged cutting being conceded.

3. For the purpose of determining the value of

certain timber, evidence tending to show the price of such timber in an adjoining town was properly received.

Exceptions from Addison county court; Taft, Judge.

Action by Joseph W. Davis against Lewis C. Cotey and others, on the statute, to recover treble damages for cutting timber. Plea, general issue. There were verdict and judgment for plaintiff, and defendants except. Affirmed.

F. L. Fish, for plaintiff. Button & Button, for defendants.

START, J. This action is brought under V. S. § 5020, to recover treble damages for cutting timber. This statute, in so far as it relates to timber, provides that, if a person cuts down, destroys, or carries away timber standing, lying, or growing on the land of another person, without leave from the owner of such land, the party injured may recover of such person treble damages in an action on this statute. But if, upon trial, it appears that the defendant acted through mistake, or had good reason to believe that the timber was on his land, the plaintiff shall recover single damages only, and costs. In making out a case under this statute, the plaintiff is only required to prove in the opening that the defendant, without leave, cut timber upon his land. He is not required to show that the defendant acted willfully or maliciously, or that the defendant did not act through mistake, or that he did not have good reason to believe that the timber was on his land. On such a showing, the plaintiff is entitled to recover treble damages. In the absence of any showing either way respecting mistake or good reason to believe, treble damages are recoverable by force of the statute. The statute expressly provides that the party injured may recover treble damages; but if it appears that the defendant acted through mistake, or had good reason to believe that the timber was on his land, only single damages are recoverable. If the defendant would reduce the damages from treble to single, he must show that he acted through a mistake which was not the result of his negligence or misconduct,—that is, such a mistake as a careful and prudent man would ordinarily make under like circumstances; or that he had good reason to believe that the timber was on his land,—that is, such reason as would lead a man, while in the exercise of ordinary care and prudence, to thus believe. He cannot recklessly and negligently omit to see and observe those things that would lead him to a right conclusion and to a right action, and then be heard to say that he had an erroneous mental conception that influenced his will, and led him to do the act contrary to his intention and wish.

There was no occasion for an instruction to the jury that the defendants were presumed to be innocent of the charge laid against them in the declaration; so far as the same related to treble damages; and the request to do so was properly denied. The cutting of the timber upon the plaintiff's land was conceded.

ed. The defendants claimed that the cutting was done through mistake, and with good reason to believe that the timber was upon their land. This concession entitled the plaintiff to a verdict for treble damages, unless the defendants made out their defense that the cutting was done through mistake, or that they had good reason to believe that the timber was on their land. Upon the issue thus made in the court below, the burden was on the defendants; and there was no presumption that they acted through mistake, or that they had good reason to believe the timber was on their land. The statute excludes such a presumption, by providing for the recovery of treble damages, if it does not appear that the defendants acted through mistake, or had good reason to believe the timber was on their land. The burden being on the defendants to make out their defense of mistake, or good reason to believe, the court properly refused to comply with their request for an instruction that, to entitle the plaintiff to treble damages, the jury must find, beyond a reasonable doubt, that the cutting by the defendants was not done through mistake, or with good reason to believe the timber was on their land. Had there been no testimony on the subject of mistake or good reason to believe, the plaintiff would have been entitled to recover treble damages.

The evidence tending to show the price of such timber in Bristol was properly received. Bristol and the town where the timber was cut are adjoining towns. For the purpose of determining values, it is competent to show the prices paid for similar articles in the same vicinity. *Vilas v. Downer*, 21 Vt. 419; *Roberts v. City of Boston*, 149 Mass. 346; 21 N. E. 668. Judgment affirmed.

(70 Vt. 96)

STATE v. DWYER et al.

(Supreme Court of Vermont. Rutland. Nov. 12, 1897.)

CITY COURTS—JURISDICTION—ACTIONS ON FORFEITED RECOGNIZANCES.

Under V. S. § 2038, giving jurisdiction of actions to recover on forfeited recognizances to no other court than that in which the action is pending, a city court had no jurisdiction of an action to recover on a forfeited recognizance taken in a prosecution in such city court, on appeal to the county court.

Start, J., dissenting.

Exceptions from Rutland county court; Tyler, Judge.

Scire facias by the state, on a recognizance of William O. Dwyer and his surety. Plea, former judgment on the same cause of action in the city court of the city of Rutland. Replication that the city court had no jurisdiction. On the hearing, it was agreed that the replication should be treated as demurred to, and considered as tendering an issue of law on the question whether the city court had jurisdiction. Acts 1892, No. 110,

creating the city court, was referred to. Judgment pro forma that the replication is insufficient, and plaintiff excepts. Reversed.

Bates & May, for the State. Joel O. Baker, for defendants.

TYLER, J. The defendant Dwyer was on the 4th day of May, 1896, prosecuted in the city court of Rutland for selling intoxicating liquor without authority, adjudged guilty, and sentenced to pay a fine and costs, from which judgment and sentence he appealed to the September term, 1896, of the Rutland county court, he, as principal, and defendant Barker, as surety, recognizing in the usual form in the sum of \$50 for his appearance at that term. The appeal and the record of the proceedings before the city court were duly entered in the county court. The case was set for trial, and, Dwyer not appearing, the recognizance was adjudged forfeited. No motion was made to chancery. In November, 1896, an action was brought in the city court in behalf of the state against these defendants upon the forfeited recognizance, and judgment was rendered therein for a nominal sum in damages and costs. This action was afterwards brought to the March term, 1897, of the county court.

The defendants contend that the action in the city court was technically an action of debt; that that court has jurisdiction of all actions of a civil nature where the debt, damage, or matter in demand does not exceed \$500; that the judgment was upon the merits, and is a bar to the present action. The state claims that the city court had no jurisdiction. In passing upon this question, it is necessary to consider the relation of the surety to his principal and to the case, and the nature of the judgment of forfeiture. Upon a complaint being made against a person, a warrant issues against him, and he is arrested thereon; and the court has power to commit him to jail to await his trial, unless he furnishes recognizance for his appearance. If he furnishes recognizance, that takes the place of and is intended to secure the same end as the warrant. The accused then puts himself into the custody of his surety, and the surety becomes his jailer to have him in court when called, as the keeper of the jail would have been his jailer under the warrant. The term "to bail" signifies to deliver, and at common law was the delivery of the respondent to the persons who became sureties for his appearance, and who were, until that time, his jailers. Nothing would exonerate them from producing him in court but his death or sickness; not even his insanity nor his imprisonment for crime in another jurisdiction. Tidd, Prac. 251. As the accused, by his recognizance, has agreed to be present in court, his bail has the right and is under a duty to have him there, any may take him wherever he can find him

and bring him in. To that end, he may use as much force as is necessary, or have a bailpiece to bring him in and exonerate himself. The purpose of the law is to secure the person of the accused, so that he may answer the charge, and submit to punishment if found guilty. In the present case, the respondent, having been adjudged guilty in the city court, was held by the warrant, and, on taking an appeal, if he had not furnished bail, might have been committed thereon to jail to await his trial in the county court. By giving the recognizance, he put himself into the custody of his surety, who became his jailer, and had the right to have him in the county court, where the case had gone by the appeal, according to the terms of the recognizance, and to have an exoneretur entered in the case. This shows that the recognizance is a part of the main case; that it is taken to save the respondent from commitment to jail while awaiting trial; that, upon the surrender of him, the surety is entitled to be discharged; and that the judgment of forfeiture is entered only upon the failure to produce him. The calling of the bonds is an order of the court to the surety to produce his principal. The character of the recognizance is not changed by the judgment of forfeiture. It is only judicially determined that its condition has been broken. The judgment is not enforceable without further proceedings. There must be a declaration upon it, and the respondent and surety given a chance to answer it. The respondent may yet be brought in, when the court will relieve the surety of so much of the penalty as, under the circumstances, it deems just.

The recognizance for Dwyer's appearance is an inseparable part of the proceedings against him, and is a means in the hands of the court to bring him in. It cannot cease to be a part of the case until there is a final judgment in the county court. Before that time the judgment of forfeiture may be stricken off by the production of Dwyer by the surety, or the court may chancer the bonds if the circumstances of the case should require such action. The city court has no power to chancer. The county court alone has the power, and that is conferred by the statute, which is remedial and for the relief of bail. If it were maintainable that the city court has common-law jurisdiction of the action, that court would have to render judgment for the full amount of the recognizance, and the surety would be deprived of his right to equitable relief which the county court may afford through its power to chancer. The state could deprive him of this right in all cases where the amount of the recognizance was within the jurisdiction of inferior courts, by bringing suits in those courts.

The statute provides, in effect, that, though the surety failed to file his motion to chancer at the term when the recognizance was forfeited, the inducement is still held out to him

to bring in his principal. His right to have the amount reduced as the circumstances may require inhered in the recognizance when given, and continues until final judgment is rendered in the county court; yet, if the city court may intervene, as claimed, while the main case is pending in the county court, with no final judgment rendered, it can deprive the county court of this means of bringing the respondent into court.

Scire facias is usually resorted to, and must be brought in the court where the record remains, because it is founded upon the recognizance, and must be considered as flowing from it and partaking of its nature. While it is so far original that the defendant may plead to it, it is judicial rather than original, and its real office is to carry into effect the interlocutory judgment; and, when final judgment is rendered, the whole is to be taken as one record. *Bac. Abr. tit. "Scire Facias"; Respublica v. Cobbet, 3 Dall. 467; Walsh v. Haswell, 11 Vt. 85; Shumway v. Sargeant, 27 Vt. 440.* In accordance with this view, it was held in *Treasurer, etc., v. Erwin, Brayt. 218*, that scire facias would not lie in the county court upon a recognizance taken by a justice of the peace. It is said in 1 Chit. Pl. 104, that debt is sometimes brought upon a recognizance of bail, but that the remedy thereon is more frequently by scire facias, because in the latter action the proceeding is more expeditious, and the bail have less opportunity of discharging themselves by rendering their principal. *Tidd, Prac. 237, 994.* It was at one time held in England that debt would not lie in the same court, because, as it was supposed, it would deprive the bail of the right to render his principal; but it was finally decided that the same right of surrender might be allowed in the one action as in the other. See *Com. v. Green, 12 Mass. 1*, and cases cited in the opinion; *State v. Folsom, 26 Me. 209.* But the right to chancer did not exist at common law. There the surety must bring in his principal, or pay the amount of the recognizance. When the right to chancer was given by statute, the action of debt was no longer applicable, for the sum to be recovered was then uncertain. In all the cases cited by the defendants' counsel the sums were definite, and we think no case can be found where debt is held maintainable in another court, while the right to chancer exists by statute in the court where the recognizance was forfeited.

The course of legislation shows that jurisdiction in such cases was intended by the legislature to be confined to county and supreme courts. Various acts have been passed for the relief of bail. At the session of 1797, when the common law of England was adopted, an act was passed to moderate its severity in all cases brought in the county or supreme courts to recover the forfeiture annexed to any bond of recognizance, etc., and in actions to recover the penalty or forfeiture annexed to any bond of recognizance given or taken in any criminal

cause, and such courts were authorized and empowered to lessen the sum of any such bond of recognizance, and render such judgment thereon as the nature and circumstances of the case required. The same provision has been continued in subsequent laws. The words "before which such action is pending," which occur in previous revisions, are omitted in Rev. Laws, § 1766, and V. S. § 2038, evidently as superfluous, as no other court could lessen the sum. The various acts are referred to upon the brief for the state, and down to the Revised Laws of 1880 are in chapters defining the powers of the county and supreme courts. In 1805 an additional act was passed, which is section 2037, V. S. "If a person bound to appear before the county court on a complaint, information, or indictment, does not appear, but forfeits his recognizance, the court shall order a warrant to be issued from time to time to take the body of such person for trial, and the surety of such person may take and deliver him to the officer having such warrant, or to the court that issued it; and, on motion to chancer, the court shall consider the same in favor of the surety." No. 21, Laws 1868, required that the motion to chancer be filed at the term when the recognizance was forfeited. V. S. § 2035. In the Revised Laws and Vermont Statutes these various sections are not placed in chapters relating exclusively to supreme and county courts, but they are under the head of "Chancering Bonds," and plainly have no reference to any other court. It is only by virtue of section 2036 that county courts in which recognizances were taken have jurisdiction of the action of *scire facias* upon recognizances in criminal cases, forfeited in the supreme court. If the right to bring debt existed at common law, there was no occasion to enact this section. V. S. § 2038, gives jurisdiction of actions to recover on forfeited recognizances to no other court than that in which the action is pending; and the city court has no more right to the action than it has to call the bonds and declare them forfeited, or to interfere with the execution of the warrant for the respondent's arrest. The *pro forma* judgment sustaining the demurrer and adjudging the replication insufficient is reversed, demurrer overruled, replication adjudged sufficient, the plea insufficient, and judgment for the plaintiff.

START, J., dissents.

(70 Vt. 67)

MEACHAM v. TOWN OF NEWPORT.

(Supreme Court of Vermont. Orleans. Oct. 14, 1897.)

VOLUNTARY PAYMENT—RECOVERY.

Evidence went to show only that M. was arrested and committed to the county jail by L., the town collector of taxes, and there remained two or three days, when he paid the

jailer, under protest, the amount claimed by L. to be due upon a warrant, and was released, and a part of the money thus paid was paid by L. to the town treasurer of defendant. *Held* that, in the absence of evidence that the money was paid on a tax warrant not due, or of the use of unlawful means to induce payment, or of arrest upon process, sued out maliciously and without probable cause, or of unlawful force or severity while lawfully arrested, or that it was not in satisfaction of a debt due from him to the treasurer or the town, payment so made is presumed a voluntary payment in satisfaction of a legal demand, and cannot be recovered back, though made under protest and while in jail.

Exceptions from Orleans county court; Ross, Chief Judge.

Assumpsit by S. D. Meacham against the town of Newport. Judgment for plaintiff. Defendant excepts. Reversed.

At the conclusion of the plaintiff's case both parties rested. No question was made as to the truth of the evidence. The defendant moved for a verdict, but the motion was overruled, and a verdict ordered for the plaintiff for the amount paid by Lindsay, the constable, to the defendant's treasurer.

O. S. Annis, for plaintiff. John Young and C. A. Prouty, for defendant.

START, J. The action is general assumpsit. At the conclusion of the evidence, the defendant moved the court to order a verdict for the defendant. The court overruled this motion, ordered a verdict for the plaintiff, rendered judgment thereon, and the defendant excepted. The plaintiff's counsel claims that the evidence tended to show that Howard Lindsay was the defendant's collector of taxes; that he had a tax warrant for the collection of taxes assessed by the defendant against the plaintiff; that Lindsay arrested and committed to jail the plaintiff on such warrant; and that the plaintiff paid such taxes to procure his release from jail, and the same were paid, as such, to the defendant. A majority of the court are of the opinion that the evidence did not tend to show that the plaintiff was arrested and imprisoned upon a tax warrant, and that it did not present any question respecting taxes. Briefly stated, the case is that the plaintiff was arrested and committed to the county jail by Lindsay, and there remained two or three days, when he paid the jailer, under protest, the amount claimed by Lindsay to be due upon a warrant, and was released from custody, and that a part of the money thus paid was paid by Lindsay to the town treasurer of Newport. Upon this showing the plaintiff was not entitled to recover, and a verdict should have been ordered for the defendant. The burden was on the plaintiff to show that the money in question belonged to him, and that he was entitled to recover it of the defendant. He having paid it in satisfaction of a sum demanded and claimed to be due on a warrant, not shown to be a tax warrant, was not entitled to its return without showing that he did not owe the sum demanded and paid, that it was wrongfully obtained from him, and that it came to the defendant's use. This he did not

Jo. There is nothing in the case to show that the sum demanded of, and paid by, the plaintiff was not justly due and owing; nor is there any evidence tending to show that the sum paid by Lindsay to the town treasurer of Newport was not paid in satisfaction of a debt due and owing from Lindsay to the treasurer or to the defendant. It does not appear that Lindsay was the agent of the defendant, or acted as such, in arresting and imprisoning the plaintiff, or in receiving and paying out the money; or that there was any evidence tending to show that the arrest and imprisonment were unlawful; or that undue force was used; or that the plaintiff, while imprisoned, was made to endure unnecessary privation; or that he was induced to pay the money sought to be recovered back, through undue coercion. The evidence does not disclose the nature of the process on which the plaintiff was arrested and confined in jail, or the character of the confinement and treatment while in jail, or the purpose for which the money was paid, except that it was the amount claimed to be due upon a warrant; but what the warrant was for does not appear. In the absence of any evidence tending to show that the money was paid on a tax warrant, and respecting the purpose for which it was paid, or of the use of unlawful means to induce its payment, the payment must be regarded as voluntary, and as having been made in satisfaction of a legal demand; and it cannot be recovered back, notwithstanding it was made under protest and while the plaintiff was in jail. A payment under protest, upon a threat of suit, the party knowing all the circumstances, is not a payment under such compulsion of process as protects it from the infirmity of a voluntary payment. *Royal Burnham v. Town of Strafford*, 53 Vt. 610. When a party is induced to pay money which he is under no legal duty to pay, through legal proceedings commenced or threatened, he cannot recover it back, if the proceedings are bona fide and no undue advantage is taken; and, when payment is thus made, the fact that it was made under protest amounts to nothing. *Taggart v. Rice*, 37 Vt. 47. When a party seeks to avoid a contract because of duress by imprisonment, it is not enough to simply show that he was imprisoned. He must go further, and show that the imprisonment was unlawful; or, if lawful, that, while imprisoned, he was subjected to undue force or unnecessary privation, and that to obtain his liberty, or to avoid such illegal hardship or privation, he was induced to make the contract. *Chit. Cont.* 217; 6 Am. & Eng. Enc. Law, 96; *Heaps v. Dunham*, 95 Ill. 583; *Hatter's Ex'rs v. Greenlee*, 1 Port. (Ala.) 222; *Eddy v. Herrin*, 17 Me. 338; *Clark v. Turnbull*, 47 N. J. Law, 265; *Mascole v. Montesanto*, 61 Conn. 50, 23 Atl. 714; *Stouffer v. Latschaw*, 2 Watts, 167. The plea of duress of imprisonment is not supported by any evidence that the party was unlawfully restrained of his liberty until he would execute the instrument. If the imprisonment was lawful,—that is, if it was by legal process,—the plea is not supported, unless it appear that the arrest was upon pro-

cess sued out maliciously and without probable cause, or that, while the party was under lawful arrest, unlawful force, constraint, or severity was inflicted upon him, by reason of which the instrument was executed. 2 Greenl. Ev. § 302. To constitute duress by imprisonment, either the imprisonment, or the duress after, must be tortious and unlawful. *Watkins v. Baird*, 6 Mass. 510. There must be actual and unlawful imprisonment to constitute duress, and the deed given as a consideration for the discharge. *Moore v. Adams*, 8 Ohio, 372. Imprisonment is not deemed sufficient duress to avoid a contract obtained through the medium of its coercion, if the party is in proper custody, under legal process of a court of competent jurisdiction. *Broom, Leg. Max.* 131. To constitute duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it; and, in the absence of proof to the contrary, an arrest must be taken as justifiable. *Stouffer v. Latschaw*, 2 Watts, 165. Judgment reversed, and cause remanded.

(70 Vt. 123)

WILLARD v. WING et al.

(Supreme Court of Vermont. Franklin. Oct. 14, 1897.)

LEASE—CONSTRUCTION—TRUSTEE PROCESS—PROPERTY SUBJECT.

1. In a trustee process it appeared that defendant sold to the trustee milk from cows owned by claimant and managed by defendant, under a written agreement whereby claimant leased her farm, with certain cows, etc., for one year, defendant agreeing to pay claimant one-half the rents and profits, "each party to have a lien on his undivided shares." In that part of the printed agreement which provided for a re-entry the word "rent" was erased, and the words "income and profits" were inserted. *Held*, that defendant and claimant intended that each should own one-half of the products of claimant's farm and cows, and did not intend that the claimant should part with her title to the half which, under the agreement, was to be hers; and that they were tenants in common of the milk sold to the trustee.

2. Where the funds in the hands of the trustee were due for milk sold him by defendant which belonged to the latter and claimant jointly, they were not subject to trustee process for the sole debt of the defendant.

Exceptions from Franklin county court; Ross, Chief Judge.

Action by Lyman E. Willard against Burton Wing. A trustee process was served on the Franklin County Creamery Association, and Susan B. Sowles claimed the funds in the hands of the trustee alleged to belong to defendant. Heard on report of a commissioner. The trustee was adjudged chargeable, and claimant excepta. Reversed, and trustee discharged.

D. W. Steele, for plaintiff. E. A. Sowles, for claimant.

START, J. The principal defendant sold and delivered to the trustee milk which was produced from cows owned by the claimant and managed by the defendant, under an

agreement in writing whereby the claimant leased her farm, with certain cows and other personal property thereon, for the term of one year, the defendant agreeing to pay to the claimant one-half of the rents and profits, being share and share alike, after deducting the expenses and taxes on the farm, and each party holding a lien on his undivided share. By this agreement the defendant did not undertake to pay any certain quantity of produce, or a definite sum, as rents and profits. The right of each party to rents and profits was contingent upon there being anything left after paying the expenses and taxes, and in the residue, if any, they were to share alike. In that part of the printed agreement which provides for a re-entry, the word "rent" is stricken out, and the words "Income and profits" are inserted. The words thus inserted in place of "rent," the words "share and share alike, after deducting the expenses and taxes," and the words "each party to have a lien on his undivided share," indicate that the parties intended that each should own one-half of the produce and products of the claimant's farm and cows, and that they did not intend that the claimant should part with her title to the half, which, by the terms of the agreement, was to be hers. We think the agreement is susceptible of this construction, and that the parties were tenants in common of the milk that was sold and delivered to the trustee. In *Aiken v. Smith*, 21 Vt. 172, the defendant leased his farm to the plaintiff for a term of years, the produce to be divided equally between them; and it was held that they were tenants in common of the produce. The holding in *Frost v. Kellogg*, 23 Vt. 308, is to the same effect.

It appears from the report of the commissioner that, shortly after the service of the writ upon the trustee, and before the return day, the claimant and defendant had a looking over of the farm accounts, and that there was found due the claimant, on account of products and profits of the farm and money furnished by her, a sum in excess of the amount found in the hands of the trustee. It would seem from this finding that at the time the writ was served the defendant had drawn more than his share of the rents and profits, and that, as between him and the claimant, the rents and profits in the hands of the trustee belonged to the claimant; but, if such was not the fact, the funds in the hands of the trustee belonged to the claimant and defendant jointly, and were not subject to trustee process for the sole debt of the defendant. In *Bartlett v. Woodward*, 46 Vt. 100, the defendant contracted in his own name to build a bridge for the trustee. One Waterman was, in fact, a partner of the defendant in the transaction, but this was not known to the trustee; and it was held that the trustee was not chargeable for any part of the contract price in a suit against the defendant to recover a sole

indebtedness of his. The holdings in *Towne v. Leach*, 32 Vt. 747, *Foundry Co. v. Inman Bros.*, 69 Vt. 181, 37 Atl. 284, and *Fairchild v. Lampson*, 37 Vt. 407, are to the same effect. Judgment reversed, and trustee discharged, with costs; costs allowed claimant.

(70 Vt. 118)

AMERICAN OAK LEATHER CO. v. EVANS BELL & CLARK CO.

(Supreme Court of Vermont. Caledonia. Nov. 12, 1897.)

ATTACHMENT—SUFFICIENCY OF PLEA.

In an action against a foreign corporation, the officer's return showed service by attachment of boots and shoes as defendant's property. A plea was filed alleging that no other service and no other attachment had been made, and that "defendant had not, at the time when said attachment was made, and has not since, had any right, title, or interest in or to any of the property attached." Held, that said plea was insufficient, in that it did not exclude the possibility that the property was in defendant's possession under circumstances that made it attachable as its property.

Exceptions from Caledonia county court; Taft, Judge.

Assumpsit by the American Oak Leather Company against the Evans Bell & Clark Company. A demurrer to the plea was overruled pro forma, and the plea adjudged sufficient. Plaintiff excepts. Reversed and remanded.

The defendant is a foreign corporation. The officer's return showed service by attachment of 76 cases of boots and shoes as the property of the defendant, and a copy of the writ and a list of the property attached left in the hands of one H. A. Bartlett at the place where the property was attached, "he having the care and custody of the property, and the defendant being without this state, and having no clerk or other principal officer or stockholder resident of this state, and no known agent or attorney resident of this state with whom" said copy could be left. The cause was duly entered and continued for notice by publication, and the order of notice was complied with. There was a special appearance for the purpose of the plea only, and a plea filed referring to the writ, declaration, and officer's return, and alleging that no other service and no other attachment had been made. Then followed the averment "that the defendant had not at the time when said attachment was made, and has not since had, any right, title, or interest in or to any of the property attached in said cause."

Harry Blodgett, for plaintiff. W. P. Stafford, for defendant.

MUNSON, J. The dilatory plea in this case is treated by counsel on both sides as a plea to the jurisdiction. It is not necessary to inquire as to its precise character, for it is defective in one particular, whatever its char-

acter. It fails to exclude the possibility that the chattels were in the possession of the defendant under circumstances that made them attachable as its property. They were so attachable if they had previously been the property of the defendant, and had been sold to another without change of possession. The defendant might have parted with all its right, title, and interest in and to the property, by a sale valid as between the parties, and still be held the owner for the purposes of attachment. The plea does not present an issue which, if disposed of upon traverse, would be determinative of the question raised. All the facts alleged might be true, and yet the attachment of the property give the court cognizance of the suit. Judgment reversed, demurrer sustained, plea adjudged insufficient, and cause remanded.

(70 Vt. 103)

CONWAY v. FITZGERALD.

(Supreme Court of Vermont. Essex. Oct. 14, 1897.)

CONTRACTS—BREACH—DAMAGES—EVIDENCE—COMPETENCY OF EXPERTS—APPEAL—HARMLESS ERROR.

1. In consideration of defendant's agreement to furnish buildings, boarding house, camps, hovels, mill, machinery, and keep the property insured, plaintiff agreed to log, manufacture, and load on cars not less than 4,000,000 feet of timber on certain land during the first season; and, if there was any then left, to log and manufacture the remainder during the next season. *Held*, that where plaintiff did not get out the 4,000,000 feet during the first season, defendant might abandon the contract.

2. In an action for breach of a logging contract it was material to show what a given number of feet weighed, in the log, as bearing on the correctness of defendant's scale of logs shipped to him by plaintiff. The clerk of the transportation company which drew certain logs was permitted to testify as a witness for plaintiff that the company had a rule for weighing cars, and what the rule was. *Held*, that error prejudicial to defendant was not shown, where it did not appear that anything was done in accordance with or in violation of such rule, since it had no bearing on any issue.

3. An expert witness is qualified to testify as to the capacity of cars for carrying logs, though his experience has not been on the route over which the logs in question were shipped.

4. Where the limitation placed by the court on plaintiff's right of recovery rendered a certain issue immaterial, error in admitting evidence on that issue was harmless.

5. In an action for breach of contract, whereby plaintiff agreed to cut and manufacture the timber on certain land, and defendant agreed to furnish mill, machinery, boarding house, etc., where it appeared that at the end of first season defendant moved his mill and machinery, evidence of plaintiff's expense in building camps and roads, and in packing up and taking timber from land that had been logged before, was pertinent on the question of profits that might have been made by plaintiff the second season under the contract, when it would not have been necessary to incur such expense.

Exceptions from Essex county court; Munson, Judge.

General and special assumpsit by John Conway against G. H. Fitzgerald, in which there was a plea of the general issue with

notice, and a declaration in offset with the common counts in assumpsit. There was a verdict and a judgment for plaintiff, and both parties except. Affirmed.

It became material to show what a given number of feet weighed, in the log, as bearing on the correctness of the defendant's scale of logs shipped to him by the plaintiff. One S. A. Baldwin, a witness for the plaintiff, having been found qualified as an expert, was asked, "What amount by measurement corresponds with the weight capacity of the car, in your experience?" to which the defendant excepted, and the witness answered, "I have used 40,000 capacity cars, and I loaded as near 5,000 feet as I could conveniently." The witness had previously stated, in the presence of the jury, in the examination as to his qualification, that if he put on over a certain amount it was beyond the weight capacity of the car. The witness' experience was not on the route over which these logs were shipped. The plaintiff introduced as a witness one John Murphy, who testified that after the mill was shut down, and the plaintiff had finished sawing, and was away selling his horses, he (the witness) spoke to the defendant about what the plaintiff owed the witness' boy, and that the defendant advised him to sue the plaintiff, and told him that he was about to fail. The defendant had testified that the plaintiff's men were afraid they would not get their pay, and that the plaintiff, being greatly embarrassed by his inability to pay his help, abandoned his contract. The court submitted a special inquiry to be answered by the jury touching the amount of profits which the plaintiff would have made had he been allowed to complete his contract in the second year. The jury answered, assessing the lost profits; but the court rendered judgment for the general verdict only, to which the plaintiff excepted. The plaintiff's failure to deliver the required amount the first year was the result of misfortune, not of negligence or bad faith.

W. P. Stafford and P. H. Dale, for plaintiff.
Geo. W. Dale and Bates & May, for defendant.

START, J. The plaintiff and defendant entered into a contract by which the plaintiff agreed to cut, log, haul, manufacture, and load on cars the timber on a certain tract of land; and the defendant, in consideration of the plaintiff's undertaking, was to furnish buildings, boarding house, camps, hovels, mill, machinery, and keep the property insured. As a part of the contract, plaintiff also agreed to log, manufacture, and load on the cars not less than 4,000,000 feet of spruce during the first season; and, if there was any then left, to log and manufacture the remainder during the season of 1892. The plaintiff did not get out 4,000,000 feet of spruce during the first season, and, at the

end of the first season the defendant removed his mill and machinery. It does not appear that anything was thereafter done by the plaintiff under the contract. The plaintiff requested the court to instruct the jury that, if he did not consent to the removal of the mill, and but for such removal would have completed the contract during the season of 1892, they should assess his damages under the special count at such sum as would fairly compensate him for loss of the profits, if any, which he would have made by so completing it. This request was properly denied. The plaintiff was not entitled to recover the profits he might have made had he been allowed to complete his contract after a breach of its conditions on his part. The time in which the contract was to be performed was material. The defendant was to furnish buildings, a boarding house, mill, machinery, and keep the property insured; but he was under no legal duty to furnish these and pay the insurance beyond the time provided in the contract. The plaintiff could not, by a breach of the contract on his part, subject the defendant to this expense and risk for an indefinite time; and when the plaintiff failed to perform the contract on his part to get out 4,000,000 feet of spruce the first season, the defendant could, at his election, abandon further performance of the contract, and take away his mill and machinery, as he did. In *Preble v. Bottom*, 27 Vt. 249, it is held that a party contracting to do the carpenter and joiner work on a house is justified in abandoning the contract when payment is not made according to its terms; and in *Bean v. Bunker*, 68 Vt. 72, 33 Atl. 1068, the holding is to the same effect. In *Rommel v. Wingate*, 103 Mass. 327, the defendant bought a cargo of coal, to be shipped immediately; and it was held that a delay of nine days in shipping excused him from accepting it. In *Rolling Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, it is held that in an agreement to ship pig iron both the amount of iron and the time of shipment are essential terms of the agreement; and that where, under such an agreement, the seller ships a part of the iron at the time appointed, and the rest from time to time afterwards, the buyer is not bound to accept any part of the iron so shipped. In *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, the contract was for the sale of 5,000 tons of rails, to be shipped at the rate of about 1,000 tons per month; and it was held that the contract was not satisfied by shipping 885 tons per month, and that the plaintiff's failure to ship the full quantity each month justified the defendant in rescinding the whole contract. In the course of the opinion it is said: "A statement descriptive of the subject-matter, or of some material incident, such as time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law; that

is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract." In view of this holding, it is unnecessary to consider any of the defendant's exceptions that relate solely to the profits the plaintiff might have made had he fully performed his contract.

The clerk of the transportation company which drew certain logs was permitted, against the defendant's objection and exception, to state that the company had a rule for weighing cars, and what the rule was. It not appearing that anything was done in accordance with, or in violation of, this rule, or that it had any bearing upon any issue in the case for or against either party, error prejudicial to the defendant is not shown. The court properly found that the witness Baldwin was qualified to testify as to the capacity of cars for carrying logs, notwithstanding his experience had not been on the route over which the logs in question were shipped.

It does not appear that the testimony of John Murphy could have had any bearing upon any issue in respect to which the plaintiff had judgment in the court below. It may have had a tendency, in connection with other evidence, to show a course of conduct on the part of the defendant that indicated that the reason why the plaintiff did not go on with his contract was not the one claimed by the defendant; but the limitation placed upon the plaintiff's right of recovery rendered his reason for not going on with the contract immaterial. The evidence, therefore, bore upon an issue that became immaterial, and the error, if any, was harmless.

The plaintiff was permitted to show the expense he incurred in building camps and roads and picking up and taking timber from land that had been logged before. This evidence, in connection with other evidence, was pertinent upon the question of profits that might have been made the second season, when it would not have been necessary to incur this expense; and, it not appearing that the court did not instruct the jury to consider it only for this purpose, error is not shown. Judgment affirmed.

(70 Vt. 113)

MATTISON et al. v. TURNER.

(Supreme Court of Vermont. Bennington.
Oct. 14, 1897.)

LIABILITY OF POUNDKEEPER—REPLEVIN.

1. V. S. §§ 4764, 4767, 4768, 4772, 4774, 4783, 4786, make it the duty of an organized town to keep proper pounds; provide for the discharge of a beast only on payment of appraised damages and costs; make it the impounder's duty to notify the owner and to appoint appraisers; authorize him to sell the impounded beast unless replevied or redeemed; provide that a person may impound a beast found doing damage in his inclosure; that the poundkeeper shall feed and water beasts impounded, and attach liability to owner for his neglect; provide that the poundkeeper

may require indemnity from impounder, and in default thereof, within 24 hours, that he may deliver beast to owner or keeper; and make impounder liable to poundkeeper for costs and expenses. *Held* that, under the foregoing provisions, no liability is imposed on the poundkeeper for the acts of the impounder.

2. A poundkeeper is not subject to replevin by the owner of impounded animals for acts done by the impounder prior to the time when the poundkeeper could exact security or lawfully refuse to perform the duties imposed by the statute.

Exceptions from Bennington county court; Thompson, Judge.

Replevin by D. P. Mattison and others against George Turner. Demurrer to a special plea is sustained, and judgment rendered for plaintiffs. Defendant excepts. Reversed.

The special demurrer assigned as causes that the plea did not allege any notice to the plaintiff of the impounding or of the appraisal of damages, or of the hearing upon appraisal, or that the beasts were taken doing damage.

Barber & Darling, for plaintiffs. Batchelder & Bates, for defendant.

START, J. This cause was heard on demurrer to the special plea. The plea alleges, among other things, that there was a pound for the impounding of beasts liable to be impounded, in the town of Shaftsbury; that the defendant was the keeper of the pound; that the cattle in question were impounded therein; and that the damages had not been paid at the time the plaintiffs brought this action. The demurrer to these allegations is general, and does not reach formal defects therein. By these allegations, the defendant justifies his acts; and he was not bound to show that the act of the impounder, in taking and impounding the cattle, was lawful. In *Badkin v. Powell*, Cowp. 476, Lord Mansfield said: "The pound is the custody of the law, and the poundkeeper is bound to take and keep whatever is brought him, at the peril of the person who brings it. There is no judgment, no direction, no warrant, or examination to be had by him. He does nothing to ratify; but only takes cattle, as he is obliged to do, at the peril of the persons who bring them. If wrongfully taken, they are answerable, not he. It would be terrible if a poundkeeper were liable to an action for refusing to take cattle in, and were also liable in another action for not letting them go." And Austin, J., said: "The instant they are in the pound they are in the custody of the law; and, if the pound is broken, he cannot bring an action, but the person who distrained them." It was held in *Mellen v. Moody*, 23 Vt. 674, that the statute relating to the replevying of beasts impounded did not contemplate that the writ should be brought against the poundkeeper, but the impounder; that the provisions in regard to the final disposition of such cases would be absurd, if the suit were to be brought against

the poundkeeper; that the action of replevin against a poundkeeper, under the statute giving an action of replevin for goods unlawfully taken or unlawfully detained, must rest upon the wrongful acts of the poundkeeper; and that the statute did not contemplate holding him responsible for the acts of the impounder. There has been no change in the statute relating to the liability of poundkeepers since it was construed in *Mellen v. Moody*, supra, unless an additional liability attaches to them by reason of V. S. § 4786, which provides that, when a person impounds a beast, the poundkeeper may require sufficient security to indemnify him for liability for detaining the beast, and for supplying it with food and drink while in the pound; that if the person so impounding does not, within 24 hours, furnish such security, he may release the beast and deliver the same to the owner or keeper; and that the person impounding the beast shall be liable to the poundkeeper for his costs, trouble, and expenses. This statute does not, by implication or otherwise, impose liability upon the poundkeeper for the wrongful act of the impounder in taking and impounding a beast. It does not provide an adequate indemnity for such a liability. The poundkeeper may demand security, but he cannot refuse to perform his duty as a poundkeeper until the impounder has neglected for 24 hours to furnish it; and, if he is holden for the wrongful act of the impounder in taking and impounding the beast, a liability may become fixed by an action of replevin, long before the expiration of this time, for which the statute gives no indemnity, and from which it has provided no escape. Had the legislature intended to impose such a liability, it would have used apt words for that purpose, and made it lawful for a poundkeeper to refuse to perform any official act until security was furnished. It is probable that the immediate occasion for this enactment was the holding in *Williams v. Willard*, 23 Vt. 389, to the effect that the law did not imply a promise on the part of the impounder to indemnify the poundkeeper, and that the statute imposed no obligation upon the impounder of a beast to pay its keep to the poundkeeper. This holding doubtless suggested that, when beasts were replevied at the suit of the owner against the impounder, the poundkeeper was without remedy for the expense incurred while the beasts were detained in the pound, and it is evident that one purpose of the enactment was to remedy this omission in the statute. The enactment may be broader than is necessary for this purpose, but it is not broad enough to impose upon the poundkeeper a liability for the acts of the impounder, for which it provides no adequate indemnity. It is clear that the legislature did not intend, by the enactment, to subject the poundkeeper to the action of replevin, for acts done by the impounder prior to the time when he could exact security, or lawfully decline to perform the duties im-

posed upon him by the statute. Other provisions of the statute that were in force at the time the statute in question was enacted, and have not been repealed, indicate that no such liability as is claimed attaches to a poundkeeper, and that such liability was not intended by the later enactment. V. S. § 4764, makes it the duty of each organized town to keep one, two, or three good and sufficient pounds for the impounding of beasts liable to be impounded. V. S. § 4783, subjects a person who breaks open a pound, or releases a beast impounded, without authority to do so, to a forfeiture of \$25, to the use of the town where the offense is committed, and to the payment of damages to the impounder. V. S. § 4772, provides that no beast shall be discharged from the pound until the damages awarded by the appraisers, charges, and costs are paid. V. S. § 4768, makes it the duty of the impounder to notify the owner of the beast that it is impounded, and to appear and appoint appraisers. V. S. § 4774, authorizes the impounder to sell the impounded beast, if the owner does not replevy or redeem it. V. S. § 4767, provides that a person may impound a beast found in his inclosure doing damage; that the poundkeeper shall supply such beast with food and drink while in the pound; and that such keeper shall be liable to pay the owner of such beast damages occasioned by neglecting to do so. It is clear from these sections that the poundkeeper does not impound beasts found in the inclosure of another doing damage. The owner of the inclosure impounds the beast, and the pound provided by the town detains it. If we give the statute the construction contended for by the plaintiffs' counsel, a poundkeeper cannot escape liability to the owner of the beast, when the acts of the impounder, in taking and impounding the beast, are wrongful. If he performs his duty as poundkeeper, he is liable for the acts of the impounder; and if he neglects his duty and does not care for the beast, he is liable for such neglect. The statute does not admit of such a construction. The legislature did not intend, by the enactment in question, to subject a poundkeeper to an action in favor of the owner of the beast if he did his duty, and to a like action if he did not. The poundkeeper's duties are the same whether the taking and impounding are lawful or unlawful; and, by the performance of these duties, he does not subject himself to an action of replevin for the wrongful act of the impounder in taking and impounding the beast. Judgment reversed; demurrer overruled; plea adjudged sufficient; cause remanded.

(59 N. J. L. 523)

DELAWARE, L. & W. R. CO. v. HARDY.

(Court of Errors and Appeals of New Jersey.
March 22, 1897.)

NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Plaintiff was in the employ of a rolling-mill company, which was rebuilding a bridge for de-

fendant railroad company, under the supervision of defendant's engineer. A train was run on the bridge and left standing, the engine being detached and taken away. While plaintiff was working alongside of and below the train, grasping one of the rails, the engine was coupled to and moved the train, and the wheels of one of the cars ran over his hand. The accident happened at 6 o'clock in the morning. The men were accustomed to go to work at 7 o'clock each morning; but on the previous evening the rolling-mill company's foreman directed them to return to work on the next morning at 4 o'clock, and they did so. No notice was given defendant or its employes of the change in the hour of beginning work, and none of the crew in charge of said train knew of plaintiff's presence on the bridge at the time. *Held*, that the facts did not show that plaintiff's injuries resulted from the negligence of defendant or its employes. Per Gummere, J., dissenting.

Dissenting opinion.

For prior report, see 35 Atl. 1130.

GUMMERE, J. The question to be determined in this case is the right of Hardy, the defendant in error, to recover from the Delaware, Lackawanna & Western Railroad Company damages for injuries received by him while assisting in the work of rebuilding one of the company's bridges, near its station at Newark, and upon which its main-line tracks were laid. This work was being done under a contract between the railroad company and the Passaic Rolling-Mill Company, by the terms of which the latter corporation was to furnish the materials required for rebuilding the bridge and also skilled labor to do the work. The work was to be done under the supervision of the railroad company's engineer, but the workmen were paid by the rolling-mill company. The amount of wages paid, however, was repaid to it by the railroad company, with a certain percentage added. The plaintiff, who was an employe of the rolling-mill company, was one of the workmen furnished by it under the contract to do the work of rebuilding the bridge. The injuries for which Hardy sues were received in this way: A train of empty cars was run out upon the bridge by the railroad company's employes, and left standing there, the engine having been detached and taken away. Hardy at that time was engaged in wedging up some false work, and, in order to do so, he was compelled to stand alongside of and below the train, grasping one of the rails of the track with his left hand, while he used his mallet with his right. While he was so at work another engine was coupled to the train, at the end opposite to that from which the original one had been cut loose, and drew the train back in the direction from which it had come. The wheels of one of the cars, near to which Hardy's hand was resting, ran over it, crushing it badly. The trial at the circuit resulted in a judgment and verdict for the plaintiff, and the supreme court, on review, affirmed the judgment. 34 Atl. 986. It was urged before that court, and again before us, that, on the facts above stated, a recovery should not have been permitted, for the reason that the plaintiff and the employes of the defendant

company who were operating the train were engaged, at the time of the accident, in a common employment; that they were fellow servants; and that, consequently, the railroad company was not liable, even if the plaintiff's injuries resulted from the careless handling of the train. I concur entirely in what was said by Mr. Justice Magle on this branch of the case in delivering the opinion of the supreme court, and am satisfied that there was no error in refusing to set aside the judgment of the circuit court on this ground.

Another ground upon which the supreme court was asked to reverse the judgment of the trial court, and which was also assigned for error here, was that there was no evidence in the case which would justify a finding that the plaintiff's injuries resulted from the negligent conduct of the defendant company or its employes, and I am unable to agree with the conclusion reached by the supreme court that there is no substance in this contention. That court disposes of this point as follows (I quote from the opinion): "This contention cannot prevail. The railroad company had arranged to rebuild its bridges while using them for the passage of its trains, and, in this case, for drilling a train. This use rendered the situation of all workmen employed on the bridge exceedingly perilous. That there was cast upon the company a duty to take such reasonable care for the safety of those workmen as the extraordinary circumstances made requisite, and that for the want of such care by its servants it would be liable, are propositions not open to discussion. There was evidence from which may be inferred the want of reasonable notice to workmen, who might be imperiled thereby, of the movement of this train." It cannot, of course, be questioned that, under the circumstances existing, a duty rested upon the defendant company to exercise a care for the safety of the men who were at work rebuilding the bridge, commensurate with the danger to which they were exposed. I am, however, unable to find anything in the evidence to justify the conclusion that the injuries which were inflicted upon the plaintiff resulted from the failure of the railroad company to fully and completely discharge that duty. The situation, as disclosed by the evidence, was this: The plaintiff and the other employes of the rolling-mill company, who were engaged in the work of rebuilding the bridge, were accustomed to begin their work at 7 o'clock each morning. As they were quitting work, however, on the day before the accident happened, the foreman of the rolling-mill company, under whose direction they were working, directed them to return to work the next morning at 4 o'clock, and they did so. No notice was given to the railroad company, nor to its employes (so far as the evidence shows), of the change in the hour for beginning work; nor does it appear that any of the crew which was in charge of the train which ran over the plaintiff's hand knew of his presence on the bridge at the time of the accident, which occurred about 6 o'clock

in the morning. The duty resting upon the railroad company to look out for the safety of the men who were doing the work of rebuilding the bridge was not a continuous one. It only existed during the hours when they were at work. It ceased when the men stopped work at night, and did not begin again until they resumed work the next morning. During this period, which ordinarily was from 6 o'clock in the evening until 7 o'clock the following morning, the company was under no obligation whatever to take them into consideration in the operation of its road at this point. This, it seems to me, cannot be controverted. But, in my opinion, not only was there no duty resting upon the company to provide for the safety of these men during the time when they were not engaged at work upon the bridge, but it was justified in assuming that there would be no change in their hours of work unless it received notice thereof, and it had a right to operate its road on that assumption. If this be so, then the duty which the company owed to the plaintiff, of affording him protection while at his work, was fully discharged by providing for his safety each day from 7 o'clock in the morning until 6 in the evening. And this the company did. The additional duty of providing for his safety at any time after 6 in the evening, and before 7 in the morning, could only be imposed upon it by notifying it that such protection would be needed. As I have already stated, no notice was given to the company that the plaintiff would need such protection on the morning of the accident. There is nothing in the case to suggest the idea that it either knew, or ought to have known, that he was to commence work on that day at an earlier hour than 7 o'clock; nor is there any evidence which will warrant the conclusion that a single member of the crew which was operating the train at the time of the accident was aware of his presence on the bridge. It seems to me that this judgment can only be sustained upon the theory that a railroad company, in a case like the present, is liable for a failure to protect, not only against those dangers the existence of which it knows or ought to know, but also against dangers the existence of which it neither knows nor could reasonably have anticipated. That such a liability exists I cannot believe. I am therefore constrained to vote to reverse this judgment. I am authorized to state that the CHANCELLOR and Judges BARKALOW and HENDRICKSON concur in this opinion.

(61 N. J. L. 461)

STATE (MARSDEN CO., Prosecutor) v.

STATE BOARD OF ASSESSORS et al.

(Supreme Court of New Jersey. Feb. 21, 1898.)

CORPORATION TAX—DIMINUTION.

The tax imposed by "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April 18, 1884, and its supplements (3 Gen. St. p. 3335 et seq.), is a franchise, not a

property, tax, and is not subject to diminution because some of the capital of the corporation taxed is invested in rights under letters patent of the United States, not taxable as property. (Syllabus by the Court.)

Certiorari by the state, the Marsden Company, prosecutor, to review a franchise tax imposed by the state board of assessors. Assessment affirmed.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

E. A. Armstrong and G. S. Graham, for prosecutor. S. H. Grey, Atty. Gen., for defendants.

COLLINS, J. The prosecutor, a corporation of this state, resists the greater part of the tax assessed against it for the year 1897 under "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April 18, 1884, and the acts amendatory thereof and supplementary thereto. 3 Gen. St. p. 3335 et seq. Resistance is based on the fact that all but \$157,000 of its capital stock of \$35,000,000 par value was issued for the purchase of rights under letters patent of the United States, and the claim is that such rights constitute property not taxable by the state. The argument for exemption rests on the false premise that the tax assessed is a property tax. The court of last resort of this state has declared otherwise. In *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270, 19 Atl. 733, it was sought to avoid a tax assessed under said act of 1884, on the ground that such a statute violated the constitutional requirement that property must be assessed for taxes under general laws, and by uniform rules, according to its true value. Mr. Justice Knapp, in delivering the unanimous opinion of the court, said: "The fault of this position is the assumption that this tax is one upon property. Such, manifestly, is not the case. The law in question imposes a tax on certain corporations by way of a license for exercising corporate franchises. It is declared to be such tax by the act, and, although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal quality of a license or franchise tax." In *Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. Law, 278, 23 Atl. 668, Mr. Justice Dixon, speaking for this court, enunciated the same doctrine in the broadest possible terms, as follows: "The tax imposed is a franchise tax, exacted from the company as the price of the right and privilege, which it received from the state, of being a corporation. Although the amount to be paid is determined by the amount of the capital stock and the duration of the corporate life, yet these are only the criteria chosen by the legislature for ascertaining the probable value of the corporate franchise which the company assumed. The tax is not levied upon the corporate property or

business. Such a tax may be collected by the state granting the corporate franchise, no matter how the property of the company may be invested or employed, or where it may be situate." This has been frequently reaffirmed. *Lumberville Delaware Bridge Co. v. State Board of Assessors*, 55 N. J. Law, 26 Atl. 711; *Edison United Phonograph Co. v. State Board of Assessors*, 57 N. J. Law, 520, 31 Atl. 1019; *Electric Storage Battery Co. v. State Board of Assessors* (N. J. Sup.) 36 Atl. 1090. In the last two cases the capital of the company was invested in patent rights. The decisions of the supreme court of the United States fully recognize the right of a state to impose by law a franchise tax on the basis of capital stock, even though the property of the company is invested in property which, by the laws of the United States, the state cannot tax. The leading case is *Home Ins. Co. v. New York State*, 134 U. S. 594, 10 Sup. Ct. 593, in which such a law was upheld, although the capital of the company was in part invested in government bonds, not taxable by the state. The principle of that decision controls the present case. The tax assessed upon the franchise of the property is affirmed, with costs.

(61 N. J. L. 466)

STATE (CUNNINGHAM, Prosecutor) v.
BOROUGH OF MERCHANTVILLE.

(Supreme Court of New Jersey. Feb. 21, 1898.)

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS
ORDINANCES—CONTRACTS—BONDS—CERTIORARI—PARTIES—LACHES.

1. The borough act of 1897 (P. L. 235) provides that ordinances must be submitted at a regular meeting, and passed at a subsequent meeting, and, before they take effect, shall be posted five days, or be published in a newspaper for two successive issues. *Held*, that a provision of the act that no certiorari shall be allowed to set aside any ordinance for any improvement after the contract therefor shall be awarded is a reasonable limitation, and therefore valid.

2. Inquiry by certiorari into the validity of a contract to do work for a municipality will not be made at the instance of a prosecutor who has suffered the work to proceed for several weeks, and only applies for his writ after the work is nearly completed. He is barred by laches.

3. Inquiry into the regularity of an issue of bonds under such a contract will not be made at the instance of such a prosecutor, where the bonds have been delivered, and the contractors are not made parties to the writ.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Francis A. Cunningham, against the borough of Merchantville. Dismissed.

Argued at November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Howard Carrow, for prosecutor. C. V. D. Joline and D. J. Pancoast, for defendant.

COLLINS, J. The prosecutor, a resident and taxpayer of the borough of Merchantville, has removed to this court by one writ of certiorari (1) an ordinance passed August

3, 1897, providing for the construction of sidewalks; (2) the returns of a special election held September 2, 1897, authorizing the issue of bonds for \$25,000 to pay therefor; (3) a contract with Richardson & Ross, to construct the sidewalks; and (4) a resolution passed October 19, 1897, directing the issue to the contractors of negotiable bonds to the amount of \$18,000, on account of \$22,668.72 due up to that time on their contract. The proofs show that, when the writ was allowed, the work under the contract was nearly completed, and the bonds had been delivered to the contractors, who were not made parties to the cause.

This certiorari must be dismissed. The general act relating to boroughs (Revision 1897; P. L. p. 285), under which all the proceedings were taken, provides, in section 92, that no certiorari shall be allowed to set aside any ordinance for any improvement after the contract therefor shall have been awarded by the council. A reasonable limitation upon the time within which a certiorari may issue is constitutional. *Traphagen v. Township of West Hoboken*, 39 N. J. Law, 232, affirmed 40 N. J. Law, 193. What is a reasonable limitation will be determined upon the facts of each case as it arises. *Green v. Jersey City*, 42 N. J. Law, 118; *Van Anglen v. City of Bayonne*, 56 N. J. Law, 463, 29 Atl. 168. Ordinances in boroughs must be submitted at a regular meeting, and passed at a subsequent regular meeting, and do not go into effect until posted for at least a week or published in a newspaper for two successive issues (section 26). A diligent prosecutor has ample time to make his application before a contract can possibly be awarded. In the case in hand more than a month elapsed before the contract was made. It is argued for the prosecutor that the contract does not rest on the ordinance, but the contrary is plain. Under section 33, par. 3, the construction of sidewalks at the expense of the abutting owners must be by ordinance. This ordinance gives such owners an opportunity, on notice, to construct for themselves, falling which the city is to construct and recover the cost by an assessment. Without such an ordinance, the contract would have been invalid, and, while the ordinance does not in terms provide for a contract, it implies that one will be made. The case comes clearly within the limitation, and the limitation is reasonable. We do not intimate that there is any infirmity in the ordinance.

The attack upon the contract itself is barred by laches. *Bowne v. Logan*, 43 N. J. Law, 420. This renders it unnecessary to inquire into the merits of the award of the contract. We would not do so in the absence of the contractors, who have not been brought into court. The same defect of parties leads us to refuse an inquiry into the regularity of the proceedings to issue bonds. The contractors are deeply interested in that

matter, and have already received about three-fourths of the entire amount authorized. The court should not render any judgment impeaching these bonds without having before it the parties interested in their maintenance. *Kiernan v. Jersey City*, 40 N. J. Law, 453. True, this course is discretionary (*Siedler v. Board*, 39 N. J. Law, 632); but every consideration of justice demands it where the bonds have been issued in payment for work done under a municipal contract. We might order that the cause stand over to bring in the contractors; but, in the exercise of our discretion, we decline to do so. It can make no substantial difference to the prosecutor whether the contractors are paid in bonds or in cash. It is claimed that bonds cannot lawfully be issued in any case for sidewalk improvements. Section 39 expressly authorizes such an issue. The defendant is entitled to costs.

(31 N. J. L. 177)

STATE (MARINELLI, Prosecutor) v. STATE
et al.

(Supreme Court of New Jersey. Jan. 25, 1898.)

PENALTIES—RECORD OF CONVICTION—AMENDMENT ON CERTIORARI.

1. In a summary proceeding for a penalty, the conviction must on its face sustain the legal propriety of the judgment founded upon it.

2. Where the conviction fails to set out evidence sufficient to support the judgment, the defendant in certiorari will not be permitted, by an amended return, to show a different conviction.

(Syllabus by the Court.)

Certiorari to court of common pleas, Atlantic county; Thompson, Judge.

David Marinelli was convicted under the game law, and he brings certiorari to review the judgment. Reversed.

Argued June term, 1897, before GARRISON and LIPPINCOTT, JJ.

G. A. Bourgeois, for prosecutor. J. W. Harding, for defendants.

GARRISON, J. The record brought up by this writ of certiorari shows a conviction and judgment under the thirty-second section of the game law (P. L. 1895, p. 482) rendered by the court of common pleas upon an appeal under this act. The conviction before us is clearly insufficient, in that it does not contain the evidence on which the court below grounded its action. In penal proceedings that belong to the class styled "summary," it is essential that the conviction should thus sustain the judgment founded on it. *Keeler v. Milledge*, 24 N. J. Law, 145; *Handlin v. State*, 16 N. J. Law, 96; *Buck v. Danzenbacker*, 37 N. J. Law, 359; *Doughty v. Conover*, 42 N. J. Law, 193; *Lions v. Spratford*, 43 N. J. Law, 376; *Hoeborg v. Newton*, 49 N. J. Law, 617, 9 Atl. 751; *Jacobus v. Meskill*, 56 N. J. Law, 255, 28 Atl. 388.

After this conviction had been returned, the

defendant in certiorari obtained a rule upon the court of common pleas to amend its return, subject to the decision of the supreme court upon the question of practice. The amended return sets out evidence sufficient to cure in the above respect the record returned with the writ. We find, however, no warrant for such a practice in the case of summary convictions. They are, as stated in *Burns' Justice*, "in restraint of the common law," so that "generally nothing shall be presumed in favor of the office of a justice of the peace, but the intendment will be against it." The same author further adds: "Therefore, where a special power is given to a justice of the peace by act of parliament to convict an offender in a summary manner, without a trial by jury, it must appear that he hath strictly pursued that power; otherwise the common law will break in upon him and level all his proceedings."

It is not enough in these summary prosecutions that the power to convict has been strictly pursued; it must, in and by the conviction, be made so to appear. The reason for this is given by Lord Mansfield in *Rex v. Little, 1 Burrows, 613*, in these words: "Convictions ought to be taken strictly, and it is reasonable that they should be so, because they must be taken as true against the defendant."

There is no analogy between these convictions and those judgments that are obtained in proceedings that follow the course of the common law, for in these latter a conviction by a jury is the orderly proceeding of record in the court of trial upon which the judgment or sentence rests; hence back of every judgment is a record. In summary convictions, on the contrary, the conviction and the judgment are acts of the same nature, and together constitute a record, that is to be taken as true even to the extent of authorizing the imprisonment of the defendant. When this record is removed, there is nothing before the convicting tribunal by which to amend. To sustain the judgment, a conviction must be substituted for the one that has been removed and found to be insufficient. This course would, in cases of this nature, be intolerable. The judgment against the defendant must stand or fall in this court by the conviction shown by the record before us.

Let the judgment be reversed.

(61 N. J. L. 353)

**BELLEVILLE STONE CO. OF NEW JERSEY
v. COMBEN.**

(Supreme Court of New Jersey. Feb. 21, 1898.)

**MASTER AND SERVANT—ACTION FOR DEATH OF
EMPLOYEE—EVIDENCE—INSTRUCTIONS—
CARE AND DILIGENCE.**

1. It appeared that deceased was working on a ledge of rocks in defendant's quarry and was struck by a swinging drag rope, knocked off the ledge, and killed. The negligence relied on was that the drag rope was not properly

supported. *Held* not error to admit evidence that generally, in other quarries, and also in this one, such drag ropes were held by hangers to prevent them from swinging.

2. It was not error to permit a witness to testify that he first saw deceased about two minutes before he was thrown over; that the next he saw was that he was lying dead; that he was just alongside of him; that the first he saw of him, he was striking a drill on top, and the next he was on the bottom; that he did not see him struck by the rope, but saw him, just about two minutes before it, working, and did not see him thrown over the precipice.

3. In an action for the death of an employé, it was not error to charge that it was defendant's duty not to subject deceased, without his knowledge, to risks not assumed under the contract; that an employer contracts to use diligence to protect an employé from ordinary risks, and for omission of such diligence he may become liable to the employé for all damages arising therefrom; and that a master should exercise reasonable care to provide safe machinery for carrying on the business and in keeping such machinery in a safe condition.

4. It was not necessary to qualify the expression "ordinary risks" by the words "not obvious to the employé, and in regard to which he had not been warned," where the court also charged that, when the employment presents special features of danger, such as are open to one ordinarily skilled in the employment, then the servant also assumes the risks of those obvious dangers which he enters upon in the employment.

Error to circuit court, Essex county; Child, Judge.

Action by Ann Comben, administratrix of the estate of Robert Comben, deceased, against the Belleville Stone Company of New Jersey. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued February term, 1898, before the CHIEF JUSTICE, and DEPUE, GUMMERE, and LUDLOW, JJ.

Hayes & Lambert, for plaintiff in error.
Thomas J. Lintott, for defendant in error.

DEPUE, J. This was an action brought by the defendant in error as plaintiff against the Belleville Stone Company to recover damages arising from the death of the deceased. The deceased was an employé of the company as a workman in its stone quarry. He was working on a ledge of rocks in the quarry, called the "pinnacle," and was struck by a swinging drag rope, and knocked off of the ledge, and was killed. The negligence of the company which is relied on to sustain this action is that the drag rope was not properly supported. At a former trial the trial court nonsuited the plaintiff. On writ of error the court of errors and appeals reversed the judgment of nonsuit, and awarded a venire de novo. The case was retried, and resulted in a verdict for the plaintiff, and is brought before this court on assignments of error touching the conduct of the trial. The facts in this case appear substantially in the opinion of Mr. Justice Lippincott in the court of errors and appeals. *Comben v. Stone Co.*, 59 N. J. Law, 223, 36 Atl. 473.

Upon the record there are 18 assignments of error. Of these but few require notice. In the brief submitted in behalf of the plain-

tiff in error these assignments of error are set out as relied on:

"First. There should have been a nonsuit or a verdict directed for the defendant on the grounds (a) that the danger from the rope was an obvious one, the risk of which was assumed by the servant in his contract of hiring; and (b) that the accident was caused by the negligence of a fellow servant." The evidence on this trial at the close of the plaintiff's case was substantially the same as in the former case, and the opinion of Mr. Justice Lippincott holds that upon the evidence a motion to nonsuit should not prevail.

"Second. Evidence of methods of operation used in other quarries was admitted, to show that the method used by the defendant was a negligent one." Witnesses on the part of the plaintiff were allowed to testify as to the methods generally used to prevent the swinging of ropes used for the purpose that this rope was used for. In the opinion of Mr. Justice Lippincott in the former case the learned judge used this language: "There is evidence to show that when the rope was taut it would not only be from eight to ten feet above the head of the intestate, but also it would not approach nearer to him than from five to eight feet, but when it was slackened it was liable to sweep across the ledge or face of the rock where the intestate was at work. It is in evidence that in a quarry worked close by this one by similar machinery this drag rope was held by hangers." In *Atz v. Manufacturing Co.*, 59 N. J. Law, 41-45, 34 Atl. 982, Mr. Justice Magie, in discussing the master's duty to his employé, says that "the master is bound to make such inspection as ordinary prudence requires; that this would involve the use of such tests and devices as are known to the master, or are so commonly employed in such inspections that the master might reasonably be deemed to have knowledge of them." The evidence objected to under this head was presented in this manner: The witness, a quarryman, was asked the question, "Do you know what is generally used to prevent ropes in such a position as that from swinging?" He answered, "Yes, I do. Q. What? A. There is generally used a tight line, a tight wire rope. On this tight wire rope there was pulleys or hangers, like that [illustrating], that caught on this tight wire rope, and the sag was allowed, as it was coming back towards the derrick, or whatever it was— This thing went right through here, see? like that. Therefore, this tight rope could not move a person one foot at the best. That was generally used in this same quarry." The question was objected to, and a motion made to overrule the answer, which was denied by the court. This testimony was competent under the rulings in this case in the court of errors and in *Atz v. Manufacturing Co.*, and is sustained by the decisions of other courts. *Myers v. Iron Co.*,

150 Mass. 125-133, 22 N. E. 631; *Murphy v. Greeley*, 146 Mass. 196, 15 N. E. 654; *Wheeler v. Manufacturing Co.*, 135 Mass. 294-298. In *Myers v. Iron Co.* evidence was admitted to show that other machinery or appliances than those used by the defendant would have been safer. The court justified the admission of such testimony in these words: "In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery in actual use, it was competent to show what other kinds of machinery or appliances were used elsewhere, and might have been used at the shaft." The learned judge, in his charge to the jury, made no other use of this testimony.

"Third. The charge of the court misstated the duties which a master owes to his servant, to the prejudice of the defendant." On this subject the charge of the learned judge was as follows: "The duty imposed on the defendant company by the contract of hiring was to not subject the deceased, without his knowledge and consent, expressed or implied, to risks not assumed by him under the contract of hiring. An employer contracts with his employé to use reasonable diligence to protect him, the employé, from ordinary risks, and for omission of such diligence or want of care the employer may become liable to the employé for all damages arising therefrom." He added an extract from the opinion of the court of errors and appeals, as follows: "The duty of a master toward a servant in his employ is to exercise reasonable care and skill to provide safe machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in a safe condition for such use, including the duty of making inspection and tests at proper intervals whilst the work progresses." This instruction is substantially in compliance with the opinion of Mr. Justice Dixon in *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 401, 31 Atl. 619, and conforms to the rule uniformly laid down for determining the conditions under which a master will be liable for injuries sustained by his servant. The instructions of the learned judge placed the liability on the basis of the negligence of the company, namely, to use reasonable diligence not to subject the deceased to ordinary risks not assumed by him. The criticism on this instruction, that the expression "ordinary risks" should have been qualified by the words "not obvious to the employé, and in regard to which he had not been warned," is without substance, for the learned judge expressly told the jury that "when the employment presents special features of dangers, yet of such a nature or character that they must be known to the employé, such as are open and obvious to one ordinarily skilled in the employment, then the servant also assumes the risks of those obvious dangers which he enters upon voluntarily in taking the employment."

"Fourth. The evidence of Arthur Flynn as to the rope striking Comben should have been stricken out." This witness testified that he saw Comben working on that pinnacle about two minutes before he was thrown over; that the next he saw was he was lying down dead; that he was just alongside of him, "forinst where Bob Comben was killed"; "the first I saw of him he was striking a drill on top, and the next he was on the bottom"; that when he turned his back the deceased was turned over on his face; that he did not see him struck by the rope, but saw him just about two minutes before it, working, and did not see him thrown over the precipice. This evidence was competent. Its effect was for the jury. We find no error upon the record, and the judgment should be affirmed.

(61 N. J. L. 443)

STATE (HUTCHINSON et al., Prosecutors) v. MAYOR, ETC., OF BOROUGH OF BELMAR et al.

(Supreme Court of New Jersey. Feb. 21, 1898.)

STREET RAILROADS—FRANCHISE—GRANT BY MUNICIPALITY—PROCEDURE—ORDINANCE.

1. When the governing body of a municipality receives a petition under the act of April 21, 1896 (P. L. 329), for permission to construct, operate, and maintain a street railroad, and at a regular meeting designates a time and place to consider the application, and notice is given and consents of landowners are filed, as required by said act, the ordinance granting such permission, after a hearing of the matter, may be passed at the time so designated or at any subsequent time to which the hearing may be adjourned. The hearing may be adjourned from time to time until final action.

2. A restriction on a municipality that an ordinance shall be submitted in writing at a regular meeting, and passed at a subsequent meeting, does not apply to an ordinance passed under said act.

3. An ordinance passed under said act will support a location of tracks and poles without the procedure prescribed by earlier statutes.

4. A location of tracks and poles may be included in such an ordinance or may be made by a subsequent resolution.

5. A requirement that the railroad company shall pay the incidental expense of such an ordinance, and a reasonable counsel fee, is not illegal or improper.

6. If permission is asked to construct a street railroad upon a route partly outside the jurisdiction of a municipality, it will be sufficient to support a grant for the part of the route within such jurisdiction that consents of the owners of the requisite proportion of frontage upon that part of the route be obtained and filed.

7. A revocation of a consent given under said act is not operative if notice thereof is not given before the passage of the ordinance, either to the petitioning company or to the governing body of the municipality. Quære, is such a consent revocable?

8. The mayor and council of a borough chosen under one of the borough acts repealed by the borough act of 1896 (P. L. 339), and exercising local government at the time of the approval of that act, were thereby authorized to continue such government under the borough act of 1878 (Gen. St. 179) until the annual election under said act of 1878, and could in the meantime lawfully proceed under said street-railroad

act of 1896. A majority of the council constituted a quorum, and a majority of a quorum could lawfully pass ordinances and resolutions.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of Forman S. Hutchinson and others, against the mayor and council of the borough of Belmar and another, to review an ordinance of said borough. Affirmed.

Argued at November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Aaron E. Johnston, for prosecutors. Allan L. McDermott, for defendants.

COLLINS, J. The certiorari in this cause brings up an ordinance of the mayor and council of the borough of Belmar, granting to the Atlantic Coast Electric Railroad Company a location of tracks upon its filed route through that borough, and permission to construct, operate, and maintain an electric street railroad upon the streets designated therein. The legislation involved is the organic law of the company, approved March 14, 1893, commonly called the "Traction Act" (Gen. St. 8235); and the act to regulate the construction, operation, and maintenance of street railroads, approved April 21, 1896 (P. L. 329). It was observed in *Camden Horse Railroad Co. v. West Jersey Traction Co.*, 58 N. J. Law, 102, 82 Atl. 72, that no reason was perceived why a location of tracks, and permission to construct, operate, and maintain a street railroad, although authorized by separate statutes, should not be embraced in the same petition and ordinance, if all statutory requirements have been fulfilled. That course was adopted in this case, and was, we think, unobjectionable. Indeed, the act of 1896 covers the whole subject, and a petition under the act of 1893 seems to be no longer necessary.

Numerous causes are assigned for reversal. One is that the ordinance does not prescribe with sufficient certainty the manner in which and the places where the rails, wires, and poles of the railroad shall be erected and placed. We have not examined the ordinance and accompanying maps in this regard, because the objection is not presented in the brief of counsel. We mention the subject only to call attention to the fact that the act of 1896 permits it to be dealt with by subsequent resolution of the council. The objection, therefore, if well founded, would not avoid the general grant of the ordinance. Any indefiniteness in these details can be remedied.

Another complaint is of a requirement in the ordinance that the railroad company shall pay the printing and other expenses and counsel fees, not exceeding \$100. It is suggested that this requirement is against public policy, and therefore renders the ordinance void. We think it entirely proper that the company should bear these expenses. To exact them was no more than performance of a duty to the public.

The remaining causes assigned for reversal may be conveniently grouped under three heads, namely: (1) As to the legal authority of the council; (2) as to the consent of landowners; and (3) as to the regularity of the passage of the ordinance.

1. Belmar was organized under the borough act of 1890 (Gen. St. p. 225), held unconstitutional at the November term, 1895, of the court of errors and appeals. Attorney General v. Borough of Angelsea, 58 N. J. Law, 372, 33 Atl. 971. On April 21, 1896 (P. L. 339), there was enacted a statute repealing that act and other statutes, and creating every de facto borough formed thereunder a borough de jure, with the powers of the general borough act of 1878, and of all other general laws relating to boroughs. It provided that the presiding officer and members of the governing body of every such borough should become the mayor and councilmen of the borough created in its stead, and should continue in office until the next succeeding annual borough election. All other offices were declared vacant, and the mayor and council were directed to fill, by appointment, all offices required by the general act of 1878. There had been an election in Belmar on March 10, 1896, and the new council had organized on the third Tuesday of that month. It is argued for the prosecutors that such election was void, and that the mayor and council intended by the borough act of 1896 must have been those in office in November, 1895, when the act of 1890 was declared unconstitutional. This is a mistaken view. The judgment in the Angelsea Case had no effect except upon the borough of Angelsea. It would have led, of course, to a like judgment if the franchise of Belmar had been attacked; but it was not attacked, and the borough was regularly exercising local government under the act. It was to the persons in office at the time the borough act of 1896 took effect that that statute applied. Those persons became the mayor and council of Belmar, under color of law at least; and the case shows that they were, at the time of the petition and subsequent passage of the ordinance in question, administering the only government in force within the borough territory. They were the proper authorities to act in the premises, and their action cannot be collaterally attacked.

2. Under the street-railroad act of 1896, a grant of permission to construct, operate, and maintain a street railroad can only be made upon there being filed with the clerk of the governing body of the municipality the consent, in writing (executed and acknowledged as a deed must be to be recorded), of the owner or owners of at least one-half in amount, in lineal feet, of property fronting on the street through or upon which permission to construct the railroad is asked. Some of the consents filed in this case are challenged by the prosecutors. One, from I. T. Lewis, is challenged

because, although he held record title in his own name, he is styled in the consent "trustee for Hudson estate," and because he added a proviso that the railroad should be built to a certain point by February, 1898. Doubtless, Mr. Lewis held the land under a trust not declared. The act provides that an executor or trustee holding the legal title or having power of sale may sign the required consent. Mr. Lewis certainly holds the legal title, and we do not see how his consent can be disregarded simply because he says he is a trustee. The proviso to his consent did not nullify it, and was fully recognized. The ordinance exacts that the entire railroad shall be finished by July 1, 1897, unless prevented by legal restraint. Mr. Lewis is not complaining on either ground of objection, and the prosecutors cannot complain for him. Two other consents are challenged. They are from executors. The objection urged is that the consents do not recite that there is either legal title or power of sale in the executor. The act does not require any such recital. The council could satisfy itself on that point. In the absence of proof to the contrary, we must presume authority. It is claimed that some consents were revoked. No notice of revocation was given to the railroad company, and only one such notice was given to the council. That one was withdrawn, and there was enough frontage even if that revocation should be upheld. Without passing on the right to revoke consents of the character of those given under the act of 1896, it is clear that mere intention to revoke a consent will not avoid municipal action based upon it. There can be no complete revocation of a consent without notice to the municipality or the railroad company before the passage of the ordinance. Proof is offered in this case that a member of the council who opposed the ordinance knew that revocations were to be presented, and so informed the mayor, and that the mayor remarked to the person handing in the revocation, afterwards withdrawn, that it was not recorded in the office of the county clerk, as the consents had been. This remark seems to have led to the withdrawal, and a report of it to have led other persons present, with unrecorded revocations, to infer that it would be useless to present them to the council, and therefore to refrain from doing so. This proof is unavailing. There was no fraud or deception practiced, and the railroad company's vested rights cannot be disturbed by reason of the landowners' mistake. It should be remarked that none of those who contemplated revoking their consents are now complaining. The further objection is made that, while it is true that consents may have been filed for the requisite proportion of frontage on the streets for which the permission to construct the railroad was granted, it is otherwise as to the distance asked for. The application carried the proposed railroad to the north line of the borough. The ordinance stopped short of that point. It is not necessary to determine the absolute right of the

council to act pro tanto where the application is for a specified route, and the owners of the requisite proportion of frontage on that entire route do not consent. In this case the omitted part of the route was on the county bridge over the Shark river, which, while within the territorial limits of the borough, was not within its jurisdiction. It was as if the route asked for lay partly without the borough limits. Consent of the owners of the requisite proportion of the frontage within the council's jurisdiction was sufficient.

3. The complaint of irregularity in the passage of the ordinance is threefold: First. That there was not a proper hearing. The petition of the railroad company was presented at a regular meeting of the council held July 8, 1896, and the consideration there was set for a special meeting on July 28, 1896, of which notice was duly posted and published. The hearing at that meeting and the meeting itself were adjourned from time to time until March 4, 1897, when the ordinance was passed. It was approved by the mayor March 8, 1897. The authority of the act of 1896 is "that upon the date fixed by such notice, or upon such subsequent date as the hearing of the said matter may be adjourned to," the ordinance may be passed. The argument is that only one adjournment is permissible. This argument is without foundation. Continued adjournment of the hearing until a decision is reached is contemplated by the statute. It is complained that the adjourned special meeting was sometimes held on the night of a regular meeting of the council, and that citizens may have been misled; but we see no indication of any misunderstanding, and certainly the course pursued was not illegal. None of the prosecutors claim to have been misled. Proof is offered of some statements at the hearings of the company's intentions not afterwards fulfilled, and of a failure of the council to consider certain objections presented. All this proof is irrelevant. Second. That the ordinance did not receive a sufficient number of votes. Three members were present at the meeting. Two voted for, and one against, the ordinance. The mayor has no vote except in case of a tie, but, as he approved the ordinance, it is clear that the result would not have been different had the absent member attended and voted against the ordinance. The prosecutors first invoke the provision of the act of 1890 for a majority vote of all the council to pass an ordinance; but that act has been repealed. They then point out that the act of 1878 provides for six members of council, and argue that either there should have been two members appointed by the others, or, if the power of appointment to offices given by the borough act of 1896 did not extend to membership in the council itself (as clearly it did not), then, at least, it should be held that all four members, as a majority of six, were necessary to a quorum. We cannot read this provision into the act. The language used is very plain. The existing governing body of every borough under the repealed statute became an ad interim coun-

cil to continue until the next annual election, when a board of six members was to be elected under the act of 1878. In the meantime the ordinary rules governing municipal legislatures would, of course, apply. It is well settled that, if there be no statutory restriction, a majority of such a body is a quorum, and that a majority of a quorum may act. *McDermott v. Miller*, 45 N. J. Law, 251; *Cadmus v. Fagan*, 47 N. J. Law, 208, 4 Atl. 323; *Barnert v. Paterson*, 48 N. J. Law, 395, 6 Atl. 15. Lastly. That, when the ordinance was first introduced and read, the consents of landowners had not been filed, although their filing was recited therein, and that there were substantial amendments of the ordinance at the meeting of its final passage. This objection is based upon the idea that the ordinance could not be passed without submission at a previous meeting. Even if this were so, there would be nothing in the suggestion that the proviso of the street-railroad act of 1896, that permission to construct, etc., shall not be granted "in whole or in part" until the requisite consents are filed, forbids the introduction of the ordinance until such consents are filed. The quoted words refer to the route, not to the proceedings; and it would be sufficient if the consents were at hand when the ordinance came up for final passage, even if a submission thereof at a previous meeting was necessary. It may be conceded that, if such previous submission were necessary, there could be no substantial amendment at the time of passing the ordinance; but there is no such necessity. The borough act of 1878 does, indeed, require that all ordinances shall be submitted in writing at a regular meeting, and be acted upon at a subsequent meeting; but this requirement is evidently superseded by the street-railroad act of 1896, as to ordinances within its purview; for that statute provides for a special meeting on notice ordered by the council, and, in terms, enacts that, upon the date fixed by the notice, an ordinance may be passed granting permission to construct, maintain, and operate the railroad, including poles, wires, conduits, and other structures and appliances appropriate or necessary therefor. The location of tracts and poles may be then or subsequently fixed and determined by resolution. Of course, this may be done by the resolution passing the ordinance. The effect of the act is to prescribe a uniform procedure for all municipalities. We find no illegality in the ordinance under review, and it is therefore affirmed, with costs.

(59 N. J. L. 423)

NEW JERSEY ELECTRIC RY. CO. v.
MILLER.

(Court of Errors and Appeals of New Jersey.
March 8, 1897.)

STREET RAILWAYS—COLLISION.

The reply: "I charge to this extent: He ought to be able to see far enough up the track to see that he has the right of way; and he has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of speed,"—given on a request to charge that a driver of a vehicle, when

approaching a street railway at a place where his view is impeded by other vehicles, ought to wait till his view is no longer thus impeded before going on the track,—correctly states the law; its meaning being that a driver under such circumstances ought to reach a point so near the railway that he could see without impediment far enough up the track to form a judgment whether he could drive on the track before the approaching car, running at a reasonable speed, would reach that place; and, if he could, he had the right of way. Per Magie, J., dissenting.

Dissenting opinion. For majority opinion, see 36 Atl. 885.

MAGIE, J. I find it impossible to give to the instruction complained of the meaning attributed to it by the majority of the court. The instruction was given upon a request to charge, in substance, that a driver of a vehicle, when approaching a street railway at a place where his view is impeded by other vehicles, ought to wait until his view is no longer thus impeded before going on the track. To this request the judge replied: "That I charge to this extent: He ought to be able to see far enough up the track to see that he has the right of way; and he has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of speed." Taken in connection with the request, this instruction plainly meant that a driver, under the circumstances supposed, ought to reach a point so near to his proposed crossing of the railway that he could see without impediment far enough up the track to form a judgment whether he could drive upon the track before an approaching car, running at a reasonable rate of speed, would reach that place. If he could do so, he had the right of way, and the car must yield to his crossing. I think the instruction must have been understood in this sense by the jury, and that it correctly stated the law governing the rights of vehicles crossing each other's course in a public street.

(59 N. J. L. 535)

JOHNSON v. STATE

(Court of Errors and Appeals of New Jersey.
March 22, 1897.)

CONSTITUTIONAL LAW—COURTS.

Act June 13, 1895 (P. L. 807), creating a county court, is not unconstitutional, though abolishing the courts of oyer and terminer and of common pleas, and giving the jurisdiction had by them to the new court. Per Dixon, J., dissenting.

Dissenting opinion. For majority opinion, see 37 Atl. 949.

DIXON, J. In January, 1896, the plaintiff in error was tried and convicted of murder of the first degree, before a tribunal styled in the record the court of oyer and terminer of the county of Somerset, held by a justice of the supreme court, and two others styled judges of the court of common pleas of said county. At that time the act of June 13,

1895 (P. L. 1895, p. 807), which purports to abolish the courts of oyer and terminer and of common pleas after the first Monday in December, 1895, stood upon the statute book unrepealed. For the reason set forth by Mr. Justice Magie in his dissenting opinion in *Schalk v. Wrightson*, 58 N. J. Law, 50, 32 Atl. 820, I think that act was a valid exercise of the constitutional power of the legislature to abolish the inferior courts of the state, and therefore that the tribunal which tried and convicted the plaintiff had no lawful existence, and consequently no jurisdiction. That the act of April 9, 1896 (P. L. 1896, p. 236), could not validate such proceedings is sufficiently maintained by the opinion of Chief Justice Beasley in *Maxwell v. Goetschius*, 40 N. J. Law, 383. The judgment should be reversed.

(61 N. J. L. 291)

LIPPINCOTT v. FELTON.

(Supreme Court of New Jersey. Feb. 21, 1898.)
ELECTIONS—CONTEST—PLEADING—PROOF—BALLOTS.

1. In a contest under the provisions of the one-hundredth and following sections of the election law, incumbent is not bound to file any answer to contestant's petition, and his failure to do so cannot be treated as a default entitling contestant to judgment.

2. The power of the circuit court on such a contest does not extend to the determination whether a vacancy existed in the office in respect to which the contest is made.

3. Ballots cast in one voting precinct having an official indorsement indicating that they were prepared for another precinct were properly rejected.

4. Contestant's petition charged that 18 illegal ballots were cast for incumbent by persons whom he named therein as known to him. His proofs established the fact that 18 ballots were cast illegally, but not by whom they were cast or that they were cast by the persons named in his petition. *Held*, that these charges were not thereby sufficiently proved, and, in the absence of other grounds in support of the petition, the failure justified its dismissal.

(Syllabus by the Court.)

Appeal from circuit court, Camden county; Richard T. Miller, Judge.

Petition by Freedom O. Lippincott against George G. Felton to contest an election. From a judgment dismissing his petition, contestant appeals. Affirmed.

Argued at November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

Lindley M. Garrison and William J. Kraft, for appellant. Henry M. Snyder and Frederick A. Rex, for respondent.

MAGIE, C. J. This is an appeal from the determination of the Camden circuit in a proceeding contesting an election, under the provisions contained in the election law, and found in section 100 and the following sections, 2 Gen. St. 1313. Four errors in law are claimed by the petition to have occurred in the course of the trial, which resulted in

the dismissal of the petition of appellant, who was the contestant.

It is first claimed that the circuit court should have found in favor of appellant upon his petition, and, without going into evidence, upon the ground that the incumbent had filed no answer, and had not denied the charges contained in the petition. But the circuit court in these proceedings is merely a part of the electoral machinery. *Conger v. Convery*, 52 N. J. Law, 417, 20 Atl. 166; *Id.*, 53 N. J. Law, 658, 24 Atl. 1002. The act invests it with jurisdiction of a limited character, upon the filing of a petition of the sort prescribed. It does not require the incumbent to file an answer. Doubtless he could do so, but, in the absence of any requirement to that effect, his failure to do so cannot be treated as a default which would entitle contestant to judgment. The contestant must establish the charges of his petition by evidence before the court can make a determination in his favor.

It is next contended that the circuit court erred in refusing to determine, preliminarily, whether or not there was a vacancy in the office in respect to which the contest is made. It has been settled by the case before cited that the power conferred on the circuit court is limited to a determination, not conclusive, of the result of an election. No power to determine whether a vacancy exists has been expressly conferred, and, if such power could be conferred by implication, it would inhere in the boards of canvassers upon the same argument which is here urged. It is incredible that the legislature should have intended to invest the officials charged with the determination of the results of an election with the power to determine whether or not such an election was required by law.

It is further urged that there was error in determining that 17 ballots cast in the First precinct of the Ninth ward, and which contained contestant's name for the office which he seeks, were properly rejected by the election officers, and in refusing to count those ballots for contestants. The rejected ballots contained an official indorsement indicating that they were prepared for another precinct of the same ward. By the provisions of section 33 of the ballot reform law of 1890, each ballot was required to have printed upon its back the words, "Official ballot for —," and after the word "for" should follow the designation of the election district or voting precinct for which the ballots were prepared. That section, as finally amended in 1893 (2 Gen. St. 1360), provides that, if an assemblyman is to be chosen at the election, the word "for" shall be followed by the designation of the assembly district, but, if no assemblyman is to be chosen, it shall be followed by the designation of the "township, municipality, ward, or other subdivision" for which the ballot is prepared. This alteration of the terms of the section,

as originally passed, first occurred in an amendment passed in 1891, and led Mr. Justice Depue, sitting in the Essex circuit, in a contestant election case, to express a doubt whether the law as altered required any designation of voting precincts, and whether its term would not be satisfied by a designation of the township or municipalities not divided into wards, and of the wards and similar subdivision, if any existed. *Ulrich v. Freisenstetner*, 15 N. J. Law J. 74. I find it difficult to discover what the word "subdivision" can be practically applied to unless it be to voting precincts. But I deem it unnecessary to express any opinion upon the terms of the section in question as now changed. By section 39 of the ballot reform law (2 Gen. St. 1338), it is enacted that if any ballot voted shall have on its back any designation other than permitted by the act, whereby it can or may be distinguished from other ballots cast at that election, such ballot shall be void, and not counted. If, then, section 33, as now existing, prescribes a designation which does not include voting precincts, the designation on these rejected ballots was not one permitted by the act. If it does prescribe the designation of the voting precinct for which it is prepared, then the indorsement is one permitted by the act, but which plainly could or might distinguish such ballot from other ballots cast at the same election. For this reason I think there was no error in refusing to count in this contest the ballots which had been rejected by the election officers on these grounds.

A more difficult question is presented by the remaining claim of appellant. By section 101 of election law (2 Gen. St. 1313), one of the grounds whereon an election may be contested is the reception of illegal votes at the polls sufficient to change the result. By section 105 of the same law, it is provided that, when the reception of illegal votes is alleged as a cause of contest, the petition which the contestant must file must set forth the names of the persons who illegally voted, if known. The petition in this case set forth the names of the persons alleged to have illegally voted as known to contestant. But, when the appellant came to his proof, he was unable to prove that the persons named by him had voted at all. All that he proved was that votes had been cast in the name of 18 registered voters in that precinct; that 17 of such registered voters did not vote at all; and that the remaining one came in after his name had been voted on, and was allowed to vote. It thus appeared that there were 18 illegal ballots received, but the evidence fell short of showing that they were cast by the persons named in the petition, or that they contained the name of respondent for the office for which he and contestant were candidates. The failure of contestant to prove that the illegal votes which he claimed had been cast for incumbent were cast by the persons who were

named in his petition, in my judgment, is fatal to his contest. The act in question, in prescribing that contestant should set out in his petition the names of those who had cast illegal votes if they were known to him, and in requiring contestant to serve upon incumbent, 10 days before the day fixed for trial, a copy of the petition, had a plain and obvious purpose. The purpose was not only to apprise incumbent of the grounds of the contest, but to enable him to prepare to meet the specific charges by evidence. It might thwart that purpose if, when contestant had specifically averred, as in this case, that one Walter Sherman, not a qualified voter, had voted upon and in the name of Samuel Lutz, who was a qualified voter, he should be permitted to show that some unknown person had impersonated Lutz, and voted in his name; for, if such proof is admissible and effective, incumbent could not rebut it, even by the production of Sherman to deny that he thus voted. Counsel strenuously contend that the real contest is over the illegality of the votes cast, and not as to the persons who cast them. But this contention ignores the right of the incumbent to prepare his defense upon the charges required by the statute to be made known to him by the petition served or by such amendment thereof as the circuit court may permit. This view of contestant's case renders it unnecessary to consider whether or not the proof offered by contestant, for the purpose of showing that the 18 illegal votes were cast for incumbent, was relevant and admissible; for, in the absence of proof that those votes were cast by the persons named by contestant as known to him, the circuit court was right in holding contestant's charges unproved, and, there appearing no other sufficient ground of contest, in dismissing his petition. The judgment must be affirmed.

(61 N. J. L. 301)

MURRAY v. PATERSON RY. CO.

(Supreme Court of New Jersey. Feb. 21, 1898.)

STREET RAILROADS—NEGLIGENCE OF MOTORMAN.

A child, about two years and nine months old, attempted to cross a public street in which a line of trolley cars was operated. There was a car then coming towards the child. From the evidence, the jury could infer that, although its power was off, the car was running at great speed, occasioned by a down grade and its very crowded condition, and that, when the motorman saw the child start to cross, he did not apply the brakes or attempt to retard the speed of the car until the child fell upon the track. It was run over before the car stopped. The trial judge was requested to charge that, in regulating the speed of the car, the motorman was not bound to allow for the possibility that a child of that age might undertake to cross and fall upon the track so as to be unable to get off before being run over. The request was given with the qualification that the rate of speed of the car was otherwise reasonable. By this qualification, and by other parts of the charge, it appears that the case was tried on the theory that, if the car was run at reasonable speed, the motorman was not bound to take into con-

sideration the possibility of the fall of a child of that age in crossing, while, if running at an unreasonable rate of speed, he was bound to that duty. Upon the charge the verdict must be taken to have determined that the car was run at an unreasonable rate of speed, and that the liability of defendant was thus made out. *Held*, that defendant has no ground of complaint thereon. But in declaring this conclusion it is not intended to indicate an opinion that a motorman, running his car in a public street, is not bound to consider the apparent condition of persons attempting to cross the street, and, if they appear to be infants of tender age, or crippled, decrepit, or drunken persons, to regulate the speed of the car as reasonable prudence would require, considering their right to cross the street and such risks as might naturally result from their apparent condition.

(Syllabus by the Court.)

Action by Robert Murray against the Paterson Railway Company to recover for personal injuries. A verdict was rendered for plaintiff, and the court allowed a rule to show cause why a new trial should not be granted.

The case is certified here on the following certificate of the trial justice, viz.: "Passaic Circuit Court. The Paterson Railway Company ads. Robert Murray. In tort. A rule to show cause why a new trial should not be granted having been made in the above-stated cause, and it appearing that the defendant has filed reasons for granting a new trial, and that the case is one of difficulty and doubt, I, Gilbert Collins, Judge of the said Passaic circuit court, do hereby certify that the foregoing printed book is the case made and stated in this cause, and I hereby certify the same to be argued at the bar of the supreme court, for its advisory opinion, upon the following questions of law, being particularly presented and stated in said reasons filed as aforesaid: First. Whether it was error to refuse defendant's motion for a nonsuit. Second. Whether it was error to refuse the defendant's motion to direct a verdict for the defendant. Third. Whether it was error for the trial judge to refuse to charge the jury that they should find under the evidence that the injuries of the plaintiff were the result of an accident, for which the defendant was not liable. Fourth. Whether it was error for the said judge to decline to charge the jury, in accordance with the defendant's request, as follows: That, even if the jury found that the defendant was operating the car in question at an excessive rate of speed, such excessive speed was not the proximate cause of the plaintiff's injury. Fifth. It appearing in the case that the plaintiff was crossing the track of the street railway operated by the defendant, and while so crossing fell prostrate, and was run over and injured by a car of defendant, which was moving on said track, and one question of fact being whether the rate of speed of said car was unreasonable and excessive, whether the said judge erred in declining to charge in accordance with the following requests of said defendant on either of them, to wit: (1) That in regulating the speed of the car

the motorman was not bound to allow for the possibility that children under three years of age might undertake to cross the track at a place where there was no regular crossing, and fall prostrate on the track, and thereby be unable to get off the track in time to avoid being run over. (2) That, in regulating the speed according to the circumstance existing at the time, the motorman, while obliged to have in view the safety of persons, including children, in crossing the track in front of the car, was not obliged to have in view a possibility of persons so crossing falling down upon the track, and thereby being exposed to the danger of being run over. Sixth. Whether it was error for the court to charge as requested as aforesaid, with the charges and qualifications of the propositions as set forth in the charge of the court. Seventh. Whether it was error for the court to charge the jury that, if they found the motorman negligent in the particulars indicated in said charge, they should find for the plaintiff and assess his damages. Eighth. Whether the verdict was contrary to the weight of the evidence. Ninth. Whether the damages (\$10,000) assessed by the jury were excessive. Gilbert Collins, Judge." It appears from the case made and stated, which has been certified for an advisory opinion on the questions above mentioned, that plaintiff, when about two years and nine months old, was run over by a trolley car of the defendant in a public street in Paterson. In consequence one of his legs had to be amputated. The action was brought in the Passaic circuit to recover damages for the injury, and, a verdict having been rendered for plaintiff, a rule to show cause why it should not be set aside was allowed by the circuit judge.

Argued November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

Z. M. Ward, for plaintiff. Eugene Stevenson, for defendant.

MAGIE, C. J. The first four questions submitted for an advisory opinion may be considered together. It appears from the evidence contained in the stated case that when his injury was received plaintiff was crossing a public street diagonally, and not at a street crossing; that a trolley car of defendant was traveling on its track upon that street towards plaintiff; that the car was crowded with passengers; and that no power was being applied, but the car was running upon a down grade, but not a steep grade. There was also evidence from which it could be inferred that the car was running at a great speed, and that, when plaintiff attempted to cross the street within the view of the motorman, the latter did not attempt to check the speed of the car. The evidence further showed that plaintiff while running across fell upon the track of the approaching car. There

was evidence from which it could be found that the motorman then for the first time applied the brake, and endeavored to arrest the motion of the car. Before plaintiff could arise, or a bystander, who ran to his assistance, could drag him from the track, the car ran over one of his legs. The case shows that it was not contended at the trial, and it has not been contended here, that plaintiff was capable of contributing to his injury by his own negligence. The sole question, then, is whether there was evidence to go to the jury in respect to the negligence of the motorman, the agent of defendant, in the management of the car. Our conclusion is that there was such evidence, and that it was properly submitted to the jury. They were entitled to and were permitted to consider the momentum given to a car on a down grade by its heavy load, and to determine whether or not it was running at a very high rate of speed. They were then entitled to consider whether or not, taking into account the momentum and speed, it was not the duty of the motorman, as soon as he saw plaintiff commence to cross the street, to use his brake and arrest the motion of the car, and not to postpone that act until he saw the plaintiff fall on the track.

But it is strenuously urged that this cast upon the motorman a duty greater than the law imposes. It is contended that as the evidence shows that, in the opinion of the bystanders, plaintiff, if he had not fallen, would have passed the track, going in the direction and at the speed he was, without injury, no duty devolved on the motorman to take into consideration the chance that a child of that age would fall upon the track. Whether a motorman is charged with that duty when he is running his car at a rate of speed which is reasonable cannot be considered, for the trial judge tried the case, as will be seen, upon the ground that no such duty was imposed on the motorman. He left to the jury whether, if the car had been run at a reasonable rate of speed or kept under a control appropriate to the momentum and grade, it could not have been stopped after the child fell without running over him. So that the case was put upon the unreasonable rate of speed, and the duty which, under the circumstances, grew out of that fact, viz. to maintain a control by the brake which would stop the car within a reasonable distance. In this we perceive no error, and the first four questions must be answered in the negative.

The fifth question asks consideration of the refusal of the trial judge to charge two requests set out therein. These requests relate to the duty of a motorman in regulating the speed of his car, and the judge was asked to instruct the jury that the motorman was not bound to consider the possibility that a person who was crossing the track in front of his car might fall upon the track, without any reference to the rate of speed at which he was running his car. The judge charged

the jury in the very language of the requests, with the added statement that the rate of speed must be otherwise reasonable. So far as the case before us is concerned, I think the requests were rightly refused. If a motorman is running his car in a public highway at an unreasonable rate of speed, and he sees a child of tender years attempting to cross the street in front of his car, I think he is bound to exercise such care for its safety, under the circumstances, as reasonable prudence would require. As children of that age frequently fall, he is bound to consider that circumstance, and, if prudence requires, to abate the unreasonable speed. The fifth question must therefore be answered in the negative.

The sixth and seventh questions are disposed of by what has been said, and must be also answered in the negative.

The eighth and ninth questions relate to matters of fact, and present no question of law at all. In my judgment, they are not questions proper to be certified, under the provisions contained in sections 247, 248, and 249 of the practice act. Those provisions came under consideration in the court of errors in the case of a judgment brought there by writ of error from a circuit court, which judgment had been entered after a rule to show cause why a new trial should not be granted had been allowed and certified to this court, and returned with the advice that the rule should be discharged. Errors having been assigned in the court of errors upon the advisory opinion, a motion was made to strike them from the record. The report of the case indicates that the motion prevailed by the unanimous vote of the court. But two opinions were delivered exhibiting divergent views. Chief Justice Beasley expressed the view that error could not be assigned upon an advisory opinion of this court returned to the circuit, and advising the making absolute or discharging a rule to show cause. Mr. Justice Dixon declared that error could be assigned upon such an opinion so far as it expressed legal propositions, but not upon its determination of questions relating to the preponderance of evidence or the amount of damages. *Railroad Co. v. Nevelle*, 51 N. J. Law, 332, 17 Atl. 836, and 19 Atl. 538. The view expressed by the chief justice may be assumed to have expressed the opinion of the majority, for that is the opinion stated in the syllabus, which was doubtless prepared by him. Upon that assumption I think that, if it were an open question, it might be strongly urged that the legislation now contained in the three sections above referred to was not intended to permit a rule to show cause why a new trial should not be granted, to be certified; for there are clear indications in the statute that what was permitted to be certified was what could be reviewed by writ of error. But, as was pointed out by Mr. Justice Dixon, an exposition of this legislation by contemporaneous practice precluded the

contention that a rule to show cause was not within the intention of the acts. The contemporaneous cases referred to by Justice Dixon, in the opinion mentioned, show, on examination, that the questions certified embraced purely questions of law. Nor am I able to discover, until comparatively modern days, any certified rule involving questions of fact as to weight of evidence, amount of damages, etc. Latterly the question was directly presented to this court whether a circuit court could certify a rule to show cause so as to require us to settle facts in dispute. The determination was contrary to the existence of such power in the circuit court. *Destefano v. Calandriello*, 57 N. J. Law, 483, 31 Atl. 385. We conceive that this case governs that now before us as to the questions 8 and 9. A certificate answering the other questions will be made. This will leave the circuit court free to deal with those questions, if he desires.

(61 N. J. L. 428)

STATE (EMERALD & PHENIX BREWING CO., Prosecutor) v. FOLEY.

(Supreme Court of New Jersey. Feb. 21, 1898.)
NOTE—COMMERCIAL INDORSER—PRESENTATION FOR PAYMENT—PAROL EVIDENCE.

1. One who, being named as payee in a negotiable promissory note, places his name upon the back of it in order to give credit to the maker, must be regarded as a commercial indorser when the note is delivered by the maker to a third party.

2. In order to bind an indorser, a promissory note payable "on demand after date" must be presented for payment in a reasonable time after its date.

3. The circumstances to be considered in determining what is a reasonable time for the presentation of such a note are only those which relate to the ability of the holder, excluding any notion of credit or indulgence to the maker.

4. The rights and obligations of the indorser of a negotiable promissory note cannot be varied by parol evidence of his oral agreement made before or at the time of his indorsing the note.

(Syllabus by the Court.)

Certiorari to court of common pleas, Essex county; Fort, Judge.

Suit by the Emerald & Phenix Brewing Company against Patrick Foley as an indorser on a note. Plaintiff had judgment, and defendant brings certiorari. Reversed.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

William C. Nicoll, for prosecutor. Thomas J. Lintott, for defendant.

DIXON, J. The transaction shown by the testimony in the court of common pleas was as follows: The plaintiff's agent, Foley, the defendant, and one Kelly, orally agreed together, on September 4, 1895, that the plaintiff should lend Kelly \$250, for which Kelly should give the plaintiff his note, payable at a bank in Newark, "on demand after date," to the order of Foley. Indorsed by Foley as surety, and that Kelly should pay \$5 a week until the note was satisfied; that thereupon the note was so

drawn, signed by Kelly, and indorsed in blank by Foley, and delivered to the agent, and then the plaintiff paid Kelly the \$250; that Kelly afterwards paid weekly installments of \$5 each until \$180 were paid, and then ceased; that on June 10, 1896, the plaintiff demanded payment of the note at the bank, and, payment being refused, gave immediate notice thereof to Foley, the indorser. On these proofs the common pleas decided that the indorser was responsible for the balance of the note. The indorser contends that such decision is erroneous.

It seems proper, in dealing with this controversy, first to consider the effect of the writing, irrespective of the oral agreement. At the time when the defendant placed his name upon the back of the instrument, and it was delivered to the plaintiff, the writing had no legal validity; and hence it was not a negotiable promissory note owned by the payee, and by him transferred by indorsement to a third party. Its legal validity came into existence only when, on the strength of it, the plaintiff advanced the \$250 to Kelly. The signature of the defendant, therefore, lacked this ingredient of a strict indorsement under the law merchant. Nevertheless it seems that the defendant must be regarded as a commercial indorser. *Smith v. Becket*, 13 East, 187; *Field v. Nickerson*, 13 Mass. 131; *Merritt v. Todd*, 23 N. Y. 28; *Jones v. Bank* (Pa. Sup.) 13 Atl. 84; *Perry v. Green*, 19 N. J. Law, 61; *Johnson v. Ramsey*, 43 N. J. Law, 279. Consequently his obligation to pay, as evidenced by his indorsement, was conditioned upon due demand for payment being first made in accordance with the terms of the note. The note was payable "on demand after date." In *Hitchings v. Edmonds*, 132 Mass. 338, this expression was deemed equivalent to "on demand"; but in *Crim v. Starkweather*, 88 N. Y. 340, a distinction was noted, the words "on demand" rendering the note immediately due, while the words "on demand after date" required that some time should elapse before demand could be made, and therefore before the note became due. The New York case comports more exactly with the terms used, but plainly a demand forthwith after the day of the date would be in accordance with the contract.

The question, therefore, on this note, is, when, after its date should the holder make demand of payment, and give notice of default to the indorser, in order to make his obligation to pay absolute? The cases all hold that that must be done in a reasonable time; or, as it is sometimes stated, the holder must use due diligence. The circumstances to be considered in determining whether a demand has been made in due time are scarcely suggested by the phrase "a reasonable time," but the form of the rule requiring due diligence in the holder indicates what, in *Merritt v. Todd*, 23 N. Y. 28, Chief Justice Comstock declared to be the true principle,—that it is merely the reasonable ability of the holder which can be considered, excluding

any notion of credit or indulgence to the maker. On this principle it is manifest that due demand of this note was not made. There is not the slightest evidence of any reason, outside of indulgence to the maker, for postponing the demand from September 5, 1895, until June 10, 1896. It therefore is manifest that, unless the rights of the defendant as indorser can be affected by his oral agreement, made before he signed his name, he cannot be held to pay the note. In *Field v. Nickerson*, 13 Mass. 131, the opinion seems to favor the view that a contemporaneous understanding between indorser and indorsee that demand should be deferred would bind the indorser; and in *Sise v. Cunningham*, 1 Cow. 397, it is said that proof of the indorser's assent to such an arrangement would undoubtedly preclude him from availing himself of the defense that demand had not been made as by the mere terms of the note it ought to have been. To the same effect is *Jones v. Bank* (Pa. Sup.) 13 Atl. 84. But in *Perry v. Green*, 19 N. J. Law, 61, Chief Justice Hornblower, expressing the opinion of this court, said: "It may well be doubted whether parol evidence of any agreement to extend the time of payment, or, in other words, to alter the force of a written contract, would be admissible." The doctrine thus doubted seems now to be completely repudiated in this state, and the principle to be firmly established that the signature upon a negotiable promissory note, made by a party thereto, imports a precise agreement, constructed by the law merchant upon the tenor of the note, which cannot be varied by parol evidence of any preceding or contemporaneous oral arrangement. *Chaddock v. Vanness*, 35 N. J. Law, 517; *Johnson v. Ramsey*, 43 N. J. Law, 279; *Middleton v. Griffith*, 57 N. J. Law, 442, 31 Atl. 405. In case of the indorsement of such a note by the payee, one of the provisions of his agreement thus implied is that his conditional obligation to pay the debt shall be discharged if demand be not made of the maker according to the terms of the note.

In view of these decisions, we must conclude that the present defendant's right to be discharged because of the plaintiff's failure to demand payment of the note before June 10, 1896, could not be impaired by the parol evidence of his contemporaneous agreement for the indulgence of the maker. It follows that the judgment of the common pleas in favor of the plaintiff should be reversed.

(61 N. J. L. 308)

PARKER v. STATE.

(Supreme Court of New Jersey. Feb. 21, 1898.)

DISORDERLY HOUSE—INTOXICATING LIQUORS—INDICTMENT—PLEADING AND PROOF—FAILURE OF DEFENDANT TO TESTIFY.

1. By the Werts law, every sale (without appropriate license) of the intoxicating liquors to which that act applied was constituted the offense of "keeping a disorderly house." *Held*, that its provisions in this respect did not take away the liability to indictment for the com-

non-law offense of keeping a disorderly house of one who maintained a place in which he habitually sold such liquors in violation of law.

2. The first count of the indictment in this case approved as sufficient under the provisions of the supplement to the crimes act, approved March 10, 1893 (1 Gen. St. p. 1101).

3. The act of 1871, now section 8 of the evidence act (2 Gen. St. p. 1398), which permits an indicted person to become a witness in his own behalf by offering himself as such, does not, as do the act of congress and the acts of some states on the same matter, provide that his failure to offer himself shall not raise any presumption against him, nor does it, as do the acts of some states, forbid allusion to such failure by counsel or court. *Held* that, when facts have been testified to by witnesses for the prosecution, which, if true, establish defendant's guilt, which facts concern the actions of defendant, and, if not true, may be disproved by him, his failure to offer himself as a witness may be considered and commented upon.

(Syllabus by the Court.)

Error to court of quarter sessions, Monmouth county; Conover, Judge.

John K. Parker was convicted of keeping a house in which he habitually sold intoxicating liquors without a license, and he brings error. *Affirmed*.

Argued November term, 1897, before MAGIE, C. J., and GARRISON and LIPPINCOTT, JJ.

Aaron E. Johnston and R. T. Stout, for plaintiff in error. Wilber A. Heasley, for the State.

MAGIE, C. J. The writ of error in this cause was returnable in December, 1895. At the June term, 1896, the case and briefs of counsel were sent to the court. On examination, the return was found to be so defective that the court declined to consider the case, and so notified counsel. No further step having been taken, the court, at November term, 1897, was about to dismiss the writ, when counsel on both sides agreed to an amendment of the return. The case was then argued at that term by briefs submitted to the judges who sat in the court when it was first presented. Out of the 23 assignments of error, those only will be dealt with which are deemed to present any debatable question.

The first point raised by the brief of counsel for plaintiff in error relates to the sufficiency of the indictment. It contains three counts, and the record shows a general verdict of guilty as charged. If any of the counts are free from objection, it will be sufficient to support the judgment. *Hunter v. State*, 40 N. J. Law, 495. It is unnecessary to express any opinion in regard to the second or third counts, because I have concluded that the first count is entirely unobjectionable. It charges, in substance, that plaintiff in error, on a certain day, and on divers other days between that day and the day the inquisition was taken, in a certain house kept and maintained by him in the township of Neptune, in the county of Monmouth, unlawfully and habitually sold by retail, and by less measure than a quart, certain spirituous, vinous, malt, and brewed liquors which are specified, to certain persons

named, and to divers other persons unknown to the grand jury, without having a license for that purpose. A brief review of the law on this subject seems to establish the sufficiency of such a charge. It has been settled in this state that a house in which unlawful sales of liquor are habitually made is a nuisance, and one who maintains it is guilty of keeping a disorderly house. *Meyer v. State*, 42 N. J. Law, 145. By the "Act to regulate the sale of spirituous, vinous, malt and brewed liquors and to repeal an act entitled 'An act to regulate the sale of intoxicating and brewed liquors, passed March 7, 1888,'" which act is commonly known as the "Werts Law" (2 Gen. St. p. 1810), the person who sells any of the liquors named in its title without license obtained for that purpose is guilty of the offense of keeping a disorderly house. When that act was adopted, sales of such of said liquors as are called ardent spirits were misdemeanors, punishable by fine, under the sixtieth section of the crimes act (1 Gen. St. p. 1060). By the provisions of the "Act to regulate the sale of ale, strong beer, lager, porter, wine and other malt liquors in the state of New Jersey," approved April 4, 1872, the sale of such liquors without license was prohibited under penalties, and, in addition, any person making such sale without license was expressly declared to be guilty of keeping a disorderly house. 2 Gen. St. p. 1797. This last-mentioned act was construed in this court to support a conviction on an indictment for keeping a disorderly house upon proof of a single sale in violation of its provisions. *State v. Fay*, 44 N. J. Law, 474. A like construction must be given to the Werts law. That law, by its repeal of all inconsistent and repugnant acts, and by the construction thus given to it, must be considered to have superseded the acts previously existing that provided for the punishment of the unlicensed sale of all the liquors named therein, for the repeal was unrestricted, and it would be absurd to suppose that the legislature intended that every person selling ardent spirits without license should be liable either to a fine, under the sixtieth section of the crimes act, or to the severer punishment that could be imposed upon the keeper of a disorderly house, according to the mode in which the grand jury presented the offense. It results that the Werts law made any sale of the liquors to which it applied, without an appropriate license, an offense, and called that offense "keeping a disorderly house." This seems an inappropriate name to characterize a crime committed by a single act, because the common-law offense of keeping a disorderly house could only habitually be committed by a series of acts done. But the legislative power was plainly sufficient to determine what should constitute a crime, and how such a crime should be named or characterized, and by what evidence it should be proved. This result is not, in my judgment, in conflict with the decision in *Rogers v. State*, 58 N. J. Law, 220, 33 Atl. 283; for the Werts law, while making a single sale of intoxicat-

ing liquor without appropriate license constitute the offense of keeping a disorderly house, did not expressly nor impliedly take away or diminish the liability to indictment of one who maintained a place in which he habitually sold such liquors in violation of law; and the late chief justice, in his opinion, was dealing with a case of that sort, and the nature of the charge that was required in an indictment for that offense under the act next to be considered. That act was enacted as a supplement to the crimes act, and was approved March 10, 1893. 1 Gen. St. p. 1101. It provides that any indictment for the offense of maintaining a common-law nuisance or keeping a disorderly house under section 192 of the crimes act, where the offense consists wholly in the unlawful sale of spirituous, vinous, malt, or brewed liquors, shall simply charge the unlawful sale of intoxicating liquors contrary to law. In *State v. Schmid*, 57 N. J. Law, 623, 31 Atl. 280, this court considered the last-mentioned act applicable to an indictment charging a single sale of intoxicating liquor, and upon the theory that the statutory crime of keeping a disorderly house by that nomenclature came within the purview of section 192 of the crimes act. The present case, however, does not depend upon the statutory provisions contained in the Werts law. The charges of the first count, if proved by proper evidence, would establish the offense of keeping a disorderly house without recourse to that act. By that count plaintiff in error was charged with maintaining a house in a specified locality (which charge was sufficient at common law,—*Whart. Prec. Ind.* 733), in which he habitually unlawfully sold the liquors named. This charge is undoubtedly sufficient to support the conviction.

Counsel for plaintiff in error present another objection to the proceedings in this case. The indictment charged that plaintiff was not licensed to make the sales of liquor of which he was accused. The state of the case shows that at the close of the charge to the jury the counsel for plaintiff in error requested the court to charge that the state was bound to prove that plaintiff in error had no license to sell those liquors, which proof had not then been made. The court permitted the prosecutor to call witnesses, and make proof of that charge of the indictment at that time, and declined to allow an exception to its ruling. There is, therefore, nothing in the bill of exceptions on which this assignment can possibly be considered. But, if it could be considered, it is obvious that the course pursued was within the discretion of the court, and could not be reviewed unless such discretion was plainly abused. Moreover, it is entirely settled that such a negative averment is not required to be proved by the state. *Greeley v. City of Passaic*, 42 N. J. Law, 87; *Jackson v. City of Camden*, 48 N. J. Law, 89; *Plainfield v. Watson*, 57 N. J. Law, 525, 31 Atl. 1040; *Whart. Cr. Law*, § 614.

Another assignment of error is based upon a portion of the charge of the court, a general exception having been allowed to the whole

charge. The court had stated to the jury that several witnesses had testified to repeated sales of the liquors named in the indictment having been made by plaintiff in error to them, and to others in their presence. Thereupon the court added: "The defendant has heard this evidence, but has remained in his seat without attempting to deny or contradict the testimony given by the state's witnesses. Neither has any other witness been called to refute it. Under the circumstances, the court submits the case for your determination." This raises for the first time in this state the question of the effect to be attributed to the failure of a defendant in an indictment to avail himself of the right accorded by our statute to be a witness in his own behalf. An act of congress permits a person charged with an offense against the United States to be a competent witness on his own request, but expressly provides that his failure to make such a request shall not create any presumption against him. 1 Supp. Rev. St. U. S. p. 312. The acts of other states extending to an accused the privilege of being a witness in his own behalf, which was denied at common law, generally imposed the same limitation upon the fact of his failing to take advantage of the privilege. Some of those acts expressly forbid all allusion to such failure by either court or counsel. In 1871 our legislature, by the act which is now section 8 of "the act concerning evidence" (2 Gen. St. p. 1898), extended to the accused the same privilege, but the act imposed no restriction or limitation. The accused was simply admitted to testify in his own behalf, if he offered himself for that purpose. Does our act, containing no express restriction, impliedly prohibit consideration and comment upon the failure of an accused to avail himself of the privilege accorded to him? I have reached the conclusion that it does not, in all cases. It is well settled that evidence may be admitted against an accused establishing the fact that declarations or charges of his guilt were made to him, and that he made no reply, provided that the occasion was such that a reply from him might be properly expected. This rule was approved by the supreme court, speaking by Chief Justice Green, in the case of *Donnelly v. State*, 26 N. J. Law, 504, and by the court of errors, speaking by Justice Ogden, in the same case, *Id.* 612. Statements thus admitted are not direct evidence against the person charged, but his conduct when such statements are made is admissible so far as it tends to show acquiescence therein by silence when he would naturally speak. So, if such statements are made in the course of judicial investigation, in which he is not called on to answer directly, and in which his response would interfere with the orderly and regular proceedings, his silence may not be proved. 1 *Tayl. Ev.* § 813. But when the accused is upon trial, and the evidence tends to establish facts which, if true, would be conclusive of his guilt of the charge against him, and he can disprove them by his own oath as a witness if the facts be not true, then his silence would justify a strong inference that he could

not deny the charges. Such an inference is natural and irresistible. It will be drawn by honest jurymen, and no instructions will prevent it. Must a court refrain from noticing that which is so plain and forcible an indication of guilt? In my judgment, there is no rule of law requiring it. The rights of the accused are not invaded or denied by proper comment on his silence. There may be cases in which the evidence against the accused does not directly affect him, and a reply from him could not necessarily be expected. His failure to offer himself as a witness when his testimony could not meet or disprove any particular fact or circumstance, and could only consist of a general denial of guilt, probably ought not to affect him, and, if so, his silence should not be commented on or considered. But in a case such as that before us I think silence, when witnesses had proved unlawful acts, which, if true, established his guilt, and which he might dispose of if untrue, was capable of raising an inference of admission by acquiescence, and might be commented on with the strictest regard to justice and the rights of the accused. No error being found in the record or proceedings, the judgment will be affirmed.

(61 N. J. L. 174)

STATE (BERGEN COUNTY TURNPIKE CO.,
Prosecutor) v. HAAS, Tax Collector.

(Supreme Court of New Jersey. Feb. 14, 1898.)

TAXATION—TURNPIKE ROAD.

There was no statutory authority that authorized the assessor of a borough in 1896 to tax the section of a turnpike road within his borough as so much real estate against the company that was incorporated to establish and maintain such road.

(Syllabus by the Court.)

Certiorari by state, at the prosecution of the Bergen County Turnpike Company, against John P. Haas, collector for the borough of Fairview, to review an assessment of taxes made against prosecutor. Tax set aside.

Argued June term, 1897, before GARRISON and LIPPINCOTT, JJ.

W. M. Johnson, for prosecutor. Samuel G. H. Wright, for defendant.

GARRISON, J. Taxes for the year 1896 were assessed in the borough of Fairview against the Bergen Turnpike Company in this form: "6 acres, \$2,100. \$65.10."

The proofs show that the six acres (afterwards reduced to four) were the bed of the turnpike road reduced to acreage. It is also shown that the company was incorporated in 1802; that its principal office is in Hackensack, where its stockholders' and directors' meetings are held, and where, in previous years, its taxes had been assessed and paid; that its treasurer lived in New York; and that its tolls are collected in various townships, but not in the borough of Fairview.

The sole question is whether there is statutory authority for this assessment.

At an earlier period, private corporations were taxed upon their capital stock and surplus. P. L. 1862, p. 349.

Turnpike companies were taxed under this and previous acts. Haight v. Plank-Road Co., 32 N. J. Law, 449.

Where the tolls were collected in several townships, the personal estate of turnpike companies was assessed at the place of residence of "the officer authorized to discharge the general pecuniary obligations of the company." P. L. 1854, p. 298, § 7.

The same section provides that the real estate of incorporated companies shall be assessed in the same manner as that of individuals; and section 3 was in these words: "The term 'real estate' as used in this act shall be construed to include all lands, all water power thereon or appurtenances thereto and all mines, quarries and all fisheries."

By Act April 11, 1866, § 15 (P. L. 1866, p. 1084), private corporations were taxable to the full amount of their stock and surplus: and by section 23 the real estate of such corporations was to be assessed and deducted from the previous amount or of the whole capital and surplus. Iron Co. v. Yard, 42 N. J. Law, 357.

The supplement to the corporation act (Revision, p. 196) which subjected the real property of corporations to taxation the same as that of an individual expressly exempts from its provisions turnpike companies; and its repealer affects the corporation act and its supplements alone. Jersey City Gaslight Co. v. Jersey City, 46 N. J. Law, 194; New Jersey Hedge Co. v. Craig, 51 N. J. Law, 437, 17 Atl. 941.

This course of legislation left turnpike companies, if subject to taxation in their roadbeds, entitled to have them assessed in such a manner that the sum could be deducted from the total amount of their assessments.

The act of 1895 (P. L. 748) provided that all real estate should be taxed in the taxing district in which it was situated notwithstanding the line between such district divide the "farm" of an owner. This act neither expressly nor by proper implication affects the companies exempted under the corporation act of 1875. Finally, in 1896, in the revision of the corporation act, it was provided that "all real and personal property of every corporation shall be taxed the same as the real and personal property of an individual: provided this 'action (presumably 'section') shall not apply to railroad, turnpike, insurance, canal, or banking corporations." P. L. 1896, p. 313, § 110.

This is the latest law in effect at the time the assessment in question was made, and it is clear that neither it nor any that preceded it authorizes or evinces a legislative intention justifying the division of a turnpike roadbed into as many links or sections as the taxing district it traverses, and the separate assessment of each as so much real estate, which is what was done in the case

before us. Upon the general relation of the prosecutor to the taxing power other than the defendant I express no opinion. The borough of Fairview could not in 1896 lawfully impose the tax brought up by this writ. It is set aside, with costs.

(11 N. J. L. 489)

STATE (TRUSTEES OF YOUNG MEN'S CHRISTIAN ASS'N, Prosecutor) v. CITY OF PATERSON.

(Supreme Court of New Jersey. Feb. 21, 1898.)

TAXATION—EXEMPTIONS—CHARITABLE PURPOSES.

The buildings of the Young Men's Christian Association of the city of Paterson are not used exclusively for charitable purposes, within the meaning of the act of May 16, 1894 (3 Gen. St. p. 3320), which exempts buildings so used from taxation.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of the trustees of the Young Men's Christian Association, to review an assessment for taxes. Assessment affirmed.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

Pennington & Beam, for prosecutor. Thom- as C. Simonton, Jr., for defendant.

DIXON, J. The question for decision in this case is whether the property of the prosecutors was in 1896 exempt from taxation, under that clause of the supplement to the tax act passed May 16, 1894 (3 Gen. St. p. 3320), which exempts "all buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary for the fair enjoyment thereof." The case shows that in 1896 the association consisted of about 100 full members, who each paid an annual fee of \$10; of about 180 intermediate members, who each paid an annual fee of \$7; of about 265 junior members and about 113 limited members, who each paid an annual fee of \$2; and of about 23 sustaining members, who each paid an annual fee of \$25,—making the aggregate income from membership about \$3,585. The buildings of the association contain an auditorium, used for its meetings and for lectures, concerts, entertainments, and similar purposes, a reading room, a library, parlors for games and social intercourse, a gymnasium, bowling alleys, and bath rooms. From these sources the association received an income of nearly \$3,000, and, besides, it received "contributions" amounting to \$660, which made a surplus of about \$200 over its disbursements for that year. The land and one of the buildings were originally given to the association by Mrs. John Cooke. The other building was erected by the association. Of the various advantages of the association the use of the reading room alone is free. All other parts of the buildings are for the use of members only, except that the bowling alleys are open to the public at a fixed price

per game, and the auditorium is occasionally rented on terms satisfactory to the trustees.

In considering whether these buildings are used exclusively for charitable purposes, within the meaning of the tax act, we must bear in mind that the word "charitable," like most other words, is capable of different significations. In the law relating to "charitable uses," it has a very wide meaning, resulting from the desire of courts to support gifts which are prompted by a benevolent disposition. In this sense, a trust for founding a Young Men's Christian Association was deemed charitable in *Goodell v. Association*, 29 N. J. Eq. 32; and the term includes religious, educational, and various other useful objects, although not all which are benevolent. *Thompson's Ex'rs v. Norris*, 20 N. J. Eq. 489. That the word has not so broad a meaning in the statute we are now considering is indicated by the statute itself, since it separately specifies for exemption many institutions which in this view are "charitable," and would have been appropriately embraced in so general a term. But a stronger reason is found in the rule that, in all statutes exempting private property from taxation, words descriptive of the property must receive the narrowest interpretation of which they are reasonably capable. So interpreted, charitable purposes are eleemosynary purposes, purposes connected with the distribution of charity,—i. e. of aid to the needy. It is impossible to hold that these buildings are in this sense used exclusively for charitable purposes. With slight exceptions, those who use them are not the recipients of charity, but such as purchase the right to use them at a price deemed adequate. For these exceptions the "contributions" may compensate the association, and to this extent the buildings are used for charitable purposes; but this is too small in proportion to the aggregate to give character to the whole, so as to justify a statement that the purposes are exclusively charitable. Appeal of City of Philadelphia (Pa. Sup.) 15 Atl. 683. The tax must be affirmed, with costs.

(11 N. J. L. 493)

STATE ex rel. TRUSTEES OF VILLAGE OF RIDGEFIELD PARK v. TOWNSHIP COMMITTEE OF RIDGEFIELD TP.

(Supreme Court of New Jersey. Feb. 21, 1898.)

TOWNSHIP GOVERNMENT.

Under the provisions of the supplement of the township act, approved March 9, 1897 (P. L. 1897, p. 33), and of the act creating the township of Overpeck, approved March 23, 1897 (P. L. 1897, p. 45), the township of Overpeck is to be governed by a township committee, notwithstanding the fact that its territorial limits are co-extensive with those of the village of Ridgefield Park.

(Syllabus by the Court.)

Application by the trustees of the village of Ridgefield Park for a rule for a mandamus against the township committee of

Ridgefield township for a division of the township's assets and debts. Refused.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

Ernest Koester and William M. Johnson, for relators. Peter W. Stagg, for defendants.

DIXON, J. The question in this case is whether the trustees of the village of Ridgefield Park are entitled, under the act of March 9, 1897 (P. L. 1897, p. 33), to have the court of common pleas of Bergen county appoint commissioners to divide the assets and debts of the township of Ridgefield as it formerly existed between that township as it now is and the township of Overpeck, which, by the act of March 23, 1897 (P. L. 1897, p. 45), was carved out of the township of Ridgefield. If only the acts above mentioned be considered, it is perfectly manifest that the trustees have not such a right. The act of March 9, 1897, is a supplement to the township act, and provides that, if the legislature shall, by any special act of incorporation, designate the boundaries of any new township, such township shall be governed by the provisions of the township act and its supplements; that within two months after the passage of such act of incorporation a township election shall be held, at which a township committee shall be chosen; and that the township committee may apply to the court of common pleas for the appointment of commissioners to divide, etc. Subsequently, by the special act of March 23, 1897, the legislature incorporated the new township of Overpeck. Plainly, by force of the act of March 9th, this new township became subject to the township act and its supplements, including the supplement of March 9, 1897, and a township committee elected in compliance with this supplement would be the proper applicant for the end now sought. These acts give no support to the claim that the trustees of a village may make such an application. But these trustees base their right to make this application upon the fact that the boundaries of the township of Overpeck are co-extensive with those of the pre-existing village of Ridgefield Park, and they insist that therefore they possess in this township all the rights and powers of a township committee, by force of a statute passed April 16, 1896 (P. L. 1896, p. 269), which enacts that "in any township in this state, wherein there now or hereafter may exist any town, village, or any municipality governed by a board of commissioners or improvement commission, the boundaries or territorial limits of which are co-extensive with those of said township, * * * the office of township committee of said township is hereby abolished, and the governing body of such town, village or municipality * * * is hereby invested with all the powers, duties, privileges and liabilities

by law conferred upon or required of any such township committee." We think this position cannot be maintained. It is impossible to apply the provisions of the act of 1896 to this new township consistently with the provisions of the act of March 9, 1897, and, of course, in such a conflict the later statute must prevail. The terms of this statute include any new township thereafter created by special act of the legislature, and we are not authorized to ingraft upon those terms an exception of such new townships as have territorial limits co-extensive with the boundaries of a pre-existing village. Furthermore, even the act of March 23, 1897, by which this new township was created, evinces a legislative purpose antagonistic to the claim of the relators, for it enacts that the township shall be subject to the same government as the other townships in Bergen county, and that nothing in the act shall be so construed as to affect the village government of the village of Ridgefield Park. The first of these enactments requires that this township should be placed under the government of a township committee, as are the other townships in Bergen county, and the second requires that the village government of the village should not be affected, either by increasing or diminishing its powers and duties. The design seems to be that, as the village government had previously co-existed with that of the township of Ridgefield, so now it should co-exist with that of the township of Overpeck. The mandamus prayed for must be refused.

(51 N. J. L. 463)

STATE *ex rel.* HERRICK *v.* HOOS, Mayor.
(Supreme Court of New Jersey. Feb. 21, 1898.)

MUNICIPAL CORPORATIONS—APPOINTMENT OF OFFICERS.

In Jersey City it is not requisite to the validity of the appointment or employment of officers, clerks, or other persons by the board of street and water commissioners that there should be a concurrence therein of the board of finance.

(Syllabus by the Court.)

Petition by the state of New Jersey, *ex rel.* William Herrick, for a mandamus against Edward Hoos, mayor of Jersey City. Peremptory mandamus awarded.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Fagen & Murphy, for relator. W. P. Douglass and John A. Blair, for defendant.

COLLINS, J. The mayor of Jersey City refuses to sign a warrant for the relator's pay as extra clerk in the water department of Jersey City for the month of June, 1897, notwithstanding the fact that the board of street and water commissioners, after considering his reasons for disapproval, has ordered the claim paid. This refusal is not justifiable under the law on the subject (1 Gen.

St. p. 496), unless the claim is without legal foundation. The relator was employed by resolution of the board approved by the mayor, and has rendered the service he engaged to perform. The mayor will not consent to payment therefor, because since he united in the employment he has been advised that such employment was illegal, for lack of concurrence of the board of finance. The water department of Jersey City is controlled, under the act of 1889, accepted by the legal voters of the city (In re Cleveland, 52 N. J. Law, 188, 19 Atl. 17), by a board of street and water commissioners succeeding with enlarged powers the board of public works, created by the city charter. Section 7 of the act (1 Gen. St. p. 781, pl. 1819) authorizes the board to employ or appoint from time to time such engineers, surveyors, clerks, and other persons to aid them in the execution of the act as they may deem necessary, or as may be authorized or required by law for the city, and to fix their compensation. It is argued by counsel for the mayor that this grant of power is limited to such employes as were authorized or required for the city by some pre-existing law. We cannot so read the statute. The legislature meant to preserve existing offices, but not to restrict the board to filling those only. No other interpretation can give full effect to all the words of the grant. A later law, passed in 1891 (1 Gen. St. p. 467, pl. 39), confirms and perhaps extends the power of the board on this subject, but enacts that, where there exists the requirement of concurrence of some other board in any action of the board of street and water commissioners, that statute shall not be construed as dispensing with such concurrence. It is contended that in official employment a concurrence of the board of finance was and is required in Jersey City. The act of 1889 was not repealed or superseded by the act of 1891, but, even if it were, there would still be no support for this contention. By the city charter, concurrence of a board of finance and taxation, succeeded under the act of 1889 by the present board of finance, was required in the employment of others than certain specified officers (P. L. 1874, p. 512, § 23); but in 1880 a general act authorized every municipal board to employ its appropriate officers and agents without the concurrence of any other board (1 Gen. St. p. 570, pl. 535). This act is met by the argument that it extends only to officers and agents then authorized by law. That argument has not prevailed with this court. We think the act operates as well on subsequent authority. Lastly, we are referred to a statute passed in 1881 (1 Gen. St. p. 654, pl. 933), which enacts that no motion, resolution, or order concerning the issuing of water scrip or bonds, or the control and cognizance of the structures and property connected with the supply and distribution of water or the supplying, sale, and use of water, in any city in

this state, shall be of any force or effect unless the same shall be concurred in by the board of finance and taxation or other board having control of the fiscal department of said city. It would be a very forced construction that would extend the limitation of this act to the employment of officers and agents, especially in the light of the legislation of the previous years dealing with that subject, and left unrepealed. We cannot adopt it. We see no force in the mayor's objection to signing the relator's warrant, and we therefore award a peremptory mandamus for its signature; but inasmuch as there is no question of the good faith of the objection made, as it was, by a public officer in the line of his duty as he conceived it, no costs will be allowed.

(61 N. J. L. 459)

STATE (BAISLEY, Prosecutor) v. UNIVERSAL DRIER & DIGESTER CO.

(Supreme Court of New Jersey. Feb. 21, 1898.)

NEW TRIAL—GRANT BY DISTRICT COURT.

The docketing in the court of common pleas of the judgment of a district court does not prescribe the granting by the district court of a new trial of the cause in which the judgment was rendered.

(Syllabus by the Court.)

Certiorari to Camden district court.

Certiorari by the state, on the prosecution of John Baisley, against the Universal Drier & Digester Company, to review the order granting a new trial by a district court after its judgment in the cause had been docketed in the court of common pleas. Order affirmed.

Argued November term, 1897, before VAN SYKEL, DIXON, and COLLINS, JJ.

J. J. Crandall, for plaintiff. J. F. Harned, for defendant.

COLLINS, J. The district court of the city of Camden granted a new trial after its judgment in the cause had been docketed in the court of common pleas. Its jurisdiction so to do is now challenged by the plaintiff in certiorari. No provision was made in the original act, constituting district courts, for the granting of a new trial. If such a power rested in implication, it is probable that it could not be exercised after the authorized docketing of the judgment in the common plea; for by section 79 (1 Gen. St. p. 1228) it was enacted:

"Sec. 79. That after such judgment shall be docketed in the court of common pleas no execution shall issue thereon out of any district court, nor shall any proceedings be had except the due and proper granting of an appeal or certiorari."

The suit shown in the record before us was one within the extended jurisdiction conferred by Act March 27, 1882 (1 Gen. St. p. 1250). The practice thereunder is that of the circuit courts, so far as is applicable, except in cases of express provision other-

wise. Circuit courts, of course, can grant new trials, but it is not necessary to construe that act or consider its limitation. Later legislation now controls in all cases, and was in force when the suit was brought. It is in the form of a supplement to the act constituting district courts, and covers many points of practice. The pertinent section reads as follows (1 Gen. St. p. 1256, pl. 233):

"Sec. 10. That in every case which within one year heretofore shall have been or which shall hereafter be tried in any of said courts, the judge may if he sees fit order a new trial to be had upon such terms as he shall think reasonable, and in the meantime stay proceedings, and for the purposes of this act, every such court shall be a continuous court of record."

We are asked to so construe the language of this statute as to limit its broad grant of power by subjecting it to the seventy-ninth section of the original act. We think that the language used accords with the legislative intent, and that there is neither room for nor need of construction. The power granted was meant to be unlimited.

The order of the district court is affirmed, with costs.

(61 N. J. L. 455)

STATE (MAYOR, ETC., OF CITY OF NEWARK, Prosecutor) v. INHABITANTS OF TOWNSHIP OF BELLEVILLE et al.

(Supreme Court of New Jersey. Feb. 21, 1898.)

TAXATION—EXEMPTION OF MUNICIPAL PROPERTY.

The exemption from taxation of the property of the counties, townships, cities, and boroughs of this state (3 Gen. St. p. 3320, pl. 200) is not limited to property used for public purposes.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of the mayor and council of the city of Newark, against the inhabitants of the township of Belleville, Essex county, and others, to review a levy of taxes on city property. Set aside.

Argued at November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Frederick T. Johnson, for prosecutor. Oliver H. Perry, for defendants.

COLLINS, J. Review by this court is invoked of taxes assessed by the authorities of the township of Belleville, in the county of Essex, in the years 1894, 1895, 1896, and 1897, upon property situate within the territory of that township, owned by the city of Newark. Some of the property is held without express authority of law; some is held for sale, and meanwhile rented, its original use being no longer necessary; and none is used for any present public purpose. In *Freeholders v. Collins*, 37 Atl. 623, this court held that the statute (3 Gen. St. p. 3320, pl. 200) exempting from taxation the property of the counties, townships, cities, and bor-

oughs of this state extends to extraterritorial holdings used for public purposes, although acquired without specific legal authority. The only question therefore now before us is whether municipal property not used for public purposes is taxable notwithstanding the statute. The decision cited foreshadowed a negative answer to this question when it should arise, as did also the earlier case of *Commissioners v. Gaffney*, 34 N. J. Law, 131; and logically such must be the answer. Implied exemption from a general taxing law, of public property, is, indeed, conditioned upon public use. A municipality may have a mere proprietary ownership, which would come within the law. It is otherwise as to an express exemption. There the legislative will has been declared, and must control. The judicial function then is mere interpretation. In the statute we must now interpret, it has been enacted that the property of cities—all of it, not a part only—shall be exempt from taxation. We have no right to interpolate a limitation. There is no ambiguity in the language of the statute. To construe it so as to accord with what the court might think ought to have been enacted, and would have been enacted had attention been directed to this phase of the subject, would be, not to exercise our power to declare, but to usurp power to make the law. No previous decision of this court has disposed of this question. *Newark v. Clinton Tp.*, 49 N. J. Law, 371, 8 Atl. 296, turned on the exemption of graveyards. In *Newark v. Verona Tp.*, 59 N. J. Law, 94, 34 Atl. 1060, there was a public use, and the property was held exempt. Other cases cited relate to property held by railroad and other private corporations, and are therefore not applicable. As to such corporations, the legal implication is in favor of the tax, and exemptions are construed accordingly, while as to public corporations the general implication is the opposite. The taxes will be set aside, with costs.

(61 N. J. L. 382)

CAMPBELL v. NEW JERSEY DRY-DOCK & TRANSPORTATION CO.

(Supreme Court of New Jersey. Feb. 23, 1898.)

INJURY TO SERVANT—LIABILITY OF MASTER—DEFECTIVE APPLIANCES.

A master who furnishes to his servant safe and suitable appliances with which to do the work upon which he is engaged is not responsible for injuries received by the servant by reason of defects in appliances substituted, by a fellow servant, for those furnished by the master.

(Syllabus by the Court.)

Action by James Campbell against the New Jersey Dry-Dock & Transportation Company for personal injuries. Plaintiff had a verdict, and the trial judge granted a rule to show cause why the verdict should not be set aside, and a new trial granted. Rule made absolute, and a new trial ordered.

Argued November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

Johnson & German, for plaintiff. Frederick C. Marsh, for defendant.

GUMMERE, J. The plaintiff is a ship carpenter in the employ of the defendant company. While at work with other employes of the company, lowering a tank into the hold of the Wilkesbarre, a vessel which was laid up in the dry dock for repairs, one of the hooks on the tackle which was being used for lowering the tank broke, letting the tank down on his hand, and crushing it. The liability of the defendant for this injury is sought to be established on the ground that it failed to discharge the duty which it owed to the plaintiff of furnishing proper tackle for the work in which he was engaged, and of inspecting and keeping it in repair, and that this failure was the cause of the accident. The testimony of the plaintiff's own witnesses shows that this claim is without support. From that testimony it appears that the defendant company's tackle and hooks were kept in a shanty in the company's yard; that the work was being done under the supervision of one John Lyons, who is styled the "boss rigger"; that Lyons sent two of the men who were under him, Long and Shields, to get the tackle and hooks to be used in lowering the tank; that Shields went to the company's shanty, and got tackle and hooks from there; but that Long, instead of following his example, picked up a tackle and hooks which he found lying on the deck of the Wilkesbarre, and which belonged to that vessel, and not to the defendant corporation; that both sets of tackle and hooks were used in lowering the tank, one on each end of it; and that it was the hook on the tackle which was picked up by Long on the deck of the Wilkesbarre which broke, and let the tank down on the plaintiff's hand. These facts make it clear that the defendant did not fail in the discharge of the duty which it owed to the plaintiff, of using reasonable care to provide safe and proper tools for his use in his work, and to keep them safe. It was not the company's tackle or hooks which broke. For the condition of the one which did break it was not responsible. In the case of *Maier v. Thropp*, 59 N. J. Law, 186, 35 Atl. 1057, the plaintiff sued his master for injuries received by him while engaged in his master's work. It appeared that he was furnished with proper implements to do the work, but that, by the direction of his foreman, he undertook to do it with other tools, in consequence of which he received the injuries complained of. The court of errors, in deciding the case, said: "If safe and proper tools are supplied by the master, he is not liable for an injury which his servant receives by using, under the direction of the foreman over such servant, a tool not furnished for or adapted safely to the work." The rule laid down in *Maier v. Thropp* governs the case before us.

In fact, there is even less merit in the present than in the cited case; for in the latter the unsafe tool was used with the knowledge and under the direction of the foreman, while in the present case it does not appear Lyons, the boss rigger, was cognizant of the fact that Long, instead of bringing the needed appliances from the company's shanty, had picked them up off the deck of the Wilkesbarre. It was proved in the case that it was a matter of frequent occurrence for the company's employes to use blocks, tackle, and hooks belonging to vessels which were under repair, instead of those which were furnished by the company, and we are told that this fact establishes the liability of the defendant for the plaintiff's injury. I am not able to appreciate the force of this contention. It does not appear that the company had any knowledge of this custom of its employes, but, even if it were otherwise, the result would be the same. The master discharges his duty to his servants by furnishing them safe and proper tools to work with. If they see fit to use other appliances in the stead of those furnished by him, they do so at their own risk, and cannot hold him responsible if such substituted appliances turn out to be unsafe for or unadapted to the work in hand. The jury having found for the plaintiff in this case, their verdict should be set aside, and a new trial ordered.

(61 N. J. L. 349)

STATE ex rel. CROOKALL v. MATTHEWS.
(Supreme Court of New Jersey. Feb. 21, 1898.)
STATUTES—SPECIAL ACTS—REPEAL—TOWNSHIP ASSESSORS.

1. 3 Gen. St. p. 3443, relating to township assessors in counties of the first class, is in conflict with Const. art. 4, § 7, par. 11, as amended in 1875, prohibiting the passage of special laws regulating the internal affairs of towns.

2. P. L. 1896, p. 55, relating to town assessors, has no application to township assessors.

3. In view of Const. art. 4, § 7, par. 11, as amended in 1875, prohibiting special legislation, P. L. 1871, p. 1371, providing for the election of township assessors annually in the township of Kearney, was impliedly repealed by P. L. 1891, p. 89, which is a general law providing that the term of office of township assessors shall be three years.

Original proceedings in the nature of quo warranto, on relation of Henry Crookall, against James M. Matthews. Plaintiff demurred to defendant's plea. Demurrer overruled, and judgment given for defendant.

Argued before the CHIEF JUSTICE, and DEPUE, GUMMERE, and LUDLOW, JJ.

Joseph Parker, Jr., for relator. Joseph F. Crowell, for defendant.

DEPUE, J. The controversy in this case is with respect to the title of these parties, respectively, to the office of assessor of the town of Kearney, in the county of Hudson. The information was filed under the supplement to the quo warranto act, approved May 9, 1884, which gave to any citizen who be-

leaves himself lawfully entitled to an office, which it is alleged another usurps, the right to file an information without the intervention of the attorney general. By a supplement passed in 1895 it is provided that in all actions of quo warranto the court may, if the writ, return, and pleadings are properly framed for the purpose, determine by its judgment not only the title of the respondent to the office in question, but also the title of the relator or relators to the same office. P. L. 1895, p. 82. This information was filed in May, 1897, and the pleadings are so framed as to present the issue as to which of the two parties was entitled to the office of assessor at the time the information was filed. The relator claims title to the office by virtue of an election held in said township on the 13th of April, 1897. The defendant claims title under a township election held on the 14th day of April, 1896, at which he was elected assessor. The township of Kearney was incorporated under an act approved March 14, 1867, setting off from the township of Harrison a new township, to be called the "Township of Kearney." P. L. 1867, p. 253. By virtue of the aforesaid incorporation, the township of Kearney became subject to and governed by the general township act of 1846 and the amendments to that act. Section 12 of the general township act of 1846 provides for the election of township officers, including assessors, to hold office for one year, and until others shall be chosen and legally qualified in their stead. 3 Gen. St. p. 3583. In 1871 an act was passed entitled "An act for the improvement of the township of Kearney, and to increase the powers of the town committee of said township." P. L. 1871, p. 1371. That act provided for the township of Kearney a system of township government, in some particulars differing from township governments provided for by the act of 1846. It provided for the election of certain officers, among them assessors, to be elected annually at the annual spring elections. The act last referred to was passed before the amendment of 1875 to the constitution, which prohibited special legislation; but the constitutional interdict against special legislation was not in this respect retrospective, and did not operate to repeal the act of 1871. *North Ward Nat. Bank v. City of Newark*, 39 N. J. Law, 389. But the question presented in this case is whether the act of 1871, relating to the township of Kearney, was or was not repealed by legislation subsequent to the constitutional amendment of 1875, by virtue of the constitutional provision which interdicted special laws in matters relating to the internal affairs of towns and counties, and required all subsequent legislation on that subject to be general. The constitutional prescription contained in paragraph 11, § 7, art. 4, with respect to legislation on the subject of the internal affairs of towns and counties, superseded the rule of construction previously in

force, that a general law did not operate to repeal a special law on the same subject, except by an express repealer. By force of that constitutional provision, general statutes relating to the internal affairs of towns and counties will proprio vigore repeal all inconsistent provisions and special charters, whether an express repealer be stated or not; "for," as was said by Mr. Justice Dixon, "if this force be not ascribed to them, the generality of statutes will be defeated by their being confined to narrower limits than an entire class, and thus by judicial interpretation the statute will become unconstitutional." *Haynes v. City of Cape May*, 52 N. J. Law, 180-182, 19 Atl. 176; *Road Commission v. Collector of Harrington Tp.*, 54 N. J. Law, 274-276, 23 Atl. 666; *Morris v. City of Bayonne*, 53 N. J. Law, 290, 21 Atl. 453; *Catholic Protectors v. Board of Township Committee of Kearney Tp.*, 56 N. J. Law, 385, 386, 28 Atl. 1043. To maintain his title to the office, the defendant relies on several statutes, namely, an act passed March 10, 1893. 3 Gen. St. p. 3443. That act related to townships in counties of the first class. That legislation is plainly unconstitutional. A township in a county of the first class has no characteristics which would distinguish it from a township of the same population and necessities in other counties of the state. The act of March 9, 1896 (P. L. 1896, p. 55), has no relevancy to this case. By its title and in the body of the act this legislation relates only to town assessors. In construing the constitutional provisions, the courts have held that cities and townships are included under the designation of towns, but that construction is inapplicable in the construction of statutes where the legislative intent is the subject-matter of consideration. Towns, townships, boroughs, and cities, in legislation, are treated as municipalities belonging to different classes. There is nothing in the subject-matter of this legislation that will exclude it from this construction. *Stout v. Glenridge*, 59 N. J. Law, 201-203, 35 Atl. 913.

The defendant also relies upon an act passed March 9, 1891, entitled "A supplement to an act entitled 'An act incorporating the inhabitants of townships, designating their powers and regulating their meetings.'" P. L. 1891, p. 89. This act provides "that the assessors and collectors of the respective townships of this state elected after the passage of this act shall hold their office for the term of three years," and "that all acts or parts of acts inconsistent with this act be and the same are hereby repealed." This act is a supplement to the general township act of 1846 (Revision, p. 1191), and took effect immediately upon its passage. This statute is a general law relating to the townships of this state, and by force of the constitutional provisions in question, as construed by the cases above cited, operated to repeal the special provisions with respect to

the terms of office of assessors and collectors in any township of this state. Kearney township was incorporated as one of the townships of this state, with the rights and privileges of a township of this state. By force of the act of March 9, 1891, the special law in force in the township of Kearney, passed April 6, 1871, was abrogated, and assessors and collectors elected after the act of 1891 became the law held office for the term prescribed by that act.

But on the part of the relator it is contended that the act of March 9, 1891, was declared unconstitutional by the decision of this court in *State v. Davies*, '89 Atl. 357. This contention is erroneous in fact. The act that was pleaded and under consideration by the court in that case was the act of April 14, 1891 (P. L. 1891, p. 417). The latter act was adjudged unconstitutional by this court because of its limitation to townships having a population of 10,000 or over. The act of March 9, 1891, was neither presented in the pleadings nor considered by the court, and the act of March 9, 1891, is free from the imperfections contained in the act of April 14, 1891, which was the ground of decision in *State v. Davies*. The act of March 9, 1891, is general in all respects, and is a valid act of legislation.

The plea of the defendant is that at the annual town meeting held in said township on the 11th of April, 1893, he was duly elected assessor of said township for the term of three years, to wit, until the 14th day of April, 1896; and that at the annual town meeting held on the 14th of April, 1896, he was again duly elected assessor of such township, and duly qualified to hold the office. By the act of March 9, 1891, the defendant, in virtue of his election on the 14th of April, 1896, took office for the term of three years, which has not expired. The relator rests his title on an election to the office of assessor at the spring election of 1897. His title rests on the provisions of the special act of 1871, relating to the township of Kearney. This act was abrogated by the general act of March 9, 1891. There was not, at the time of the election of the relator, a vacancy in the office of assessor, the defendant being in office in virtue of his election in April, 1896, pursuant to the act of March 9, 1891. The defendant's plea shows title to the office in him, and on the demurrer judgment should be given for the defendant.

(59 N. J. L. 23)

NEW YORK & N. J. TEL. CO. v. SPEICHER.

(Supreme Court of New Jersey. June 15, 1896.)

NGLIGENCE—WHAT CONSTITUTES.

Plaintiff, while in the employ of a city as a "lineman," climbed a telephone pole to work on wires of the city fire department, which were carried by the topmost of three crossbars. The other two crossbars carried wires of defendant

telephone company. When plaintiff descended the pole, he took hold of one of the latter crossbars, which gave way, and he fell. Held that, assuming that defendant invited plaintiff to mount and descend the pole in discharging his duties to the city in regard to its wires, defendant owed no duty to him in respect to the crossbars, since the sole object of them is to carry the wires, and not to support linemen.

Error to circuit court, Essex county; Childs, Judge.

Action by Mahlon Spelcher against the New York & New Jersey Telephone Company for personal injuries caused by defendant's negligence. There was a judgment for plaintiff, and defendant brings error. Reversed.

Spelcher, while in the employ of Jersey City as a "lineman," climbed a telegraph pole to do some work upon wires of the city fire department, which were carried by the topmost of three crossbars. The lower two crossbars carried wires of the New York & New Jersey Telephone Company, the plaintiff in error. When Spelcher descended the pole, he took hold of one of those crossbars, which gave way, and he fell.

Argued February term, 1896, before BEASLEY, C. J., and DIXON, MAGIE, and GARRISON, JJ.

Depue & Parker, for plaintiff in error. Samuel Kallsch, for defendant in error.

MAGIE, J. The only assignments of error which need be considered are those based on the exceptions to the refusals to nonsuit and to direct a verdict for defendant below. These present the question whether the evidence established a liability to Spelcher on the part of the telephone company. It was conceded that there was no contractual relation between them, for he was the employé of the city and not of the telephone company. Proof that the pole from which Spelcher fell had been erected by the telephone company, or was owned by it, and that it was maintained in a public street upon condition that the topmost crossbar should be used by the city to carry the fire-alarm wires, might justify an inference that the telephone company invited the city's agents to use the pole and that crossbar in stringing, repairing, and caring for those wires. The argument for Spelcher assumes that there was such evidence. I find it difficult to discover it in the bills of exception, for those show that the pole was erected by another company, and fail to show that the telephone company have any property or possessory right in said pole, except that they support their wires on the lower two crossbars. But, if it be assumed that the telephone company is shown by the evidence to have sustained to Spelcher the relation that one sustains to another who has been invited to come upon his premises, the duty devolving upon the former is only to take reasonable care that what the other is to use is reasonably safe for such use. If the visitor is invited to use a path, for example, his inviter will not be liable for an injury sustained by the visitor at other places to which he has gone without invitation. *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478.

Assuming that the telephone company invited Spelcher to mount and descend the pole in discharging his duties to the city, in regard to its wires, what did it invite him to make use of in going up and coming down? Clearly, it would be held to the duty of reasonable care as to the strength and fitness of the pole to carry the wires and the workman engaged in arranging and repairing them. But the sole object of the crossbars is to carry the wires. He who maintains the crossbars does it for that purpose, and his duty is thus limited. It is not perceived how his duty in that respect is extended by proof that linemen, in climbing, usually lay hold of and rely upon the crossbars for support, in whole or in part. That custom is not, in this case, brought home to the knowledge of the telephone company; but, if it were, it could not operate to compel them to make crossbars intended for one purpose sufficiently strong for another purpose for which they were never intended. No invitation to use the crossbars can be deemed to be extended to the lineman. When, therefore, a lineman makes use of a crossbar in climbing, he steps beyond the limit of his invitation, and he who invited him to climb by the pole has no liability for any resulting injury. It results that it was error to permit the jury to consider whether the telephone company took reasonable care to have the crossbar safe, and there should have been a direction for a verdict for the company, on the ground that it owed no duty to Spelcher in respect to the crossbar. The judgment must be reversed.

(61 N. J. L. 20)

LINDENTHAL v. HATCH et al.

(Supreme Court of New Jersey. March 4, 1898.)

ATTORNEY AND CLIENT—VALUE OF SERVICES—HYPOTHETICAL QUESTION—INDEFINITENESS—EVIDENCE.

1. It is error to allow a hypothetical question to be put to an expert as to the value of an attorney's services which is so indefinite as to admit of no answer except mere guesswork.

2. Separate sheets of paper, called "blotter sheets," on which were entries, in the nature of diary entries, showing the acts of the parties, or books made therefrom, are incompetent as testimony.

Error to circuit court, Hudson county; *Nevius*, Judge.

Action by Edward S. Hatch and another against Gustav Lindenthal to recover for professional services rendered defendant as attorneys at law. From a judgment for plaintiffs, defendant brings error. Reversed.

Argued November term, 1897, before **MAGIE, C. J.**, and **DEPUE, VAN SYCKEL**, and **GUMMERE, JJ.**

James A. Gordon, for plaintiff in error. **Brinkerhoff & Fielder**, for defendants in error.

DEPUE, J. At the trial the plaintiffs' attorney called as a witness **Thomas P. Wickes**, one of the plaintiffs, and propounded to him

the following question: "Mr. Wickes, you examined the interrogatories prepared by the defendant's counsel in this case, and the answers thereto made by you and Mr. Hatch and Mr. Clute?" to which witness answered, "Yes, sir." And then the attorney of the plaintiffs asked the following question of said witness: "Having those in mind, and assuming that during the years 1891-94, at various dates in the months of those several years, the firm of Hatch & Wickes were engaged in frequent consultations with the defendant in respect to his rights in connection with the North River Bridge Company, and advising him in respect to his rights on oft-repeated occasions; were also giving him advice in respect to arrangements to be made with various parties at Washington, and the manner in which his interests should be represented before the committee in congress having in charge the matters of the application for the construction of bridges over the North river, between the city and county of New York and the state of New Jersey, and how best to further his own and the bridge company's interest before congress, and the many questions which arose respecting the legality of the proceeding in connection with the said bridge, and the examining of the laws of the state of New York and New Jersey, and the federal laws relating thereto; conferring with the defendant in relation to changing and making a mortgage on said bridge, and the examination of the intricate questions involved therein, and in respect to the issue and sale of bonds in connection with said mortgage, to be sold in this and foreign countries, one object being to determine whether the issue and sale of said bonds would constitute a lottery, the opinion relating to the said mortgage and the issue of said bonds, having been subsequently approved by the general term of the supreme court of the First department of the state of New York; the examination of the amounts and various interests involved in the various steps connected with the proceedings relating to the said bridge; the great amount of time consumed, thought and research involved, and the magnitude of the enterprise, and the amount involved,—what, in your opinion, would be a reasonable charge for the services so rendered in the city and county of New York?" And on further examination the counsel propounded to the witness other questions of similar import and indefiniteness. These questions were objected to by defendant's counsel as being too general. The judge overruled the objection, and bills of exception were sealed. Testimony of the character of that sought to be elicited by these questions was testimony of the class known as the "evidence of experts." We think the question put to the witness was so indefinite as to admit of no answer except as mere guesswork.

2. Certain separate sheets of paper, called "blotter sheets," were offered by the plain-

tiffs, and received in evidence, under objection by defendant's counsel. There were over 1,000 of these sheets, samples of which appear in the case on pages 369 to 371. The entries on these sheets were simply diary entries, exhibiting the acts of the parties. They might be used for the purpose of refreshing the recollection of a witness who had knowledge of the facts they relate, but they were incompetent as testimony.

8. The plaintiffs further offered a number of books, called "registers," which were made up from the blotter sheets, and their contents were the same in character as those of these sheets. Sample copies of these register entries are found in the printed book on pages 372 and 373. For the errors above indicated, we think the judgment should be reversed.

(61 N. J. L. 373)

BURNETT v. EASTON & A. R. CO.

(Supreme Court of New Jersey. Feb. 28, 1898.)

ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

A railroad company is not responsible for injuries received by a person who unsuccessfully attempts to cross the track in advance of a train which he knows is approaching the place of crossing.

(Syllabus by the Court.)

Action by Charlotte Burnett, administratrix of Henry J. Burnett, deceased, against the Eastern & Amboy Railroad Company, to recover for the killing of plaintiff's intestate. Plaintiff had a verdict, and the trial court allowed a rule to show cause why the same should not be set aside. Rule made absolute.

Argued November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

Craig A. Marsh, for plaintiff. Robert H. McCarter, for defendant.

GUMMERE, J. The plaintiff's intestate was killed by being run down by an engine and cars of the defendant company, while driving across the latter's tracks at Bound Brook. The defense set up was absence of negligence on the part of the railroad company or its employes, and contributory negligence on the part of the decedent. The trial justice, in his charge to the jury, used the following language: "You must determine another question, gentlemen. Assuming him [the decedent] to have stopped, or assuming him to have gone on cautiously, looking both ways, what could he have seen? * * * Now, gentlemen, if he could have seen these cars approaching, and did look and did see them, then, gentlemen, it will be for you to say whether he was prudent in undertaking to cross before the approaching train." It seems to me that it was error to leave it to the jury to say whether or not the decedent was prudent under the conditions mentioned. The jury should have

been told that if the decedent saw the train approaching, and, instead of waiting for it to pass, undertook to cross in advance of it, there could be no recovery against the defendant. As was said by the late Vice Chancellor Van Fleet in *Blaker's Ex'r v. Railroad Co.*, 80 N. J. Eq. 240: "A person intending to cross a railroad track is bound to look and listen for an approaching train; and if he sees or hears a train approaching, and then daringly assumes the hazard of attempting to cross in advance of it, and fails, he must bear the consequence of his folly." Mr. Justice Field, in the case of *Railroad Co. v. Houston*, 95 U. S. 702, which was somewhat similar to that before us, said that a person approaching a railroad crossing was bound to look and to listen, and that if, doing so, "he saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of his mistake and temerity cannot be cast upon the company. No railroad company can be held liable for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure." A number of cases to the same effect will be found collected in *Patt. Ry. Acc. Law*, § 176, in support of the rule laid down by the author that "a person is contributorily negligent who attempts to cross a railway when he sees or hears that a train is moving towards the crossing." Moreover, irrespective of the question of negligence in attempting to cross a railroad track in front of a train known to be near at hand, the very moment that it appears that the person injured had knowledge that the train was approaching the crossing, the nonliability of the railroad company for the injury is established. The only ground upon which it can be held responsible is that it failed in the discharge of a duty which it owed to the person injured, namely, the giving him timely warning of the approach of its train, and that by its failure it caused the accident which produced the injuries. But, if the injured person discovers for himself what the railroad company should have informed him of,—that its train was approaching the crossing,—it is quite clear that the negligence of the company, in failing to warn him, had no part in the bringing about of the accident. The rule to show cause should be made absolute, and a new trial granted.

(61 N. J. L. 256)

TAYLOR et al. v. SHUTE et al.

(Court of Errors and Appeals of New Jersey.

Feb. 28, 1898.)

SURETIES—REMEDIES.

The rule that, "when two persons contract as principal debtors, but by arrangement interpose one of them is or subsequently becomes surety for the other, the creditor, if informed of this relationship, is bound to treat the surety, with regard to that contract, in the same man-

ner as if he had contracted as surety," is not enforceable against the creditor, when suing on the contract, in the courts of law of this state; the surety's remedy is in chancery.

(Syllabus by the Court.)

Error to circuit court, Gloucester county; before Justice Garrison.

Action by George E. Taylor and others against Joseph H. Shute and another. From a judgment for plaintiffs, defendants bring error. Affirmed.

John J. Crandall, for plaintiffs in error.
Robert S. Clymer, for defendants in error.

DIXON, J. This action was brought in the circuit court of Gloucester county against Joseph H. Shute and Josiah H. Shute upon a book account for goods sold and delivered by the plaintiffs, and, upon bills of exception sealed at the trial, two questions are raised: First, whether the court erred in refusing to charge, further than it had charged, that notice of a fact to the plaintiffs' agent was notice to the plaintiffs; and, second, whether the court erred in refusing to charge that, if the defendants had purchased the goods as partners, and afterwards one of the partners had retired from the firm under an agreement which bound the other to pay all the partnership debts, and these facts had been communicated to the plaintiffs, and then the plaintiffs, by accepting the note of the remaining partner, had extended the time for the payment of the debt, without the consent of the retiring partner, the latter was thereby discharged.

With respect to the first point, we think the court had already charged substantially as requested.

On the second point the court had gone no further than to charge that if the plaintiffs, in accepting the note of the single partner, intended to release the firm, then the retiring partner was discharged. *Swain v. Frazier*, 35 N. J. Eq. 326; *The Co. v. Drinkhouse*, 59 N. J. Law, 462, 38 Atl. 1034. The refusal of the court, therefore, requires us to decide whether it is the duty of courts of law to enforce the rule that, when two persons contract as principals, but by arrangement inter sese one of them is or subsequently becomes surety for the other, the creditor, on being informed of this relationship, is bound to treat the surety, with regard to that contract, in the same manner as if he had contracted as surety. All courts of equity, and in this country most courts of law, I think, maintain this principle. See *Pain v. Packard* and subsequent cases and notes, 2 Am. Lead. Cas. 862. But in New Jersey our legal tribunals have uniformly declined to sanction the doctrine, holding that at law the rights of the creditor, as defined by the contract, cannot be altered without his consent, and one of those rights is to treat each of the debtors as a principal. The following cases support this statement: In *Manning v. Shotwell*, 5 N. J. Law, 584, the defendants had given the plain-

tiff a sealed bill, and afterwards one of them told the plaintiff that he was only a surety. With this knowledge the plaintiff agreed with the other defendant to give further time for payment. But, notwithstanding the dissent of Mr. Justice Southard, the supreme court decided that in law this formed no defense for the surety. In *Pintard v. Davis*, 19 N. J. Law, 205, Mr. Justice Nevius, delivering the opinion of the supreme court, said: "Where a creditor gives time to the principal, a surety cannot avail himself of that defense, unless it appears on the face of the instrument that he is such surety, and even in that case his relief is in equity, and not at law." Although this was mere dictum, and in the last clause is probably incorrect, yet it shows the trend of judicial opinion. In the same case (21 N. J. Law, 632), Mr. Justice Carpenter, speaking for this court, said of a sealed contract: "If bound as a principal, a defendant cannot aver at law, in an action upon the instrument, that he is only a surety, although in equity parol evidence is admissible to show who is principal and who surety." In *Paulin v. Kaighn*, 27 N. J. Law, 503, 508, is a similar dictum by Chief Justice Whelpley. Finally, in *Anthony v. Fritts*, 45 N. J. Law, 1, the subject was fully considered in the supreme court, and, after discussing the cases, Chief Justice Beasley announced as the decision "that, in a suit at law against two makers of a promissory note, one of them cannot set up as a defense that he was known to the payee to be an accommodation maker, and that the payee bound himself by legal contract to the other maker to give him time for payment;" and that in such cases a mere equity arises, and the remedy is in chancery. In view of these indications of judicial opinion so long prevailing, and inasmuch as the matter concerns, not rights, but only remedies, we think it should be considered settled that, in an action on the contract, the creditor will not be held at law bound to treat as sureties those who contracted as principals, merely because they were in fact or became sureties, to his knowledge. We find no error in the record, and the judgment is affirmed.

(51 N. J. L. 440)

TAYLOR v. HUTCHINSON.

(Supreme Court of New Jersey. Feb. 21, 1898.)

PLEADING—SHAM ANSWER—RES JUDICATA.

1. A motion to strike out pleadings as sham can prevail only when it is entirely clear that they are devoid of merit.

2. In a declaration founded upon a covenant in a mortgage to pay the debt secured by the mortgage, it was averred that, on a "bill filed for the foreclosure of the mortgage," a court in a sister state had decreed that the debt was due from the defendant to the plaintiff and that the equity of redemption should be barred; the defendant having pleaded certain defenses to the alleged covenant. *Held*, that the decree was not so clearly an estoppel as to render the defendant's pleading a sham.

(Syllabus by the Court.)

Action by Frederick F. Taylor against David B. Hutchinson on a covenant. On motion to strike out certain pleas and notice. Denied.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

William M. Lanning, for plaintiff. William M. Jamieson and James Buchanan, for defendant.

DIXON, J. The declaration in this case seems to rest upon a covenant to pay a sum of money, which is contained in a deed given by the defendant to the plaintiff, mortgaging certain lands in Michigan. The pleas and notice of the defendant set up certain matters in defense of the alleged personal obligation, and the plaintiff's present motion is to strike out these pleas and notice "as frivolous and sham, for the reason that the matters have been adjudged against the defendant by the final decree in the foreclosure cause set out in the declaration." A motion to strike out pleadings as sham should prevail only when the pleadings are clearly without merit. If they present a debatable question of law, demurrer is the appropriate means of raising it. *Miller v. Association*, 46 N. J. Law, 505. The declaration in this case alleges, in effect, that by his deed, dated March 29, 1895, the defendant covenanted to pay the plaintiff \$7,000 in five years after date, with interest semiannually, and conveyed the lands in Michigan to secure such payment; that by the deed the defendant covenanted to keep paid all taxes assessed against the property, and agreed that if any default should be made in any of his covenants "the plaintiff should be entitled to foreclose the mortgage and to collect the whole amount secured thereby"; that in 1894 certain taxes were assessed against the property, and remained unpaid until August 12, 1895, when the plaintiff elected that the whole principal sum should become due, and thereupon "filed his bill of complaint for the foreclosure of the aforesaid mortgage in the circuit court of the county of Kent, in the state of Michigan," on which bill that court, by final decree, dated July 1, 1896, adjudged that there was due to the plaintiff on June 29, 1896, the sum of \$7,816.17, and that that sum be paid by the defendant to the plaintiff on or before August 15, 1896, or, in default thereof, the mortgaged premises be sold to raise the amount due; that afterwards the premises were accordingly sold, realizing only \$3,000, and leaving due to the plaintiff \$4,819.23, with interest from October 2, 1896. The question now presented is whether, on these allegations, it is entirely clear that the decree estops the defendant from disputing his personal obligation to pay the balance thus mentioned.

It is laid down as a general rule that the judgment or decree of a court having proper jurisdiction will conclude the parties upon the matter directly involved in the issue pre-

sented by the pleadings or actually litigated at the trial; but respectable authorities also hold that controversies which are only incidental or collateral to the issue are not concluded, although they may have furnished the very ground on which the issue itself was determined. Thus, in *King v. Chase*, 15 N. H. 15, it was decided that, although in a former action of trover for the conversion of oats the plaintiff had based his title to the oats upon a certain mortgage, and the defendant had assailed that mortgage as fraudulent, and thereupon had obtained a verdict and judgment, yet the judgment, which undoubtedly concluded the plaintiff as to the title to the oats, did not conclude him as to the validity of the mortgage. Other cases of similar purport are cited in the note to 21 Am. & Eng. Enc. Law, 185. If this doctrine be applied to the present case, it may induce a denial of the estoppel now claimed. The only indication of the issue involved in the Michigan cause is to be found in the averment that the bill in that cause was filed "for the foreclosure of the mortgage." Such a bill does not properly raise the question whether the owner of the equity of redemption is personally indebted. The direct issue is whether, under the circumstances, his right to redeem should be barred. The defendant's personal obligations can be only collateral or incidental to this issue, as bearing upon the question whether his right should be cut off. Indeed, on the face of the pleadings now before us there is room for the inference that the parties did not intend the consequences of default in the payment of taxes to go beyond the immediate foreclosure and sale of the mortgaged premises, for their language is, not that in case of default the debt should become due, but that "in such event the plaintiff should be entitled to foreclose the mortgage and to collect the whole amount secured thereby." In this state of the case, it is a debatable question whether, on the bill filed and the evidence presented, the court in Michigan had jurisdiction to adjudge, or attempted to adjudge, anything more than that, if the defendant did not pay the sum specified before the designated day, his right to redeem should be foreclosed, and the property should be sold. We therefore cannot say that the decree is so clear an estoppel against the defendant as to render his pleading a sham. The motion to strike out is denied, with costs.

(36 N. J. E. 432)

SAVAGE v. MILLER et al.

(Court of Errors and Appeals of New Jersey.
Feb. 23, 1898.)

CORPORATION—INSOLVENCY—PREFERENCES—SUBROGATION.

1. When a corporation becomes insolvent its directors become trustees for the creditors, over whose claims they can obtain no personal preference.

2. Where the note of a creditor has been law-

fully preferred, the fact that directors are indorsers thereon does not defeat his preference. The result is to subrogate the general creditors to the rights of the preferred creditor against the indorsing directors to the extent of the preference.

Ludlow, J., dissenting.
(Syllabus by the Court.)

Appeal from court of chancery; Reed, Vice Chancellor.

Bill in equity by Edward I. Savage, receiver of the Johnson Railway Signal Company, against George W. Miller, trustee, and others, attacking a mortgage. From a decree in favor of plaintiff, defendant Miller appeals. Reversed.

George W. Miller (Corbin & Corbin, of counsel), pro se. John Griffin, for appellee.

GARRISON, J. The question to be decided upon this appeal is whether the claims of certain creditors of the Johnson Railway Signal Company were lawfully preferred by a mortgage given by its directors to George W. Miller, trustee, in the month of January, 1895, at which time the corporation was insolvent. The bill which is filed by Edward I. Savage, receiver, attacks the mortgage as a preference upon the ground that George W. Miller, to whom it was made, was a director of the insolvent company. It may be well to note here that the statute of this state that, prior to the revision of 1875, rendered void as against creditors the transfer of its property by any insolvent corporation, or by a corporation in contemplation of insolvency, was dropped by the legislature from the revision of that year (1875), but was re-enacted on the 5th day of March, 1895, which, it will be observed is after the giving of the present mortgage. During the 20 years this statute was off the books, this court decided *Wilkinson v. Bauerle* (1886) 41 N. J. Eq. 635, 7 Atl. 514; *Vail v. Jameson* (1886) 41 N. J. Eq. 648, 7 Atl. 520; *Bergen v. Fishing Co.* (1887) 42 N. J. Eq. 395, 8 Atl. 523, and *Montgomery v. Phillips* (1895) 53 N. J. Eq. 203, 31 Atl. 622.

The necessity for these decisions may, in the future, cause perplexity, unless the fact with respect to the statutory law be borne in mind.

The mortgage in question, having been given during this interval, is to be tested by these authorities, especially by that last cited.

The creditors preferred are five in number, whose claims may be thus epitomized:

(1) Mrs. Georgina M. Johnson, a daughter of George W. Miller, to whom he had passed a note of the company for \$2,500, made to its own order and delivered to Miller for past services.

(2) The Union County Bank, which had loaned to the corporation \$5,000, for which it held its note, indorsed by George W. Miller and two other directors.

(3) Georgina M. Johnson, who, as executrix of her husband, held the company's note for \$6,143, loaned to it by her husband.

(4) A note for \$29,205.53, held by the same

executrix, for money due to her husband from the Hall Signal Company, that, by an agreement between it and the present company, before insolvency, was assumed by the latter upon a good consideration.

(5) A note for \$8,600 to Frederick Kernochan, administrator.

Applying to these creditors the doctrine of *Montgomery v. Phillips*, the learned vice chancellor who heard the cause set aside all of the claims, with the single exception of that of Frederick Kernochan. In reaching this result in the case of the Union Bank and of the two claims of Georgina M. Johnson, executrix, a meaning and an effect was given to the prior decision of this court that goes beyond what it decided, and extends the doctrine of that case beyond the ground on which it rests; for, clearly, the decision of the lower court is that any application of the property of an insolvent company to the payment of its debts, made by its directors from personal motives, or the desire to benefit friends or kindred at the expense of the general creditors, is void. In effect and in terms the directors are treated as powerless to make a preference in favor of creditors to whom they are related by consanguinity, affection, or even professional relationship.

This is practically to re-enact the statute against preferences; for every preference is the expression of a motive or desire on the part of the directors to favor some creditors over others,—to put them, as the word implies, ahead in the race for assets. This the legislature may forbid, but this court may not. *Vail v. Jameson*, 41 N. J. Eq. 648, 7 Atl. 520. All that *Montgomery v. Phillips* decided was that, upon the insolvency of a corporation, its directors became trustees for the creditors, and could not use their position of trust to obtain for their own debts an inordinate share of the assets. If a court of equity go further, and place those whom the directors desire to prefer in the same category with themselves, the result would be that they may lawfully prefer those only whom they do not wish to benefit, which clearly was not the doctrine announced. Beyond what was held in *Montgomery v. Phillips*, a purely judicial rule does not seem to admit of much extension; certainly not to the application made in the present case. Upon the same line of reasoning, the contention is not tenable that the mortgage, as a deed, is void, because it secures, *inter alia*, a claim which the director is upon equitable consideration disentitled to have preferred.

Applying what I conceive to be the correct rule to the several claims secured by this mortgage, the result is:

1. The note of \$2,500, given to Miller for his services, and by him passed to Mrs. Johnson, is set aside, not because she was his daughter, but because she was not, in this regard, a creditor of the company. The holding of the note did not make her one in equity. She knew that this note was to come into existence, and for what purpose, and is thereby charged with

knowing that it was invalid in the hands of the person from whom she got it. She gave no new consideration for it, and gave up no old security or right of action. She stands in the position of a volunteer who knowingly seeks to take an inequitable share of the assets of an insolvent company. To the extent that the note entitles her to share with the unpreferred creditors, it is unimpeachable.

2. The note of the Union Bank for money loaned to the company is sustained. Inasmuch, however, as the directors who are indorsers cannot obtain any benefit from this preference, the amount paid to the bank over and above what it would have received as a general creditor is recoverable from the indorsers, in a suit to be brought by the receiver, if necessary; that is to say, the general creditors, through the receiver, are subrogated to the right of the bank against the indorsing directors to the extent that the bank profits by the preference. In *Wilkinson v. Bauerle* and *Montgomery v. Phillips* there were preferences sustained upon which directors were indorsers. It may be that the attention of the court was not called to that feature of those cases; but there is nothing that in principle defeats an otherwise lawful preference merely because it would be inequitable to extend the preference to all parties to the transaction. The cases were properly decided upon the idea that the equities work out as above indicated.

3. The note of \$6,143 of Georgina M. Johnson, executrix, being a debt of the corporation, is sustained.

4. The note of the same for \$29,205.53 is sustained, for the same reason.

5. The claim of Frederick Kernochan, which was sustained by the opinion of the vice chancellor, is in this awkward situation. The mortgage secured certain notes held by Frederick Kernochan as administrator of Walter O. Kernochan. The bill alleged that Frederick Kernochan was not administrator, and hence did not make him a party, but made Joseph H. Kernochan a party as administrator, and took a decree pro confesso against him. Notwithstanding this, the final decree, after reciting that the vice chancellor found that the Kernochan claim was good, sets aside the claim of all the defendants, which included Joseph H., and did not affect Frederick.

The question of the proper trustee is one which may be cleared up in the court of chancery before its decree is finally settled.

The record will be remitted to chancery, with its present decree reversed.

LUDLOW, J., dissenting.

(61 N. J. L. 340)

CLAYTON v. GREEN.

(Supreme Court of New Jersey. Feb. 21, 1898.)

COUNTIES—BOARD OF FREEHOLDERS—DIRECTOR—TERM OF OFFICE—FORFEITURE.

1. Under section 6 of the act of 1894 (1 Gen. St. p. 422), being an act to reorganize boards of

chosen freeholders, which provides that all statutes in force at the time the act was passed, not in conflict therewith, shall still be operative, Gen. St. p. 410, § 7, which restricts the board's power to remove the director to cases of his absence or refusal to serve, is made part thereof.

2. Under Gen. St. p. 410, § 7, which provides that the board of chosen freeholders shall annually elect one of their number as director, and, in case of his absence or refusal to act, shall elect another in his place, such director holds his office for one year, and the board is restricted, in electing another in his place, to cases where he is absent, or refuses to act.

3. Unlawfully deciding a motion to adjourn and refusing to further preside over the meeting will not warrant the board of freeholders, under Gen. St. p. 410, § 7, which provides that they may elect a director to take the place of the one elected, who absents himself or refuses to act, electing another in his place.

Quo warranto proceedings, on relation of Arthur W. Clayton against William Green. From a verdict in favor of plaintiff, a rule to show cause was granted. Rule discharged.

Argued February term, 1898, before the CHIEF JUSTICE, and DEPUE, GUMMERE, and LUDLOW, JJ.

Leon Abbett, for relator. Allan McDermott, for respondent.

DEPUE, J. This information was filed in the name of the attorney general by Arthur W. Clayton, who claims the office of director of the board of chosen freeholders of Hudson county. The information sets out that the board of chosen freeholders of the county of Hudson met on December 7, 1896, for organization, and that at the said meeting the relator was duly elected director of the board, and qualified as such, and is lawfully entitled to said office; and that William Green, who was also a member of the board of chosen freeholders, usurps and intrudes into and unlawfully executes the office of director and presiding officer of said board of chosen freeholders. The defendant, Green, by his plea, does not deny the election of Clayton as director at the organization of the board, but sets out that Clayton refused to act as director of the board of chosen freeholders of the county of Hudson, and that on the 30th day of December, 1896, the said board removed the relator from office, and proceeded to elect him, the said Green, as director; and that he, the said Green, did thereupon assume the duties of said office, and from thence has been and is director of the board. The issue was tried at the Hudson circuit on July 6th, before Mr. Justice Lippincott and a struck jury. Testimony was taken on both sides, and at the conclusion of the case the judge directed a verdict in favor of the plaintiff, on which this rule to show cause was granted.

The facts are practically undisputed. The official minutes of the meeting of the board of freeholders of December 7, 1896, which was the meeting at which the board was organized, show that when the clerk, who held over, called the board to order, and declared

that the first business in order was the election of director, a motion was adopted by the board that the board should go into an election for director. Nominations were made, and the relator in this case received a majority vote of all the members, and was duly declared director of the board. At a special meeting of the board on Wednesday, December 30, 1896, a resolution was passed, reciting that the relator, the director of the board, "has ever since election as such director either refused altogether to discharge the duties or perform the functions of his office of director of this board, or has presided over the meetings of this board in such a manner as to violate the law, and to endeavor to tyrannize over the members of this board, and endeavor to usurp and arrogate unto himself the rights and prerogatives of the majority of this board, and to deprive said majority of their rights and prerogatives, and has repeatedly defied the duly-expressed will of the majority of the board when said majority was in the lawful exercise of its clear and certain rights; and has so misconducted himself in and abused his said office as to bring said office, and endeavor to bring the board, into disrepute, and to give the public a false impression of this board, and of the management of the affairs of this county by the board of chosen freeholders,"—with an enumeration of particulars. And it was thereupon "resolved that for the causes aforesaid the director be, and he is hereby, removed from the office or position of director of this board, and that the said office or position be, and the same hereby is, declared and made vacant." This resolution was adopted by a vote of the majority of the board, and by the same vote it was "resolved that William Green, a member of this board, be, and he hereby is, appointed and elected director of this board." "The clerk declared Freeholder Green elected as director, and administered to him the oath of office. Director Green assumed the chair as presiding officer, and directed the roll to be called." The evidence showed that at the meeting of the board of December 17th the relator, as director, decided that a resolution offered by one of the freeholders was out of order without the same being read to the board, and that on an appeal from the decision of the chair, duly seconded, the director refused to have the resolution read, and refused to entertain the appeal from his decision that the resolution was out of order; and on a demand that the appeal be put to a vote of the board he refused to permit an appeal by the board from his decision. One of the freeholders then moved to adjourn, and a demand was made by several members of the board to call the ayes and nays on the motion to adjourn. This call the director ignored, refused to permit the roll to be called, put the question on the motion, took a viva voce vote, and declared the motion adopted. He then vacated the

chair, and refused further to preside. Freeholder Riordan having assumed the chair, the roll was called, and resulted in a vote of 21 to 6, overruling the decision of the director, whereupon Freeholder Riordan was elected director pro tempore, and the board proceeded with the transaction of business, and a resolution was adopted for the purpose of recording the vote of the members against the motion to adjourn which had been made while the relator was in the chair. Substantially, this is a recital of the events of the meeting of December 17th, with respect to the conduct of the director and the board. The transactions of the meeting of December 30th, removing the relator, and appointing Green director, have already been stated.

The power of the board to remove its director and elect another member director is the issue in this case. In the preamble to the resolution adopted on December 30th, among other charges made against the relator, is the publication of a pamphlet relating to the public institutions under the control of the board, in which the management of these institutions was severely condemned. Under the issue made by the plea in this case, and under the statute which confers power upon the board of freeholders with respect to its directors, such extraneous matters have no relevancy to this case. The board of chosen freeholders of the county of Hudson is organized under an act entitled "An act to re-organize the boards of chosen freeholders in counties of the first class in this state," passed May 16, 1894. 1 Gen. St. p. 422. The first section of that act provides for the mode in which the boards of chosen freeholders in counties of the first class shall be constituted, and provides that the terms of office of the members of the boards shall begin on the first Monday of December next after their election, and that they shall hold office for two years, and until their successors are elected and qualified. The office of this section is to create a board of freeholders in counties of the first class, whose life shall be for the term of two years. Section 2 provides that the boards shall meet for organization on the first Monday in December succeeding the passage of the act and on the first Monday in December of each second succeeding year, and shall elect from their own number a director, who shall be the presiding officer of said board, and shall appoint the standing committees. The third section provides that the members of the boards of chosen freeholders of such counties shall receive as compensation for their services a salary of \$500 per annum, and the director shall receive the additional sum of \$500 as such director, to be paid in equal quarterly payments as the same becomes due. By section 7 of the general act concerning chosen freeholders the board is empowered to elect annually one of their own number to preside at their meetings, who shall be called the director of the

board, and, in case of his absence or refusal to serve, then the board shall proceed to the election of another. *Id.*, p. 410. This section in the general act concerning boards of chosen freeholders providing for an election of a director annually implies a term of office for one year, and this implication is made certain by the restriction of the power of the board to elect another in his place to cases of the director's absence or refusal to serve. The act of May 16, 1894, gives a term of two years to the members of the boards of freeholders of counties of the first class, and provides that on the first Monday in December next after their election, and on the first Monday in December of each second succeeding year, they shall elect a director. By this prescription in the act of 1894 of the time when the director shall be elected, the term of office of any director elected would continue until a successor could be elected in compliance with the section providing for the election of a director, which event could not occur until the period of two years from the organization of that board had elapsed, and a new board came into existence.

People v. Kilbourn, 68 N. Y. 479, cited by the defendant's counsel, is not relevant to the construction of the statute now in question. The contest in that case was over the office of street commissioner in the city of Albany. The only provision of the city charter relating to the subject was the tenth section of the third title, which enacts "that the mayor, with the consent and approval of the common council, shall biennially appoint" certain ministerial officers, including one street commissioner, and that "such officers shall continue in office until their successors have been appointed and duly qualified." The relator's title to the office depended wholly upon the construction of this provision. The section in question related exclusively to the power of the mayor, and the court held that the words "shall biennially appoint" meant that the mayor must appoint at all hazards, no matter whether the incumbent in office had served two years or less than that period. The section under consideration in that case related to the power of the mayor, and expressly conferred upon him the right to appoint biennially, and an appointee in office held office only until his successor had been appointed and duly qualified. The seventh section of the general act concerning boards of freeholders (1 Gen. St. p. 410) must necessarily be applied to boards elected under the act of 1894, for otherwise there would be no power in the board to elect another person as director where the director first elected was absent, or refused to act. The act of 1894 is an act reorganizing boards of freeholders which theretofore existed in counties of the first class under the general act, and the sixth section of the act of 1894 expressly vests in the boards of freeholders constituted and

elected under its provisions all the powers, authority, rights, and privileges which were vested in the boards of freeholders of the said counties when the act was passed, and provides that all statutes and parts of statutes in force in anywise applicable to said boards of freeholders in said counties, public, general, or special, be in all respects continued in full force, and made applicable to the boards of chosen freeholders so constituted and elected under the provisions of the act, except in so far as the same may conflict or be inconsistent with it. The seventh section of the general act being by necessary intendment incorporated in the act of 1894, power of removal is restricted to the conditions under which a director may, by that section, be removed by the board, namely, absence or refusal to act. In the New York case power was conferred on the mayor to appoint biennially, and his biennial appointment terminated the term of office of an incumbent. By the seventh section of the act above referred to the power of the board to elect a successor to a director is restricted to the absence or refusal to serve of the director regularly chosen at the organization of the board.

The counsel of the defendant contend that the board of freeholders may at any meeting remove the director and elect another presiding officer in his stead. If by this is meant the election of a presiding officer when the director is temporarily absent, who shall perform any of the functions and duties of the director other than presiding pro tempore, this contention cannot be yielded to. To sustain this contention, the defendant's counsel refers to the common-law doctrine with respect to the power of a motion incident to the good order and government of corporate bodies, and to the removal of the speaker of the house of commons and the presiding officers of other legislative bodies. This subject is set at rest by the decision of this court in *State v. Jersey City*, 25 N. J. Law, 536-539. By the charter of Jersey City then in force, power was expressly conferred on the common council to expel a member for disorderly conduct or a violation of its rules. The relator was a member of the common council, and, charges having been preferred against him of official corruption and bribery, the common council, having investigated these charges, sustained them, and removed him from office. Mr. Justice Potts, in delivering the opinion of the court, discussed the power of expulsion existing at common law, and added: "But the jurisdiction exercised in this case is not derived from the common law. The common council is not the corporation, and, whatever powers a municipal corporation may have to remove or expel a member for cause at common law, it is clear that the corporation itself has not by any by-law delegated any of them to the common council; and that body therefore cannot avail itself of the common-law jurisdiction, vested as an inherent right in the corporation itself, to expel a member of their own body. The council derives

its jurisdiction from the charter of the corporation." It is quite clear from this extract from the opinion of this court in the case just cited that the power to remove a director does not reside in the board of freeholders otherwise than in virtue of the seventh section of the general act. To justify the action of the board of freeholders in removing the relator, the power must be found in the powers expressly granted to the board to that end by the statute above referred to. The conditions under which the board is authorized to remove its director, as expressed in the seventh section of the act, are his absence or refusal to act. "If the governing statute defines the causes for which an officer may be removed, he cannot be removed for any other cause; the statute being interpreted in conformity with the principle, 'Expressio unius exclusio alterius.'" 1 Thomp. Corp. § 816. The action of the board in this instance in removing the relator cannot be justified on the ground of his absence or on the ground of his refusal to act. He was present at the meetings of the board on the 6th, 17th, 21st, and 30th of December, and presided at each meeting. At the meeting of the 30th, when the resolution declaring his office vacant was acted upon, he presided, and declared the resolution out of order, and refused to entertain an appeal from his decision. He refused to permit the roll to be called on the motion to adjourn, and on a viva voce vote declared the motion adopted. He then vacated the chair, and refused further to preside. That the relator was present at these meetings, and that he served as director as he understood the duties of his office as director, or at least attempted to do so, is entirely clear. Indeed, the complaint in the preamble to the resolution removing him from office relates to the alleged arbitrary conduct of the relator as director, and not to his refusal to act as director. *Billings v. Fielder*, 44 N. J. Law, 381, in principle, is pertinent to this part of the case. The contest in that case was over the office of clerk to the board of freeholders of the county of Hudson. The board was composed of 20 members besides the director at large. It met on the 18th of May, 1892. The director declared a motion to proceed to the election of a clerk out of order. He refused to call for nominations, and refused to call for the vote on nominations, and ignored a call for ayes and nays, and took a viva voce vote, and declared the motion to adjourn carried, although 13, which was more than a majority of the board, protested that the motion was lost. He then left the board. A new director was elected, and *Billings*, the relator in that case, was elected clerk. Mr. Justice Van Syckel, in delivering the opinion of the court, said: "The general rule of parliamentary law which governs legislative bodies must apply so far as to enable the board to elect a presiding officer pro tempore, to conduct its deliberations in due and orderly form. In such case the authority he can exercise will be merely that of a presiding officer. Assuming the facts to be as presented by the relator, the director at large at the meeting of the 18th of May was not necessarily or

willfully absent; neither did he refuse to act in his official capacity. On the contrary, he was present and acting, and ruled that the board, by its vote, had agreed to an adjournment. In the absence of the director from a regular meeting of the board, a member could be chosen to act as mere presiding officer, but for an unlawful decision of the director when present at the meeting the appropriate remedy is by certiorari, and for any unlawful refusal on his part to act in the discharge of his official functions relief may be had by application to this court for mandamus." The court decided that *Billings*, who was elected in this irregular manner, was not entitled to the office. The action of the board in removing the relator from office was ultra vires, and the instruction of the trial court that the jury should render a verdict in his favor was correct.

(56 N. J. E. 429)

PRATT v. BOODY et al.

BOODY et al. v. PRATT.

(Court of Errors and Appeals of New Jersey.
Feb. 28, 1898.)

INJUNCTION—RESTRAINING ACTION AT LAW.

Where a court of equity, upon bill and cross bill, has ordered an accounting for the purpose of ascertaining the sum due from the complainant to the defendants, a pending suit at law by the latter for the same debt under the heirs and devisees act should be restrained until the coming in of the account.

(Syllabus by the Court.)

Appeal from court of chancery; Emory, Vice Chancellor.

Bill in equity by Caroline C. Pratt against David A. Boody and others for an accounting. Defendants filed a cross bill. From a decree of accounting, both parties appeal. Remitted, with instructions.

Vall & Ward, for plaintiff. W. P. Voorhees, for defendants.

GARRISON, J. The parties to this suit are Caroline C. Pratt, who is the widow of Charles E. Pratt, and the sole devisee and beneficiary under his will, and Boody, McLellan & Co., a firm of stock brokers in the city of New York, with whom, in his lifetime, Mr. Pratt had had extensive dealings, out of which this litigation arose. The original bill was filed by Mrs. Pratt, charging, as its main allegation, that the dealings between her husband and the defendants were gambling transactions. The vice chancellor to whom the cause was referred found as a matter of fact that the transactions were sales and purchases made for Pratt by the defendants, and not wagers between them. The conclusion thus reached is concurred in by this court, with the further comment that, were the fact otherwise, there is no proof in the case that the common-law rule does not still obtain in the state of New York. Having eliminated from the controversy the questions arising from this source, the court of chancery decreed an accounting between the parties, from which de-

cree each party has appealed. The case is this: Boody, McLellan & Co., claiming that Pratt, deceased, was indebted to them in a large sum, brought an action therefor in New Jersey under the heirs and devisees act. Mrs. Pratt, who as sole devisee of her husband was a defendant in this action, having a claim of her own against Boody, McLellan & Co. for a smaller sum, filed it as a set-off. She also brought in her own name an action against Boody, McLellan & Co. in the state of New York to recover this same sum. These two actions pending, this bill in chancery was filed by Mrs. Pratt, based in great part upon the theory of the illegality of the transactions with respect to which it sought relief, but alleging other facts that showed the necessity of an accounting in equity. A cross bill exhibited by the defendants alleged other facts tending to a similar end; so that the parties were before the court, each asking for an account and decree that should, upon equitable terms, include and settle all of their said differences.

This the decree made in the cause fails to accomplish in one particular, viz. that it leaves the defendants free to proceed to judgment in their action under the heirs and devisees act. This question was alluded to by the learned vice chancellor in his conclusions as one upon which counsel should be heard, but the decree now before us, by discharging the injunction against the defendants, places the matter beyond the present control of the inferior court.

The anomalous situation is that the parties are compelled to ascertain in equity the sum which, as between them, shall constitute the debt for which recovery by the defendants may be had, while the defendants are free in their suit at law to establish their debt, unaffected by the account taken in equity, or by the terms or considerations upon which it was based. That the sum for which the lands devised are liable is not the same sum due by the sole devisee to the defendants is not thinkable, in the terms of equity.

Nothing in the action at law can vary the sum so found to be due as between these parties. The function of this special action at law is to fix a charge upon the lands devised, and in their pleadings in equity both parties admit that the complainant is the sole devisee of her husband. By their cross bill Boody, McLellan & Co. brought into the suit in equity their pending action at law, so far as the amount recoverable was concerned, and by sufficient statement submitted in equity to the offset Mrs. Pratt had filed therein. Every element, therefore, necessary to the complete ascertainment of the ultimate amount recoverable by the defendants was before the court of chancery, together with all the considerations deemed by the parties to be essential to the equitable adjustment of the matter.

The decree in equity based upon this account must be a finality, binding upon the parties, in whatever form or forum the sum thereby ascertained is sought to be secured or recovered. The injunction against the defendants from the

further prosecution of their suit at law in the supreme court should be retained until a decree has been made in chancery upon the coming in of the account.

The record is remitted to the court of chancery, in order that such account may be taken, and the cause proceeded with in accordance with these views.

(61 N. J. L. 270)

WATER COM'RS OF CITY OF NEW BRUNSWICK v. CRAMER.

(Court of Errors and Appeals of New Jersey.
March 1, 1898.)

RES JUDICATA—PLEADING—IDENTITY OF ISSUES—MUNICIPAL BOARDS—CONTRACTS.

1. To work an estoppel of record, a former judgment between the parties to an action must be pleaded, if there be opportunity to plead it, and must be proved to be directly upon the point in question. Quære, can there be a collateral estoppel of record on matter of public law?

2. Under a municipal charter, certain water commissioners are required to elect annually one of their number to be president of the board, who may under their direction have the general superintendence of the waterworks and the business of the board, and are empowered to elect a treasurer. They are also authorized to appoint and employ all proper assistants, officers, agents, and clerks. These commissioners, by resolution and written contract, assumed to appoint and employ C. H. C. for five years, at a stated compensation, to perform, under their direction, the duties of general superintendent of the waterworks, and, if desired, the duties of treasurer of the board, without further compensation. After some 15 months he was discharged, and another person was appointed in his stead. He sued for compensation under the contract. *Held*, that the duties of this employment were incidental to public offices created by law, and could not be made the subject of a contract extending beyond the term of a president or treasurer incumbent. Such contract was ultra vires.

Gummere, Ludlow, and Vredenburg, JJ., dissenting.

(Syllabus by the Court.)

Error to supreme court.

Suit by Caleb H. Cramer against the water commissioners of the city of New Brunswick to recover salary under a contract. From a judgment in favor of plaintiff on a case reserved, defendants bring error. Reversed.

Robert Adrain, for plaintiffs in error. A. V. Schenck, for defendant in error.

COLLINS, J. This writ of error reviews the judgment of the supreme court on a case reserved, turned, by leave, into a special verdict, for the purpose of permitting a writ of error. The state of the case discloses the following facts: On February 8, 1892, the board of water commissioners of the city of New Brunswick, by resolution, appointed the plaintiff general superintendent of the waterworks of the city, and the parties entered into a written contract whereby it was agreed that the plaintiff should perform the duties of such position for five years, and the board should pay him the yearly sum of \$2,500 in

monthly payments. It was also agreed that the plaintiff should, if desired, perform the duties of treasurer of the board without further compensation. On June 12, 1893, the board by resolution declared vacant the position of superintendent of the waterworks, and appointed another person thereto. The plaintiff tendered himself ready and willing to perform his duties, but was refused permission to do so. He has renewed his tender each month with like result, and has presented monthly bills. His suit is for the equivalent of compensation under the contract from July 1, 1893, to December 31, 1895, with interest on the monthly installments. He has diligently sought other employment without success, except that he has been employed, without compensation, as an officer of a corporation in which he is interested.

It is claimed that the case also shows that, before the suit was brought, the plaintiff had recovered, under said contract, a judgment for the value of his services for June, 1893, and that, therefore, his right to recover in this suit, under the same contract, is *res judicata*. This claim cannot be sustained. An estoppel or record, to be effectual, must be pleaded if there be opportunity to plead it. *Ward v. Ward*, 22 N. J. Law, 699; *Black*, Judgm. § 784. Not only did the plaintiff fail to plead such former judgment in his declaration, but he did in fact therein aver that he had performed and been paid for the services agreed on in the contract up to July 1, 1893. He met the defense set up by notice in lieu of plea, by an answering notice, on the merits, without reference to any former adjudication. Nor was any estoppel of record established by proof. It was, indeed, admitted by defendants, that the plaintiff had "brought a writ in the supreme court for \$208.33 for services for the month of June, 1893, under the contract, and interest on the same; that there was a verdict in his favor at the April term of 1894 of the Middlesex circuit; that a rule to show cause was thereupon granted, which was discharged at the February term, 1895, of the supreme court; that the defendant paid the judgment, and that the case is reported in 57 N. J. Law, 478, 81 Atl. 384;" but the record was not produced, and there was no competent evidence of the issue tried and determined. The decision cited does deal with the legal question now being litigated, but it is entirely possible that a judgment for compensation for a month, during a part of which the defendants had accepted the plaintiff's services might, under the pleadings in the case, have been warranted, without involving an adjudication that the contract was enforceable as to subsequent compensation. The admission was made in order to explain why counsel did not intend to argue the points involved in the former decision, and it was coupled with the statement that it was the purpose of the defendants to review that decision, by means of a writ of error to be brought upon any judgment against them in

the pending cause. *Stare decisis*, not *res judicata*, was the obstacle confronting the defendants at the trial. Had any purpose to claim an estoppel been disclosed, they could have objected to the evidence as not within the pleadings; and, had the record of the judgment been produced, they might have shown that it did not estop their defense. To work an estoppel a former judgment must be directly in point, and must involve the identical matter presented in the new action. This rule is strict. *Chamberlain v. Hopper*, 34 N. J. Law, 220; *Insurance Co. v. Newton*, 50 N. J. Law, 576, 14 Atl. 756; *Cromwell v. County of Sac*, 94 U. S. 351.

It must not be understood, however, that, had the former judgment been pleaded and proved, it would have been an estoppel of defense to the plaintiff's suit. The decision turned on a pure question of public law, and there is very respectable authority that such a question may be reconsidered in a subsequent controversy between the parties involving identical facts. In *Boyd v. Alabama*, 94 U. S. 645, the supreme court of the United States held that *res judicata* would not preclude inquiry into the constitutionality of a statute interpreted as if valid in a former cause between the same parties, and held to make a contract between the state and the defendants on facts proved in both causes. The case is not decisive, for it was an indictment, but the principle is plainly declared. In *Commissioners v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, the same court looked through a judgment, formed on coupons, to the statute under which the bonds were issued, and, finding it invalid, refused a mandamus to raise a tax to pay the coupons, although merged in the judgment. The judgment stood as such, but was held not to bar an inquiry into the law. The doctrine that the estoppel of a judgment is conclusive on the facts, but not on the law, is approved by Mr. Bigelow in his work on Estoppel (5th Ed. p. 100). In this state a close precedent to the case in hand has stood unquestioned since 1859. It is the decision of the supreme court of *Bernard v. Mayor, etc.*, of Hoboken, 27 N. J. Law, 412. The situation was this: The city, under its charter, had, by an ordinance that was claimed to make a contract, established a police force for two years, with the plaintiff as a member. After his discharge on the disbanding of the force at the end of a half year, he brought suit, and recovered the equivalent of his compensation up to the time of the bringing of his suit. In a later suit for compensation for the residue of the term, it was held that the former judgment did not estop the defense that, as the plaintiff was a public officer, he was subject to discharge, notwithstanding an employment by contract for a fixed term. The decision was put on the ground that this question of law was not concluded by the former judgment. I proceed, therefore, to the merits of the defense urged to the plaintiff's suit.

The waterworks of the city of New Brunswick were, by authority of the city charter (Sp. Pub. Laws 1873, p. 450), purchased from a private company, and under the same enactment are controlled as follows: Section 2: "That the said waterworks shall be conducted and managed by a board of commissioners to be appointed by the common council, who shall hold their office for three years, one-third of them to be appointed yearly; that all the authority, powers and duties relative thereto now exercised or performed, or that hereafter may be exercised or performed, by the said company, shall be exercised and performed by the said commissioners (except as therein-after provided); and, in pursuance of this authority, the said commissioners may appoint and employ all proper assistants, officers, agents and clerks necessary or convenient for the purpose aforesaid, at such compensation as they may deem reasonable, and shall take from their treasurer and such other officers and agents as they may appoint, such bonds and sureties for the faithful performance of their duties as they may deem proper." Section 3: "That the said commissioners shall elect annually one of their number to be president of the board, who may, under their direction, have the general superintendence of the waterworks and the business of the board; the said president, or in his absence, one of the said commissioners appointed by the said board for the purpose, shall sign all contracts and all orders on their treasurer for the payment of moneys which may be authorized by said commissioners." Section 10: "That the contracts and engagements, acts and doings of the said commissioners, within the scope of their duty or authority, shall be obligatory upon and be in law considered as done by the mayor and common council of the city of New Brunswick, and any judgment recovered against the said commissioners in their official capacity shall have the same force and effect and be enforced in the same manner as if the same had been rendered in an action against the city in its corporate name."

The defendants insist that, under this statute, the contract with the plaintiff was beyond the power of their predecessors who made it. The supreme court, in its judgment now under review, followed the decision in the former suit on the same contract, to which allusion has already been made. That decision declared the grant of power conferred by section 2, above quoted, to be broad enough to warrant any contract with an employé not a public officer. The discretion of the board both as to salary and time was held to be unlimited. I do not dissent from that view. It was correctly assumed, and is now conceded by the plaintiff, that a public office cannot be the subject of a contract. It was further held that such a position as superintendent of waterworks, created, not by statute, but by appointment under a general power to "appoint and employ all

proper assistants, officers, agents, and clerks," is not a public office, but is a mere employment. The industry of the learned counsel for the plaintiff has supported that decision with many others of like purport from the courts of sister states and of the federal jurisdiction. I do not question their correctness. The real defense to the plaintiff's action was not made in the supreme court, or, at least, was not there discussed. It is this: That the duties embraced in the contract for the plaintiff's services are attached by the statute to public offices thereby created: Of course, the president and treasurer of the board of water commissioners are public officers. Attached to the office of president is the right to have "under direction" of the board "the general superintendence of the waterworks." The plaintiff's contract was to perform the duties of "general superintendent of the waterworks of the city of New Brunswick, under the direction of the board of commissioners thereof," for five years, at the salary fixed. It is frankly stated in the brief of plaintiff's counsel that "Mr. Cramer, under the contract in question, was in fact, and was designed and intended to be, simply a substitute for, and a subordinate of, the president of the board of commissioners, and who, in his place and under their direction, should, in the language of the act of 1873, 'have the general superintendence of the waterworks.'" Granting the power of the board, with the assent of the president, to afford him a salaried substitute or subordinate, it seems to me clear that such power is limited by the official tenure of the president himself. He is elected annually. The commissioners cannot make a contract that will take from future presidents their statutory right. If they can put upon a stranger a part of the duties of the president, they can so confer all the powers of that office. The board may, indeed, direct; but the direction must be to the officer created by the law. Change the designation in the contract to its admitted equivalent, and the infirmity of such a contract will more plainly appear. None will contend that the commissioners have power to appoint a "substitute president" to perform, under their direction, a part of the statutory duties of the president, and make, with their appointee, an irrevocable contract to pay him a salary for five years; yet this is what was, in effect, attempted. The contract further provided that, if so desired, the plaintiff should perform the duties of "treasurer of the said board (giving such bond as may from time to time be required of him by the said board), without any further or additional compensation therefor." The right to plaintiff's service in the capacity of treasurer must have entered into the consideration of the contract, and, while the board did not assume to bind itself or its successors to a fixed term for the treasurership, a new board could not, if this contract were valid, make

a change to another salaried treasurer without entailing on the public pecuniary loss. In effect, the attempt was to appoint a treasurer for five years, which, of course, is not warranted by the statute. The contract of the water commissioners was plainly ultra vires. I shall vote to reverse the judgment, and to remit the record to the supreme court for the entry there upon the special verdict of a judgment for the defendants.

GUMMERE, LUDLOW, and VREDENBURGH, JJ., dissent.

(61 N. J. L. 380)

CHANDLER v. ATLANTIC COAST ELECTRIC RY. CO.

(Supreme Court of New Jersey. Feb. 28, 1898.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK—INCOMPETENT SERVANTS.

1. A servant who chooses to enter into an employment involving danger of personal injury which the master might have avoided takes upon himself the risks of all the hazards incident to the employment, the existence of which are known to him, or which are plain and obvious, and which he has no reason to expect will be counteracted or removed; and no action will lie against a master for injuries to the servant resulting from such dangers.

2. A master owes to his servants the duty of using reasonable care and prudence in the selection of their fellow servants; and, if he knowingly employs or retains in his service an unskillful or incompetent workman, he is responsible for injuries received by an employé through the unskillfulness or incompetency of such workman.

(Syllabus by the Court.)

Action by Nettie E. Chandler, administratrix of the estate of Augustus E. Chandler, deceased, against the Atlantic Coast Electric Railway Company. On demurrer to declaration. Demurrer overruled, with leave to defendants to plead over.

Argued November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

Hawkins & Durand, for plaintiff. Isaac C. Kennedy, for demurrant.

GUMMERE, J. The cause of action set up in the declaration in this suit is that the plaintiff's intestate came to his death by the negligence of the defendants. The statement in the declaration is that the decedent, who was an employé of the defendant company, was engaged in the work of clearing away the dirt and refuse which had collected upon the company's track, and while so engaged, and without any negligence or want of care on his part, was run down and killed by one of their cars. The negligence of the defendants, by which the decedent's death is alleged to have been caused, is stated to have consisted in their failure to provide suitable fenders or guards for their cars, thereby rendering them unnecessarily dangerous to those of the company's employés who worked upon

the track, and also in knowingly employing an unskillful and incompetent motorman to operate the car which ran down the decedent. So far as the negligence of the company in failing to provide their cars with fenders or guards is concerned, it is enough to say that, even if it be conceded that such omission rendered the cars more dangerous to employes working upon the tracks than otherwise they would have been, no liability can be predicated upon such negligence. It is entirely settled both in the courts of this country and of England that if a servant chooses to enter into an employment involving danger of personal injury, which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence of which are known to him, or which are plain and obvious, and which he has no reason to expect will be counteracted or removed, and that no action will lie against the master for injuries to the servant resulting from such dangers. 14 Am. & Eng. Enc. Law, p. 845; Bailey, Mast. Liab. p. 145, and cases cited; Foley v. Light Co., 54 N. J. Law, 411, 24 Atl. 487. That the cars of the company were operated without fenders or guards was perfectly obvious to the decedent; and, if the operation of the railroad was thereby made more dangerous, the risk of injury from such danger was assumed by him, as one of the risks of his employment.

But the statement in the declaration that the decedent's death was due to the negligent conduct of the defendants in knowingly employing an incompetent and unskillful motorman to operate the car which struck and killed him shows a cause of action. The allegation is that the defendants, not regarding their duty to the decedent, caused and permitted said car to be run and operated in an unskillful, careless, and negligent manner, by an unskillful, inexperienced, and incompetent operator and motorman, then and there well known to the said defendants to be unskillful, inexperienced, and incompetent, and that, by reason of the unskillful, careless, and negligent manner in which said car was run and operated by said motorman, the said decedent, without any negligence or want of proper care on his part, was struck down and run over by the said car of the defendants. A master owes to his servants the duty of using reasonable care and prudence in the selection of their fellow servants; and, if he knowingly employs or retains in his service an unskillful or incompetent workman, he is responsible for injuries received by an employé through the unskillfulness or incompetency of such workman. Harrison v. Railroad Co., 31 N. J. Law, 203; McAndrews v. Burns, 39 N. J. Law, 117; Machine Works v. Hand, 50 N. J. Law, 463, 14 Atl. 766. Judgment should be in favor of the plaintiff as the record now stands. The defendants may apply to the court for leave to plead over if they desire to defend on the merits.

(61 N. J. L. 378)

FITZPATRICK v. CUMBERLAND GLASS MFG. CO.

(Supreme Court of New Jersey. Feb. 28, 1898.)

NEGLIGENCE—DANGEROUS PREMISES.

The owner of lands is under no obligation to keep them in a safe condition for the use of a person who comes upon them not by the invitation of the owner, but merely by his permission.

(Syllabus by the Court.)

Action by Thomas Fitzpatrick, by his next friend, against the Cumberland Glass Manufacturing Company, to recover for personal injuries. Plaintiff had a verdict, and the trial court showed a rule to show cause why the verdict should not be set aside and a new trial granted. Rule made absolute, and new trial granted.

Argued November term, 1897, before **MAGIE, C. J., and DEPUÉ, GUMMERE, and LUDLOW, JJ.**

Thomas W. Trenchard and John W. Westcott, for plaintiff. Walter H. Bacon, for defendant.

GUMMERE, J. This is an action brought to recover damages for personal injuries received by the plaintiff at the defendant company's glass works under the following circumstances: The plaintiff's father was an employé of the defendant company, and plaintiff (who was a boy 12 years of age) was accustomed to carry his father's dinner to him at the company's works. The evidence justifies the conclusion that this was done not only with the knowledge of, but by the permission of, the company. On the day upon which the plaintiff received his injuries he carried his father's dinner to the works as usual, and, as he passed through the main gateway, one of the gates, which had been allowed by the company to get out of repair, fell upon him, crushing his leg. These facts having been proved by the plaintiff, and not having been controverted by the defendant company, a verdict in his favor was rendered by the jury.

The chief question presented by this rule is whether the defendant, at the time of the injury, owed the plaintiff any duty with regard to keeping the entrance to its works safe for his ingress and egress. If it did, the jury properly found in favor of the plaintiff, but, if it did not, the verdict must be set aside; for, unless the plaintiff's injuries were the result of the neglect of duty on the part of the defendant, which it owed to him, no legal responsibility rests upon the defendant to compensate him for those injuries. The question of the liability of the owner of land for injuries received by a person entering thereon, by reason of the unsafe condition of the premises, came before the court of errors and appeals for determination in the late case of *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478. Mr. Justice Depue, who delivered the opinion of the court, after considering and discussing the cases on the subject, declares the rule to

be this: "That the owner or occupier of lands who, by invitation, express or implied; induces persons to come upon the premises for any purpose, is under a duty to exercise ordinary care to render the premises reasonably safe for such purpose, or, at least, to abstain from any act that will make the entry upon or use of the premises dangerous;" but that "mere permission to pass over dangerous lands, or acquiescence in such passage, for the benefit or convenience of the licensee, creates no duty on the part of the owner except to refrain from acts willfully injurious." The same rule had previously been enunciated by this court in the case of *Vanderbeck v. Hendry*, 34 N. J. Law, 467; and Chief Justice Beasley in the case of *Mathews v. Bensel*, 51 N. J. Law, 33, 16 Atl. 195, declares that there is no legal principle that imposes upon the owner of property, with respect to a mere licensee, the duty of keeping it in a safe condition. Applying the rule established by these cases to the case in hand, it will at once be perceived that the defendant company was under no obligation to keep its premises safe for the use of the plaintiff. He was not there by the invitation of the company, express or implied. He was there about a matter in which the company had no concern, i. e. the bringing of his father's dinner, and was saved from being a mere trespasser only by the fact that the company permitted him to come upon its premises for that purpose. He was a mere licensee. His presence on the company's land being merely permissive, and not by invitation, the only duty which the company owed him was to abstain from acts willfully injurious. That they failed in the performance of any such duty is not pretended in this case. The rule to show cause should be made absolute, and a new trial directed.

(61 N. J. L. 404)

STATE (PIERSON, Mayor, et al., Prosecutors) v. CITY COUNCIL OF DOVER et al.

(Supreme Court of New Jersey. Feb. 21, 1898.)

MUNICIPAL CORPORATIONS—RESOLUTIONS OF COMMON COUNCIL—SUBMISSION TO MAYOR.

The common council of a city cannot evade the requirement of the city charter to submit every resolution to the mayor for his approval, by using the word "motion" instead of "resolution," in authorizing the making of a contract for lighting the city with electricity.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of George Pierson, mayor of Dover, and others, against the city council of Dover and others, to review a resolution of defendant council. Resolution set aside.

Argued November term, 1897, before **VAN SYCKEL, DIXON, and COLLINS, JJ.**

Geo. T. Werts, for prosecutors. James H. Neighbour and Joseph Coult, for defendants.

VAN SYCKEL, J. This certiorari is sued out to prevent the consummation of an alleged contract for lighting the streets of

Dover by electricity. The contract bears date July 20, 1897, and purports to be between the mayor and city council of Dover of the first part, and the Dover Electric Light Company of the second part. The mayor refused to approve the contract, and the question in the case is whether the making of the contract was such action as is required by law to be submitted to the mayor for his approval or veto. Dover is incorporated under chapter 268, p. 506, Laws 1895. By section 56 of that act it is provided "that the council shall have power to provide for lighting of the streets, avenues and public places of the city, in such places as they in their judgment may deem necessary." By section 26 it is provided that "every resolution or city ordinance passed by the city council shall before it takes effect, be presented to the mayor by the city clerk, duly certified by the chairman of the city council and city clerk; if he approve it he shall sign it; if not he shall return it with his objections," etc. The action of the city council in making this contract was as follows: Councilman Carhart said: "I move that the contract between the city council and the Dover Electric Light Company for the lighting of the city of Dover, as reported and read, be accepted as a binding contract for that purpose, and that the city clerk be directed to affix thereto the seal of the city in duplicate, and attest the same under his signature, and that the chairman of the city council be directed to sign such contract, and that such contract so executed be spread in full upon the minutes of the city council." The motion was seconded by Councilman Stumpf, and adopted, the roll being called, by a vote of three to one. Was this a resolution, within the meaning of the twenty-sixth section of the city charter? "A motion is a proposition made to the house by a member, which, if adopted, becomes the resolution, vote, or order of the house." Cush. Law & Prac. Leg. Assem. § 1279. In *City of Burlington v. Dennison*, 42 N. J. Law, 165, the city council passed a resolution to purchase a fire engine. The prosecutor controverted the validity of this resolution, because it was not submitted to the mayor for his approval. The supreme court held that the approval of the mayor of the proceedings of a city council is essential to their validity only by special requirement of the charter. Under the charter of the city of Burlington, the necessity for such approval is restricted to ordinances. For that reason the court said it did not include resolutions, and the action of the council was therefore affirmed. By the charter of Jersey City, every ordinance and every resolution of common council must be submitted to the mayor for his approval. In *Dey v. Mayor, etc.*, 19 N. J. Eq. 412, an ordinance, duly passed, authorized the common council to make contracts for the removal of night soil, such contract to be made by the common council as a body by a vote of a majority. Chancellor Zabriskie held that a resolution passed by council to make

such contract was without authority and void, unless it was presented to the mayor for his approval. In *Schumm v. Seymour*, 24 N. J. Eq. 143, Vice Chancellor Dodd adopted the declaration in *Dey v. Mayor, etc.*, that the only existence of the mayor and council is as a board, and they can do no valid act except as a board, and such act must be by ordinance or resolution or something equivalent thereto. *Paret v. Bayonne*, 39 N. J. Law, 564, holds these municipal bodies strictly to the prescribed method of procedure in the performance of their official functions, and refers with approval to the two cases last cited. Although the word "resolution" or "resolved" was not used by the common council in taking this proceeding, it is none the less a proceeding resolved upon by the council, by whatever name it may be called. The requirement of the charter cannot be evaded in a matter of such importance, nor the mayor deprived of his prerogative by a mere change of words, by calling what is resolved to be done a motion, and not a resolution. The proceeding certified is, in substance and effect, a resolution of council; and it is void, and must be set aside, because it was not submitted to the mayor for his approval.

(61 N. J. L. 296)

CARD v. WILKINS et al.

(Supreme Court of New Jersey. Feb. 21, 1898.)

INJURY TO EMPLOYE—VIOLATION OF RULES.

1. When an employer clearly and explicitly forbids his employé to do a certain act around or in connection with the machine on which the employé is working, and the employé, while violating such prohibition, and as a result of such violation, receives an injury, the employer is not liable therefor.

2. This rule applies as well to minor as adult employées.

(Syllabus by the Court.)

Action by James Card against Alfred Wilkins and others to recover for personal injuries. A verdict was rendered for plaintiff, and the trial court allowed a rule to show cause why a new trial should not be granted. Rule made absolute.

Argued November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

John W. Harding, for plaintiff. Edward M. Collie, for defendants.

MAGIE, C. J. Plaintiff brought this action to recover damages from defendants for an injury received by him while in their employ, which he claimed resulted from a breach of their duty to him as masters. At the trial, plaintiff represented himself to have been a little over 12 years old at the time he received the injury. He was then employed in tending a machine called a "gilling" machine, in defendants' shop. From the description he gave of that machine, it appeared that it contained two

pairs of rollers, armed with sharp teeth of considerable length, and which, when in operation, revolved with rapidity. He knew how to stop the machine when in motion, and had frequently stopped it. Plaintiff's duty was to feed to this machine twisted ropes of horsehair, which were seized and torn apart by the teeth of the first pair of rollers, and passed from them, without his action, to the second pair, which further tore apart the horsehair, and passed it onto an apron or canvas slanting to the floor, from which it was removed for further processes of manufacture. The duty of plaintiff required him to feed the ropes to the front pair of rollers. It further appeared that at times the teeth of the rollers became clogged with the hair to such an extent as to stop the motion of the machine, and that plaintiff, when that result was threatened, had stopped the machine, and removed the hair which clogged it, or had it removed by one of the older workmen. The injury of plaintiff was received by his hand being drawn into and lacerated by the teeth of the rear pair of rollers, while he was engaged in attempting to remove from them some hair which threatened to clog them. The machine was then moving at its usual speed, for plaintiff had made no effort to stop it. It could be stopped without difficulty. In order to reach the rear rollers, where plaintiff was injured, he was obliged to climb partially upon the machine. A verdict having passed for plaintiff, a rule to show cause why a new trial should not be granted was allowed. It is now supported for the defendants on the ground that there were errors in the trial and result, and on the further ground that they have discovered since the trial, and have established, as they claim, by affidavits, that plaintiff at the time of the injury was considerably older than he had represented himself to be.

It is first strenuously argued that the danger of attempting to remove hair from the sharp teeth of rapidly revolving rollers was one which must have been obvious even to a boy of 12 years of age, for the rollers were open to his view, and he admitted he knew what would result if his hand should be drawn in. The contention is that there should have been a consult, or a direction for a verdict for defendants. This contention would be irresistible but for the testimony of plaintiff that the person in charge of the work, who had given him instructions as to the machine, had more than once, within his observation, removed hair which threatened to clog the machine while the rollers were in their usual motion. That person denied ever having done so in most positive terms, and there was corroborating evidence. Perhaps there was enough contradictory evidence to lay a foundation for the contention that a verdict grounded on the veracity of plaintiff in that respect ought not to stand. But the case was not present-

ed to the jury in that way, and it is deemed best not to express any opinion thereon, except to say that, if it was established by proof that plaintiff had seen his superior and instructor remove clogging hair from the teeth of the rollers, while the machine was in motion, with impunity, it would be a question for the jury whether a boy such as plaintiff was must have perceived and comprehended the danger attached to such an act. The defendants produced evidence from several witnesses, which, if believed, established that defendants' agent had forbidden plaintiff to touch the machine if it got clogged, or to attempt to remove the clogging hair until the machine was stopped. In view of this evidence, the trial judge was asked to charge the jury that, if they found that plaintiff was explicitly and clearly forbidden by defendants or their agent to do the act in which he received his injury, he could not recover. The instruction thus asked was refused, except so far as it was embraced in the charge made. On examination of the charge it is plain that it did not contain the substance of the request. The jury were told that the case turned on the question whether the danger was obvious to plaintiff, considering his youth and inexperience; and, if not, whether he had been properly instructed and warned against the danger. When the trial judge directed the attention of the jury to the evidence respecting the prohibition of plaintiff from doing the act whereby he received his injury, he accompanied his statement with language which plainly showed that he deemed the prohibition immaterial, unless it also pointed out the danger from which the prohibition was designed to preserve the plaintiff. If defendants were entitled to have the jury instructed in the substantial terms of that request, they ought to be allowed a new trial. When an employé receives an injury which has been brought about by his willful violation of rules laid down by the employer, and within the knowledge of the employé, he cannot hold the employer liable. This doctrine is in accord with the principles governing the liability of masters to servants, and has been announced in many cases which are collected in 14 Am. & Eng. Enc. Law, p. 908. In none of the cases is it intimated that the employé must be informed of the reason of the rule, or have explained to him the danger to which its violation would expose him. The doctrine would be deprived of any practical application if the immunity of the master would not exist, except the servant knew the danger. For if that danger was patent and obvious, it was one which the employé took the risk of when he entered the service; if it was latent and nonobvious, then, upon the employer's disclosure of the danger to him, the employé also took the risk of it. Therefore it would be of no consequence that the avoidance of the danger was enforced by a regulation or

a prohibition. In my judgment, so far, at least, as adult employes are concerned, an injury received by one of them as the direct result of willful disobedience of rules or willful violation of prohibitions laid down by the employer, and known to the employé, is an injury which the employé brings upon himself by his own act, and for which the employer is in no wise responsible, even though the employé was ignorant of the danger to which his act would expose him. But it is urged that the doctrine is not properly applicable to employes who are minors. I am unable to discover any distinction in this respect between employes who are adults and those who are minors. If the regulations are brought to the attention of the minor, and they are clear and explicit, the violation of them is the voluntary act of the employé, which, if it produces injury, ought not to charge the employer. For this reason I think defendants were entitled to the charge in this respect which they requested. It may be added that, had I reached a different conclusion, I should still think that the jury should have been instructed as requested. As has been stated, if plaintiff's account was accepted, the jury might infer that he did not appreciate and comprehend the full danger to which one was exposed who did the act in doing which he received his injury. But it is clear that he must have perceived that there was some danger in doing it. The prohibition against doing that act was therefore addressed to one who did have some knowledge of its danger. In this aspect of the case it resembles the case of *Beckham v. Hillier*, 47 N. J. Law, 12. There a minor employé was killed, presumably by being caught in a belt which he was attempting to adjust alone after having been instructed not to do so without the assistance of another workman. Mr. Justice Dixon, speaking for this court, said: "*Beckham*, however, did not ask for aid, but alone attempted to adjust the belt. In so doing we think he acted at his own peril. Even if, as is claimed, he had not been apprised of the exact nature of the hazard, yet he knew that the operation was dangerous, and his disregard of the precautionary direction manifestly intended for his greater security was culpable negligence, which relieved defendants from responsibility." The result reached relieves us from considering the other reasons relied on for a new trial. Let the rule be made absolute.

(61 N. J. L. 494)

STATE (CADMUS et al., Prosecutors) v.
CITY OF BAYONNE.

(Supreme Court of New Jersey. Feb. 21, 1898.)

CERTIORARI—WHEN LIES.

A certiorari removed into the supreme court the resolution by which the city of Bayonne agreed to sell certain lands that it had purchased at a tax sale under the Martin act.

Held, that the proceeding was nugatory as a means of testing whether the purchaser at the tax sale had legally extinguished the prosecutor's right to redeem the lands.
(Syllabus by the Court.)

Certiorari by the state, on the prosecution of James R. Cadmus and others, against the city of Bayonne, to review a resolution of the board of councilmen of the defendant. Certiorari dismissed.

Argued November term, 1897, before GARRISON and LIPPINCOTT, JJ.

Marshall N. Van Winkle, for prosecutors.
T. F. Noonan, Jr., for city of Bayonne. J. Benny, for Anna W. Wall.

GARRISON, J. This writ of certiorari removed into this court a resolution adopted by the board of councilmen of the city of Bayonne. The resolution recites the sale of certain lots under the provisions of the Martin act, their purchase by the city of Bayonne, and the offer of one Anna W. Wall to buy the same of the city at a price named. The resolution accepts the offer and authorizes the execution of a deed.

The purpose of this certiorari is to set aside this resolution. The right of the city both to buy the land and to sell again at private sale is conferred by the statute. 3 Gen. St. § 3385.

The prosecutors, who were the owners of the lots at the time of their purchase by the city, deny in form the power of the city to sell what it had bought; but, in effect, they only contend that such sale will not divest their right to redeem. They say that the purchaser, the city, did not serve upon them the notice required by the statute, and that hence the six months within which they may redeem has not commenced to run.

This redemption must, under the statute, be the act of the owner, and its form is strictly prescribed, viz. by paying to the city treasurer the sum paid by the purchaser, with interest at 10 per cent. This the prosecutors have not done. This, if their contention be correct, they might have done, or still may do. The effect of such payment when made is declared by the statute. But obviously these considerations have no bearing upon the right of the purchaser to sell such title as it has, whether perfect or imperfect, to any one who is willing to buy it.

There is not the vestige of authority in this court to extend the time for redemption, to alter the terms prescribed by the statute, or to interfere with a sale by a purchaser who has or thinks he has a title.

If the contention of the prosecutors be correct, the sale by the city would in no wise affect their statutory right to redeem, and it certainly would not prevent their paying the proper amount to the proper officer, without which they can acquire no status with respect to the title that the city provisionally held. The whole question is one of title, which the prosecutors are not in a position

to test, and which cannot be tested by an attack upon the resolution of the city to sell to another what it bought at the tax sale.

The question cannot be raised until the prosecutors have color, at least, of title, and then only in an action by which the title to land can be tested, and the disputed question of fact and veracity passed upon by a jury.

The present proceeding is entirely nugatory, and will be dismissed, with costs.

(61 N. J. L. 388)

WOOSTER v. FITZGERALD et al.

(Supreme Court of New Jersey. Feb. 28, 1898.)

WILLS—CONSTRUCTION—DEVISE OVER.

C., by his will, made the following provision for his wife: "I order and direct that all my estate, real, personal, and mixed, shall, during the life of my beloved wife, should she survive me, pass into her hands, and be subject to her sole management and control, to keep and use, or sell and dispose of the same, as she shall see fit. From and after the death of my wife, should she survive me, otherwise from and after my death, all my estate, real, personal, and mixed, which shall then remain, I order and direct my executors, or the survivor of them, to dispose of as soon as conveniently may be thereafter, as follows," etc. *Held*, that the power of disposal created by this testamentary provision is one which must be exercised *inter vivos*, and that so much of the testator's estate as remains undisposed of at the wife's death becomes subject to the gift over.

(Syllabus by the Court.)

Action by Charles I. Wooster against Christopher Fitzgerald and others in ejectment to recover possession of certain lands. From a special finding of facts by the court below the case is certified to the supreme court. Judgment is rendered for defendants.

This is an action of ejectment, brought to recover the possession of certain lands in the county of Camden, of which one Benjamin D. Cooper died seised. The case was tried by the court without a jury, and by agreement of parties the trial judge found the facts specially, and referred it to this court for judgment as to whether, on the facts so found, the defendants, or any of them, are guilty as in the declaration charged.

Argued November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

J. J. Crandall, for plaintiff. James Buchanan and William Moore, for defendants.

GUMMERE, J. The following are the facts found by the trial judge in this case: That Benjamin D. Cooper died seised of the lands in controversy, having first made his last will, dated December 31, 1881, by which he provided for his wife, Tacy Cooper, as follows: "I order and direct that all my estate, real, personal, and mixed, shall, during the life of my beloved wife, Tacy Cooper, should she survive me, pass into her hands,

and be subject to her sole management and control, to keep and use, or sell and dispose of, the same, as she shall see fit; and my executors, hereinafter named, shall not, during said time, be responsible therefor. From and after the death of my wife, should she survive me, otherwise from and after my death, all my estate, real, personal, and mixed, which shall then remain, I order and direct my executors, hereinafter named, or the survivor of them, to dispose of as soon as conveniently may be thereafter, as follows," etc. That upon the decease of her said husband, Tacy Cooper possessed herself of all the real and personal estate of which he died seised, and demised during her lifetime the premises and real estate in the declaration set forth to defendant Christopher Fitzgerald for the term of one year, who has held over under said tenure up to the time of the commencement of this suit. That subsequently the said Tacy Cooper also died, having first made her last will, thereby giving and devising to the plaintiff all her property, real and personal, and appointing him the executor thereof. That said Tacy Cooper never had any real estate, lands, and tenements of her own, and died possessed of a small amount of personal property; and that after the probate of the will of Tacy Cooper the plaintiff paid to certain of the legatees in remainder, named in the will of Benjamin D. Cooper, the legacies given to them thereby to the amount of \$1,100. That afterwards the plaintiff, Charles I. Wooster, filed his bill of complaint in the court of chancery of this state against the defendants in this suit for the purpose of compelling them to account for the personal estate of the said Benjamin D. Cooper which had come to their hands, and that such proceedings were thereupon had that in the month of October, 1895, a decree was entered in said cause adjudging that said Tacy Cooper took only a life estate in her husband's personalty under his will, and that upon her death so much thereof as had not been disposed of by her in her lifetime passed to the defendants, who were the legatees named in the will of said Benjamin D. Cooper, unaffected by the will of his widow. That said decree was appealed from by the plaintiff in this suit to the court of errors and appeals, and was there affirmed. 33 Atl. 1050.

On these facts it is now argued before us on behalf of the plaintiff that, although the decision of the court of errors and appeals settled definitely and finally the rights of these litigants in the personal estate of Benjamin D. Cooper, their rights in the lands of which he died seised have never been judicially determined, and that the plaintiff is still entitled to litigate them in a court of law. The ground upon which counsel rests his contention, as I understand it, is this: The court of errors and appeals, in deciding the equity suit (*Wooster v. Cooper*, 53 N. J.

Eq. 682, 33 Atl. 1050), used the following language: "The husband's will gives to his wife, by express words, a life estate in his property, and then annexes to it a power to dispose of the same without qualification or limitation. The rule that a devise of an estate generally, with a power to dispose of the same absolutely and without limitation, imports such diminution over the property that an estate in fee is created, and that a devise over is consequently void, has one exception, which is this: that where the testator gives an estate for life only, by certain and express words, and annexes to it a power of disposal, the devisee for life will not take an estate in fee." The court did not discuss the question whether the will of Tacy Cooper was a valid execution of the power which was conferred upon her. Counsel therefore insists that the only thing which the court of errors and appeals has decided is that Tacy Cooper was not given, by her husband's will, the absolute ownership of his estate, but merely a life interest therein, coupled with a power to dispose of the same; and that the court has never considered or passed upon the question whether Tacy Cooper's will was a good and valid execution of her power of disposal. Assuming it to be true, as contended by counsel for the plaintiff, that this latter question has never been decided, and still remains open for litigation between the parties, I am of opinion that the power was not one which could be executed by will. We are told that the court of errors and appeals decided otherwise in *Wooster v. Cooper*, supra, when it said that the will of the husband gave to the wife "a life estate in his property, and then annexed to it a power to dispose of the same without qualification or limitation." I cannot adopt the view of counsel as to the meaning which is to be put upon this expression contained in the opinion. What the court decided, as I understand the language quoted, was that the power annexed to the life estate authorized the donee thereof to dispose of the testator's property absolutely; that is, to vest in the person to whom she passed it an unqualified and unlimited estate. In other words, that the phrase, "without qualification or limitation," is descriptive, not of the power, but of the estate to be passed by its execution. The power of disposal, it seems to me, is one which must be exercised *inter vivos*. The provision of the husband's will, following the bequest to the wife, "from and after the death of my wife, all my estate which shall then remain I order and direct my executors to dispose of," etc., draws the line at the wife's death, so that what is remaining at that time becomes subject to the gift over. The plain intention of the testator is that, if his wife has not disposed of all his estate during her lifetime—if any of it remains in her hands at her death—it shall go to the persons designated in his will. *Herring v. Barrow*, 13

Ch. Div. 144. But I cannot assent to the position, taken by counsel, that the question whether Tacy Cooper, by her will, executed the power conferred upon her by her husband's will, is still an open one between these parties. While it is true that this question was not discussed in the opinion of the court of errors and appeals, it is equally true that there could not have been an affirmation by that court of the decree in chancery, unless it had considered that the will of Tacy Cooper did not constitute a valid execution of the power. The decree appealed from adjudged that at her death so much of her husband's estate as had not been disposed of by her in her lifetime, went to the legatees named in her husband's will. If her will had constituted a valid execution of the power, that decree would have been erroneous, and would necessarily have been reversed, because, in that event, the plaintiff herein, as her appointee, and not her husband's legatees, would have been entitled to the part of her husband's estate which she had not disposed of during her lifetime. The highest court of the state having decided that Tacy Cooper took a life estate under her husband's will, and that the power of disposal vested in her thereby had not been exercised by her, these questions are no longer open for litigation by these parties. On the facts found by the trial judge in this case, the defendants are entitled to judgment.

(61 N. J. L. 408)

STATE (NEW YORK, S. & W. R. CO., Prosecutor) v. MAYOR, ETC., OF CITY OF PATERSON.

(Supreme Court of New Jersey. Feb. 21, 1898.)

EMINENT DOMAIN—LAYING OUT STREETS—DEPOT GROUNDS.

Under the authority given by the charter of the city of Paterson to lay out and open streets, and to take such lands as may be necessary therefor, upon making compensation, the city has no power to lay out a street through land used by a railroad company as a freight yard, when it will deprive the company of the beneficial use of such freight yard, and compel it to transfer its freight business to another locality. To authorize such an invasion of the rights of the company, there must be an express grant of power by the legislature, or an implication equally conclusive. Such power will not be inferred from the general authority granted to lay out and open streets.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of the New York, Susquehanna & Western Railroad Company, against the mayor and aldermen of the city of Paterson, to review an ordinance of defendant. Ordinance set aside.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Hobart Tuttle, for plaintiff. T. C. Simon-ton, for defendants.

VAN SYCKEL, J. The subject for review in this case is an ordinance of the city of Paterson to lay out and open a public street known as "Fourteenth Avenue," across the lands of the prosecutor in said city. The avenue proposed to be laid out is 70 feet wide, and crosses the lands of the prosecutor at grade. The said railroad company owns a strip of land 100 feet in width, extending from Broadway on the north to Ellison Place on the south, a distance of 557 feet on one side, and 530 feet on the other; said streets running over the tracks of said railroad on grade. This piece of land is occupied, not only by the railroad company's main double tracks, but is also its freight yard, and was acquired by the company in the year 1871 by condemnation proceedings. It has since that date been used exclusively for such railroad tracks and as a freight yard. The incoming freight is put in on the side tracks, and deposited there for the consignees to come in with their teams and remove it. These sidings are built with special adaptation for that purpose. The company has no other yard or yard facilities in the city of Paterson that can be used in the place of this. There is a freight house on this land near Broadway. The proposed street is laid nearly across the middle of this yard, and, according to the testimony, would destroy the yard so that the company could not use it to advantage. The city charter (Laws 1871) § 92, contains all the authority on this subject, which is to lay out, open, vacate, straighten, widen, or alter any street, and to take such lands and real estate as may be necessary therefor, upon making compensation in the manner therein prescribed. No special provision is made for taking the lands of a railroad company. There is no doubt that, under this general authority, the city may lay out a street over the right of way of a railroad corporation, but that does not dispose of the question involved in this controversy. In the case of *New Jersey Southern R. Co. v. Long Branch Com'rs*, 39 N. J. Law, 23, the right of said commissioners to take, for the purposes of a street, a strip of land on which the tracks of the railroad company were laid longitudinally, was denied. The ground upon which that decision was put was that it would deprive the company of the right to use the land for its corporate purposes. The court said: "Where the use for which the condemnation is prosecuted is of such a character as necessarily to require for its enjoyment the exclusive possession and occupation of the premises, it is manifest the condemnation will be utterly futile, unless it may also operate to extinguish the right of the corporation whose title is condemned to use the land for its corporate purposes. A condemnation that will accomplish this result will destroy, pro tanto, the franchises of the corporation, and impair, to that extent, the powers granted by the legislature. * * * The power to in-

vade the privileges of a corporation in such a manner will not be inferred from a naked grant of the power to condemn. It can only be derived from a power granted either in express terms, or arising by a necessary implication; and the legislative intent to authorize such an interference with the rights and privileges of another corporation, whichever way it may be manifested, must be plainly perceived." This is in accordance with the views previously expressed by the supreme court in *Mayor, etc., of Jersey City v. Montclair Ry. Co.*, 35 N. J. Law, 328, where it was held that, in the absence of an express legislative grant or an implication equally conclusive, the railroad company could not condemn and take for its tracks a strip through property acquired by the city for the purpose of a reservoir. The principle which controlled the decisions in the cases cited applies with equal force here. The railroad company cannot be deprived of the beneficial use of its freight yard, and be constrained to transact its freight business elsewhere, unless clear authority is given to the city of Paterson to require it to do so. No such authority appears in this case, and it cannot be inferred from the general power given to lay out and open streets. Until the legislature bestows such powers upon the municipality, the company cannot be compelled to abandon its freight yard, and seek another locality for the transaction of its daily business. The ordinance is without authority, and should be set aside.

(31 N. J. L. 470)

STATE (MOORE et al., Prosecutors) v. COMMISSIONERS OF STREETS OF BOROUGH OF HADDONFIELD et al.

(Supreme Court of New Jersey. Feb. 21, 1898.)

STREET RAILROADS—USE OF STREETS—CONSENT OF ABUTTING OWNERS.

It is not necessary to the regulating of the use of streets in a borough, by a street railroad company already having, by ordinance passed conformably to the acts of 1893 and 1894 (3 Gen. St. pp. 3235, 3247), a location of tracks, and the right to construct, maintain, and operate its railroad, that there should be a new or continued consent of any abutting landowners, or a public hearing on notice. The general powers of boroughs (P. L. 1897, p. 296, § 25) suffice for that purpose, even though the railroad has not been fully constructed.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Henry D. Moore and others, against the commissioners of streets of the borough of Haddonfield and the West Jersey Traction Company, to review an ordinance of that borough. Ordinance sustained.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

J. Fithian Tatem and Herbert A. Drake, for prosecutors. Henry S. Scovel, for defendant borough of Haddonfield. E. A. Armstrong

and D. J. Pancoast, for defendant West Jersey Traction Co.

COLLINS, J. The West Jersey Traction Company, a corporation organized under the act of March 14, 1893 (3 Gen. St. p. 3235), procured from the governing body of the borough of Haddonfield, by ordinance passed March 6, 1895, and accepted by the company March 10, 1895, a location of its tracks, on the Haddonfield and Camden Turnpike, and on certain streets, including Main street, in said borough, and permission to construct, maintain, and operate a street railroad thereon. There was full compliance with said act of 1893, and with the act of 1894 (3 Gen. St. p. 3247). The consent of landowners presented as a basis for the ordinance named the said turnpike and the streets affected, was general in form, unlimited in scope, and extended to the location of tracks and the construction of the railroad with all lawful appliances. Section 1 of the ordinance contained the location and description of tracks, and the grant of permission to construct and operate. Section 2 made certain requirements, for a violation or refusal whereof the company should forfeit all rights under the ordinance, and fixed the period of consent at 25 years. It is admitted by a stipulation in the cause that said ordinance "was properly passed and accepted, and that thereunder railroad track was built on the turnpike in the borough of Haddonfield, approaching within a few feet of the Main street, and extending along the turnpike beyond the borough line, but that no track has been laid on the Main street in the borough of Haddonfield." On May 12, 1897, there was passed "A supplement to an ordinance regulating the railroad of the West Jersey Traction Company." It recites the ordinance of March 6, 1895, and that "certain regulations and limitations contained in the said ordinance are deemed impracticable, and it is believed to be best for the interest of this municipality and the said corporation in that respect only to make certain changes therein and thereof," and then proceeds to ordain that sections 1 and 2 of the ordinance be amended as therein follows: Sections are added requiring the work therein authorized to be commenced within three weeks, and to be finished within six months from such commencement, and repealing all ordinances and parts of ordinances inconsistent therewith to the extent of such inconsistency. The changes made by this supplement from the original ordinances are substantially as follows: In the first section (1) a derailing switch at the crossing of the Camden & Atlantic Railroad is dispensed with; (2) the gauge of the tracks is changed from five feet and two inches to five feet,—this does not affect the location of the tracks, but only the distance between the inner surfaces of the tops of the rails projecting above their

flanges. In the second section (3) macadam, faced with Belgian block, is substituted for rubblestone pavement, which, where already laid, is to be taken up, and relaid outside the macadam; (4) a time limit for finishing at least one line of track is omitted; (5) a requirement to run cars at specified minimum intervals is omitted; (6) the maximum rate of speed is changed from six to eight miles an hour,—but this had already been done by a supplemental ordinance passed April 30, 1895. And (7) the limit of the period of the consent to 25 years is omitted.

The prosecutors attack the ordinance of May 12, 1897. The causes assigned for its reversal are that the consent of abutting landowners above recited has spent its force, and cannot sustain a new ordinance; that, by reason of withdrawals there does not now subsist the consent of the owners of the necessary frontage; and that there was no public hearing upon a notice posted and published as required by said statutes. The supposed invalidity of the ordinance under review rests upon the erroneous assumption of its being a new grant. The original ordinance still stands, and no withdrawal of consent of the abutting owners can affect it. The consent upon which that ordinance was based was unlimited and unconditional. Where a grant is partial only, as permitted by the act of 1894, then, if the consent be withdrawn, power to extend the grant may be questionable; but, where the grant is complete, the right to construct cannot be made to depend upon the continuance of the consent. Modification or removal of restrictions do not involve a new grant, requiring the statutory consent. The restrictions concern the public, not the abutting owners. No public hearing on notice was required as a prerequisite to the changes ordained May 12, 1897. They come within the general municipal power of regulation. The restrictions imposed by the original ordinance either were within the general corporate powers of the borough, or else derived their efficacy from their acceptance by the traction company, as conditions of its grant. It would be absurd to say that no restriction can be imposed on or removed from a street-railway company without a public hearing on notice. It is not necessary to give notice even to the owners of land on the street, unless their private property rights are to be affected. *Kennelly v. Jersey City*, 57 N. J. Law, 293, 30 Atl. 531. The general borough act, approved April 24, 1897 (P. L. p. 296, § 28), authorizes ordinances to prescribe the manner in which corporations or individuals shall exercise any privilege granted to them in the use of any street, road, or highway, to regulate the use of the streets of the borough by street railway companies, etc. The supplemental ordinance is within this authority, and seems to have been regularly passed. It is affirmed, with costs.

(61 N. J. L. 411)

STATE (BENTON et al., Prosecutors) v. CITY OF ELIZABETH et al.¹

(Supreme Court of New Jersey. Feb. 23, 1898.)

CERTIORARI — PRESUMPTIONS — CORPORATIONS — GRANT—VALIDITY—USE OF STREET—NUISANCE.

1. If the prosecutors of a certiorari do not, in their reasons filed, question the status of a foreign corporation, it will be assumed on final hearing that the corporation has complied with the statutory prerequisites to the transaction of business by it in this state.

2. A corporation owning the fee of land can grant to another corporation the right to use the land for a purpose which is not within the powers of the grantor, but is within those of the grantee; and private persons having no interest in the land cannot question the validity of such a grant.

3. Where a corporation has acquired the private right to lay a pipe for the transportation of oil through land which is traversed by a public street in the city of Elizabeth, the city council may, by ordinance, prescribe the manner in which the pipe shall be laid and used, and permit the corporation to dig the necessary trench across the street.

4. A pipe line for the transportation of oil is not rendered a nuisance by the mere fact that its presence enhances the rates of insurance on property in the neighborhood.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Thomas H. Benton and others, against the city of Elizabeth and the National Transit Company, to review an ordinance of said city. Ordinance sustained.

Argued November term, 1897, VAN SYCKEL, COLLINS, and DIXON, JJ.

John T. Dunn and R. V. Lindabury, for prosecutors. C. Addison Swift, for city of Elizabeth. Frank Bergen and Foster M. Voorhees, for National Transit Co.

DIXON, J. The ordinance attacked by this writ of certiorari purports to grant to the National Transit Company the privilege of opening and crossing certain streets in the city of Elizabeth, and of laying and maintaining a pipe therein for the transportation of oil, and to regulate the exercise of the privilege. In considering the case we must assume that the National Transit Company has corporate power to acquire and exercise the right of laying pipes for the transportation of oil in this state, because the prosecutors have raised no question whatever with respect to its capacity in the premises. It is said that the company is a Pennsylvania corporation, but under our statute (P. L. 1896, p. 277, §§ 95-97) corporations of sister or foreign states may, by certain proceedings therein mentioned, obtain legal authority to acquire and hold real estate and transact their business in New Jersey. Hence it may easily be that this company possesses all requisite power, and, if the prosecutors intended to challenge the power, they should have declared that purpose in the reasons filed. The evidence shows, sufficiently at least for present pur-

poses, that the company has purchased such a right in the land mentioned in the ordinance as would entitle it to lay pipes therein for the transportation of oil if the land were not subject to the easement of a public street. The Central Railroad Company, which owns the fee of the land, has granted that right to the transit company; and, although the grantor could not lawfully use the land for such a purpose, yet that would arise only from defect of power in the railroad company, and not from any illegality in the appropriation of the land to such a use. Being possessed of the fee simple, the railroad company could grant whatever rights in the land an individual owner of the fee could grant, provided the company did not impair its power to perform its public duties; and no such impairment is shown. But, even if the validity of the grant were, in the abstract, questionable for want of corporate power in either party, yet the prosecutors, who are only private persons having no interest in the land, cannot dispute it. *Leazure v. Hillegas*, 7 Serg. & R. 313; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93; *De Camp v. Dobbins*, 31 N. J. Eq. 671, 691.

The point next to be considered relates to the power of the council to pass the ordinance. Its authority resides in the thirty-first section of the city charter (P. L. 1863, p. 109), which enables the council to make and establish ordinances, rules, regulations, and by-laws prescribing the manner in which corporations or persons shall exercise any privilege granted to them in the use of any street in said city, or in digging up said street for the purpose of laying down pipes, or any other purpose whatever, and regulating the keeping and conveying of gunpowder, camphene, spirit gas, and other dangerous materials. The authority thus delegated seems to us sufficient to sustain the present ordinance. Against this view it is urged, first, that the enactment does not empower the council to grant privileges in the use of the streets, but only to regulate the exercise of privileges already possessed. In a sense this is true, but in the sense in which it is pertinent to this case it is not true. A party invoking the action of the council must, indeed, have a right or privilege to be exercised in a street, but the right is imperfect until the council indicates in what manner it may be exercised. The pre-existing right is one to be exercised only as the council permits, and within the meaning of this section the council grants the privilege of exercising the right in the particular manner designated. So, in the present case, the transit company's right to use the land preceded the ordinance, but the enjoyment of that right depended upon the council's defining the mode in which the street might be temporarily interfered with, and granting the privilege of such interference. The grant of such a privilege is just what this section of the city charter contemplates.

¹ For dissenting opinion, see 39 Atl. 906.

It is further urged that this power of the council relates only to the use of streets as streets, and not to the private use of the land within the street lines by the owners thereof. This construction, we think, would be too narrow. If the owner of land traversed by a street desired to lay a water pipe or gas pipe or telephone wire across the street, beneath its surface, from his house to his stable, or if an abutting owner desired to build a vault or coal chute under his sidewalk, we think this provision of the charter authorizes the council to grant him the privilege of doing so by prescribing the method in which it may be done. The object of the law is to enable the council to regulate the exercise both of private rights and of special franchises in the streets in order to secure, as far as practicable, the full enjoyment of the general public easement. But it is insisted the laying of pipes in accordance with this ordinance is not within the private right of ownership of the land. Clearly, the private owner could so use the land, if it were not subject to the public easement; and the existence of the highway does not deprive the owner of the right to use the land in any mode consistent with the public easement. *Allen v. City of Boston*, 159 Mass. 324, 84 N. E. 519; *Roebling v. Railway Co.*, 58 N. J. Law, 666, 670, 34 Atl. 1090. The use now contemplated will not interfere with the public easement. The tracks of the Long Branch Division of the Central Railroad Company are laid upon the land across the streets mentioned in the ordinance, and the pipe of the transit company is to be placed parallel with, and near to, the tracks, and at least 2½ feet below the surface of the ground. Manifestly, in this position, the pipe cannot at all obstruct the enjoyment of the public right. The temporary inconvenience caused by the digging of the trench is one of the things which the council has power to regulate and permit, and no fault can be found with the reasonableness of the ordinance in this particular.

The prosecutors further contend that the decisions in *Montgomery v. Trenton*, 36 N. J. Law, 79, *Telegraph Co. v. Newark*, 49 N. J. Law, 344, 8 Atl. 123, and *Hutchinson v. State*, 39 N. J. Eq. 569, in this state, and other decisions to like effect elsewhere, are in conflict with the views we have expressed. We do not so understand them. The basis of some of these decisions is merely that, under a proper construction of the statutes, the legislature had not delegated to the municipality the power to sanction the substantial encroachment upon the public easement there attempted; and in others there was also the element that the thing attempted involved the use of the private property of one person for the private purposes of another. In none of them was it held that, under statutory authority like that before us, a municipality might not permit an owner to use his land, which was subject to a public easement, in any lawful mode consistent with the enjoyment of the public right. The object and effect of the present

ordinance do not go beyond such a permission. Should the location of the pipe become hereafter inconsistent with the public easement, this ordinance will not prevent its removal.

Finally, the prosecutors insist that the transportation of oil through a pipe thus laid in the populous portion of a city is per se a nuisance, and specially injurious to the persons living in the neighborhood, and hence cannot, in any degree, be favored by municipal action. On this point it is enough to say that the testimony does not sustain the allegation of fact. The existence of the pipe line may perhaps enhance the rates of insurance upon property in the vicinity, but that result would follow from the presence of various other businesses which would nevertheless be entirely legal. It does not constitute reason enough for the suppression of an occupation otherwise lawful. *Butler v. Rogers*, 9 N. J. Eq. 487; *Duncan v. Hayes*, 22 N. J. Eq. 23; *Courter v. Board*, 54 N. J. Law, 325, 23 Atl. 949; *Rhodes v. Dunbar*, 57 Pa. St. 274. The ordinance is within the power delegated to the council, and must be affirmed, with costs.

(61 N. J. L. 302)

**STATE (GILLEN, Prosecutor) v. MAYOR,
ETC., OF BOROUGH OF
SPRING LAKE.**

(Supreme Court of New Jersey. Feb. 21, 1898.)

**MUNICIPAL CORPORATIONS—SEWER SYSTEM—
APPROVAL OF VOTERS.**

Under the eightieth and ninetieth sections of the borough act of 1897 (Laws 1897, p. 235), a definite plan for the construction of a system of sewers must be submitted for approval to the voters before it can be undertaken by the borough council.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Samuel L. Gillen, against the mayor and council of the borough of Spring Lake, to review an ordinance. Ordinance set aside.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

G. D. W. Vroom, for prosecutor. Frank Durand and R. V. Lindabury, for defendants.

VAN SYCKEL, J. The validity of the following ordinance is controverted in this case: "An ordinance providing for the construction of a system of sewers and drains in the borough of Spring Lake. Whereas, in the judgment of the council of this borough the public good demands that a system of sewers and drains should be constructed in this borough, therefore, be it ordained, by the mayor and council of the borough of Spring Lake. First. That this borough cause to be constructed in the borough of Spring Lake a system of sewers and drains. Second. That this ordinance shall take effect on the second day of August, 1897, but shall remain inoperative until consented to in writing by the owners of a majority of real estate in the borough of Spring Lake, according to its as-

essed valuation, as contained in the latest preceding assessment for the purpose of taxation, made in this borough, and until the same shall have been assented to by a majority of the legal votes cast at an election held in this borough for that purpose. Passed and approved July 19th, 1897. E. V. Patterson, Mayor. Attest: H. C. Van Arsdale, Clerk." The construction of the borough act of 1897 is involved in this dispute. Laws 1897, p. 285.

The point first taken by the prosecutor is that this ordinance was not, before its passage, consented to in writing by a majority of the real estate owners in the borough, and also because it was not, before its passage, assented to by a majority of the legal voters at a general or special election. Section 80 of the borough act provides that, "whenever in their judgment the public good demands it, the council may, by ordinance, cause a trunk sewer or lateral connecting sewers or a system of sewers and drains to be constructed in any part of the borough." Section 90 provides that "it shall not be lawful for the council to construct or purchase any waterworks, or water supply plant, sewers or system of sewerage and drainage, until there shall have been presented to the council the consent thereto in writing, signed by the owners of a majority of real estate in said borough according to its assessed valuation as contained in the latest preceding assessment for the purpose of taxation made in said borough, nor until the same shall have been assented to by a majority of the legal votes cast for or against the proposition of construction, purchase or contract at any general or special election held in said borough." If the ordinance had been so drawn that an affirmative vote upon it would have been effective as a consent under section 90 to what the council is authorized to do under section 80, the objection above noted would lose its force. The ordinance in that case could stand as an expression of the popular will, and, after approval, a supplemental ordinance could be passed directing that the work be done accordingly. But the reasons relied on disclose the defect in the ordinance which renders it, in our judgment, abortive. The majority vote upon the ordinance certified shows merely that some system of sewerage is favored, but it cannot be inferred that the affirmative vote would have been obtained if the voters had been advised of such facts as would have enabled them to form an intelligent judgment upon the merits of the scheme.

The question to be submitted was not whether the people desired to have the borough sewerred, but whether they favored a system of sewerage; and they had a right to know what the system was before they could be called upon to elect. The power given by section 80 is "to cause a trunk sewer or lateral connecting sewers, or a system of sewers and drains, to be constructed in any

part of the borough," with the approval of the real-estate owners and voters, as prescribed by section 90. The ordinance as passed provides generally that a system of sewers and drains shall be constructed. It does not specify what the system shall be, nor what portion of the borough will be drained by it, nor its estimated cost. The ninetieth section requires the assent of real-estate owners and voters to the system of sewers which the borough council purposes to construct. The question which must be submitted for such approval is whether the system shall be adopted. Until a system is chosen by the council, no assent can be given to it under section 90; and no vote can be cast until a system is formulated, and presented to the people for their acceptance. Plans and specifications must be voted upon. All voters might agree that sewerage is desirable, while the majority might be hostile to the system which the council had in contemplation. It cannot be supposed that the legislative intent was to require voters to approve something of which they had no knowledge, and which it might be the council itself had not definitely determined upon. The ninetieth section requires the same assent to the system of constructing sewers that is necessary to the purchase of waterworks or sewers; and it cannot reasonably be contended that a submission for approval to purchase would satisfy the statute without specifying the terms upon which it was proposed to consummate such purchase. Every one upon whom the burden of the cost of the work will fall has a right to demand the assent of landowners and voters to a definite scheme.

The suggestion that, under such a rule, every alteration rendered necessary by unforeseen difficulties in the progress of the work would have to be submitted to a vote is without force. Such changes, which are incident to every work of magnitude, are necessarily left to the discretion of those whose duty it is to see that the sewers are constructed in substantial accordance with the adopted plan. The ordinance as passed neither confers authority to proceed with the proposed work, nor is it a valid mode of submission, under the ninetieth section of the borough law of 1897, and therefore it should be set aside.

(61 N. J. L. 424)

STATE (LANDIS Prosecutor) v. MAYOR,
ETC., OF BOROUGH OF
VINELAND.

(Supreme Court of New Jersey. Feb. 21, 1898.)

TAX SALE—VALIDITY—FAILURE TO RETURN
WARRANT.

1. In proceedings for the sale of land for taxes, all provisions of the statute which are designed for or conducive to the protection of persons interested in the land, whether they relate to proceedings before or at or after the sale, must be strictly complied with, or the sale will be set aside.

2. The provisions of the statute (3 Gen. St. p. 3353, §§ 331, 349) which require the officer making the sale to return his warrant within four months after its date are conducive to the protection of the persons interested in the land.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of George K. Landis, against the mayor and common council of the borough of Vineland, to bring up a tax warrant issued by defendants. Proceedings under the warrant set aside.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

Charles K. Landis, for prosecutor. Royal P. Tuller, for defendants.

DIXON, J. This certiorari brings up a tax warrant issued by the borough of Vineland for the sale of the prosecutor's land for the taxes of 1895, and the proceedings thereunder, including a certificate of sale made to the borough as purchaser. The warrant was issued July 14, 1896; the sale was made August 27, 1896; and the warrant was returned November 17, 1896. The only ground on which the prosecutor asks for a reversal of the proceedings is that the warrant was not returned within four months from its date, as the warrant and the statutes under which the sale was made required. 3 Gen. St. p. 3353; *Landis v. Borough of Vineland* (N. J. Sup.) 37 Atl. 1099. The question whether the title of a purchaser at a tax sale can be defeated by the failure of the officer to make return of his proceedings within the time prescribed by law has been answered by courts both affirmatively and negatively. Some have held that all such provisions of the statutes are mandatory, and strict compliance with them is necessary to perfect the title of the purchaser. Others have decided that only those provisions are mandatory which tend to protect the rights of parties jeopardized by the sale, and that in other respects statutory rules as to the officer's proceedings subsequent to the sale are merely directory. The latter doctrine seems to be most in accord with judicial opinion in this state. Thus, in *Hopper v. Malleson's Ex'rs*, 16 N. J. Eq. 382, Chancellor Green said: "To establish a title under a sale for taxes, it is incumbent on the purchaser to show that all the prerequisites to the exercise of the power of sale have been complied with." And in *Inhabitants v. Allen*, 43 N. J. Law, 262, Mr. Justice Depue, in delivering the opinion of the court of errors, said "that one who claims title under a tax sale takes upon himself to show affirmatively that the tax was duly assessed, and was a lien on the land, and that the successive steps which led to the sale were regularly taken." To the same effect is the language of this court in *Jones v. Landis Tp.*, 50 N. J. Law, 374, 13 Atl. 251: "A sale of land for taxes will be set aside unless all conditions precedent ap-

pear to have been performed." In none of these cases is it intimated that the omission of the officer after the sale can invalidate the title of the purchaser. But in *Baxter v. Mayor, etc.*, 36 N. J. Law, 188, the rule was stated more broadly thus: "The sale of land for taxes or assessments is the execution of a naked power. Every requirement of the statute imposing the liability, and prescribing the procedure to enforce it, which tends to the security of the owner, or is for his benefit, must be strictly conformed to." On these cases, it seems safe to say that all proceedings up to and at the sale must be in accordance with the directions of the statute, and that such proceedings subsequent to the sale as are designed for or conducive to the protection of the owner must likewise be regularly taken. The statute must therefore be examined to discover whether it will be of any advantage to persons interested in the land to have the officer make return of his proceedings within the time prescribed by law.

Under section 333, 3 Gen. St. (page 3353), the officer having the warrant to sell is required to give, at least, four weeks' public notice of the time and place of sale, by advertisement published in a newspaper, and to set up copies of the notice in five public places, and to mail a copy to the owner. Under section 349, he is required to return with his warrant all his proceedings thereunder, annexing thereto copies of the said notices, with proof of the publication, posting, and mailing thereof, and his own affidavit that the return is true, full, and complete in all respects. Under section 348, this return and the papers thereto annexed are to be recorded at length, in the "record of tax sales" kept by the borough clerk; and by section 340 this record is made presumptive evidence of the regularity of the proceedings therein recorded. So far as these proceedings are required to be thus returned and recorded, the defects of the record cannot be supplied by extrinsic evidence. *Jones v. Landis Tp.*, 50 N. J. Law, 374, 13 Atl. 251; *Landis v. Borough of Vineland* (N. J. Sup.) 37 Atl. 1099. It thus appears that, according to the statute, the record in the clerk's office should within four months from the date of the warrant, and within three months from the date of sale, afford evidence, conclusive in some respects against the purchaser, whether the proceedings under the warrant have been such as to make the sale valid, and, if that record does not afford necessary evidence, the sale cannot be supported. According to the statute, the owner, mortgagee, occupant, or any other person having a legal or equitable estate in land sold for taxes may redeem the same at any time within two years from the date of sale. Under our decisions above cited, this right of redemption need not be exercised, unless it can be shown that the steps leading up to the sale had been taken in strict

accordance with law. One of the objects for which "record of tax sales" is required is that persons interested in the property may be apprised of their situation. *Jones v. Landis* Tp., 50 N. J. Law, 374, 378, 13 Atl. 251. If this record does not disclose the requisite proceedings, these persons need not exercise their right of redemption. Of course, therefore, it is important for them to know when they may obtain an inspection of this record, and that they should have inspection as soon as possible. If the law as to the time for returning the warrant be held mandatory, these persons will know that, within three months after the sale and for a year and nine months before their right to redeem will expire, they can learn whether on the record the sale is invalid. If the law be held not mandatory, the time when they may obtain this useful information is left utterly indefinite. Hence we are brought to the conclusion that the time when the officer's return should be made is important for the protection of parties having an interest in the land, and, therefore, that strict compliance with the statute in this particular, as well as in regard to the substance of the return, is essential to the validity of the title which the officer has attempted to convey. The proceedings under the warrant must be set aside, with costs.

(66 N. J. E. 375)

DUVALE v. DUVALE.

(Court of Errors and Appeals of New Jersey.
Feb. 28, 1898.)

HUSBAND AND WIFE—SETTLEMENTS—RESULTING TRUSTS—CONTRACTS TO DEVISE—EQUITY JURISDICTION.

1. When the consideration of lands conveyed to a wife is paid by her husband, the presumption is that the transaction is a settlement on the wife; but such presumption may be overcome by proof of facts accompanying the transaction, and showing the intent of the parties to have been that the husband should have an interest therein notwithstanding the conveyance to her.

2. When the proofs show clearly that the intent of the parties is that only a limited interest in the lands should be settled on the wife, the husband holds in equity such estate and interest therein as was not settled on her, and her title is subject to a resulting trust in his favor to that extent.

3. An agreement by a wife to devise lands to her husband, which induces him to pay for them and have them conveyed to her, and to expend money in their improvement, is an enforceable contract; and when the wife in her lifetime repudiates the agreement, and makes other testamentary disposition of such lands, the husband is entitled to the intervention of a court of equity to prevent such violation of the agreement.

(Syllabus by the Court.)

Appeal from court of chancery; Reed, Vice Chancellor.

Bill in equity by Charles L. Duvalé against Jeline M. Duvalé, praying for the declaration of a trust in certain lands. From a de-

creed declaring the trust, defendant appeals. Reversed.

Cortlandt Parker and R. Wayne Parker, for appellant. Charles L. Corbin, for respondent.

MAGIE, C. J. This appeal is from a decree that appellant shall hold certain lands, the legal title to which is in her, in trust for herself and husband during their joint lives, and for the survivor of them, his or her heirs or assigns, and subject to an agreement on her part to devise said lands by her will to respondent, his heirs and assigns. It further enjoins her, while respondent is living, from making a will devising said lands to any other person than him, and directs that, if she shall die before him, her heirs and devisees shall forthwith convey said lands to him. The parties are husband and wife. Appellant's appeal is from the whole decree. The opinion of Vice Chancellor Reed, who advised the decree, contains so full a statement of the pleadings and proofs that it will serve no useful purpose to repeat more than seems essential to make intelligible the conclusions we have reached. The prayer of the bill of respondent was in the alternative. He asked relief by a decree that the lands in question were held by appellant in trust for him, and directing a conveyance thereof to him; and also relief by a decree compelling appellant to perform an agreement to execute a last will and testament devising said lands to him, with such incidental restraints and directions as would compel such performance. The decree does not direct a conveyance of the lands to respondent, and he has not appealed.

The lands in question were conveyed to appellant by three deeds. The first deed was made June 12, 1890. Respondent held a contract for the tract thereby conveyed, but satisfied his contract by requesting the owners to make the conveyance to which he was entitled to his wife. He paid the whole purchase price, and thereafter expended large amounts of his own money in erecting a dwelling house and making improvements on that tract. The second deed was made September 2, 1891, and the husband furnished the purchase money. Thereafter he spent much of his money in the erection of stables and other conveniences for use in connection with the residence on the lot first conveyed. The third deed was made July 29, 1892, and the consideration paid for it was money which had been awarded to appellant for a part of the lot first conveyed to her upon a condemnation by a railroad company. When lands are purchased by one person, who pays the purchase price, and they are conveyed to another person, who is a stranger, a trust in the lands is implied or results in favor of him who has paid the consideration. But where a husband purchases and pays for lands, and takes the title in the name

of his wife, such a trust does not necessarily result. On the contrary, a presumption arises that the husband has caused the conveyance to be made to his wife by way of a settlement upon her. Such a presumption may be rebutted and overcome by proof of facts accompanying the transaction which show that the intention of the parties was that the lands should not be held by the wife as settled upon her, but in trust for the husband. Her subsequent acknowledgment and recognition, by words or acts, may be given in evidence. If, from all the evidence, it is clear that the presumption of settlement is rebutted, a trust will then result which can be enforced. This well-settled doctrine is illustrated in many cases in our courts. *Peer v. Peer*, 11 N. J. Eq. 432; *Persons v. Persons*, 25 N. J. Eq. 250; *Lister v. Lister*, 35 N. J. Eq. 49; *Id.*, 37 N. J. Eq. 381; *Read v. Huff*, 40 N. J. Eq. 229.

The appeal, therefore, first presents the question whether the proofs in the case clearly show that the presumption that these lands which were paid for by the husband were conveyed to the wife as a settlement in her favor has been overcome, and that the parties to the transaction had other intentions. It has been already stated that the decree does not direct a conveyance to the husband under the prayer of his bill asking that relief. Although he has not appealed from the decree, it is proper to say that the conclusion in the court below, that he was not entitled to that relief, was entirely correct. It is true that respondent testified that, before the purchase of the first lot, his wife and he had conversations which expressed the intentions of both that the title which she was about to acquire should be conveyed to him whenever he desired. If the transaction, when finally completed, was with the intention thus expressed, I think a trust in favor of the husband for the whole interest in the land must have resulted. But appellant denied that such conversations took place between them, and there is no such corroboration of the husband as to justify a determination that it is clearly made out that such was and continued to be the intent of the parties when that purchase was completed by conveyance to her. But it is obvious from the proofs that, if the previous intentions of the parties had been such as would be indicated by the conversations detailed by the husband, those intentions were changed before the completion of the transaction. The testimony of Cannon, the New York lawyer, and of respondent, and the proof of subsequent admissions made by appellant, render it entirely clear that, although the land was to be conveyed to her, she was to devise it to him by her last will and testament.

From this view of the evidence, it results, in my judgment, that the settlement made thereby upon appellant was not of the whole estate in the land, but of a limited interest

therein. It can probably be best expressed as being a settlement of a life estate in the land, with a remainder in fee contingent upon her surviving her husband. Therefore there remained unsettled upon her the estate in the land which would result in case the fee was not cast upon her by the happening of the contingency contemplated. If she died before her husband, the intention was that her heirs should have no interest whatever in the lands.

Since the husband paid the purchase price, and the evidence shows with clearness that the settlement intended was limited, does a trust result with regard to so much of the estate as was not settled? The implication of a trust in such cases does not necessarily depend upon its affecting the whole interest in the lands in question. Thus it was held in this court that the payment of part of the purchase money, if that part be shown with certainty, will create a resulting trust to the extent of that payment. *Cutler v. Tuttle*, 19 N. J. Eq. 549. So, in that class of resulting trusts which Mr. Lewin says arise when, upon a conveyance, devise, or bequest, a trust is declared of part of the estate, and nothing is said of the residue, it is settled that the undisposed-of equitable interest of the settlor will result to him or his representative. *Lewin, Trusts*, *146; 1 *Perry, Trusts*, § 150. Lord Hardwicke declared that the reason why the court of chancery had allowed a trust by operation of law to arise in that class of cases was that the party, by declaring part of the trust to be for another and by saying nothing as to the other part of it, shows his intention to be that the other was to have only one part of the trust, and consequently he himself ought to have the benefit of the other part. *Lloyd v. Spillit*, *Barnard*, ch. 388. In my judgment, these principles are applicable to the case before us, and appellant, when she took the conveyance of that land with the intention that a limited interest therein should be settled upon her, took and holds the title to all interest therein, not settled upon her, in trust for respondent. This is the trust, as I understand it, the vice chancellor found established by the proofs.

What has been said so far relates to the circumstances surrounding the transaction whereby the first conveyance was made to her, and the effect on the legal title acquired by the wife. The vice chancellor finds in the proofs other ground to support respondent's claim. His conclusion is that the undertaking of appellant to devise the land to respondent induced him to make the purchase and vest the title in her. The proofs show that respondent commenced to make improvements on the tract first purchased, and, finding that appellant was reluctant to make the will which it had been arranged she was to make, notified her that, unless she did so, he would withdraw his workmen and stop the work. Delay still occurring, he did with-

draw the workmen, and appellant then went and executed the will, which had been drawn at the same time or shortly after the acquisition of the first title. Thereby she devised her lands to respondent. Then he resumed work on the improvement, and spent thereon a large sum of money. That will continued in existence, unrevoked, until after the acquisition by her of the two other tracts, and after respondent's improvements on the tract secondly conveyed. Upon these facts, it is plain that it would be inequitable to permit appellant to disregard her agreement to devise the land to respondent, which agreement had induced respondent to purchase the tract first conveyed to her and to expend large sums of money upon it. Such an agreement is an enforceable contract, and a court of equity may intervene to require its enforcement. *Van Dyne v. Vreeland*, 12 N. J. Eq. 142; *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Parsell v. Stryker*, 41 N. Y. 420; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Pflugar v. Pultz*, 43 N. J. Eq. 440, 11 Atl. 123; *Davison v. Davison*, 13 N. J. Eq. 246; *Young v. Young*, 45 N. J. Eq. 27, 16 Atl. 921. In this case the contract is between husband and wife, and therefore only enforceable in equity, and, as the wife has repudiated it in her lifetime and made other testamentary disposition of the lands, the husband is justified in asking the remedial intervention of equity to prevent the violation of the agreement.

All of the court deem the trust and contract applicable to the tract first acquired and enforceable against it. A majority of the court think that the contract is also applicable and enforceable as to the tract secondly acquired. As originally made, perhaps that contract might not apply to the second tract, but, when recognized and continued by the unrevoked will, it operated to induce respondent to expend his money on the purchase of that tract, to join it to the first tract, and to erect the stables, tank, and other conveniences for the use of the residence on the first tract. A majority also think that the tract thirdly acquired is impressed with the trust, and subject to the agreement, as having been acquired with money raised out of the first tract, which was in that situation. The result is that respondent was properly held to have been entitled to relief. It remains to consider whether the relief which was accorded him was appropriate. But neither the trust, nor the agreement of which we find evidence, justifies any restriction upon the appellant in the lands during her life. The effect of both is that so long as she lives she has the estate therein which married women now hold by statute; that is, the same estate that she would have if she were a feme sole. Should respondent die before her, her estate in the lands is discharged from the trust and from the performance of the agreement. Should she die before him, the equitable estate in the lands vests in him, and he would be entitled to have

them conveyed to him by the owners of the legal estate, if she has not devised them to him. The decree before us goes further, and declares that the lands are held in trust for herself and her husband during their joint lives, and for the survivor of them, his or her heirs or assigns. In respect to the provision as to the trust during their joint lives, it exceeds the trust which was intended and the agreement which was made, and, it should be added, it is not supported by the vice chancellor's opinion. This requires a reversal of the decree, and its modification, so as to declare that appellant holds the lands subject to a trust in favor of the respondent, whereby, if she should die before him without devising the lands to him, an equitable estate in the lands in fee simple would vest in him, which would entitle him to have the legal estate conveyed to him by her heirs or devisees. In other respects the decree is approved. As this modifies the decree in a part to which no attention was directed in the argument, and which seems comparatively unimportant, no costs will be allowed up on the reversal.

(56 N. J. E. 549)

LONG BRANCH BANKING CO. v. DENNIS
et al.

(Court of Chancery of New Jersey. March 12, 1898.)

FRAUDULENT CONVEYANCES — DEED BY INDORSER
OF COMMERCIAL PAPER—INSOLVENCY OF MAKER
—ACTUAL FRAUD—EVIDENCE—CONSIDERATION.

1. Though a voluntary conveyance by one of all his property to the wife of his son, when contingently liable as indorser of the notes of his son, was not conclusive proof that such conveyance was made to defraud the holder of such notes, as such holder was not an existing creditor of such grantor, the fact of such contingent liability should be considered, with other facts, as tending to show actual fraud.

2. The indorser of certain notes of his son, after their renewal, and after the son had become financially embarrassed, conveyed all of his property to the wife of such son, in consideration of "one dollar and other good and valuable considerations." In an action to subject such property to a judgment on such notes, the son's wife claimed that she had rendered services for, and loaned money and furnished clothing and food to, her father-in-law, in consideration of such conveyance. It was admitted that the son's wife had agreed, as a part of such transaction, to support her father-in-law for life, and it appeared that his alleged debt to her was inflated, and that the immediate occasion of the conveyance was the financial embarrassment of the son. Held that, though the deed in question could not stand against such judgment creditor as an absolute conveyance, it should have effect as a mortgage to the extent of the reasonable value of the grantee's services.

Bill by the Long Branch Banking Company against Sarah E. Dennis and others to subject certain land to the lien of a judgment. Heard on bill, answer, and proofs.

Parker & Van Gelder, for complainant.
Fay & Van Note, for defendants.

PITNEY, V. O. The object of the bill is to subject certain lands, the title whereof is vested in the defendant Sarah E. Dennis, to the lien of a judgment which the complainant holds against Edwin Dennis, who was previously the admitted owner, and conveyed them to Sarah E. Dennis by deed dated January 18, 1896. On the 29th of January, 1897, the complainant obtained judgment in the Monmouth county circuit court against Edwin Dennis and Charles E. Dennis for the sum of \$872.34 and \$38.90 costs,—in all, \$911.24. The judgment was based upon four promissory notes, made by Charles E. Dennis, the husband of Sarah and son of Edwin Dennis, to the order of and indorsed by the latter, which matured on the 8th, 13th, 14th, and 16th of October, 1896, respectively. Those notes were given in renewal of other like notes, which were discounted by the complainant bank for Charles E. Dennis, and which renewals ran back to a period prior to the date of the conveyance in question. The consideration mentioned in the deed from Edwin Dennis to Sarah is one dollar and other good and valuable considerations, and the premises included the whole of the grantor's property. Thus briefly presented, and in the absence of any other facts, the case would be this: That on the 18th of January, 1896, Edwin Dennis, being contingently liable as indorser for his son Charles, to the amount of between \$800 and \$900, to the complainant bank, made a gift of the land in question to his daughter-in-law Sarah E. Dennis, the wife of his son Charles. Thus stated, the case would be within the doctrine of *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7, reversing *Dodson v. Severs*, 54 N. J. Eq. 305, 38 Atl. 28. The gist of the decision in that case, as I read the opinion, is that a contingent liability as an accommodation indorser of a promissory note on the part of a person making a gift of land is not, of itself, conclusive proof that the gift was made for the purpose of defrauding the holder of the note. The settled rule in this state is that, as to all existing creditors, voluntary conveyances are conclusively fraudulent, without regard to the existence of an actual intent to defraud. *Severs v. Dodson* held that the holder of such accommodation indorsement is not such a creditor, and the indorser is not a debtor. It, however, recognized the right of the holder of indorsed mercantile paper to show actual fraud in a conveyance by the indorser. At page 635, 53 N. J. Eq., and page 8, 34 Atl., the court says: "At the time in question they were not creditors of the donor. It is readily admitted that they were such in a sense that entitled them to the remedies provided in the act for the prevention of frauds and perjuries. They can, undoubtedly, set aside conveyances and transfers of property made to defeat their just claims. But at present we are not called upon to construe the statute itself, our present function being to construe the rule

of evidence that this court has superinduced upon the statute. This discrimination has not always been made, and the omission has confused the subject. The act invalidates certain transfers of property infected with fraud. The rule now being considered relates to the proof of such fraud, declaring that the contemporaneousness of the gift and the debt establishes it for certain purposes and to a definite extent. * * * When a man is in debt, especially if such debts be due, it is certainly not irrational to infer, if he give away his property, that the intention was to defeat such claims; but such deduction would seem to be most extravagant if, instead of a present indebtedness, he has incurred a mere liability as a warrantor of title, as a tortfeasor, or as surety on an administrator's bond. If such responsibilities as these latter, which may, in the long run, be transformed into debts, should have the effect of invalidating voluntary settlements of property, then such settlements would be the most uncertain of legal transactions." And at page 639, 53 N. J. Eq., and page 9, 34 Atl.: "But the present case demands the application of a rule the most opposite of this. We are not now called upon to ascertain the meaning of statutory language in legislative policy, our entire province being to demarcate the rule of evidence promulgated by ourselves, that makes the existence of fraud in voluntary conveyances, under a certain condition, a mere inference of law, irrespective of the truth. The rule is one of the most rigorous character, having the operation of an estoppel, and is to be kept within the narrowest limits. It is, therefore, enough for this court to say that the contingent liability of an accommodation indorser, before dishonor, does not make him a debtor, so that the holder of the paper can invalidate a voluntary conveyance made by him when there was no actual fraud in the transaction." This view does not deprive the fact of the existence of a contingent liability on the part of the grantor of its ordinary and natural probative force, in connection with other facts and circumstances to show actual fraud, but simply of any conclusive effect in that respect. Hence, I conclude that the decision leaves the parties in the present case at liberty to allege and prove fraud on the one side, and to repel it on the other, and leave the contingent liability of the grantor to be considered as a fact in the case. Neither party was content at the hearing to rest the case upon the bare facts as above stated, but went into proof on the issue of fraud or no fraud.

The defendant Mrs. Dennis sets up a consideration for the conveyance in the shape (1) of services rendered by her to her father-in-law, who is quite aged, and has been somewhat helpless for many years, and (2) moneys loaned and advanced and clothing and food furnished by her to him. In reply to these the complainant contends that the amount of service claimed to have been ren-

dered and moneys advanced by Mrs. Dennis has been inflated and exaggerated greatly beyond the truth, and, further, that the deed is open to attack for actual fraud in two respects: First, that it was made at a time when Charles Dennis, the maker of the notes, was placed by unexpected circumstances in a situation of great embarrassment, if not actual helplessness, in his financial affairs, and that the deed was made at his instance and request, in order to protect this property from his father's liability on these notes held by the complainant; and, in the next place, that there was a private and unwritten understanding between the grantor, Edwin Dennis, and his daughter-in-law Mrs. Dennis, the defendant, that he should have and retain an interest in the land, to wit, that he should be supported by his daughter-in-law during his lifetime. I think these contentions of the complainant are sustained by the proofs. It is an admitted fact in the case that Mrs. Dennis did, as a part of the transaction connected with the conveyance, agree to support and take care of the old gentleman during his lifetime. The other allegations of the complainant, to wit, the inflation of the amount of the indebtedness of the old gentleman to her for services and moneys advanced, and the fact that the immediate occasion of the conveyance was the sudden embarrassment of Charles Dennis, the maker of the notes, I think appear clearly from a consideration of the evidence in the cause.

The premises in question are situate about two or three miles from the village of Long Branch, and consist of an old and somewhat dilapidated dwelling house and barn, with six or seven acres of land, on which the old gentleman lived with his wife, and supported themselves by the produce of the land. The value of the land is differently estimated. For farming purposes it is worth very little now, but it has a considerable value for building purposes, by reason of its proximity to a summer resort village, and may be worth several thousand dollars. The wife of Edwin Dennis died about 10 years before the conveyance, and he continued to live upon the premises, renting out the land and part of the house to a tenant for a few dollars per month, and living upon the rent and some assistance from his son Charles and daughter-in-law Mrs. Dennis. Previous to 1889, Mrs. Dennis had occupied and carried on a large boarding house in Long Branch, but in that year her husband purchased (and the family moved into) a storehouse and dwelling in Long Branch, and engaged in the shoe trade. The dwelling was a single front, the first floor being occupied by the store, and the floor above as a dwelling. They had several growing children,—two sons and two daughters,—who lived at home with their parents, and the boys swear that they paid board whenever they earned the money, generally in the summer time only,

and in small amounts, from \$3 to \$5 a week. She had, at times, one or two additional lodgers, and some day boarders. The husband conducted the shoe store with moderate success. In 1879 the store and dwelling were mortgaged by Dennis for \$1,200 to Jacob W. Morris, and another mortgage was given by him to the executors of Morris in August, 1893, for \$1,000, making \$2,200 in all. In 1888 he mortgaged the premises to a New York business corporation known as "James Chambers Limited," to secure advances of merchandise, and later on in the same year he mortgaged it for \$1,000 to one Layton. In 1892 Chambers & Co. entered up a judgment by confession against Charles for \$1,000, and in the same year a firm of Wallace, Elliott & Co. recovered a judgment against him for the sum of \$418, and some cents, on confession. Wallace, Elliott & Co., in order to protect themselves, took an assignment from Chambers & Co. of its mortgage and judgment, and also of a chattel mortgage which was given upon the store goods by Dennis to Chambers to secure the same debt. So that Wallace, Elliott & Co. held three liens for their debt,—a mortgage on the land, a chattel mortgage, and two judgments and an execution. Charles Dennis, in December, 1893, had managed to pay Wallace, Elliott & Co.'s debt down to \$1,100, and procured his brother, William A. Dennis, to advance the amount to them, and take an equitable assignment by a mere delivery of the several securities which Wallace, Elliott & Co. held. Charles went on in business from that time, seemingly without embarrassment, keeping down his interest, and keeping up a large stock of goods in his store, stated by his solicitor as a witness to be worth \$1,500, and by his counsel in his argument to be worth at least \$3,000, and by Charles in his testimony to be worth still more, when, in the month of August, 1895, the executors of Morris filed a bill in this court to foreclose their two mortgages; the money, as I suppose, being needed for the purposes of the estate, bringing in all these parties, except William A. Dennis, who, as we have seen, never had any written assignment of the mortgages and judgment. He came into the suit afterwards by petition. Before foreclosure commenced, Charles Dennis attempted to raise money by mortgage upon his house and lot, stated by his counsel to be worth \$5,000 or \$6,000, to pay these claims, and found himself embarrassed in so doing, because of difficulty in procuring discharges of record of these mortgages and judgments held by his brother, with the result that in January, 1896, his stock of goods was seized by his brother as chattel mortgage and on execution, and held by the sheriff of the county, and the store itself was closed. About this time, as Edwin Dennis, the father, swears, Charles went to him (Edwin) and asked him to make a conveyance of the property to his wife, Sarah E.

Dennis. She sent for the attorney, and gave instructions to draw the deed, but her husband took him out to his father's house to have it executed. Though the consideration mentioned was one dollar and other good and valuable considerations, Mrs. Dennis borrowed \$100 of her son, and handed it to the attorney who attended to the matter, who handed it to Edwin Dennis at the time the deed was executed, and he handed the greater part of it back to Charles Dennis, who handed it to Mrs. Dennis. The deed was recorded at once, but no change of possession took place for several months. The old gentleman remained upon the premises precisely as he had done before, up to the fall of 1896. The notes held by the bank were renewed once or twice after the giving of the deed, Charles Dennis paying the discount as usual. In the fall of 1896 the old gentleman, then over 80 years of age, was brought into town, and went to live with the defendants, his son and daughter. The notes were permitted to go to protest, and suit was brought, and judgment recovered as before stated.

With regard to the advances made by Mrs. Dennis to the old gentleman, there is no doubt that, from the time of the death of his wife, or, at least, for 10 years before the conveyance was made, the old gentleman obtained the greater part of his living from his son and daughter, or one of them. He received the rent of the house and the income of the lands. He had, as they say, two suits of clothes a year, which Mrs. Dennis swears cost \$12 or \$14 apiece, but which the old gentleman swears cost \$6 apiece. His shoes came from his son's store, undoubtedly. Mrs. Dennis swears that his clothing cost \$150 a year, which appears extravagant, in view of the undisputed evidence in the cause. He got some money from time to time with which to buy food. He swears it came from his son and from his daughter-in-law; that he got money from both of them; and the trend of his evidence is that he got as much from his son as from his daughter-in-law. His daughter-in-law and her children swear that she furnished it all. She swears that she gave him \$1, \$2, and \$3, a week. No account whatever was kept of it in any way, nor is there a single written entry or voucher produced. She swears that she paid a doctor's bill, amounting to a large sum, for attendance upon the old gentleman in one, and I think two, fits of sickness he had during this period; but no receipt for the doctor's bill is produced, nor is the physician himself, who is still living, called to substantiate it. She swore most positively that she paid the taxes, but the proof of the collector is that her husband paid them. Mrs. Dennis and her children swear that she furnished him seven or eight tons of coal a year. He swears it was three or four; and I should think the smaller amount was ample to keep one fire going, if indeed, he

had a fire separate from his tenant. No account is produced from the books of the coal dealer of the amount furnished.

The statement by Mrs. Dennis of the sources from which she derived her money is not satisfactory. She, at one place in her evidence, inadvertently admitted that her husband furnished the family table. He certainly owned the house. The house did not afford room for many lodgers in addition to the members of the family. She had only one or two for a short time in the summer season. She claims, however, that she furnished meals to day boarders. She swears that she had saved up money from the proceeds of keeping boarders when she had a large boarding house, prior to 1889. She said she had \$1,000 in a stocking leg laid away in her drawer, but no member of her family is produced to swear that this large sum of money was ever seen or heard of by anybody. And it is hardly necessary to repeat the remark which has been so often made by judges as to the dangerous character of such evidence. Notwithstanding her statements that she kept money in her pocket at all times, when this conveyance was about to be made, and it became necessary, as she supposed, to make some sort of a show of a consideration paid, she borrowed the money from one of her children for that purpose. During this whole period her husband was doing business on a scale and at a rate which would render it improbable that his wife would be willing to take her scanty earnings from boarding her husband and children to support his father when he could do it himself, or that he would permit his wife to do it. The judgment debtor's pecuniary situation at the time of his failure is important in this connection. His total indebtedness at the time his store was closed consisted, first, of his mortgage indebtedness, amounting to about \$4,500 (and which his counsel swears was entirely paid by the sale of the house), and the complainant's four notes, amounting to less than \$900, or less than \$5,500 in all; and his assets consisted of the store and dwelling and stock of goods, which were worth from \$7,000 to \$8,000, if not forced on the market at a sacrifice. The amount of his accounts receivable for goods sold does not appear. I think that the statement that the wife, out of her savings, supported the old gentleman, and that the husband furnished nothing, is of itself highly improbable, and is met by contrary proof.

A litigation arose in the foreclosure suit of Morris v. Dennis, as to whether William A. Dennis, as assignee of the chattel mortgage and judgment, and having a lien upon the store goods, should be also entitled to hold his place as mortgagee of the land, and some time was occupied by that litigation. It was finally determined that he was entitled to a place as mortgagee of the land. In the meantime the goods were held in stor

age by the sheriff, instead of being sold, as it would seem from the present point of view they might and should have been, and were still held at the time of the hearing of this cause, and are stated to be, and seem to be admitted to be, by reason of depreciation and decay due to age, of no value beyond enough to pay for storage. I think it is fairly inferable that, having committed the imprudence of putting a chattel mortgage on his stock, and a large mortgage for advances on his real estate, Charles Dennis' credit with wholesale dealers in New York was not of the best, and he was working under disadvantageous circumstances, and probably could not, and in fact did not, get credit outside of the persons who held the chattel mortgage. Still, the circumstance that he was able to reduce that indebtedness down to \$1,100, and carry a large stock of goods, shows that he was, under the circumstances, reasonably prosperous, and, if permitted to wind up his affairs in the ordinary way, would have been solvent. We have seen that the old gentleman swore that he received money from both Charles and his daughter-in-law, and this statement, taken in connection with all the circumstances and natural probabilities of the case, leads me to the conclusion, notwithstanding the mass of affirmative evidence that the wife furnished him with all the money he used to buy food, that the whole or the greater part of that money came directly or indirectly from the son.

It is hardly necessary to say that, so far as the old gentleman was supported by his son Charles, the real debtor, the indebtedness, if there be one, from the father to the son for support, cannot, as against creditors of the father and son, be made use of as a consideration for the conveyance by the father to the son's wife. To support such a transaction would be to permit the son to make a present to his wife, as against his creditors, of a debt due from his father. There is proof, however, that the old gentleman had all the time been promising to give this property to his daughter-in-law in payment for her kindness and attentions to him. But then the circumstances under which the conveyance was made, viz. the pending foreclosure suit on the Morris mortgage, and the seizure of his stock of goods and closing his store by his brother at that time, are such as to show that it was the result of a contrivance by the husband to protect the property from the effect of his father's indorsement of his paper. The father swears that, shortly before the transaction, the son came out to see him, and asked him to make the deed. It is true that the wife sent for the conveyancer, and that she directed the deed to be made; but the husband took the conveyancer out to the old gentleman's house, and himself superintended the making of the conveyance. And it is by no means clear that the old gentleman would have done it at that time unless the son had

particularly requested it. He swears that he made the conveyance at the son's request, and denies Mrs. Dennis' statement that it was done at her cotemporaneous request. It seems to me that the fact that the conveyance was made at the request of the son, at a time when the son knew that his father was contingently liable as indorser for him in the bank, and that the son was in embarrassed, though not necessarily insolvent, circumstances, is a clear indication of fraud. It is not necessary, in a case of this kind, to show that the grantor himself intended to defeat his creditors. He was manipulated by his son and daughter-in-law, and did what they desired, and had no thought of the consequence, except an undertaking on their part to take care of him as long as he lived. Whatever of fraud is found is that of the son, the real debtor, and the wife, who desired to secure this property, and protect it from the contingent liability of the old gentleman's indorsement. The wife does, indeed, swear that she knew nothing of her husband's embarrassment, or of the fact that her father-in-law was indorser on his paper; but this statement is simply incredible, in face of the admitted facts of the case.

My conclusion upon the whole case is that this deed cannot stand against this judgment creditor as an absolute conveyance. At the same time, however, I think there is sufficient merit in the wife's claim, particularly with regard to her services in taking care of the old gentleman, to warrant the court in allowing it to stand as a mortgage for a reasonable sum. The difficulty in the case is to arrive at a just amount. We have seen that no account whatever was kept of moneys advanced, and substantially no vouchers are produced. The whole transaction is a family affair, and this increases the difficulty. Taking the case altogether, the best estimate I can make is the sum of \$800, and I will advise a decree that the conveyance in question shall be deemed and held to be a mortgage for \$800, as against the complainant, without interest up to the date of the decree. Two modes of enforcing this decree suggest themselves: One is that the premises be sold by a master to pay the complainant's claim, with interest and costs, subject to a mortgage in favor of Sarah E. Dennis for \$800; or, second, that the premises be sold free of the mortgage, and the defendant Sarah E. Dennis be first paid out of the proceeds \$800, with interest from the date of the decree,—in either case, the balance, if any, to go to Mrs. Dennis.

(80 N. J. L. 427)

JOHNSON v. MAYOR, ETC., OF BOROUGH OF ASBURY PARK.

(Court of Errors and Appeals of New Jersey. Feb. 28, 1898.)

STATUTES—SPECIAL ACTS—SUBJECT AND TITLE—AMENDMENT—BOROUGH—OCCUPATION TAX.

1. The "Act to amend an act entitled 'An act respecting licenses in the boroughs of this state,'

approved May 1, 1894" (Laws 1895, p. 490), is not a mere amendment to the borough act of April 5, 1878, but applies to all boroughs, whether created under that act or otherwise.

2. Legislation empowering boroughs to license certain trades and occupations, and to raise revenue by such license fees, is not obnoxious to the constitutional prohibition against special legislation because it does not apply to other municipalities of higher or lower degree.

3. When the title of an act expressly or by necessary implication indicates that its object is to legislate respecting all of certain specified things, then, if the legislation in the body of the act is confined to only part of such things, the act is unconstitutional because of the falsity and deception of its title. But when the title is general, and merely indicates its object to be to legislate in respect to certain specified things, then the act will be a valid expression of legislative will if it legislates in respect to a part of those things included within the title. *Beverly v. Waln*, 30 Atl. 545, 57 N. J. Law, 143, distinguished.

(Syllabus by the Court.)

Error to supreme court.

Action by George C. Johnson against the mayor and council of the borough of Asbury Park. A judgment was rendered, and plaintiff brings error. Affirmed.

Allan H. Strong, Claude C. Guerin, and R. T. & W. B. Stout, for plaintiff in error. Hawkins & Durand, for defendant in error.

MAGIE, C. J. By this writ of error we are called upon to review a judgment of the supreme court (33 Atl. 850) affirming the validity of an ordinance of the borough of Asbury Park, adopted under the provisions of the act entitled "An act to amend an act entitled 'An act respecting licenses in the boroughs of this state,' approved May 1, 1894," which amendatory act was approved March 22, 1895. Laws 1895, p. 490. The provisions of the ordinance and of the act which was claimed to confer power upon the borough to pass it are fully set out in the opinion delivered in the supreme court, and need not be here repeated. The conclusion reached in that court is entirely approved by this court, but it is deemed proper to indicate that such approval does not apply to all the statements of the opinion. The act in question doubtless impliedly amends section 12 of the borough act of April 5, 1878, but it cannot correctly be characterized as only an amendment to that section. If so, it would plainly be open to the objection that it was not applicable to the borough of Asbury Park, which it is said was organized under the borough act of 1891, but probably to an objection which might be fatal to its validity; for the purpose of the act is equally applicable to boroughs formed under the act of 1878, to boroughs formed under other acts, and to boroughs formed under special acts prior to the adoption of the constitutional amendments of 1875. It would be difficult, if not impossible, to find any quality or characteristic of boroughs formed under the act of 1875 which, with reference to such legislation, would differentiate them from other of the boroughs of this state. But the act in question is not thus

limited. Its language is unrestricted, and it evidently operates upon all the municipalities called boroughs, in whatever mode their organization has been effected.

The act in question may also be supported against the charge that it lacks constitutional validity because special in its character on other grounds than those stated in the court below. Its purpose is to raise revenue for the municipality by licensing certain trades and occupations when carried on therein. Such a purpose is obviously appropriate to municipalities of a higher grade. It is obviously inappropriate to the lowest grade of municipalities, viz. townships. It is therefore not rendered special because it does not include townships. Municipalities of high grade, such as boroughs, towns, and cities, exhibit different characteristics, which may not distinguish them from each other with respect to the propriety of legislation for revenue from licensing trades and occupations, but which may properly distinguish them with respect to the amount of license fees which they may be empowered to exact, and the amount of penalties they may inflict for failure to take out license. The duty imposed by the constitutional requirement that the legislature shall pass general laws regulating the internal affairs of municipalities cannot be enforced by the courts. We can only interfere with legislation regulating such affairs when it is in manifest opposition to the prohibition against special legislation thereon. When, therefore, the legislature enacted a law appropriately regulating the matter of license in municipalities of the grade of boroughs, and limited to that grade, we should assume that, with respect to municipalities of higher grade, it was of opinion that some other regulation was required, not in respect to the power conferred, but to the mode and details of the execution of the power, for in that regard there is a manifest distinction in the grades of municipalities which would justify a difference in legislation. Whether such legislation has been enacted in respect to the higher grades of municipalities we need not inquire. We could not compel its enactment, and perceive no reason why the constitutional requirement may not be satisfied either by the passage of one general law covering all classes of municipalities or of several co-related laws, adopted and appropriated to different classes, if such classes are properly distinguished from each other.

In the supreme court the act in question was also attacked upon the ground that its title did not sufficiently express its object to satisfy the constitutional mandate on that subject. The objection is pressed here upon grounds which do not seem to have been presented below. The contention is based upon the well-settled doctrine that a grant of authority to a municipality to license, merely, confers only a power of police regulation, but no power to impose a license fee for revenue. *North Hudson County Ry. Co. v. Mayor, etc., of Hoboken*, 41 N. J. Law, 71; *Muhlenbrinck v. Commissioners*, 42 N. J. Law, 364; *Clark v. Mayor, etc.*, 43 N. J. Law, 175.

Flanagan v. Treasurer, 44 N. J. Law, 118; *Morgan v. Orange*, 50 N. J. Law, 389, 13 Atl. 240; *Mulcahy v. City of Newark*, 57 N. J. Law, 513, 31 Atl. 226. But, as was well said by Mr. Justice Dixon in *Mulcahy v. City of Newark*, ubi supra: "Authority to exact license fees may be classified either under the police power or under the taxing power. In the absence of any indication to the contrary, it is deemed a branch of the police power, and as such it warrants the exaction of no fees beyond the reasonable expense of issuing the license and regulating the thing licensed." Whether, however, the power granted to a municipality is to be classified under the police powers or under the taxing powers, it is, in either case, to be exercised by means of the issuing of a license. Now, the title of the act in question does not indicate a mere intent to grant power to license. It is declared to be an act respecting licenses, and, as there are licenses of two sorts, viz. those designed merely as means of regulation and those designed to raise revenue, it may well be deemed to express an intent to legislate in respect to either class of licenses or both of them. A restricted construction should not be applied if it would render a legislative act obnoxious to constitutional prohibition if a broader, but yet reasonable, construction would avoid such an objection. But it is suggested that upon a construction of this title which makes it applicable to one or both of the two classes of licenses the act, which in its body applies only to one of those classes, cannot be supported under the case of *Beverly v. Wain*, 57 N. J. Law, 143, 30 Atl. 545. A contention of that sort can only be based upon a misconception of what was decided in that case. The title of the act then under consideration ran thus: "An act relating to the cost of improving sidewalks in the cities of the state." The enactments of the body of the act operated only upon cities of the third class. There were many constitutional questions raised in the case, only one of which was dealt with in the opinion of Mr. Justice Reed. An examination of that opinion will show that the act under review was declared to be invalid because the title was construed to declare that its object was to legislate in respect to all the cities of the state. In that view the title was false and deceptive, and upon well-settled doctrine thus failed to accord with the constitutional requirement on the subject. Such must be considered to be the whole scope and force of that decision. It was not held, nor was it intended to hold, that an act legislating respecting some objects fairly included within the title will be invalidated because it does not include all such objects, except where the title, expressly or by necessary implication, evinces an intent to legislate as to all of them. This construction of the decision in *Beverly v. Wain* puts it in harmony with all our adjudged cases on the subject of the constitutional mandate in respect to the title of legislative acts, except perhaps one such case. In *Walter v. Town of Union*, 33 N. J. Law, 350, Mr. Justice Van Syckel, speaking for the supreme court, declared the

true rule to be that "the degree of particularity which must be used in the title of the act rests in legislative discretion, and is not defined by the constitution," and that, while "there are many cases where the object of the act might be more specifically stated, yet the generality of the title will not be fatal to the act if by fair intendment it can be connected with it." That decision has been repeatedly approved in the supreme court and in this court. *Doyle v. City of Newark*, 34 N. J. Law, 236; *Van Riper v. North Plainfield Tp.*, 43 N. J. Law, 340. In *Richards v. Hammer*, 42 N. J. Law, 435, the doctrine was applied, and Chief Justice Beasley took occasion to distinguish the decision in the case of *Rader v. Union Tp.*, 39 N. J. Law, 509, which had been claimed to be adverse thereto. *Richards v. Hammer* was affirmed, 44 N. J. Law, 667, but without consideration of the point now under discussion. But in *Bumsted v. Govern*, 47 N. J. Law, 368, 1 Atl. 835, a similar point was involved; and a general title held to be sufficient, although it did not indicate the means or method of attaining the object expressed, and that decision was affirmed upon the opinion of the supreme court. *Govern v. Bumstead*, 48 N. J. Law, 612, 9 Atl. 577. If the decision of the question in *Contieri v. Mayor, etc.*, 44 N. J. Law, 58, is supportable, it must be on the ground that the title of the act under review in that case was false and deceptive, because importing a regulation of a class of cities, while in fact it applied only to a single city of such class. The title of the act now under review expressed its object to be to legislate respecting licenses in certain municipalities. Nothing in it indicates an intent to legislate as to both kinds of licenses, viz. licenses under the police power and licenses under the taxing power. Legislation upon the latter class of licenses was included in the expressed object, and the title was neither false nor deceptive. The judgment of the supreme court must be affirmed.

(61 N. J. L. 277)

CENTRAL R. CO. OF NEW JERSEY v.
SMALLEY.

(Court of Errors and Appeals of New Jersey.
March 1, 1898.)

RAILROADS—CROSSING ACCIDENTS—CONTRIBUTORY
NEGLIGENCE—PROVINCE OF COURT.

1. The duty to look and to listen before crossing a railroad includes the duty to do that which will make looking and listening reasonably effective. If there is a permanent obstruction to sight that would make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety to a place of possible danger. Prudence requires delay until the transient noise has abated, and hearing again become efficient for protection.

2. The plaintiff drove by daylight along a highway in a northerly direction towards a railroad crossing that was guarded neither by gates nor by a flagman. He drove slowly, looked, and listened. His view of trains that might come from the west was cut off by a building, and by

a bank of earth, on which were a fence and bushes. A coal train, in plain sight, was moving west along the north track towards the crossing, which it passed over just before the plaintiff reached it; the caboose clearing the highway as he drove, without stopping, upon the south track. At the same instant, his horse was killed, his sleigh demolished, and he himself injured, by the engine of an east-bound passenger train, which, until it was upon him, by reason of the obstructions above mentioned, he could not see, and which he did not hear. *Held*, that it was error in the trial judge to deny a motion to nonsuit for contributory negligence.

(Syllabus by the Court.)

Error to supreme court.

Action by Jacob S. Smalley against the Central Railroad Company of New Jersey. Plaintiff had judgment, and defendant brings error. Reversed.

A. A. Clark, for plaintiff in error. A. H. Strong, for defendant in error.

ADAMS, J. This writ of error brings up a judgment rendered in the supreme court upon a verdict for the plaintiff in the Somerset circuit. It is necessary to notice only the assignment of error that is directed against the refusal to nonsuit the plaintiff for contributory negligence. The evidence on behalf of the plaintiff presented this case: On the 11th day of January, 1898, at a few minutes past noon, the plaintiff was driving a one-horse sleigh, with bells, in a northerly direction, along Vosseller avenue, in Bound Brook, towards a crossing of the Central Railroad, which was guarded neither by gates nor by a flagman. On the west side of the avenue there was a building, and a bank of earth, with a fence and bushes upon it, which cut off the plaintiff's view of trains in that direction. A coal train in plain sight was moving west along the north track, towards the crossing. As the plaintiff reached the crossing, and drove upon the south track, which he did without stopping, the caboose of the coal train was just clearing the highway, and was distant from him only a few feet. As the horse came upon the south track, the engine of an east-bound passenger train struck and killed him, crushed the sleigh, and seriously injured the plaintiff. Several witnesses testified, negatively, on behalf of the plaintiff, that they did not hear any signal by bell or whistle from the engine of the east-bound train. The plaintiff himself testified that, by reason of permanent obstructions, he could not see the east-bound train until his horse was on the track. The evidence of Harvey Smalley and John C. Morris was to the same effect. The plaintiff further testified that he did not hear the east-bound train, and that he heard no bell rung or whistle blown. There was no express evidence to show how much noise the coal train made, or, indeed, that it made any noise; nor, under the circumstances, was such evidence necessary. The thing spoke for itself. The court will not ignore common experience. There is no reason to

think that the physical conditions were exceptional, or that the phenomenon of an inaudible coal train was a feature of the situation. The conclusion is inevitable that this moving body was accompanied by the usual roar and rumble, which must have greatly hindered a person in its immediate vicinity from distinguishing other sounds.

The duty of a person who is about to cross a railroad track is to be prudent, to look and to listen, and to do the things that will make looking and listening reasonably effective. If the vision or hearing of such a person is limited by permanent obstructions or disturbances, he should for that reason be cautious. If his vision or hearing is limited by transient obstructions or disturbances, under circumstances which oblige him to rely on the sense thus limited, he should wait until it has again become efficient to warn him of peril. One sense, if well used, may give warning enough. To go on a railroad crossing in the way of a train which can be neither seen nor heard, but which would be either visible or audible except for some temporary hindrance to sight or hearing, is to be negligent. These are rules of good sense, and therefore of law. In *Merkle v. Railroad Co.*, 49 N. J. Law, 478, 9 Atl. 680, the plaintiff's intestate went into danger while permanent obstructions, as in this case, hindered his seeing, and the noise of his own load hindered his hearing. It was held that he contributed, by negligence, to the disaster that ensued, not in relying on one sense alone, for that was a necessity of the situation, but in advancing while circumstances within his own control made the only sense on which he could rely ineffective to protect him. In *Railroad Co. v. Ewan*, 55 N. J. Law, 574, 27 Atl. 1064, the plaintiff was held to have been negligent in going upon a railroad track while the noise and smoke of a train that had just passed deprived him temporarily of the power to see clearly and hear distinctly. The governing rule was thus declared by this court in *Railway Co. v. Block*, 55 N. J. Law, 605, 612, 27 Atl. 1067, 1069, in language immediately referring to impediments to sight, but equally applicable to impediments to hearing: "It may be generally said that, if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made." The case under consideration appears to fall within the rule which these decisions define and illustrate. The plaintiff went forward into a danger which permanent obstructions made it impossible to see, and which a passing noise made it difficult to hear. The permanence of the obstructions to sight made hearing his best reliance. A few moments' delay would have given him the full benefit of it. In advancing at once while circumstances interfered with its efficient exercise, he acted with less prudence than the law exacts.

At the trial, which took place nearly four years after the accident, the plaintiff, by way of excuse for not understanding a question, testified that he was a little hard of hearing. He was then 84 years old. Injury to hearing was not enumerated, either by the plaintiff or by Dr. Davis, his physician, among the consequences of the injury. It is therefore natural to suppose that the plaintiff's hearing was not acute at the time of the accident. Deafness increases the obligation to be cautious. *Buttelli v. Railway Co.*, 59 N. J. Law, 302, 38 Atl. 700. As it is not quite clear that the plaintiff's disability existed on the day of the accident, no weight has been given to this consideration.

The plaintiff is entitled to the benefit of an examination of the whole record, in order that the court may see whether the defect in his case was cured by subsequent proof. *May v. Railway Co.*, 49 N. J. Law, 445, 9 Atl. 688. Nothing appears to alter the conclusion that the motion to nonsuit the plaintiff for contributory negligence should have been granted. The judgment against the plaintiff in error is therefore set aside.

(61 N. J. L. 386)

STATE (MUNDY, Prosecutor) v. WARNER et al.

(Supreme Court of New Jersey. Feb. 21, 1898.)

LANDLORD AND TENANT—WHEN RELATION EXISTS—REDEMISE—SURRENDER—PLEADING.

1. By a written agreement, the defendants "leased, demised, and to farm let" unto the plaintiff a farm in this state for a term of five years, from April 1, 1893. The plaintiff agreed to cultivate the farm according to the rules of good husbandry, that he would not underlet, and that he would give to the defendants one-half of the products of the farm. The dwelling house in the occupancy of a third person was excepted from the lease. *Held*, that this agreement created the relation of landlord and tenant between the parties to this suit.

2. By a note in writing signed by the plaintiff in October, 1896, and delivered to the defendants, and accepted by them, the plaintiff agreed to surrender possession of the premises to the defendants on the 1st of April, 1897. This operated as a redemise. Such an agreement to surrender a term to take effect in futuro had the effect of terminating the tenancy created by the lease on the 1st day of April, 1897.

3. The affidavit upon which the proceedings before the justice under the landlord and tenant act were based set out a copy of the original agreement, and stated that by a note in writing, dated October 9, 1896, signed by the plaintiff, delivered to the defendants, and accepted by them, the plaintiff surrendered the said term to the defendants, said surrender to take effect April 1, 1897. This was a sufficient statement of facts to show that the term had expired April 1, 1897, and is not void, as being a mere conclusion of law from undisclosed facts.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Martin L. Mundy, against Donald J. Warner and Donald T. Warner, to review proceedings had before a justice of the peace. Proceedings affirmed.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

John W. Bookman, for prosecutor.
Ephraim Cutler, for defendants.

VAN SYCKEL, J. The writ in this case is prosecuted by Mundy to contest the legality of proceedings had against him before a justice of the peace under the landlord and tenant act. The defendants, who resided in the state of Connecticut, by an agreement in writing dated March 13, 1895, "leased, demised, and to farm let" unto the said plaintiff a farm in the county of Middlesex, in this state, for the term of five years from the 1st day of April, 1893. Mundy, among other things, agreed that he would cultivate the farm according to the rules of good husbandry, that he would not underlet, and that he would give to the defendants one-half of all the crops raised on said premises. The dwelling house on said farm, which was in the occupation of one Augustus Warner, was excepted from the lease.

The first reason relied upon by the prosecutor is that the relation of landlord and tenant did not exist between these parties under this lease. The case of *Edgar v. Jewell*, 34 N. J. Law, 269, is cited to support that contention. In that case one Price cultivated the farm of Edgar, and received for his labor and services as farmer a certain share of the products of the farm. The supreme court held that this was an agreement for the services of Price, and not a lease for the farm, and that under such a contract the said Price, as in *Guest v. Opdyke*, 31 N. J. Law, 552, became simply a tenant in common with the other contracting party, of the growing crops. The case of *Doe v. Derry*, 9 Car. & P. 494, referred to by our supreme court in support of these decisions, was an agreement between the owner of lands and A. that the latter should manage the farm for a stipulated sum per week, and be allowed to reside in the dwelling house rent free. The arrangements presented by these cases did not create the relation of landlord and tenant, but they differ widely from the case in hand. Here a definite term is granted with apt and proper words to create a tenancy, and, so far as concerns this case, it is immaterial whether the tenant returned a money rent, or gave to the landlords one-half of the products of the premises leased. This objection cannot prevail.

By the terms of the lease, the tenancy does not expire until April 1, 1898. These proceedings against the tenant were commenced in May, 1897. The affidavit upon which they are founded is made by the agent of the lessors, and, after setting forth a copy of the lease, avers that Mundy entered into possession of said farm under said lease, and that the term thereby granted to him was surrendered by him to said lessors prior to the 1st day of April, 1897, by a note in writing dated on the 9th day of October, 1896, signed by him, and delivered by him to the lessors, and accepted by them, said surren-

der to take effect on the 1st day of April, 1897, and that the deponent served notice in writing on the tenant personally to deliver up possession, a copy of which notice is annexed to said affidavit, and that the tenant refused to surrender possession. It is insisted that such an agreement to surrender a term to take effect in futuro could not have the effect of terminating the tenancy created by the lease. Mr. Justice Cowen, in *Allen v. Jaquish*, 21 Wend. 628, after referring to the English authorities on this subject, says "that, though no case goes so far as to say that a surrender may be made to become good upon condition precedent, yet there seems to be no objection to that in principle, if the interest surrendered be not a freehold. That cannot, in general, be granted so as to take effect in futuro; but a term for years can. The surrender of a term to operate in futuro is equally free of objection." Justice Cowen, I think correctly, adopted the language of Woodfall on Landlord and Tenant, that the surrender operates as a redemption. The term was thereby made to end on the 1st day of April, 1897.

The remaining question to be discussed is whether the affidavit in this case was sufficient to give the justice jurisdiction. The defect attributed to the affidavit is that it sets forth the conclusions of the affiant, and does not contain sufficient facts to show a surrender in law. There is no doubt that the affidavit of the claimant must contain a statement of facts which authorize the removal of a tenant. A declaration that the defendant is tenant of the affiant, and holds over premises heretofore leased to him, his term having expired, is insufficient, being merely conclusions from undisclosed facts. That was the informity in *Fowler v. Roe*, 25 N. J. Law, 549, and that case has been recognized as authority hitherto. In *Brahn v. Forge Co.*, 38 N. J. Law, 74, the affidavit of the president of the company set forth that the company let and rented the premises to Brahn on the 14th day of July, 1874, for the term of 24 days from July 13th, at the rent of \$250; that Brahn entered into possession under said agreement; that his term had expired; and that on the 18th of October, 1874, the company had served upon Brahn notice in writing to surrender possession of the premises, which he refused to do. The supreme court held that the jurisdictional facts were set out in this affidavit as fully as is required by *Fowler v. Roe*, supra. In the case before us the affidavit gives a copy of the lease showing what the term originally was, and then declares that by a note in writing dated October 9, 1896, signed by Mundy, and delivered by him to lessors, and accepted by them, he agreed to surrender his term on the 1st of April, 1897. Applying the doctrine of the New York case before cited, that the note in writing operated as a redemption, making the term end April 1, 1897, the affidavit is sufficiently full, under the rule ap-

plied in *Brahn v. Forge Co.* There the averment was that the landlord let and rented the premises to Brahn for the term of 24 days from July 13th, at a rent of \$250, and that his term had expired. Here the written lease shows what the term was originally, and the statement in regard to the surrender by note in writing established the fact that the tenancy was at an end. It is not as in *Fowler v. Roe*, 25 N. J. Law, 549, and in *Wooley v. Lane*, 51 N. J. Law, 504, 18 Atl. 353, a mere statement of the conclusions of the affiant from undisclosed facts. It shows facts from which the conclusion can be legally drawn. The recent case of *Lloyd v. Richman*, 57 N. J. Law, 385, 30 Atl. 432, is decisive of the controversy on this question. There the affidavit under the landlord and tenant act stated that the original lessor "sold and conveyed the house and lot to deponent by deed of conveyance bearing date the day and year last aforesaid, and recorded February 8, 1894." This was pronounced by the judgment in that case to be a sufficient averment that the claimant was the "assign" of the lessor, and not void as being a mere conclusion of law. The facts upon which the surrender depends in this case are as fully shown by the statement that a surrender was made by a note in writing, it being competent to make a valid surrender in that way, as the fact that the claimant in *Lloyd v. Richman* was the "assign" of the lessor was set forth by a statement that the lessor sold and conveyed to deponent by a deed. It was no more a mere conclusion of law in the former than it was in the latter case. The proceedings certified are affirmed, with costs.

(56 N. J. E. 634)

DAVIS v. PIGGOTT et al. CRESSMAN v. SAME. DE WITT v. KANIPER.

(Court of Chancery of New Jersey. Feb. 24, 1898.)

MORTGAGES—RELEASE—BONA FIDE ASSIGNEE.

The mortgagee released a part of the mortgaged premises with notice of a subsequent mortgage upon the unreleased portion, but with an agreement with its holder that the first mortgage should be the first lien upon such unreleased part. *Held*, that the agreement created a latent equity in favor of a third party, and that a subsequent bona fide assignee of the second mortgage held it free from this equity.

(Syllabus by the Court.)

Suits by William M. Davis against Edward Piggott and others; by David Cressman, administrator, etc., against David Piggott and others; and by James D. De Witt against John C. Kaniper and others,—to foreclose mortgages. The three suits were tried together. Rights of the several mortgagees determined.

O. D. McConnell, for complainant Davis. Joseph M. Roseberry, for defendant Cressman. I. W. Schultz, for defendant De Witt.

Henry S. Harris, for defendant Paxton. George M. Shipman, for defendant Shober. George A. Nichol, for defendants Rush and Butler.

REED, V. C. These are three suits for the foreclosure of three mortgages. They were tried together. The contest concerns the priorities of the respective mortgages. One Kaniper owned a tract of land containing 181.40 acres (which will hereafter be styled the "181-acre tract"). He executed a mortgage upon this tract in March, 1873, to Christian and Levi Cressman, to secure two bonds, each one for \$1,000,—one held by Christian, and the other by Levi, Cressman. In March, 1875, Kaniper made a second mortgage upon the same tract to James D. De Witt, for \$600. In March, 1876, Kaniper sold off, from the 181-acre tract, 111.24 acres (which will hereafter be styled the "111-acre tract"), to one Edward Piggott. Piggott gave back to Kaniper a mortgage dated March 14, 1876, for \$2,000, to secure part of the purchase money. This mortgage was on June 18, 1877, assigned to W. H. Lawall. By a release dated November 29th, and acknowledged and recorded December 15, 1877, Christian and Levi Cressman released the 70 acres still owned by Kaniper after the sale of the 111-acre tract to Piggott, from the lien of their mortgage. To the release was added an agreement signed by De Witt, the holder of the second mortgage on the whole 181-acre tract, and by Lawall, the assignee of the mortgage made by Piggott to Kaniper on the 111-acre tract. This agreement is in the following words: "We, the subscribers, James D. De Witt and William H. Lawall, who hold subsequent incumbrances on the premises herein described, do hereby consent that the said premises be released and discharged as is herein set forth, and do, for the consideration of one dollar to each of us in hand paid, agree that in case the said Cressman or either of them attempt to collect the said mortgage or either of the bonds thereby secured, that in that case the said De Witt and Lawall agree that the moneys secured thereby and the interest and costs shall be first collected out of the premises (covered by said mortgages) remaining after the part is released as is therein set forth. Dated December 6th, 1877. J. D. De Witt. W. H. Lawall." This agreement was not recorded. Afterwards, on March 12, 1886, the administratrix of Lawall, deceased, assigned the Kaniper mortgage to William M. Davis, the complainant in the first suit. Kaniper sold, of the 70 acres remaining after the sale of the 111-acre tract to Piggott, in four parts, as follows: (1) To Thomas Butler, November 14, 1877, 8.51 acres, for \$153.18, the expressed consideration; (2) to Thomas Miller, on December 15, 1877, 32.15 acres, for \$1,125.25, the expressed consideration; (3) to Rosetta Rush, on December 29, 1877, 9.70 acres, for \$175, the expressed consideration;

(4) to S. V. Davis, on January 1, 1878, 22.15 acres, for \$725, the expressed consideration. The order in which these three suits were instituted is as follows: On April 17, 1897, William M. Davis filed a bill to foreclose his mortgage upon the 111-acre tract. Among others, he made parties to the suit Cressman, who held the oldest mortgage upon the 181-acre tract, and De Witt, the holder of the second mortgage upon the same tract, and Davis, the holder of the Kaniper mortgage upon the 111 acre tract. The prayer of the bill is that the Davis mortgage may be decreed to be the first lien upon the 111-acre tract. Subsequently, while this suit was pending, James D. De Witt, on July 8, 1897, filed his bill to foreclose his \$600 mortgage upon the whole tract, charging that, by virtue of the release executed by the Cressmans, his mortgage became a first lien upon the 70-acre tract, and a second lien next in order after the Cressman mortgage upon the 111-acre tract. He prays that the whole tract may be sold. To this suit all the preceding parties are made defendants. On the same day, namely, July 8, 1897, the administrator of Christian Cressman filed his bill to foreclose the Cressman mortgage, so far as it secured the bond for \$1,000, which has been held by Christian Cressman, now deceased. To this bill, Davis, the complainant in the first suit and a defendant in this suit, has filed a plea in abatement and an answer. The plea is grounded upon the pendency of his own suit, in which the same facts are pleaded, and in which the administrator of Christian Cressman is a defendant. The answer claims that the lien of the Cressman mortgage upon the 111-acre tract covered by complainant's mortgage is extinguished by the release given by the Cressmans of their lien upon the 70 acres. The effect of this plea will be reserved.

I will proceed to consider the relative status of the holders of the several mortgages under the facts displayed upon the hearing. It appears that when Kaniper, the owner of the 181-acre tract, sold 111 acres from it to Piggott, there were upon the whole tract two mortgages,—the oldest, the Cressman \$2,000 mortgage; and the next, the De Witt \$600 mortgage. By the sale to Piggott of the 111-acre tract, the 70 acres retained by Kaniper became first liable for the payment of these mortgages. Then Piggott gave to Kaniper the \$2,000 mortgage on the 111-acre tract. After this mortgage was made, the condition of affairs was this: The 111-acre tract became liable, first, for that part of the amount secured to Cressman and De Witt left unpaid after the sale of the 70 acres; and, secondly, liable for the \$2,000 secured by the mortgage made by Piggott to Kaniper. This was the position of affairs when the Kaniper mortgage was assigned to Lawall. Afterwards the Cressmans released the 70 acres still owing by Kaniper from the lien of their \$2,000 mortgage. They

executed this release with knowledge of the existence of the Kaniper mortgage upon the 111-acre tract. Their knowledge of its existence is admitted in the pleadings; for the fact of such knowledge is charged in the bill of Davis, and is not denied by Cressman or Paxton, the owners of the Cressman mortgage, both of whom filed answer to the Davis bill. Besides, the release was acknowledged December 15, 1877. Attached to this release, and upon the same sheet upon which the release is written, is added the agreement already set out, which agreement is dated December 6, 1877, upon which date it presumably was executed, which was nine days previous to the date of the acknowledgment by the Cressmans of the release. It was executed by Lawall, assignee of the Kaniper mortgage, and by De Witt.

The agreement displays upon its face the existence of subsequent incumbrances held by the signers. In the absence of any explanation by the Cressmans of the circumstances under which this agreement was attached to the release, or any testimony from them upon the hearing denying the knowledge which such a condition of affairs would impute to them, it is irresistible that they signed the release with notice of both incumbrances. The legal effect of such a release, with knowledge of the existence of subsequent incumbrances, is entirely settled. It operates to discharge the lien of the releasing mortgagee to the extent of the value of the part of the mortgaged premises released. *Relly v. Mayer*, 12 N. J. Eq. 59; *Vanorden v. Johnson*, 14 N. J. Eq. 376; *Harrison v. Guerin*, 27 N. J. Eq. 219; *Cogswell v. Stout*, 32 N. J. Eq. 240. The release, therefore, standing alone, left that portion only of the sum secured by the Cressman mortgage, after deducting the value of the 70-acre tract, a lien upon the 111-acre tract. It left, secondly, the lien of that portion of the De Witt mortgage, if any, remaining unpaid after the sale of the 70-acre tract. It left, thirdly, the lien of the Kaniper mortgage, then held by Lawall, for its full amount.

The important question in the case springs out of the agreement made between Lawall, who then owned the mortgage now held by Davis, with the Cressmans, at the time the release was executed. The substance of this agreement was to shift the prior lien of the Cressman mortgage, which rested upon the whole 181-acre tract, to the 111-acre tract alone. Its effect was, therefore, to increase the incumbrance of the Cressman mortgage upon the 111-acre tract, and so decrease the security of the holder of the Kaniper mortgage upon the same tract. Inasmuch as this arrangement was approved by the parties concerned at the time, including Lawall, who then owned the Kaniper mortgage upon the 111-acre tract, it was, as between those parties, entirely valid. Had the Kaniper mortgage remained in the hands of Lawall, it would be clear that the Cressmans

would be entitled to be first paid from the proceeds of the sale of the 111-acre tract. But Lawall is not the owner of the Kaniper mortgage. After his death, his administratrix sold it to Davis, who appears to have been a purchaser for value, without notice of the mentioned agreement. The question is whether he, as Lawall's assignee, took the mortgage free from the equity by which Lawall was bound. The doctrine is rudimentary that an assignee of a mortgage takes it subject to all equities, latent or otherwise, in favor of the mortgagor, against the mortgagee or his assignee. But the counsel for Mr. Davis insists that this was a latent equity, created by the assignee of the mortgagee of the Kaniper mortgage in favor of a third person, and that Davis, as assignee of such mortgage for value, and without notice of this equity, is not chargeable with its existence. If this is a latent equity created by the mortgagor or his assignee in favor of a third person, under the law of this state, Davis undoubtedly took a title to the mortgage entirely relieved from the effect of this agreement.

In a number of cases, all cited in the opinion of Vice Chancellor Van Fleet in the last case upon this subject, namely, *Vredenburg v. Burnet*, 31 N. J. Eq. 229, the distinction between latent equities in favor of the mortgagor and in favor of third persons has been repeatedly stated. In some of those cases, it is true, the equity was one existing in favor of the obligor or mortgagor, and so did not involve a decision upon the point whether latent equities in favor of third persons stood upon the same footing. In the case, however, of *Manufacturing Co. v. Peck*, 6 N. J. Eq. 37, the question was directly involved; and it was held that a bona fide assignee of a mortgage, first in execution and registry, took it free from an agreement between the first and second mortgagees that the latter should be the prior incumbrance. In *Vredenburg v. Burnet*, supra, the doctrine that the assignee takes free from latent equities created by the mortgagee in favor of third persons was discussed at length, and reasserted, and the case was affirmed by the court of appeals upon the opinion of the vice chancellor in 34 N. J. Eq. 252. This case definitely settles the law in this state. The counsel for Mr. Cressman cited, as pertinent decisions modifying this doctrine, the following cases: *Conover v. Van Mater*, 18 N. J. Eq. 481; *Coursen v. Canfield*, 21 N. J. Eq. 92; *Atwater v. Underhill*, 22 N. J. Eq. 599; *Insurance Co. v. Sturges*, 33 N. J. Eq. 323. In the opinions in one or more of these cases expressions may be found to the effect that the assignee of a bond and mortgage takes it subject to all equities; but in none of the cases is the doctrine laid down in *Vredenburg v. Burnet* impugned. In *Conover v. Van Mater*, supra, the equity was not created by the mortgagee or the assignee, in favor of a third person, but existed

before the mortgage was made. In *Coursen v. Canfield* and in *Atwater v. Underhill*, supra, the respective equities were between the original parties, and in favor of the mortgagors. In *Insurance Co. v. Sturges*, supra, while the equity was latent and in favor of third parties, yet the assignee was appointed in bankruptcy proceedings. He was therefore not an assignee for value, and took only the property of the debtor as it existed at the time of the insolvency.

Did this agreement create a latent equity in favor of a third party? The conclusion that it did seems to be unavoidable. Lawall, whose mortgage lien was subject only to that part of the Cressman mortgage which would be left unpaid after the application of the value of the 70-acre tract, agreed with Cressman that it should become subject to the whole amount due upon the Cressman mortgage. To this extent he agreed that the Cressman mortgage should have a priority, to which it was not entitled by execution or record. This equity seems to be exactly similar to that in *Vredenburg v. Burnet*, supra. No inquiry, directed to the mortgagor would have disclosed any defense to the mortgage, or laid the foundation for estoppel against the mortgagor from asserting a defense. In fact, he had no defense. In my judgment, Davis, who stands in the position of a bona fide purchaser for value, holds his mortgage free from this equity. The result is that the Cressman mortgage is a lien upon the 111-acre tract for so much of the mortgage debt as remains unpaid after the application upon it of the value of the 70 acres released. The value of the released portion must be estimated at the time when the release was executed. *Hill v. Howell*, 36 N. J. Eq. 25.

It is proven that the 70-acre tract was sold by Kanlper by four conveyances, the aggregate consideration of which is the sum of \$2,178.43. All these sales were made within 15 days of the time of the execution of the release, and, as no other evidence of value was offered at the hearing, this sum must be taken to have been the value of the tract at that time. This sum exceeds the amount due upon the Cressman mortgage for principal and interest. The 111-acre tract is therefore discharged from any lien on account of the Cressman mortgage. In respect to the suit brought by them, there must be a decree for the defendants. This renders the issue raised by the plea in abatement in this suit unimportant. The 70-acre tract should be sold under a decree in the *De Witt* suit, the portions of that tract being sold in the inverse order of their conveyances by Kanlper, the sale being continued until sufficient is released to pay this mortgage. If all the tract is insufficient to pay the mortgage, then the 111-acre tract must be sold under that decree. If the 70-acre tract is sufficient, then the 111-acre tract must be sold under a decree in the *Davis* suit.

KERRIGAN v. TABB et al.

(Court of Chancery of New Jersey. Feb. 17, 1898.)

WILLS—CONSTRUCTION—LAPSE OF LEGACIES—RELIGIOUS BEQUESTS—VALIDITY.

1. A will provided that a legacy should go to the legatee if she survived testatrix, and, if not, it was to go into the residue of the estate. A codicil provided that the legacy should go to the legatee, "and her executors and administrators, absolutely." Held, that the legacy passed, on the death of the legatee before testatrix, to the legatee's executor or administrator.

2. The executor or administrator of the legatee's estate took no personal interest in the legacy, but held it as assets of the estate.

3. A legacy given to a priest, to be expended for masses for the repose of testatrix's soul, is a trust, and does not lapse on the death of the trustee before testatrix, but will be carried out by the appointment of another trustee.

4. A legacy to a priest, to be expended for masses for the repose of testatrix's soul, is a religious use, and valid, under Const. art. 1, §§ 3, 4, and Const. U. S. Amend. 1, providing for freedom of conscience and religious belief.

Bill between Michael Kerrigan, executor of the will of Bridget Madden, deceased, and Thomas Tabb and others, for the construction of a will.

Mr. Lintott, for complainant. David Kay, for defendant Tabb. Guild & Lum, for defendant St. Michael's Church. M. T. Barrett, for defendants Smith and others.

EMERY, V. C. The bill in this case is filed by the executor of Bridget Madden for instructions on several points arising in the construction of her will, and I will state briefly my conclusions upon the several points.

The first question is whether a legacy given by the will to Catherine Saul, a sister of testatrix, and which would have come to her had she survived testatrix, has lapsed by the death of Catherine Saul in the lifetime of testatrix, and has thus become part of the residue of her estate, or whether, by the terms of the will and codicil, the executors or administrators of Catherine Saul are entitled to the legacy, as legatees intended by testatrix to be substituted in Catherine Saul's place, in case she did not survive. The provisions of the will and codicil bearing upon this question are in the first place the original will, in which, after providing for the payment of her debts and some pecuniary legacies, the will provides: "Thirdly. I give and bequeath to my beloved sister, Catherine Saul, of Phœbus, P. O. Elizabeth City, Virginia, if she survive me, the sum of eight hundred dollars and my feather bed. If, however, she do not survive me, this bequest is to go into the residue of my estate." The entire residue of her estate, after deducting \$100 for a tombstone, was given for charitable purposes,—masses for the repose of her soul. On June 10, 1892, the testatrix made a codicil, by which, after confirming all the provisions of her will, except so far as in conflict with the codicil, she provides: "First.

I give and bequeath to my friend Mrs. Stoffa, wife of William A. Stoffa, the sum of two hundred dollars, and the bequest of my sister mentioned in said will I hereby give to her and her executors and administrators absolutely." The bequest of the residue made by the will is then revoked, and, after giving \$1,000 to the Rev. Patrick Leonard, to be expended for masses for the repose of her soul, the residue is given to St. Michael's Church of Newark. Catherine Saul died after the execution of the codicil and before the testatrix. She left a will, but without naming an executor, and the defendant Tabb has been duly appointed administrator cum testamento annexo. The question is whether he, as such administrator, is entitled to the legacy, or whether it has lapsed. The question is altogether one of the intention of the testator, and is to be solved by the construction of the will and codicil. And the special question is whether, upon the entire will and codicil, the gift to the executors and administrators is to be considered as substitutional, or whether the words, "and her executors and administrators absolutely," added to the gift of testatrix's sister, are words merely of limitation or description of the estate or interest given to her sister. If, on the whole will and codicil, the former construction is to be placed on the words, then the legacy did not lapse, while it did so lapse upon the latter view.

The briefs of counsel have presented very fully the cases and authorities which state the rules applying to these cases, so far as general rules can be said to be laid down in reference to the decision of a question which depends ultimately upon the construction of the paper itself, and these rules, as I understand them, are that, ordinarily, and in the absence of anything further to indicate the intention of a testator that a legacy should not lapse, a gift to A., his executors or administrators, would lapse in case of A.'s death before testator, and not pass to his executors or administrators, for the reason that by a general rule of construction, these words, "executors and administrators," are words descriptive merely of the estate or interest bequeathed to A. 2 Williams, Ex'rs (Rand. & T. Ed.) p. 490. But if the testator, upon the entire will, has sufficiently shown his intention that the legacy shall not lapse in case of death, and a substitute legatee is provided, this intention will be carried out. Id. p. 501. The practical question of construction on each will is whether the intention (1) that the legacy should not lapse, and (2) should go to a substituted legatee, sufficiently appears; and upon this question of intention of the testator to prevent a lapse, and to provide a substitute legatee, it is not necessary that the declaration be express, but the form of the bequest itself is often held to indicate sufficiently both of these intentions. Thus, where there is a bequest "to A. or his personal representatives," or to "A. or his heirs," the word "or," generally speaking, implies a substitution,

and prevents a lapse. 2 Williams, Ex'rs (Rand. & T. Ed.) p. 501. And while a bequest simply to "A. and his executors," standing alone, would manifestly afford little or no evidence from which it could be concluded that the same intention existed, yet where, upon the construction of the whole will and codicil, these words used in the codicil, taken in connection with the previous gift in the original will, sufficiently show this intention that there should be no lapse, and that the executor is a substituted legatee, this form of gift is as effective by way of substitution, as if the words had been "A. or his executors." The words "and" and "or" are so often required to be substituted for each other in the construction of wills, to carry out the intention of testator, that the rule authorizing such substitution for that purpose is entirely settled. If, therefore, the intention to prevent lapse and substitution are manifest, "and" may, if necessary to carry these out, be read with the same effect as if it were "or." In the present case, I think it is sufficiently clear that these intentions appear. The codicil appears to have been made for the express purpose of changing the direction of the fund given by the original will on the death of the legatee during testator's life, so that it would not then go into the residue, and, by way of changing the character of the gift from one which would thus fall into the residue, the testator gives the legacy to her sister "and her executors and her administrators, absolutely." This addition to the original gift made by these words, which are substituted for the provisions of the original will as to what is to become of the fund there given to her sister, if she did not survive, which words are the only difference between the two, show, in my judgment, that the testatrix, desiring by her codicil to substitute a clause which, while changing the direction of the fund after the death of her sister, should still provide for that same contingency, added the executors of her sister as the additional legatees of the fund, to take after the death of her sister, and for the further expression of her intention that the gift to her sister was not to be qualified, as in the original will, by failing, if she survived, the gift to the executors and administrators is a gift "absolutely," as distinguished from a gift liable to lapse. It appears to me, therefore, that these intentions of the testatrix to provide against lapse, and to make the executors additional legatees, sufficiently appear, and that the executors or administrators are entitled to take as substituted legatees.

The second question raised is whether the executor or administrator c. t. a. takes a personal interest as legatee, or whether he holds it as assets of his testator's estate. On this question I hold that he takes, not for his personal benefit, but for the estate. Authorities for this view, if necessary, are abundantly cited by counsel for the administrator.

The third question is whether the legacy given by testatrix in the codicil to Rev. Patrick Leonard, of the sum of \$1,000, to be expended for masses for the repose of her soul, had lapsed and fallen into the residue, either by reason of his death before testatrix or by reason of the bequest being invalid. On the first point my conclusion is that, inasmuch as the Reverend Patrick Leonard received the gift on a trust to expend the money for masses, and not for his personal participation therein, the gift is a trust, which may be carried out as intended by the appointment of another trustee to expend the money. The main declared object of the testatrix's will is thus preserved, and the legacy does not lapse. This course was pursued in *Re Schouler*, 134 Mass. 426, where the money was to be expended for masses and other charities, and a new trustee was appointed in place of the deceased trustee. Upon the second point, the validity of the bequest, it was said that the purpose of the bequest was illegal, as being a superstitious, and not a charitable, use. But a use of this kind, based on the doctrines and practices of a Christian church, and which does not in any wise conflict with or impair any of the rights or obligations arising under the authority of the state, its constitution or laws, must be considered a religious use. This seems to be the view of the American authorities. 5 Am. & Eng. Enc. Law, 928, and cases cited, *inter alia*, *In re Schouler*, *supra*, *Rhymer's Appeal*, 98 Pa. St. 142, and others. The general view of these authorities is that the validity of such bequests is assured by the provisions of the federal and state constitutions relating to freedom of conscience and religious belief. Const. U. S. Amend. 1; Const. N. J. art. 1, §§ 3, 4. See, on this point, *Holland v. Alcock*, 108 N. Y. 312, 329, 16 N. E. 305, 313, *Rapallo, J.* Another trustee should therefore be appointed to carry out this trust, and, when appointed, the executors of Patrick Leonard will be directed to pay over the fund to him, following, in this respect, the course taken under similar circumstances in *Re Schouler*, *supra*. This appointment of a new trustee should not, however, be made in this suit, but on proper proceedings for that special purpose.

(61 N. J. L. 231)

WOODWARD et al. v. EMMONS.

(Court of Errors and Appeals of New Jersey.
March 1, 1898.)

SALE — ACCEPTANCE — EFFECT — FAILURE OF CONSIDERATION.

1. Where the vendees of machines intended or adapted for pulverizing stone and hard materials, and purchased under a warranty of fitness for such purpose, after testing them, and, discovering defects which cause dissatisfaction, continue to use them, not in order to make further tests, but merely for the purpose of their own convenience or profit, such use constitutes an acceptance, and concludes them from the defense of a total failure of consideration, and they must rely upon their warranty.

2. In a suit on the note given for the consideration of such contract, a charge to the jury to the effect that under the evidence in the cause the defense of a total failure of consideration cannot be interposed is correct, whether the right of rescission is exercisable or not.

(Syllabus by the Court.)

Error to circuit court, Essex county; Child, Judge.

Action by J. Frank Emmons against Charles B. Woodward and another on a note. Plaintiff had judgment, and defendants bring error. Affirmed.

J. E. Howell, for plaintiffs in error. C. E. Hill, for defendant in error.

VREDENBURGH, J. The trial of this cause before the circuit court of Essex county resulted in a verdict and judgment in favor of the defendant in error (who was the plaintiff below), for the full amount of the note in suit, and this writ of error brings before this court certain exceptions to the refusal of the trial judge to charge the jury as requested by the plaintiffs in error. The action was brought by the indorsee, who is charged with notice of an alleged false warranty made in the sale of three pulverizing machines (intended to grind to fineness stone and other hard materials), sold by the Frisbee Lucop Mill Company in July, 1895, to the plaintiffs in error. As the rights of the parties will be considered as if the original vendors were the plaintiffs in the action, it will not be necessary to determine the question raised by one of the exceptions respecting the knowledge of the facts to be imputed, as a matter of law, to the indorsee in his character as president of the vendor company. In passing, it may not be amiss to say, however, that the decisions of our courts do not seem to sustain the contention of the plaintiffs in error in this regard. The refusal to charge, which will be considered in this opinion, was made in response to the following request, *viz.*: "If the jury believe the evidence adduced on the part of the defendant, they may find that the consideration of the note sued on had wholly failed." The trial judge charged as follows, *viz.*: "It is insisted by the defendants that under the evidence in the case a verdict must be rendered for the defendants, because the defendants insist that the evidence establishes the fact that there was a total failure of consideration. I charge you that that defense cannot be interposed against this note. In order to make that defense available, it was necessary that the defendants should rescind this contract. There is absolutely no evidence of any rescission in this case." No claim was made by the plaintiffs in error, nor does the record here show that this charge misstated the facts in evidence, and I think that the statement of the law in the charge was as favorable to the defendants as they had the right to demand. Having taken and retained possession of the machines, and used them for

profit in their business up to the commencement of this suit (for nearly one year), the vendees should, I think, be held to have made their election to accept them, and were bound in law to pay the vendors some consideration for them. A defense of a total want of consideration after possession delivered and retained under these circumstances has no countenance in the authorities. Indeed, the defense, even of a partial failure of consideration, in suits on such notes, has grown up in this state only within comparatively recent years. And it will perhaps be useful to refer briefly to the course of adjudication and legislation in this state on this subject, to show the departure from the old rule, which forbade defenses of abatement of the contract price to the extent of consideration failed. In the early case of *Allen v. Bank*, 20 N. J. Law, 620, decided (in 1846) in the supreme court of this state, it was held that it was then well settled that partial failure of consideration is not a good defense at law to an action on a note or check, where the amount to be deducted on account of such failure was unliquidated. See, also, *Beninger v. Corwin*, 24 N. J. Law, 257, and *Starr v. Torrey*, 22 N. J. Law, 190. But in *Bouker v. Randles* (1865) 31 N. J. Law, 335, the supreme court expressed the opinion, after the fullest consideration of the whole question, that when the suit is between the original parties to the note, or is brought by an indorsee with notice, partial failure of consideration, though indefinite in amount, should be permitted to be shown, and, as far as it goes, is a legal defense to such action. In *Wyckoff v. Runyon* (1868) 33 N. J. Law, 106, where the question came directly before the court, after referring to the prior decisions of this and other jurisdictions the supreme court reaffirmed this rule, and held directly that in suits on such notes a partial failure of the consideration of the note can be set up as a defense to the same extent as though the action were founded on such consideration. The principle of these decisions has been approved by the following adjudications in our law courts, in which the above rule has been applied, or its application distinguished, viz.: *Lord v. Brookfield*, 37 N. J. Law, 552; *Price's Ex'rs v. Reynolds*, 39 N. J. Law, 171; *Wakeman v. Illingsworth*, 40 N. J. Law, 431; *Bozarth v. Dudley*, 44 N. J. Law, 304; *Smith v. Manufacturing Co.*, 58 N. J. Law, 242-245, 33 Atl. 244; *Meador v. Cornell*, 58 N. J. Law, 378, 33 Atl. 960. See, also, *Wolcott v. Mount*, 36 N. J. Law, 262-267. The revision of our Practice Act of March 27, 1874, § 129 (same section in 2 Gen. St. p. 2555), expressly provided a course of pleading applicable to such defenses as to contracts not under seal, and rule 83 of the supreme court, followed by the act of 1896 (P. L. 185), embracing also contracts under seal, has placed in this state the whole subject of such defenses, about which there has been so much discussion in our courts and text-books, as well as the subjects of counter-

claim and recoupment of damages by the defendant against the plaintiff, upon a broad, well-defined, and permanent foundation, dispensing with the necessity of cross actions.

It cannot be successfully claimed in the present case that the trial judge failed to give the plaintiffs in error, either in the admission of evidence or in the charge to the jury, the benefit of any pro tanto defense by reason of the alleged breach of warranty on the sale of these machines, but it is insisted in this court that he should have charged that they had shown a complete defense, and that they were entitled to escape all liability on the note in suit. This is asking too much in behalf of vendees who had taken possession of the machines, sold to them in July, 1895, and had kept and used them until about July, 1896, in the hard wear and tear of grinding stone, cement, and other hard substances, and who had neither verbally nor in writing given notice of an intention of abandoning them, nor made any effort to rescind the contract of sale, or redeliver the machines, or place the vendors back in the position they were in before the sale. The case of *Starr v. Torrey*, 22 N. J. Law, 190, relied on as a precedent for reversal of the ruling below in the briefs of the plaintiffs in error, as a "parallel case in nearly all the facts," falls short of such parallel in important particulars, and is, on the contrary, to be regarded, I think, as authority for the rule herein defined. In that case the defendant, the vendee, after making every effort to use a wholly worthless steam engine, sold and delivered to him about July 1, 1842, and after finding that it could not be used at all for the purpose intended, abandoned it to the vendors, giving them due notice that he refused to take it by letter dated August 22, 1842. The supreme court said, in reviewing the case: "After the delay and expense incurred by him [the vendee] in attempting to repair an engine known by the vendors to be worthless at the time of the contract, it was sufficient for him to give notice that he would not take it; and upon such notice they might have informed him whether they would or would not receive it, and advised him where to deliver it, if he was bound to deliver it at any other place than where it then was. The notice of the 22d of August * * * was sufficient." The evidence before the trial court in the present case was barren of any such notice, as well as of any offer by the vendees either to return or redeliver the machines, or to surrender or abandon possession of them to the vendors. The failure of the vendees to return or offer to return the machines, together with their continued use for purposes of profit or convenience for almost a year, should be construed, under the admitted facts of this case, to be an election on the part of the vendees to accept and retain the machines, and rely upon their warranty. See 2 Benj. Sales, *908, and *Palmer v. Banfield*, 86 Wis. 441, 58 N. W. 1090, hold-

ing that such dealing with the property was inconsistent with its rejection or return. Whether the strict right of rescission as indicated in the charge of the judge, is exercisable in case of a breach of warranty in the sale of goods, after their delivery and acceptance, is a question not yet decided by the courts of this state, but the inclination of the authorities seems to be against such right. See *Wolcott v. Mount*, 36 N. J. Law, 262, 265-267; *Smith v. Manufacturing Co.*, 58 N. J. Law, 242-245, 33 Atl. 244; *Meador v. Cornell*, 58 N. J. Law, 375-378, 33 Atl. 960. And see, also, 2 Benj. Sales, §§ 1342, 1343; *Clark*, Cont. pp. 313, 314. There is no error found, and the judgment below should be affirmed.

(61 N. J. L. 400)

STATE (RICHARDS et al., Prosecutors) v.
MAYOR, ETC., OF DOVER et al.

(Supreme Court of New Jersey. Feb. 21, 1898.)

MUNICIPAL CORPORATIONS—POWERS.

The common council of Dover is without power to grant leave to a corporation organized under the general law of this state, entitled "An act concerning corporations," to lay gas pipes and operate a gas plant in Dover.

(Syllabus by the Court.)

Certiorari, on relation of George Richards and others, against the mayor, etc., of Dover and the Dover Electric Light Company, to review an ordinance passed by the city council of Dover. Ordinance set aside.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Geo. T. Werts, for plaintiffs. Jas. H. Neighbour and Joseph Coult, for defendants.

VAN SYCKEL, J. The writ in this case is prosecuted to set aside an ordinance passed by the city council of Dover, July 20, 1897, granting to the Dover Electric Light Company the exclusive right, liberty, and privilege for and during the term of 10 years to construct, lay, and at all times to keep and maintain its gas mains through and under the surface of any and all streets, lanes, alleys, and squares of said city. The Dover Electric Light Company was originally incorporated April 4, 1888, as an electric light company only, under the general corporation act of this state, entitled "An act concerning corporations," approved April 7, 1875, and confined itself exclusively to electricity until June 28, 1897. By a certificate of that date filed with the secretary of state, June 29, 1897, being, as therein stated, a "certificate of changes, by way of amendments, to the charter of the Dover Electric Light Company," said company certified that it had "changed the nature of the business of said company as follows: "To construct, purchase, sell, lease, and operate a plant and works in the city of Dover, New Jersey, for the manufacture and distribution of gas,

for light, heat, and power, in connection with its present manufacture of electricity; * * * to lay conduits, mains, and pipes for the distribution of the same; and to lease and sell the manufactured products thereof." The Dover Gaslight, Heat & Power Company (one of the prosecutors) is incorporated under the general gas act of this state, entitled "An act to authorize the formation of gas light corporations and regulate the same," approved April 21, 1876 (2 Gen. St. p. 1607), by a certificate filed with the secretary of state, January 23, 1897. The common council of Dover refused to permit the last-named company to lay its pipes in the public streets.

The first reason relied upon for reversal of the ordinance is that the common council of Dover was without authority to grant leave to a corporation organized under the general law of this state, entitled "An act concerning corporations," to lay gas pipes and operate a gas plant in said city. This general corporation act has existed in this state for many years. The first general act for the incorporation of gas companies was passed in 1874 (Laws 1874, p. 124). Prior to 1874, gas companies were incorporated under special legislative acts. The act of 1874 provided that nothing therein contained should authorize the building of gas works or laying of gas pipes in any city or town which was already being supplied with gas, and therefore no rival company could, as the law then was, be organized without a special charter. That is the clear reading and the manifest purpose of the act of 1874, and that it was the accepted interpretation of it is evinced by the subsequent legislation. After the adoption of the constitutional amendment in 1875 interdicting special legislation, there was no mode in which a second company could lawfully be organized and operated; and doubtless for that reason the legislature, in 1876, repealed the gas act of 1874, and passed the gas act now in force, and omitted from it the exclusive provision before mentioned. The provision in the act of 1874 excluding a second company would have been futile if it could have been evaded by incorporating under the general act concerning corporations. The passage of these general laws authorizing the incorporation of gas companies shows a clear legislative intent to separate gas companies from those corporations which may lawfully be organized and promoted under the general corporation act, and to subject the former to limitations and restrictions not applicable to the latter. Reference to some of the provisions of the gas act of 1876 disclosed such intention too clearly to permit it to be disregarded. Sections 19, 20, 21, and 27, containing stringent provisions for the protection of the public, are made expressly to apply only to corporations formed under said act. These provisions cannot be rendered nugatory by the simple device of incorporat-

ing under the general corporation act. The defendant company was organized under the general corporation act, and therefore, not being subject to any of these safeguards, the only construction of this legislation which can reasonably be accepted is that the right to exercise the privilege of laying gas pipes and conducting gas business is not within the scope of its charter rights, and cannot be conferred upon it by municipal authority. The general powers over streets and the lighting of streets granted to the common council by the charter of Dover must be exercised in subordination to the public laws of the state, and cannot be invoked to justify the evasion of the regulations so carefully provided by the gas act. Chief Justice Magle, in *Telegraph Co. v. Newark*, 49 N. J. Law; 348, 8 Atl. 128, said that the passage of the act of 1875 and the supplement of 1880, providing for the organization of telegraph and telephone companies, in modes and under conditions quite inconsistent with those prescribed by the general corporation act, seemed to be a strong legislative declaration that such companies could not be organized so as to acquire a corporate existence under the latter act.

In my judgment, the legislature has clearly expressed its intention that no corporation shall acquire or exercise the franchises of a gas company without subjecting itself to the salutary provisions of the gas act by incorporating under it. Under this interpretation of these laws, the common council was disabled to pass the certified ordinance, and the cases cited in support of its action are not pertinent to the controversy. The Dover Gaslight Company, being organized under the general gas act, has a right to invoke the aid of this court to remove out of its way an ordinance which gives the exclusive right to lay gas pipes to a company not entitled to exercise it. While this ordinance stands, this prosecutor cannot receive from the common council a fair consideration of its application for leave to lay its pipes in the streets.

I am of opinion, also, that the relators, who are resident taxpayers and abutting land-owners on streets in the thickly-populated portions of Dover, have a right to resist the laying of gas pipes in such streets until the company proposing to exercise that right puts itself under the provisions of the law framed for their protection. "The rule must be considered settled that no person can acquire a right to make a special or exceptional use of a public highway, not common to all the citizens of the state, except by grant from the sovereign power." *Gas Co. v. Dwight*, 29 N. J. Eq. 248. Certainly, the defendant corporation cannot be permitted to occupy the street in contravention of the clearly-declared policy of the state. It is not necessary to consider the other questions discussed in this case. The ordinance certified is illegal, and must be set aside.

(61 N. J. L. 386)

STATE (MORFORD et al., Prosecutors) v.
BOARD OF HEALTH OF
ASBURY PARK.

(Supreme Court of New Jersey. Feb. 21, 1898.)

BOARD OF HEALTH—POWERS—NUISANCE.

1. Under the provisions of the acts of February 22, 1888, and March 20, 1892, the board of health of Asbury Park has no power to restrict the owners of a stable to the mode of laying a stable floor prescribed by an ordinance of the board. The owners have the alternative of resorting to any other method which will secure the sanitary condition of the stable, but by departing from the prescribed method they take the risk of creating a nuisance.

2. If the stable is a nuisance, the owners must be prosecuted for maintaining a nuisance, and not for failing to comply with the plans specified in the ordinance.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Harry W. Morford and others, against the board of health of Asbury Park, to review an ordinance of defendant. Judgment below set aside.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Hawkins & Durand, for prosecutors. Samuel A. Parkson, for defendants.

VAN SYCKEL, J. The controversy in this case relates to the validity of the following ordinance, certified into this court:

"Be it ordained by the board of health of the borough of Asbury Park.

"Sec. 43. Every stable or building which may be hereafter constructed or reconstructed in the borough of Asbury Park, in which any horse, mule or cow is kept or stabled, shall be so constructed and drained that no fluids, excrement or refuse liquids shall flow upon or into the ground. All of the surface of the ground, beneath every stall, in every such building, and for a distance of at least four feet in the rear of every such stall, shall be covered and protected from pollution by a water-tight floor, or covering, which shall be constructed as follows: Where the said water-tight covering rests directly upon the ground surface, the said covering shall consist of concrete made with finely broken stone, one part; sharp sand, one part; hydraulic cement, one part, or coarse gravel, two parts; hydraulic cement, one part; to be laid at least three inches in thickness. Upon this concrete foundation a layer at least two inches in thickness of best asphalt, or a layer at least two inches in thickness of coal-tar concrete, or a layer at least two inches in thickness of cement concrete made with sharp sand, one part, best Imperial Portland cement, one part, shall be laid. When the water-tight covering is not in contact with the surface of the ground, it shall rest upon joist or floor beams three inches by ten inches, laid twelve inches from centers, and it shall consist of spruce or yellow pine planking, two inches thick and six inches wide, with beveled

edges, and it shall be closely laid so that the joints shall be V-shaped, and be open at the top one-quarter of an inch. Said joints shall be calked with oakum and be made water-tight. Every such water-tight covering shall be laid upon a grade not less than one-eighth of an inch to each foot, and shall be so drained that all fluids which may fall upon it will be conveyed to a street sewer or otherwise disposed of subject to the terms of a permit from this board. Portable wooden racks shall be placed upon all such asphalt, coal-tar, concrete or cement concrete floors within said stalls. Said wooden racks or floor coverings shall be constructed of spruce strips, two inches in thickness, made in two sections and they shall be so placed that they may be readily removed for cleaning. No refuse liquids nor any fluid excrement shall fall upon or flow or soak into the ground beneath or adjoining any stable or building which is already erected in the borough of Asbury Park, and in which any horse, mule or cow may be kept or stabled. Whenever the floor of any stable or building already erected and in which any horse, mule or cow shall be kept or stabled is not water-tight and is not so graded and drained that all refuse fluids which may fall upon it are quickly carried to a street sewer or otherwise disposed of in accordance with the requirements of this section, then the owner of every such stable or building shall, within thirty days after having received notice from this board, cause the floor of every such stable or building to be relaid in conformity with the requirements and specifications contained in this section. All of the solid excrement of animals which may accumulate on any premises in the borough of Asbury Park or which is stored thereon shall be placed upon a water-tight floor in accordance with the terms of a permit from this board, and all such excreta shall be protected from sun and rain. Any person or persons or corporation who shall offend against any of the provisions of this section shall forfeit and pay a penalty of one hundred dollars."

The board of health derives its power from the following legislative acts: By the act of February 22, 1888 (2 Gen. St. p. 1642), boards of health are given power to adopt ordinances; to compel, prescribe, regulate, and control the plumbing, ventilation, and drainage of all buildings, public and private, and the connection thereof with outside sewers, cesspools, or other receptacles, etc.; and to secure the sanitary condition of all buildings, public and private. Again, by the act of March 29, 1892 (2 Gen. St. p. 1644), power is given to regulate the keeping of all kinds of animals, and to regulate and control the accumulating of offal, and to secure the sanitary condition of all public buildings, and to protect the public water supply, and to prohibit and remove any offensive matter or abate any nuisance in any place, public or private. The act of 1888

also requires plans for the plumbing, ventilation, and drainage of buildings to be submitted to the board of health for inspection and approval. While the courts fully recognize the importance of the powers granted to boards of health, and give them a liberal construction, such boards will be confined in their interference with the lawful business of any individual to such interruptions and regulations as may be reasonably necessary to enable them to abate any nuisance he may create in conducting it. *Well v. Ricord*, 24 N. J. Eq. 169.

The prosecutors insist that the statutes under which boards of health are constituted do not empower them to prescribe the manner in which stable floors shall be laid with the strictness and particularity contained in the certified ordinance, and that it is therefore unreasonable and void. In *Gregory v. Mayor, etc.*, 40 N. Y. 273, the board of health had power to carry into full execution whatever the health and safety of the citizens required. The New York court held that, in the exercise of such authority, the board could not order generally that all sinks and privies be removed as nuisances, but must find the existence of the nuisance as a fact, and exercise a specific judgment as to the necessity for removal. The Massachusetts statute in general terms authorizes the boards of health to order the owner or occupant of premises at his own expense to remove a nuisance. In *Reservoir Co. v. Mackenzie*, 132 Mass. 71, the supreme court denied the power of the board to prescribe the exclusive manner in which it should be removed, namely, by filling with gravel, earth, or some proper material, to the satisfaction of the board, the flat lands which caused the alleged nuisance. The court declared that the owner had the right to adopt the alternative of excavating or dredging the flats, or keeping them covered with water. This ruling was in conformity to the view which prevailed in *Salem v. Railroad Co.*, 98 Mass. 431, where the owner was not restricted to the mode prescribed by the board of health for removing a nuisance. In *Health Department v. Lalor*, 38 Hun, 542, the statute provided that the drainage and plumbing of all buildings should be executed in accordance with plans previously approved in writing by the board of health, and in consequence of such specific authority the owner of property was prohibited from departing from the plan so approved.

It is well settled that, in order to uphold the action of boards exercising a special statutory jurisdiction, authority for it must be found in the positive law. In our statutes, before referred to, the power is given in general terms to the board of health to pass ordinances to regulate the drainage of stables. There is no language which authorizes the board to prescribe a mode to which stable owners must rigidly conform. On the contrary, the act of 1888 expressly rec-

ognizes the right of the stable owner to submit plans for drainage to the board for approval, and this negatives the idea that an ordinance may lawfully be adopted which will deprive the owner of that privilege. The conclusion which results from this view of the statute is, not that the ordinance is void, but that the owner is not restricted to the manner of laying the floor which is prescribed by the ordinance. The ordinance stands as a protection to those who conform to it. If the owner secures the sanitary condition of his building by adopting some other plan, he is not amenable to prosecution. In departing from the directions contained in the ordinance, he takes the risk of creating a nuisance. If the plan he resorts to is a failure, he may be held for the penalty, not on the ground that he has not conformed to the plan specifically set out in the ordinance, but on allegation and proof that his stable is a nuisance.

Whether, in this case, the complaint is in such form, and the ordinance so framed, that upon proper proof the penalty could lawfully be imposed upon the owners of the stable, it is not necessary to decide. The justice before whom the proceedings below were had convicted the owners of the offense of violating the ordinance, and imposed the penalty for that alleged offense, and not for maintaining a nuisance. They may have violated the ordinance without committing the offense of creating a nuisance. No conviction could lawfully have been had except for maintaining a nuisance. The judgment below must, therefore, be set aside.

(61 N. J. L. 486)

STATE (RICHARDS, Prosecutor) v. CITY OF BAYONNE.

(Supreme Court of New Jersey. Feb. 21, 1898.)

INTOXICATING LIQUORS—KEEPING OPEN ON SUNDAY.

The proprietor of a licensed saloon was convicted under an ordinance that forbade "keeping open" on Sunday.

Held: (1) That the ordinance was a lawful regulation, under the city charter.

(2) That its meaning was that the proprietors of public houses should temporarily cease entertaining the public.

(3) That the testimony described a saloon that was "keeping open," and justified the conviction.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Frank Richards, against the city of Bayonne, to review an ordinance of defendant. Ordinance sustained, and judgment of the court below affirmed.

Argued June term, 1897, before GARRISON and LIPPINCOTT, JJ.

W. D. Daly, for prosecutor. Thos. F. Noonan, Jr., for defendant.

GARRISON, J. The prosecutor of the writ was convicted under the following ordinance:

"Sec. 14. No person or persons licensed to keep a restaurant and beer saloon, or either, as aforesaid, within the limits of the city of Bayonne, shall keep open restaurant or saloon on the Christian Sabbath, or the first day of the week, commonly called 'Sunday,' under the penalty of twenty dollars for each offense."

This ordinance was passed under the police powers contained in the city charter, and the general authority thereby given to "regulate" saloons.

The first reason assigned is "that this ordinance is unreasonable and uncertain, and does not specify in what respect it was illegal for the defendant to keep open his restaurant and beer saloon on Sunday."

To "keep open," as applied to places of business and to public houses, is a familiar expression, constantly in use. Its meaning in the present case is clear, viz. that the proprietors of public houses shall temporarily cease to entertain the public.

It does not refer to the closing of shutters or to barring of doors. These may be done in order that the place may "keep open."

It is not met by the mere refusal to sell intoxicating liquors. It means more. As "to keep open" is a standing invitation that gives to the public a right of access and of entertainment, so "not to keep open" means that this invitation is withdrawn, and that all public entertainment has ceased. No better illustration of just what constitutes a saloon that is being kept open on Sunday can be found than that given by the witness upon whose testimony this conviction rests.

John Gorman, a police officer of the city of Bayonne, being called and sworn as a witness, testified as follows: "I was doing my duty on West Twenty-First street on the morning of the 28th day June, A. D. 1896, it then being the Christian Sabbath, or the first day of the week, commonly called 'Sunday.' Heard loud noise inside of Richards' place. My attention was first attracted by the loud talk of a man and woman outside. I went through an alleyway on the east side of the saloon, and went to the back door, opened same, and went into the saloon. Walked up to the bar. Saw four or five men at the bar. Dice and box were on the bar; also four glasses half full of some liquor of a light red fluid. The defendant was behind the bar, with an apron on. I told him he was doing business illegally. He said he would not do so again; let it go this time. There was no other door to enter the saloon, except the one in front of the house, which was locked."

This aptly describes a saloon whose proprietor had closed the doors in order to "keep open" the saloon.

The cases cited in the brief of counsel for the defendant are in point so far as identity

of legislative language permits. *Harrison's Case*, 11 Gray, 308; *Kurtz v. People*, 33 Mich. 282; *People v. Waldvogel*, 49 Mich. 337, 13 N. W. 620; *People v. Cummerford*, 58 Mich. 328, 25 N. W. 203; *State v. Amba*, 20 Mo. 220; *Hall v. State*, 3 Ga. 22; *Hussey's Case*, 69 Ga. 54; *Ringgold*, Sunday Law, 182; 11 Am. & Eng. Enc. Law, 547, and cases and notes there cited.

The case of *Houtsch v. Jersey City*, 29 N. J. Law, 316, is not in point. The ordinance in that case specified "exposure for sale" of intoxicating liquors.

The second reason is that the ordinance is "oppressive, and interferes with personal rights, in that it may impose a penalty upon an act which is not in violation of law."

To this the rejoinder is that all police regulations are in the nature of interferences with unrestricted personal freedom, which thereby ceases to be a right, and becomes a violation of law.

The remaining reason is that the ordinance is not a "regulation" of restaurants and saloons within the meaning of the city charter, the words of which are, "to license, and regulate and prohibit inns or taverns, restaurants and saloons." The definition of such a regulation is that it is a partial restriction, which does not wholly prohibit. The case of *Paul v. Gloucester Co.*, 50 N. J. Law, 585, 590, 15 Atl. 272, is directly in point. Finding no error or insufficiency in the record sent to this court, the judgment contained in it is affirmed.

(61 N. J. L. 500)

STATE (PRICE, Prosecutor) v. STATE.

(Supreme Court of New Jersey. Feb. 21, 1898.)

INDICTMENT—CAUSING PREGNANT.

An indictment for causing pregnancy, under section 204 of the Crimes Act (1 Gen. St. p. 1086), is not insufficient because it states more than one occasion upon which illicit intercourse occurred, and omits to state any certain time and place.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Theodore J. Price, against the state, to review an indictment found in the court of oyer and terminer of Atlantic county. Motion to quash denied, and record sent back for trial.

Argued November term, 1897, before GARRISON and LIPPINCOTT, JJ.

H. S. Scovel, for prosecutor. S. E. Perry, for the State.

GARRISON, J. The indictment brought up by this writ charges that the prosecutor, on or about the 15th day of November, in the year 1895, and on divers other days in the months of November and December, 1895, and on divers other days in the months of January, February, March, and April, 1896, being a single man above the age of 18, under promise of marriage, did have

sexual intercourse with one M. B., a single female of good repute for chastity, under the age of 21 years, she thereby becoming pregnant.

The reasons assigned for quashing this indictment are two:

First. Because the offense is charged and alleged to have been committed in continuity.

Second. Because each act of having sexual intercourse, under the circumstances mentioned, is a distinct offense; hence, two or more acts cannot be charged in the same count or indictment.

The statutory authority for this indictment is section 204, Crimes Act (1 Gen. St. p. 1086). Its provisions are: "That if any single man over the age of eighteen years, under promise of marriage shall have sexual intercourse with any single woman of good repute for chastity, under the age of twenty-one years, and she shall thereby become pregnant, any person so offending shall be deemed guilty of a misdemeanor and, on conviction," etc., "and provided that in case the party offending marry the female at any time before sentence then sentence shall be suspended and he be discharged from custody, and in case he marry the female after sentence, then he shall be discharged from all further imprisonment."

It will be observed that the ensuance of pregnancy is the essential condition of this punitive legislation, the gravamen of which is, not the mala mens of the offender, but the physiological result of his offense. By it fornication is not *malum in se*, but the production of pregnancy is *malum prohibitum*. Regarding the legislation, not in its moral, but in its legal, aspect, the indictment based upon it is not open to criticism upon either of the grounds stated. By the peculiar structure of the statute, acts of illicit intercourse are not penal when committed, and at no time constitute an independent or complete ground of indictment. In case pregnancy ensue, they become, by way of relation, evidence of an essential factor of the defendant's guilt. The rule that time and place must be stated with certainty in an indictment is limited to the offense, and does not include evidence, however essential, and is applicable only where that which happened at a certain time and place was indictable. The cases cited in the brief for prosecutor are all of this character,—under indictment for incest, adultery, fornication, hunting on Sunday, single sales of liquor, etc.

I have drawn attention to this distinguishing feature because of the zeal with which the general rule of pleading was argued. A complete disposal of the motion to quash is, however, found in the statute (1 Gen. St. p. 1128, § 42), which enacts that no indictment shall be held insufficient for such an omission in any case where time is not of the essence of the offense, as it is not in this

case. *Ketline v. State*, 59 N. J. Law, 468, 36 Atl. 1033.

The motion to quash is denied, and the record sent back to the Atlantic sessions for trial.

(61 N. J. L. 499)

STATE (WOMSLEY, Prosecutor) v. MAYOR, ETC., OF JERSEY CITY.

(Supreme Court of New Jersey. Feb. 21, 1898.)

DISCHARGED VETERAN—ABOLITION OF OFFICE.

Section 3 of "An act regarding honorably discharged Union soldiers, sailors and marines" (P. L. 1895, p. 317), applied to a state of facts. (Syllabus by the Court.)

Certiorari, on relation of James Womsley, against the mayor and aldermen of Jersey City, to review a certain resolution. Resolution set aside.

Argued November term, 1897, before GARRISON and LIPPINCOTT, JJ.

McEwan & McEwan, for prosecutor. W. P. Douglass, for defendant.

GARRISON, J. The prosecutor of the certiorari is an honorably discharged Union soldier. On June 29, 1895, he was employed by the defendant under the following resolution:

"Resolved, that James Womsley be, and he is hereby, appointed as reservoir keeper at high service, vice Theodore Meedles, said appointment to become effective from and after June 30th, instant."

Pursuant to this appointment, the prosecutor performed the duties of reservoir keeper by residing on the spot, and being in constant attendance there, taking care of the grounds, telephoning the height of the water twice daily, reporting breaks in the reservoir, shutting off the gates, and weighing the coal delivered at high service.

On February 8, 1897, the following resolution was adopted by the board of street and water commissioners:

"Resolved, that from and after February 28th, instant, the position designated 'Reservoir Tender' at high service be abolished, and that the services of James Womsley as said reservoir tender be dispensed with from and after that date."

On June 19, 1897, the prosecutor, at the request of the engineer in charge at high service, delivered up the keys, but continued to perform the same duties, except that from that date until August 24, 1897, he did not take and telephone the height of the water.

On August 24th the keys were redelivered by him to the engineer, and he resumed all of his former services.

On May 12th this resolution was adopted:

"Resolved, that James Burke be, and he is hereby, appointed as general overseer at high-service pumping station."

And five days later it was:

"Resolved, that the two several resolutions heretofore adopted by this board, May 12,

1897, (first) appointing James Burke as general overseer at high-service pumping station, and (second) fixing the salary of said office, be, and are hereby, reconsidered and rescinded."

James Burke never reported for duty. The prosecutor has continuously performed the duties above enumerated, which are specially pertinent to his position, and of a permanent and essential character.

Assuming that by the abolition of the position of "reservoir tender" the position of "reservoir keeper," to which the prosecutor was appointed, was intended to be, and was, effectively designated, the facts above detailed show clearly that the duties of the place were not done away with, altered, or merged into any other service. In fact, the elusive character of the pretended abolition is too plain to require any demonstration. It was, in effect, an evasion of the sort that was forbidden by section 3 of "An act regarding honorably discharged Union soldiers, sailors and marines" (P. L. 1895, p. 317).

The resolution of February 8th is set aside, with costs.

(61 N. J. L. 436)

STATE ex rel. SUTHERLAND v. BOARD OF STREET & WATER COM'RS OF JERSEY CITY.

(Supreme Court of New Jersey. Feb. 21, 1898.)

ABOLITION OF OFFICE—DISCHARGE OF UNION SOLDIER.

The abolition of a municipal office or position held by an honorably discharged Union soldier, for the purpose of economy or of promoting the efficiency of the public service, is not rendered unlawful by the veteran act of March 31, 1897 (P. L. 1897, p. 142).

(Syllabus by the Court.)

Rule for mandamus, on relation of George F. Sutherland, against the board of street and water commissioners of Jersey City. Rule to show cause discharged.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

Wm. T. Hoffman, for relator. W. C. Fisk, for defendant.

DIXON, J. Prior to May 12, 1897, the relator was assistant assessment clerk in the office of the board of street and water commissioners of Jersey City. His position was under the control of that board, and on the day named the board passed the following resolution: "Resolved, that for the purpose of economizing in the salary list in the bureau of engineering and survey, the position designated and known as 'Assistant Assessment Clerk' be, and is hereby, permanently abolished, and the duties thereof transferred to and required to be performed by the assessment clerk. Further resolved, that the services of G. Frank Sutherland as such assistant assessment clerk be, and are hereby, dispensed with and terminated." The relator now asks for a mandamus directing

the board to rescind that resolution, because he is an honorably discharged Union soldier, and the act of March 31, 1897 (P. L. 1897, p. 142), forbids the abolition of an office held by such a person "for the purpose of effecting his dismissal," and entitles him to a remedy by mandamus for righting the wrong. But it is settled that statutes of this nature are not designed to prevent the abolition of an office and the transfer of its duties to another official, when such a course is taken bona fide for economical reasons, or for the promotion of greater efficiency in the public service. *Evans v. Freeholders of Hudson*, 54 N. J. Law, 585, 22 Atl. 56; *Newark v. Lyon*, 53 N. J. Law, 632, 23 Atl. 274; *Boylan v. City of Newark*, 53 N. J. Law, 133, 32 Atl. 78. According to its terms, the resolution now before us was taken "for the purpose of economizing," and the evidence does not lead us to the conclusion that the board was actuated by an ulterior motive, such as this statute condemns. The rule to show cause should be discharged.

(61 N. J. L. 407)

STATE (KELTY, Prosecutor) v. STATE.

(Supreme Court of New Jersey. Feb. 21, 1898.)

INTOXICATING LIQUORS—SALES NEAR CAMP MEETING.

An indictment under the act of March 31, 1897 (Laws 1897, p. 145), must allege that the sale of liquors was made within two miles of the lands occupied by an incorporated camp-meeting association, specifying the name of the association and the grounds so occupied, and the place where sale was made. Quære, whether said act is valid.

(Syllabus by the Court.)

Certiorari to court of oyer and terminer, Monmouth county.

Certiorari by the state, on the prosecution of Thomas Keltly, against the state, to review an indictment. Indictment quashed.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Aaron E. Johnston, for plaintiff. Wilbur A. Heasley, for the State.

VAN SYCKEL, J. The prosecutor is indicted in the oyer and terminer of Monmouth county, under an act entitled "An act for the punishment of crimes," approved March 31, 1897 (Pamph. Laws 1897, p. 145). This act provides that, "if any person shall sell from any wagon, sleigh or vehicle within two miles of any incorporated camp-meeting association any spirituous, vinous, malt or intoxicating liquors, such person shall be deemed guilty of a misdemeanor," etc. This certiorari is sued out to test the validity of the indictment.

Unless this act is construed to mean that the sale of liquors is prohibited within two miles of the lands occupied by an incorporated camp meeting, it is too indefinite and uncertain to be the basis of a criminal prosecution. Otherwise, there would be no fixed

point from which the measurement of distance could be made. Whether that meaning can be read into a criminal statute, in order to make it effective, is a question which it is not necessary, for the purposes of the present controversy, to decide. The indictment charges the offense in the language of the act. Where the language of the statute fully and clearly defines the crime, without leaving anything for implication or construction, it is sufficient to charge the offense in that manner. Here, however, the only interpretation which can uphold the act is that it is intended to forbid the sale within two miles of the grounds of the camp meeting. It is essential, therefore, in order to show that the crime has been committed which the statute, so construed, is designed to suppress, to allege in the indictment that the sale was made within two miles of the lands occupied by an incorporated camp-meeting association, specifying the name of the association, and the location of the grounds so occupied, and the place where alleged sale was made. The rule that, in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute, is said, in *State v. Halsted*, 39 N. J. Law, 402, to be always subject to the qualification that the crime must be set forth with clearness and all necessary certainty, to apprise the party accused of the offense with which he stands charged. The indictment in this case fails to make such allegations, and is therefore radically defective, and should be quashed.

(61 N. J. L. 437)

STATE (TREASURER OF CITY OF PLAINFIELD, Prosecutor) v. HALL.

(Supreme Court of New Jersey. Feb. 23, 1898.)

CONSTITUTIONAL LAW—TITLE OF ACT.

The supplement to the act providing for the review of summary convictions, which was passed March 31, 1890 (1 Gen. St. p. 1206), is rendered invalid by article 4, § 7, par. 4, of the state constitution, because the object of the law is not expressed in its title.

(Syllabus by the Court.)

Certiorari to court of common pleas, Union county; McCormick, Judge.

Certiorari, on the prosecution of the treasurer of the city of Plainfield, against Benjamin Hall, to review a certain order. Order set aside.

Argued February term, 1898, before COLLINS and DIXON, JJ.

Craig A. Marsh, for prosecutor.

DIXON, J. The writ in this case brings up an order made by the law or president judge of Union county common pleas, under the authority of "a supplement to an act entitled 'An act to provide for the review, by the justices of the supreme court of this state, of summary convictions by justices of the peace, police justices and recorders of cities in this state,' approved February 27,

1880," which supplement was passed March 31, 1890. 1 Gen. St. p. 1206. The constitution of this state requires (article 4, § 7, par. 4) that every law shall embrace but one object, and that shall be expressed in the title. Evidently the latter clause of this requirement is not met by the title of the law just mentioned. The object of the law is to confer on the judge of the court of common pleas the same jurisdiction as was conferred by the original act upon a justice of the supreme court, but no intimation of such an object is expressed in the title. For this reason, without considering the other objections taken to the proceedings, the order under review must be set aside.

(56 N. J. E. 413)

SLINGERLAND v. BINNS et al.

(Court of Errors and Appeals of New Jersey.
Feb. 28, 1898.)

MECHANICS' LIENS—NOTICES TO OWNER—ASSIGNMENT BY CONTRACTOR.

Under the fifth section of the supplement to the mechanic's lien law, approved March 14, 1895 (2 Gen. St. p. 2073), workmen and material men, creditors of the builder, who serve notices upon the owner in accordance with the statute, thereby secure, with respect to any money thereafter growing due upon the contract according to its terms, a right to payment in preference to the right of persons to whom the contractor has assigned such money before the notices were served.

Depue, Gummere, Ludlow, Adams, Kreuger, and Vredenburg, JJ., dissenting.
(Syllabus by the Court.)

Appeal from court of chancery; Plney, Vice Chancellor.

Bill by Henry Binns and another against David H. Slingerland to restrain the enforcement of a judgment. From a decree for plaintiffs (36 Atl. 277), defendant appeals. Decree reversed, and bill dismissed.

William W. Watson, for appellant. George P. Rust and John B. Humphreys, for respondents.

DIXON, J. On April 6, 1895, the complainants entered into a written contract with Ebenezer Scott, by which Scott agreed to erect for them a building in the city of Passaic for \$3,900. This contract with the specifications was duly filed in the Passaic county clerk's office. Afterwards Scott bought from the defendant materials which he used in the construction of the building, for which he owed the defendant \$450; and on September 12, 1895, the defendant, having demanded payment from Scott, served on the complainants a notice thereof in accordance with the provisions of the mechanic's lien law. At that time all moneys accruing under the contract were past due and paid, except the last installment, \$1,400, which was payable on the completion of the building, and had not yet matured. Scott failed to complete the building, and the complainants therefore finished it at an expense

of \$235.25. Besides this, they paid \$500.37, for which they claim credit on account of the \$1,400. Conceding all these credits, there would have become due to Scott for his final payment a balance of \$664.38, on the completion of the building, had he not previously given to various persons orders on the complainants amounting to \$690.86, which the complainants had paid. The complainants refused to pay the defendant's demand, and thereupon he sued them at law, and recovered judgment in spite of their contention that Scott's orders, having been given before the defendant's notice was served, were, as equitable assignments pro tanto of the fund, entitled to priority over the defendant's claim. The present bill was filed to restrain the defendant from enforcing his judgment, on the ground that, although the complainants' defense was overruled at law, it should be sustained in equity. On this bill the complainants obtained a decree in their favor, and thereupon the defendant appeals to this court.

Conceding that the contention of the complainants would have prevailed before the passage of the supplement to the mechanic's lien law, approved March 14, 1895 (2 Gen. St. p. 2073), the question now turns on the proper construction of the fifth section of that supplement, which is as follows: "That if the owner or owners of any building or other property which, by the act to which this is a supplement or the various supplements and amendments thereto, is made the subject of liens for or toward the construction, altering, repair or improvement of which labor or services have been performed or material furnished by contract, duly filed, shall, for the purpose of avoiding the provisions of the act to which this is a supplement, or the various supplements and amendments thereto, or in advance of the terms of such contract, pay any money or other valuable thing on such contract, and the amount still due to the contractor, after such payment has been made, shall be insufficient to satisfy the notices served in conformity with the provisions of the act to which this is a supplement, or the various supplements or amendments thereto, such owner or owners shall be liable in the same manner as if no such payment had been made." Prior to that supplement, this court had held that the contractor in a building contract was free to deal with his inchoate rights under the contract as he pleased, up to the moment when they were impounded by a notice given to the owner pursuant to the statute, and if, before the notice reached the owner, the contractor had assigned his rights, the notice was ineffectual. *Craig v. Smith*, 37 N. J. Law, 549; *Meyer v. Mutchler*, 50 N. J. Law, 162, 13 Atl. 620. The basis of these decisions was that the statute gave the workmen and material men no claim whatever upon the money payable under the contract, or upon the owner, until the statutory

notice was served. But, plainly, this section of the law changes the situation. It expressly forbids the owner to pay any money in advance of the terms of the contract, if the effect may be that the amount unpaid will prove insufficient to satisfy notices served in conformity with the statute. The prohibition is not confined to payments made to the contractor personally. It embraces payments made to any one. In substance, it directs that the owner shall not in any way discharge his liability to pay under the contract until, according to the terms of the contract, the time to do so has arrived, in order that, until that time, such liability may be preserved for the benefit of workmen and material men who serve the statutory notice. This enactment, we think, affords a reasonably clear indication of a legislative purpose to give to persons entitled to serve the statutory notice an inchoate lien upon the liability of the owner under the contract, until that liability matures according to the terms of the contract, such lien to become perfect on service of the notice before the liability matures, but to expire on such maturity if no notice has been given, for a notice served after maturity derives no aid from this provision. Of course, this inchoate lien does not impair the owner's right to protect himself against consequences of any default upon the part of the contractor, but it does prevent the contractor from making any disposition of his rights detrimental to the claim of those serving notice according to the act. These views are supported by decisions on similar statutes elsewhere, although, the statutes being somewhat different, the decisions may not be exactly in point. *Post v. Campbell*, 83 N. Y. 279; *Jorda v. Gobet*, 5 La. Ann. 431; *First Nat. Bank of Bridgeport v. Perris Irrigation Dist.*, 107 Cal. 55, 40 Pac. 45. On this construction of the statute, the rights of Scott's assignees were subordinate to the rights of the defendant, and the complainants could not, by paying those assignees, lessen their liability, either at law or in equity, to the defendant.

The suggestion made against the constitutionality of the statute, if it has any substance, should have been presented in the trial at law. The decree should be reversed, and the bill dismissed.

(March 4, 1898.)

GUMMERE, J. (dissenting). I am unable to concur in the view, expressed in the opinion of the majority of the court, of the effect to be given to the fifth section of the supplement to the mechanic's lien law, approved March 14, 1895. In my judgment that section was correctly construed by Vice Chancellor Pitney, in his opinion delivered in the court of chancery in this case. 55 N. J. Eq. p. 55, 36 Atl. 277. For the reasons stated in that opinion, I vote to affirm the decree appealed from.

I am authorized to state that Justices DE-

PUE and LUDLOW and Judges ADAMS and KREUGER also vote to affirm the decree, for the reasons stated in the vice chancellor's opinion.

(March 3, 1898.)

VREDENBURGH, J. (dissenting). This controversy relates to rival equities, founded on claims for materials furnished in the erection of a building by contract, asserting precedence, as between themselves, out of the contract money owing from the owners to the contractor, such money being insufficient to satisfy all the claims against it. The case was heard in the court of chancery upon bill and answer, and the decree appealed from restrains appellant from enforcing his judgment at law against the owners, which judgment, they insist, is without equitable support if they are entitled to certain credits against the last payment, of \$1,400, of the \$3,900 of money payable by them under the contract. The facts material for the present purpose are these: On April 6, 1895, a written contract for the erection of a building in the city of Passaic was made between the owners (the respondents) and the contractor, and was duly filed in the clerk's office, containing the following clause: "Should the contractor at any time during the progress of said works refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three days' notice in writing being given, to finish the said works, and the expenses shall be deducted from the amount of said contract." The contractor neglected to supply a sufficiency of materials, and the owners, having given him the three days' notice in writing contemplated, incurred, in July, 1895, debts for lumber of \$243.27, procured by them to finish the works. Debts, also, for other lumber and materials, for \$615.86, were incurred in the erection of the building (the bill inadvertently omits to state the circumstances and the dates when or by whom), for which written orders were drawn by the contractor, and presented to the owners, prior to the service upon them by the appellant of his "stop notice." Subsequently, on September 12, 1895, the appellant, who had furnished tin and plumbing materials for the building at request of the contractor, served a "stop" notice upon the owners under the third (now the thirty-eighth) section of the mechanic's lien law, and on May 26, 1896, obtained judgment in the Passaic circuit court for a balance of the amount so demanded against the owners. The materials, constituting the debt of \$243.27, which were purchased by the owners, were delivered at the works with the knowledge and sanction of the contractor. The owners paid the debt (so previously incurred by them) on December 7, 1895, to the American Lumber Company, and claim the right to deduct such amount as a credit or expenditure authorized by the contract. They have also, since Sep-

tember 12, 1895, paid the said orders for \$615.86, previously drawn upon them as above stated, and claim like credit for such expenditure, and have filed their bill of complaint in the court of chancery to enforce preference for these several payments against this contract money in their hands, and to that end to restrain the appellant from prosecuting his judgment at law against them. While the bill of complaint is not technically one for the specific performance of a contract, I think that it may be so regarded, and that the respondents are entitled to the specific relief they ask against this judgment, as well as to a decree, under their general prayer for relief, declaring that the contract money has been fully paid, and that the contract should be delivered up to be canceled.

The question now to be considered, it seems to me, is whether the respondents, having exercised their right, under the above-quoted clause of the contract, "to provide materials, etc., to finish said works," after the contractor's default therein, and having incurred debts, and also expended money upon the contractor's orders for that purpose, have, notwithstanding the provisions of the fifth section of the supplement to the mechanic's lien law (hereinafter quoted), established an equity to be credited therefor upon said contract. While the practical effect of such credits is to exhaust the fund payable by the owners under this contract, and to discharge them from further liability thereunder, as well as from appellant's judgment, yet I think that such result, where no fraud or collusion is charged, is their just protection under the contract, and does no violence to the intent of said fifth section. It will be observed that the exercise by the owners of their contractual right of supplying the materials necessary to complete the building worked a distinct benefit to the appellant, as well as to other material men, in this: that it secured to the owners, who were responsible for the contract money, a finished and valuable building, instead of a worthless ruin. For instance, the tin and plumbing materials placed in the works by the appellant would be valueless if the lumber put there by the respondents was wanting. So that, even if we regard the question from the appellant's standpoint alone, the ultimate payment of his claim out of the contract money might depend upon the feature of the contract which enabled the owners to come to the rescue of an insolvent contractor, and supply the money and credit necessary to complete the building. The falling walls of an unfinished structure, exposed to the storms and winds and the elements, could easily drag down the financial credit and ability of its owners to destruction with it. Now, it is obvious that the exercise of this measure of self-protection by the owners worked neither hardship nor surprise to the appellant. On the contrary, his

own "stop notice" was grounded upon the fact of the publicly filed contract itself, and he is therefore charged in law with, not only constructive notice, but also with actual knowledge of all its terms. His materials were furnished with full notice of this precaution taken by the owners to enable them to rescue their property and save themselves from the neglect of the contractor when the crisis should arise which would justify such action on their part. The most cursory examination of the third (now the thirty-eighth) section of the lien law cannot fail, I think, to show that the whole scope of that section is to place the unpaid material men, who serve notices under its terms, upon the same footing as the contractor; certainly, upon no higher standing. It simply authorizes the owners to "retain" from amounts of money either "owing" or "that may thereafter become due from them" on the contract such amounts as they are satisfied are, correctly, still due from and unpaid by the contractor to the material men serving such notices. Their rights under this section are in all respects subordinate to those of the parties to that contract. If we need the suggestions of authority upon this subject, the cases of *Craig v. Smith*, 37 N. J. Law, 549, decided by this court, and of *Kirtland v. Moore*, 40 N. J. Eq. 110, are sufficient. In the last case the pointed language of Vice Chancellor Van Fleet is as follows: "Upon notice given, the workman or material man, to the extent of his demand, takes the place of the contractor. But if, when the notice is served on the owner, there is nothing owing to the contractor, and he is without right against the owners, the notice is without legal effect. The test is whether a suit for the money demanded will lie by the contractor against the owner. If it will not, the owner is not liable to a suit by the material men."

If the matter rested here, it must be plain that the owners had the clear contractual right, and, of course, the superior equity, to preference for such expenditures upon their contract. But it is insisted by the appellant that the fifth section of the supplement of March 14, 1895, to the mechanic's lien law (2 Gen. St. p. 2074), denies to the owners any preference for money so expended, and makes them "liable in the same manner as if no such payment had been made." If this be the correct interpretation of the intent of that enactment, as applicable to the present contract, it will certainly demonstrate the futility of any effort by owners in their filed contracts (which are notices to all interested) to protect themselves, and all those having valuable interests at stake, from the disaster of an unfinished erection thrown suddenly upon their hands by insolvent contractors. It seems to me that such construction is not warranted by its terms. That section, in its material parts, reads thus: "That if any owners for the purpose of avoiding the pro-

visions of the [lien] act, or in advance of the terms of such contract, pay any money on such contract, and the amount still due to the contractor, after such payment has been made, shall be insufficient to satisfy the notices served in conformity with the provisions of the [lien] act, such owners, shall be liable in the same manner as if no such payment had been made." In the first place, the purpose of the owners in their efforts to complete the building, and their action in the purchase of materials, and the payment of the contractor's orders to that end, exercised in strict conformity to the contract, should not be construed to be a "purpose" to avoid the provisions of the lien law. In a certain sense, the making of all building contracts which avoid, as they all certainly do, when made and filed, except as to the contractor alone, the provisions of the first section of the lien law, is subject to the same condemnation. A purpose to avoid the statute will not be ascribed by any court of equity to owners endeavoring only to avoid a financial loss, and acting in compliance with the very terms of their contract. I think we are justified in assuming, in the absence of any charge of fraud or collusion, that their only purpose, in making such payments, was to complete the building, and thus to effectuate, not to avoid, the provisions of the lien law. It is unnecessary to pursue this point further. In the next place, the act of the owners in incurring and paying said debts and orders to provide sufficient materials to finish the works, as well as in the payment to material men of the orders in question, was not either literally or in effect a payment "in advance" of the terms of the contract; i. e. a payment contrary to the terms of the contract. Nor was it a payment on the contract at all, in the sense used in the fifth section. It was a disbursement, authorized by the terms of the contract in case of default of the contractor, made to the third persons holding equities adverse to the contractor,—not a payment to or favoring the contractor. The section in the New York law, upon this head, uses the word "collusion," showing the evils against which the law in that state was leveled. But there is no pretense of collusion in the present case. The contractor received nothing, and was entitled to no payment, because he had broken his contract and had disintegrated himself to any payment. The whole of the contract must be read together. The contractor, by his neglect to finish the works, had no legal right to demand of the owners the payment of the \$1,400 (which was covenanted to be paid him only on condition that he performed the work), nor any part of it, as such. There was, in fact, no payment made by the owners to the contractor of this \$1,400, or any part of it, either in advance of the terms of the contract, or at any time, and therefore the statute does not come into operation. If it be claimed that, in the contempla-

tion of this statute in a court of equity, those payments by the owners to third parties, made necessary by the contractor's breach of his contract, were payments to the contractor, such claim disregards the facts of the whole transaction, and seems to me to be unwarranted. There could exist no basis for such a claim, without the charge of fraud or collusion, and no such charge has been made anywhere in the case. Again, the words "pay" and "payments" are used in this section in their usual signification, and refer only to an extinguishment of a previous indebtedness owing from the debtor to the payee. But in the case in hand the owners owed no debt to the contractor (the payee intended by the law) by force of the contract for the materials in question.

Unless the above reasoning is at fault, the advance payments intended to be forbidden by this section apply only and strictly to the payments due from owners to a contractor by reason of the performance of his contract, and not to payments of debts due from the owners to third persons for liabilities incurred by them because of the nonperformance of the contract by the contractor. The equity of respondents to apply, as a credit upon the contract price, the expenses incurred or assumed by them for materials supplied by them, by whatever methods they deemed effective, to the works neglected by the contractor, rests securely upon their contractual rights as owners against the defaulting contractor, which rights, I think, are unimpaired and unaffected by the statute in question. The argument then becomes narrowed to this point, viz.: After the failure of the contractor to perform his contract, the \$1,400 payment which would otherwise have become due him, or to those serving stop notices under him, never could become due, except by the waiver by the owners of the performance of the contract. The juncture of a payment "in advance of the terms of the contract," referred to in section 5, therefore, never arose in this case, because the owners were absolved from such payment unless there was a waiver by them of their right to performance by the contractor, and none is pretended. It follows that the payments by the owners of the \$243.27 and of the \$615.86 incurred and assumed by them to the material men were not payments "in advance of the terms of the contract," but were simply their own expenditures to complete the building, and for which, in an accounting with the contractor on a quantum meruit, they would be entitled to credit against any claim by him, or of the appellant under him, for any part of said \$1,400.

I have endeavored to present additional support for the equitable conclusion of the court below, and to show, from the peculiar contractual relations of the parties, reasons why the equities of these owners in this case rise beyond the reach of the enactment in question; but it is not intended, in what has gone

before, to overlook the importance of the reasoning in the opinion below, supported by cases there cited. These clearly show that the drawing of those written orders operated as equitable assignments, according to their extent, of any payment, and that the owners, by their diligence, thereby acquired a priority, as being "first in time and therefore prior in right," over the claims of the appellant. The drawing and presentation of those orders placed the drawees in a position to enforce such payment in a court of equity out of any unpaid money which might become due. The rights of third persons, which had become superior to those claiming under the contractor, had therefore supervened, and the owners, in paying them afterwards, were yielding to their equitable obligations, and their payment of them was wholly involuntary. Notwithstanding this, the true equity of the owners in making such payment rests, in my view of the facts and the statute, entirely upon the above-quoted clause of the contract, and of the action of the owners in good faith thereunder, and because of that view this opinion has been written. This controversy, in its form at law, was submitted to the Passaic circuit court upon an agreed statement of facts, which a subsequent stipulation between the solicitors, in its present form, has enlarged, and from which and the statements of the bill, as admitted by the answer, it sufficiently appears that the respondents were denied the right to present to the law court the defense of the payment of said orders on the ground that it was purely an equitable defense. The respondents acquiesced in that ruling, and then resorted to a court of equity to obtain relief, but, if their decree be now reversed, will be denied it in both jurisdictions. Under the submission incorporated in the bill of complaint, and the circumstances in which the jurisdiction of this court has intervened, I think the respondents should have been allowed the benefit of the feature of their contract above set forth, even though such claim could also have been made available at law, if it had been insisted upon against the ruling of the circuit court. Therefore, and at this late day, the parties should not be turned around. I think the decree below should be affirmed.

(61 N. J. L. 223)

INHABITANTS OF TOWNSHIP OF BERNARDS, SOMERSET COUNTY,
et al. v. ALLEN et al.

SAME v. POST et al.

(Court of Errors and Appeals of New Jersey.
Feb. 28, 1893.)

CONSTITUTIONAL LAW—TAX COMMISSIONERS.

Act March 20, 1884, provides that if the local boards or officers of incorporated towns or municipalities neglect or fail to levy the taxes for certain specified purposes of local government, or there is a vacancy in the local board or office, it shall be the duty of the gov-

ernor to appoint and commission three resident freeholders, who shall assess and levy such taxes for such sums as they shall deem expedient. *Held*, that the act, in so far as it attempts to grant authority to commissioners appointed by the governor to levy taxes, is unconstitutional, since it is the delegation of a power which the legislature may confer only on the local municipal bodies.

Error to supreme court.

Certiorari by Anna Skinkle Allen, George B. Post, and others to review a tax levy made by the inhabitants of the township of Bernards, Somerset county. From judgments rescinding a part of the levy (31 Atl. 219), the township brings error. Reversed in part.

R. V. Lindabury, for plaintiffs in error.
Francis E. Marsh and Frank B. Allen, for defendants in error.

DEPUE, J. The township of Bernards was incorporated as one of the townships of this state, with all the rights, privileges, powers, etc., given and granted by the general township act of 1846 and the supplements thereto. By section 4 of that act the freeholders and inhabitants who are qualified to vote at town meetings were given full power, and were directed and required to assemble and hold town meetings in their respective townships at the places designated in the act. By section 8 the persons qualified to vote at town meetings were authorized to make and ordain such regulations and by-laws as the majority of them so assembled should from time to time judge necessary and proper for certain local purposes. Section 11 enacted: "That the persons qualified to vote at town meetings shall be and they are hereby empowered at their annual meetings, or at any other meeting duly held for the purpose, to vote, grant, and raise such sum or sums of money for the maintenance and support of the poor, the building and repairing of pounds, the opening, making, working and repairing of roads and keeping them in order, in such townships as are authorized to repair their highways by hire, the destruction of noxious wild animals and birds, for running and ascertaining the lines, and prosecuting or defending the common rights of such township, and for other necessary charges and legal objects and purposes thereof, as are or shall be by law expressly vested in the inhabitants of the several townships of this state, by this or some other act of the legislature, which money so voted and granted shall be assessed, levied and collected by the same persons, in the same manner, and under the like fees, fines and penalties as the money raised in such township by the board of chosen freeholders of the county shall be assessed, levied and collected, and at such times and in such proportions as the said town meetings, respectively, shall direct and appoint; provided, that the said fines and penalties shall

when recovered be paid to the clerk of the said township, and be applied to the use of the said township, in such manner as shall from time to time be directed and appointed at their annual meeting." 3 Gen. St. p. 3579.

At the annual town meeting of the inhabitants of Bernards township held pursuant to law March 4, 1883, the sum of \$1,200 was, by a vote of the qualified voters, ordered to be raised for the support of the poor, \$4,000 for roads, and \$500 for removing snow. On application to the governor, pursuant to the provisions of an act passed March 20, 1884, entitled "An act to provide for and secure the raising of revenue for the execution of the public duties of maintaining public schools, preventing the destruction of property by fire, preserving the public health, supporting the poor, maintaining police and keeping the highways and streets in a safe condition for public use within the limits of incorporated cities, towns and municipalities in cases where the local or municipal authorities or officers fail to provide for the performance of such duties" (3 Gen. St. p. 3411), the governor appointed three persons, freeholders and residents of the township, as commissioners of taxation for the said township. The commissioners, in pursuance of the authority conferred upon them in virtue of the said appointment, made a new levy of taxes under the provisions of the said act, and resolved to levy on the taxable property in the township \$2,000 for the protection and maintenance of public health, \$2,300 for the maintenance and support of the poor, \$324 for the support and maintenance of a police force, \$14,000 for keeping the highways and streets in a safe condition for public use, and \$1,700 for the expense of assessing and collecting such taxes and to meet deficiencies, making in all the sum of \$21,124 in lieu of the sum of \$5,700, the aggregate amount of appropriations voted at the town meeting, and fixed a percentage of \$1 per \$1,000 upon the valuation of taxable property as the rate of taxation. On the hearing of the certiorari, the supreme court excised so much of the levy of the commissioners as exceeded the amounts appropriated by the town meeting for supporting the poor and for keeping highways in a safe condition, on the ground that the town meeting had performed its duty in relation to the poor and roads of the township, and consequently the commissioners, under the statute referred to, had no power to levy taxes for those purposes. The court also excluded the levy of the commissioners for the support of a police force, for the reason that no police force had been established in the township. The court allowed the levy of the commissioners for the protection of public health to stand, on the ground that it was the duty of the voters of the township at the town meeting to provide for raising funds for these purposes. The levy of the commissioners to meet the expense of assessing and col-

lecting the taxes imposed by them, and to meet deficiencies, was reduced to the sum of \$200. The writ of certiorari was sued out by certain taxpayers of the township, and the township authorities, being dissatisfied with the judgment of the supreme court, prosecuted this writ of error. The claim of the plaintiffs in error is that the judgment of the supreme court was erroneous, in that the taxes levied by the commissioners were in all respects within the powers conferred on the commissioners by the act. On the argument of the writ of error, this court, of its own motion, directed that the case should be reargued on the constitutionality of the act of 1884, and the case was accordingly reargued on constitutional grounds. The material parts of this act will be stated presently. A preliminary consideration of the source of the power of taxation, and the principles by which power of taxation is controlled, will be serviceable.

Under the Norman kings of England, the right to tax to obtain money for public uses was vested in the king, and was exercised by him at his own will. The money directed by him to be raised was assessed on persons or property by the officers of the exchequer, collected by the sheriff, and paid into the exchequer. The expenses of foreign wars increased the burden of taxation upon the English people, and, taxes becoming so onerous, there was resistance, and, by force, the power of taxation was renounced by the crown, and conceded to the people. This result was accomplished by several charters granted by the crown. Not the earliest, but the most conspicuous, of the early concessions in this respect, was the Great Charter granted by King John. By this charter and others that followed it the renunciation of the right of taxation was given to, and the right of taxation conferred upon, the people. In the charter of the ninth year of Henry III. the grant in the first chapter is expressed in these terms: "We have granted also and given to all the freemen of our realm, for us and our heirs forever, these liberties underwritten, to have and to hold, to them and their heirs forever." By the confirmation of the Charter of Liberties of Englishmen, granted by 25 Edw. I., which, as was said by Sir Edward Coke, "is but an explanation of this branch of Magna Charta" (2 Co. Inst. 59), it was granted as well to the archbishops, etc., and also to the earls, etc., and "to all the communality of the land, that for no business henceforth we shall take such manner aids, taxes nor prizes but by the common assent of the realm." By a later grant, contained in the Statute de Tallagio non Concedendo, passed in the thirty-fourth year of Edward I., it was expressly granted that "no tallage or aid shall be taken or levied by us or our heirs in our realm without the good will and assent of archbishops, bishops, earls, knights, burgesses and other freemen of the land." Sir Edward

Coke, in his comment upon this statute, says "that the word 'tallagium' is a general word, and doth include all subsidies, taxes, tenths, fifteenths, impositions, and other burdens or charge put or set upon any man." 2 Co. Inst. 533. By the charter in the twenty-eighth year of Edward I., which was a confirmation of previous charters, it is recited that "forasmuch as the articles of the Great Charter of Liberties and of the Charter of the Forest, the which King Henry, father of our king that now is, granted to his people for the weal of the realm, have not been heretofore observed and kept because there was no punishment executed upon them, which offended against the points of the charters before mentioned, our lord, the king, hath again granted, renewed and confirmed them at the request of his prelates, earls," etc., "assembled in parliament," etc., "and hath ordained and enacted and established certain articles, against all them that offend contrary to the points of the said charters or any part of them or that in anywise transgress them in the form that ensueth; that is to say, that from henceforth the Great Charter of the Liberties of Englishmen, granted to all the communality of the realm," etc., "shall be observed, kept and maintained in every point," etc. Sir Edward Coke's comment on this charter is that "here 'commune' is taken for 'people,' so as 'tout le commune' is taken here for 'all the people'; and this is proved by the sense of the words, for Magna Charta was not granted to the commons of the realm, but generally to all the subjects of the realm, to those of the clergy and those of the nobility and to the commons also, and that 'commune' in this place signifieth 'people.' * * * So, 'a la commune' here signifieth, not to the commons of the realm, but to the people of the whole realm." 2 Co. Inst. 540. Though by these concessions the right of taxation was vested in the people of England, a legislative power was essential to a grant of money, and for providing the means by which moneys so granted should be raised by taxation; but this legislative function was exercised in parliament in a manner not in the ordinary course of legislation. The house of commons, as the representatives of the people, always claimed, and still does claim, successfully, the exclusive right to originate money bills, reducing the house of lords to the alternative of passing or rejecting such bills sent up to it by the house of commons for their consideration.

The right of the popular branch of the government to originate and adopt measures for providing revenue for public purposes was asserted by the colonial assembly as early as 1748. Acts had been passed granting money for the use of the colony, to give effect to which an act was necessary to settle the quotas of the respective counties. Such an act was passed by the house of assembly, and sent to the council. The council made

amendments to the bill. The house of assembly rejected the amendments, and sent a message to the council unanimously refusing to confer, with a resolution that the council had no right to amend any money bill whatever, and therefore they (the assembly) do reject the said amendments, and adhere to the bills as passed by the assembly, and that the house looks upon their amending the said bills to be a manifest infringement upon the rights and privileges of this house and those whom they represent. To a message from the governor, representing the great need of the means of carrying on the government, and expressing a desire for concord and unity in the deliberations of the two houses, the assembly returned an address stating that they had passed several bills for that purpose, and sent them to the council for their concurrence; that the council took upon themselves the liberty of amending them, which was an infringement upon the privileges of this house and the liberties of the people, by depriving them of the natural rights of his majesty's subjects, of being taxed in such a manner as they like best. This controversy continued, leaving the government without adequate support for nearly four years, until the session of February 11, 1752, when the council passed the bill sent up by the house of assembly. N. J. Archives (1st Series) Vol. 16, pp. 22, 201, 218, 256, 352, 357. The privilege thus asserted by the house of assembly was conceded during the colonial period, and was embodied in section 6 of the constitution of 1776, in these words: "That the council shall also have power to prepare bills to pass into laws, and have other like powers as the assembly, and in all respects to be a free and independent branch of the legislature of this colony, save only that they shall not prepare or alter any money bill, which shall be the privilege of the assembly." Const. 1776, § 6. This provision stands in our present constitution in a modified form, as follows: "All bills for raising revenue shall originate in the house of assembly, but the senate may propose or concur with amendments as on other bills," which is substantially the same as section 7, art. 1, of the constitution of the United States.

As already observed, the right of taxation is vested in the people; but legislation is necessary to exercise the right of taxation. Under our form of government, this legislative power is vested (in the first instance) in the legislature of the state. The legislature, in the exercise of its sovereign power, may confer upon the minor political subdivisions of the state (which are merely instrumentalities for the better administration of the government in matters of local concern) power to impose and levy local rates (taxes and assessments to provide the revenue by which municipal expenses are borne and debts and liabilities paid), on the principle that for local purposes the local authorities are the repre-

sentatives of the people. The powers conferred on boards of chosen freeholders in the counties, and upon other political subdivisions, such as cities, towns, townships, etc., are instances in which this legislative power is conferred upon minor subdivisions of the state. The townships from an early period were accustomed to regulate their local affairs, and provide means for local purposes, by a vote of the inhabitants assembled in town meeting; probably, in the first instance, without statutory authority. The tax act passed in 1686, entitled "An act for rates for highways," recites "that as there is no provision yet made for empowering the respective inhabitants of each town or hamlet to make assessments or rates or defraying the charge of the same," and enacts "that it shall be lawful for the inhabitants of each town or hamlet," etc., "to meet together and choose five of their inhabitants, who shall have power to make such rates and taxes for making and maintaining all highways, bridges, landings and ferries as are laid out, and also for defraying all public charges within their respective limits; the said rates and taxes to be confirmed, approved and amended by the quarter sessions, and collected by a constable by a warrant issued by some justice of the peace." The act also provides "that the persons so to be chosen shall have power to make such orders touching and concerning fences as they shall see meet for the good of the respective towns and hamlets." *Leam. & Spic. 294.* By an act passed January 26, 1716 (17), the freeholders and inhabitants, householders of every town, division, precinct, and district within the several counties of the province, were authorized to meet on a day mentioned yearly and every year, and, by plurality of vote, choose one assessor and one collector for the town, division, precinct, or district for which they are chosen, for the ensuing year. *Allison's Laws, 35.* By the act of June 28, 1766, it was enacted that no person or persons except in towns corporate should have the privilege to give his or their voice or vote at any town meeting for electing any town or precinct officer or officers or other business to be done or transacted at any town meeting, unless the person offering such vote is a freeholder, a tenant for years, or householder and resident in such township or precinct. *Allison's Laws, 288.* The act passed February 21, 1798, embodied the several statutes relating to townships in a general act, which is substantially our present act. It constituted the inhabitants of every township, precinct, and ward a body politic and corporate, by certain names mentioned. The freeholders and inhabitants qualified to vote were required to assemble at town meetings at a specified time, and were authorized to elect officers for their government, and to make and ordain such regulations and by-laws as the majority of them so assembled should judge necessary and proper for certain local pur-

poses. The eleventh section of that act conferred upon the qualified voters of the township at such town meetings the right to vote and grant money for specified local purposes. The eighth section of our present act is in all material respects a copy of section 11 of the act of 1798 (*Pat. Laws, 276; Rev. Laws, 332*). The legislation just referred to constituted the qualified voters of the townships assembled in town meeting the legislative body by which the affairs of the township were administered, and invested the town meeting with power to appropriate and raise moneys by taxation for local purposes.

Except as the legislature of the state may confer upon political divisions powers to legislate and to provide revenue for defraying the expenses of the local governments, it has no power to delegate the power of taxation to ministerial officers or to another department of the government. *Cooley, Taxn. 47; 25 Am. & Eng. Enc. Law, 79-186.* It may provide for the appointment of officers and other persons to assess and collect taxes, but the essential power of taxation, which is the power to levy a tax, is incapable of being delegated by the legislature. Every system of taxation consists of two parts,—one the levying of taxes, the imposition of taxes on persons or property; the other, the assessment and collection of taxes. The first is a legislative function, controlled by constitutional prescriptions; the other—the assessment and collection of taxes—is mere machinery by which the legislative purpose is effectuated. Whether taxes shall be assessed and collected by officers elected by the people, called "assessors" and "collectors," or by officers holding office under some other authority, is left to legislative discretion. *Trustees of Public Schools v. City of Trenton, 30 N. J. Eq. 668-678.* "The legislature must prescribe the rule under which taxation shall be laid, and originate the authority under which taxing officers assess and collect the taxes. It need not prescribe all the details or fix with precision the sum to be raised. If the rule is prescribed which in its administration works out the result, that is sufficient; but to refer the making of the rule to another authority would be in excess of legislative power. To leave to a state officer or board the power to determine whether a tax should be laid for the current year, or at what rate, or upon what property, prescribes no rule and originates no authority. It merely attempts to empower some other tribunal to prescribe a rule, and set in motion the tax machinery. This is clearly incompetent." *Cooley, Taxn. p. 50.*

The legislature, having prescribed a rule of taxation, may intrust the assessment and collection of taxes in conformity with prescribed rules to officers appointed by other authority. The acts providing for taxation of railroads and canals are precedents of this import. The legislature prescribed that certain designated property of these corpo-

rations should be taxed at an assessed valuation at an annual state tax of one-half of 1 per cent. The valuation of the property with respect to which taxes were imposed, and the computation of the amount of taxation thereon, were matters committed to a state board of assessors appointed by the governor. The legislature, in this instance, prescribed the rule by which taxation should be made, and committed to the state officers the ministerial duties of ascertaining, by valuation, computation, and assessment, the amount of tax to be paid by these companies. 3 Gen. St. pp. 3322, 3324, 3334. The act establishing a state board for the equalization, revision, and enforcement of taxation, the members of which are appointed by the governor, is of the same character. This act does not confer upon these commissioners the power to originate taxation. The duty of the board consists in an examination into the administration of the laws regulating the assessment of taxes, in order to secure the equalization, revision, and enforcement of taxation as prescribed by law, with power to direct assessors and other taxing officers to make a reassessment of taxation, so that the same may conform to constitutional or other legal rules. 3 Gen. St. p. 3344. The statute (3 Gen. St. p. 3404 pl. 547) which empowers the court on certiorari to revise and correct taxes and make a new assessment is of like import. It confers upon the court no power to tax. It simply requires the court, under its own rules, to correct and amend an assessment of taxes brought up by certiorari, so that it may conform to the laws in virtue of which the taxation was imposed, and to ascertain and determine for what sum such person or property was legally liable to taxation. 25 Am. & Eng. Enc. Law, 81, note 2. But the essential power of taxation—the power to levy a tax—cannot be delegated by the legislature. In *Hance v. Sickles*, 24 N. J. Law, 125, the supreme court held that a resolution of a town meeting to raise for general township expenses as much as the township committee should direct, "ways and means left to the committee," was illegal as a delegation of the taxing power which the town meeting could not delegate or transfer to the township committee or any other officer. In *Wharton v. Koster*, 38 N. J. Law, 308, it was decided that a vote of the town meeting "for notes and bonds to be left to the town committee" was illegal. It appeared in that case that there were outstanding notes and bonds made by the township. The court held that if the vote of the town meeting had authorized the raising of money to pay such notes, leaving the calculation of the amount to the committee, as the amount ordered to be raised could be made certain by mere computation, the action of the town meeting would have been legal, but that a resolution to leave the amount to be raised in the discretion of the

town committee was unauthorized. In *Munday v. Rahway*, 43 N. J. Law, 339-347, an act by which the court was required to determine what rate of taxation could be imposed on a corporation without injury to the interests of its creditors was held to be invalid, on the ground that it conferred upon the courts a purely legislative function. These decisions are precedents in our own courts affirming the want of power in the legislative body in which the power of taxation is vested to delegate the authority to others to determine in its judgment or discretion the amount to be raised by taxation.

The first section of the act under consideration provides that in case the local boards or officers shall neglect or fail to levy the taxes specified in section 5 of the act, or there be a vacancy in the local boards or officers, or the boards or officers have not commenced the assessment or valuation of property for taxation, or the said taxes have not been levied at the time required by law, it shall be the duty of the governor, upon notice to the local authorities, to appoint and commission three freeholders, who shall be residents of such city, town, or municipality, to be known as "commissioners of taxation," whose duty it should be, under the authority of the act, to assess and levy the taxes specified in section 5, and to discharge all other duties therein required. It does not appear in the case that the assessor elected for the township had vacated his office; but it was admitted by counsel on the argument that the assessor had resigned, and it will be assumed for present purposes that there was a vacancy in that office, and that the appointment of commissioners was made on the two grounds that the township authorities (that is, the town meeting of the township) had not made adequate provision for taxation for the purposes mentioned in the fifth section of the act, and that there was also a vacancy in the office of assessor. The fifth section, which defines the duties of these commissioners, and prescribes the powers conferred upon them, enacts that the commissioners "shall have power to levy taxes for such sums as they shall deem expedient for the following and no other purposes: (1) For the support of public schools and the repair of school houses; (2) for protecting property within such city, town or municipality from fire; (3) for the protection and maintenance of the public health within such city, town or municipality; (4) for the maintenance and support of the poor; (5) for the support and maintenance of a police force within such city, town or municipality; (6) for keeping the highways and streets within the limits of such city, town, or municipality in a safe condition for public use; (7) for the expenses of assessing and collecting the taxes levied under this act, and in addition thereto a sum to meet deficiencies not exceeding ten per cent. of the sums required to be

raised for the above stated purposes." The objects enumerated in this section for which these commissioners were authorized to levy taxes—support of public schools, repairs of school houses, protecting property from fire, protecting the public health, support of the poor, maintenance of a police force, and the repair of highways and streets—comprise a large part of the duties of municipal governments, for defraying the cost and expenses of which the local power of taxation is exercised; and the act, by its terms, applies to all incorporated cities, towns, and municipalities. The expenditures annually for these purposes in the cities, towns, and municipalities in which the act applies are very large, and the authority to make appropriations for these purposes, and levy taxes therefor, independent of this act, was lodged in the local municipal government.

This act does not purport in any sense to confer on local municipal bodies powers of taxation. Its legal effect is to delegate the powers mentioned in the act to three persons appointed by the governor. In making this delegation, the legislature prescribed no rule by which the taxation should be laid. The power conferred upon the commissioners was, in express words, the "power to levy taxes," with no prescription or limitation, except that the taxes levied for any one year for all purposes should not exceed 1½ per cent., and commits to the judgment and discretion of the commissioners the right to determine whether taxes for the purposes mentioned should be laid, and at what rate and upon what property, as they might deem expedient. Plainly, the scheme of taxation devised by this act is a delegation of the power of taxation. A decision which would sustain this legislative action would antagonize fundamental principles of constitutional law, and, in effect, overrule *Hance v. Sickles*, *Wharton v. Koster*, and *Munday v. Rahway*, above cited. In this respect the act is unconstitutional. Some of the sections provide for the performance of mere ministerial duties in the assessment of taxes,—duties which the legislature, having perfected a scheme of taxation, may delegate to other persons. Whether these sections can be separated from the main provisions of the act, and sustained, as in themselves an exercise of competent legislative authority, within the doctrine laid down by this court in *Johnson v. State*, 59 N. J. Law, 535, 87 Atl. 949, need not be decided in this case. The writ of certiorari was allowed on condition that taxes assessed in compliance with the vote of the town meeting should first be paid, and the same overpaid, and persons assessed for such taxes have not taken out writs of error, and no reason appears on this record which would present that question for decision. The result is that the judgment of the supreme court, in so far as it sustains the assessment of taxes voted at the town meeting, should

be affirmed, and, with respect to the assessment of taxes beyond the amount so voted, it should be reversed.

(61 N. J. L. 217)

CLIFFORD v. STATE.

(Court of Errors and Appeals of New Jersey.
Feb. 28, 1898.)

CRIMINAL LAW—HARMLESS ERROR—EXAMINATION OF JUROR.

1. When, upon a writ of error in a criminal case, the plaintiff in error procures to be returned the "entire record of the proceedings," as permitted by the supplement to the criminal procedure act, approved May 9, 1884 (1 Gen. St. p. 1154, par. 170), quære, whether the reviewing court should reverse for an error which, if all the proceedings were not before it, the court would pronounce capable of prejudicing the accused in maintaining his defense on the merits, but which is shown by the proceedings before it not to have had any prejudicial effect.

2. When a juror was called to the book, counsel for the accused proposed to ask him certain questions, and stated that his purpose was to elicit information, so that the right of peremptory challenge might be intelligently used. No challenge had been interposed, and it was not prosed to swear the juror as upon challenge made. *Held*, that the trial court rightly refused to permit the juror to be thus interrogated.

(Syllabus by the Court.)

Error to supreme court.

Edward Clifford was convicted of murder in the first degree, and brings error. Affirmed.

William T. Hoffman and Allen L. McDermott, for plaintiff in error. Charles H. Winfield, for the State.

MAGIE, C. J. This writ of error brings before us the judgment of the supreme court affirming the conviction of plaintiff in error in the Hudson county oyer and terminer of the crime of murder in the first degree. 87 Atl. 1101.

Plaintiff in error has caused to be returned with the writ what the judges of the oyer and terminer certify to be the entire record of the proceedings had upon his trial. Thereupon, and notwithstanding that counsel for plaintiff in error have not urged it in their argument, this court deems itself compelled by the legislative mandate contained in the supplement to the criminal procedure act, approved May 9, 1884 (1 Gen. St. p. 1154, par. 170), to consider and adjudge whether it appears therefrom that plaintiff in error suffered manifest wrong or injury, whether by rejection of testimony, or in the charge made to the jury, or in the denial by the oyer of any matter which was matter of discretion, or upon the evidence adduced at the trial. Since the adjudication, which the legislature thus requires this court to make whenever a convicted criminal presents us with such a return, in this case involves momentous consequences to the plaintiff in error, we have given it the consideration which its importance to him and to the public requires.

The result of this consideration has been the conviction, on the part of every member of the court, that plaintiff in error suffered no wrong or injury whatever in any of the respects included in the act of May 9, 1894, and that the verdict finding him to have been guilty of the crime of murder in the first degree was the only verdict which could have been properly rendered.

Counsel for plaintiff in error have, however, urged upon our consideration various alleged errors, assigned by them upon admission or rejection of testimony at the trial and upon the charge of the court. A question of grave importance is thereby suggested. Before the adoption of the supplement to the criminal procedure act above referred to, a court reviewing by writ of error a conviction in a criminal case was limited to the consideration of errors, pointed out by proper assignments, either in the record or in such occurrences at the trial as were disclosed by bills of exceptions allowed by the trial court. Nor were all such errors, even if obvious, to be made the ground of a reversal of a criminal judgment, for, since the passage of the supplement to the act entitled "An act regulating proceedings and trials in criminal cases," approved April 16, 1846,—the supplement having been approved April 3, 1855 (Laws 1855, p. 648),—the reviewing court was expressly prohibited from reversing a judgment of this sort for any error except such as had or might have prejudiced the accused in maintaining his defense on the merits. The pertinent section of the supplement of 1855 has remained in force, and is now section 89 of the criminal procedure act. 1 Gen. St. p. 1188. It is unnecessary to refer to the numerous cases in which, under this legislation, reviewing courts have declined to interfere with criminal convictions for errors which had not prejudiced, and could not have prejudiced, the accused in his defense on the merits. But it is obvious that, in some cases in which an error had occurred which might have been of prejudicial effect to the defense on the merits, it was not in the power of the court of review to determine whether or not such prejudicial effect had been produced, because the whole case was not before it, but only the case disclosed in the record and in the bills of exceptions. By the provisions of the supplement of May 9, 1894, before cited, our criminal procedure act is so amended that a person convicted of crime may by writ of error bring before the reviewing court the whole proceedings at the trial. When he does so, the question at once arises whether it is to be deemed the legislative intent that he may avail himself of errors which might have been prejudicial to a meritorious defense, if the reviewing court, on considering the whole proceedings, finds that such error cannot have been thus prejudicial. It would seem to border on the absurd to suppose that it was intended that a re-

viewing court, upon which is now cast the grave duty of adjudging upon the whole proceedings, were yet to be bound to reverse for an error which, if the whole proceedings were not before it, might be considered to have been prejudicial to a meritorious defense, but which, when the whole proceedings are considered, is discovered to be incapable of producing such a result. This question was not presented by counsel for the state, nor argued, and will not, therefore, be determined. It is mentioned solely to avoid appearing to decide it by proceeding to consider the matter presented by the bills of exception and pressed in argument.

Among the matters presented by the arguments of counsel for plaintiff in error, one is to be noticed which does not seem to have been presented to the supreme court. It arises upon an exception allowed under the following circumstances: When a juror was called, counsel for the accused proposed to put to him the following questions, viz.: "Were you acquainted with Mr. Watson, the deceased?" "Are you acquainted with the officers of the West Shore Railroad or any of them?" "Have you any personal or business relations with the West Shore Railroad, or with any officer or employé thereof?" "Are you employed by any railroad company in this state?" At the time this course of procedure was proposed, the indictment had disclosed that the prisoner was charged with the murder of William C. Watson. It did not then, but did afterwards, appear that Mr. Watson, at the time of his killing, was a division superintendent of the West Shore Railroad Company. When counsel proposed to propound these questions to the juror, no challenge of any kind had been interposed, and counsel stated the purpose of the questions to be to elicit information for counsel, "so that the right of exercising a peremptory challenge may be intelligently used." As the juror was not put under oath, and it was not proposed to put him under oath, the proposition was to permit counsel to engage in open and audible conversation with the juror,—a conversation over which, as there was no challenge or issue to be tried, the court would seem to have no control. The trial court refused to permit the questions to be propounded to the juror, and thereupon exception was taken and allowed to such refusal. The refusal thus complained of was, in our judgment, in accord with ancient and inveterate practice, never departed from, so far as we have observed, when objection was interposed. As long ago as 1824, one Zellers was tried before the Hunterdon oyer upon an indictment for murder, and the case was considered of sufficient importance to justify a report of it to be published in 7 N. J. Law, 220 (*State v. Zellers*). It therefrom appears that one of the defendant's counsel asked a juror if he had not made up and expressed an opinion as to the guilt of the prisoner. Chief Justice Kirkpatrick inter-

posed and said: "You cannot ask that question. If you mean to make a challenge, you must do it in regular form, and then prove it in regular form. * * * What a man says, not under oath, cannot be received in any form." Another of defendant's counsel then suggested that the practice of thus interrogating jurors had been repeatedly followed, and the chief justice replied: "It is true we have slipped into the practice; but, on looking into it, I am satisfied it is not the true way. The only proper way is to make the challenge, and then prove it on oath." It will be observed that in the *Zellers Case* the question proposed to be put to the juror was obviously designed to elicit information upon which a challenge for cause could be interposed. While the juror, upon such a challenge, could not then have been compelled to answer such a question, upon the ground that an answer in the affirmative would have tended to his disgrace, as was afterwards held in *State v. Spencer*, 21 N. J. Law, 196, yet, doubtless, the admission of the juror that he had formed and expressed an opinion that the accused was guilty could have been given in evidence upon such a challenge. The proof of the mere formation and expression of such an opinion would not have been sufficient to support such a challenge, as was afterwards held in *State v. Fox*, 25 N. J. Law, 566. But it was a necessary step in the necessary proof. The purpose of the question in the *Zellers Case* was, therefore, analogous to the avowed purpose of counsel in the case under review, viz. to elicit information on which counsel might interpose a challenge. Mr. Linn, in his note to the *Zellers Case*, contained in the reprint of Halsted's Reports (7 N. J. Law, 220), has collected a number of cases by which the practice adopted by Chief Justice Kirkpatrick is supported. From that time to this, we think the practice has been invariable, whenever an objection has been interposed or the court's attention has been called to the matter. The practice followed by the trial court is approved of and followed elsewhere. Whart. Cr. Law, § 3026; Rap. Cr. Proc. § 185, and cases in notes; *King v. State*, 5 How. (Miss.) 730; *Bales v. State*, 63 Ala. 30; *State v. Creasman*, 32 N. C. 395.

The argument of counsel for plaintiff in error, that such questions as he proposed to put to each juror were essential to the protection of the accused, by reason of the fact that not otherwise could information be obtained on which he could intelligently exercise the right of peremptory challenge, cannot prevail. The accused has the benefit of the knowledge of what jurors have been called to serve at the term, and is then served with the panel out of which the jurors who are to sit in his case are to be selected. His counsel are thus afforded every opportunity to inquire in respect to the jurors, and gain the information which they require in order

to intelligently act in making peremptory challenges. I think it would be impossible to exaggerate the evil consequences which would follow the adoption of the contrary practice. If the court is bound to permit counsel to engage in a public conversation with each juror, for the purpose of enabling counsel to determine whether he should interpose a challenge or not, what control has the court over the examination? Where can it draw the line between proper and improper questions, when the purpose of the talk is, not to prove a fact, or to establish a challenge, but only to furnish counsel information? How is a juror to be protected against improper questions, except by his refusal to answer them? And if he refuses to answer proper questions, what power has the court to compel him to answer? Or, if a juror is anxious to escape service, how can it be discovered whether his answers, not given under the sanction of an oath, are true or false? Such a practice would introduce into this state, happily so far free from them, the unseemly, vexatious, and expensive delays in impaneling juries in criminal cases which have been a reproach to the administration of criminal justice in some other states.

The other assignments of error relied on and urged before us were all considered by the supreme court, whose conclusions thereon are entirely satisfactory to us. The judgment must be affirmed.

STREIB v. STREIB et al.

(Court of Chancery of New Jersey. March 8, 1898.)

WILLS—CONSTRUCTION—VESTING OF ESTATES.

Property was devised to a trustee, the income to be used for the support of himself and children until the youngest reached 21 years, when the principal was to be divided among the children, with cross limitations over in case of the death of any of them. The trustee died before the eldest son reached his majority. Held, that the eldest son, on becoming of age, could not compel payment of his share of the estate, on the ground that the postponement of the division was solely for the purpose of having the trustee receive the income for himself and children, and, this purpose having failed, the estate limited to the children became vested at once on the death of the trustee.

Bill by John P. Streib against Bertha Streib and another for construction of a will. Dismissed.

Thomas Anderson, for complainant.

EMERY, V. C. William C. Glenk, by his will, dated November 27, 1882, and proved March 15, 1883, bequeathed to his wife all his personal property, and then directed as follows: "It is further my will, and I herewith bequeath unto my said wife, Sophia, all my real estate, of all kinds and description, and wherever the same may be, to her, my said wife. And I further order, and it is my will, that from and after my wife's

decease all property, real and personal, shall be given, and is hereby bequeathed, to the children of John Streib, and my deceased daughter, Sophia Streib, being at present alive, to wit: John Streib, Jr., Bertha Streib, and Emil Streib, and be kept for them in safe-keeping by their father, John Streib, Sr., until all shall become of age, and during said time said John Streib, Sr., my son-in-law, shall receive all income and interests from my property for his and the children's support. And when the youngest child shall become of age, the whole property shall be equally divided among the said three children, John Streib, Jr., Bertha, and Emil; and if one of the same shall die, then his share shall go to the remainder children; and in case all three shall die, then I order, and it is my will, that the same be divided as follows: One-third shall go to my son-in-law John Streib, Sr., and two-thirds shall go to the children of my brothers and children. And I further order, and it is my will, that my son-in-law, John Streib, shall, as soon as one of his three children aforesaid become of age, pay each of them the sum of five hundred dollars out of my property; that is to say, when John Streib, Jr., shall become 21 years five hundred dollars, when Bertha Streib shall be 21 years five hundred dollars, and when Emil Streib shall be 21 years five hundred dollars, and then the remainder property be equally divided among them, as aforesaid." Testator, at the time of his death, was seised in fee of a house and lot of land in Newark, which was occupied by his widow until her death in 1886. John Streib, the surviving executor, then received and appropriated the income for the support of himself and his three children, named in the will, until his death, on February 1, 1888. His three children, John (now called John P. Streib), Bertha, and Emil, survived him, and are still living; John having attained the age of 21 years on November 28, 1893, Bertha being now 17, and Emil 16 years of age.

After his father's death, John P. Streib was, on April 7, 1896, appointed trustee in the place of John Streib, deceased, and, there being no personal property of the testator to pay the legacies to be paid to John on coming of age, suit in this court was brought for its payment, and by a decree in that suit, in which John P. Streib, as trustee, was the complainant, and Bertha and Emil Streib defendants, the lands were ordered to be sold for the payment of the \$500 legacy, with interest, and the surplus to be paid into court. Under this order \$6,210.88 has been paid into court, and this bill is now filed by the complainant, John P. Streib, claiming payment to himself, now, absolutely, of one-third of the moneys. He insists that, by the true construction of the will, the grandchildren, upon the death of their father, were entitled at once to their shares absolutely in fee, and therefore are entitled

now to the immediate payment of their shares from the proceeds of sale. I cannot agree with this contention. While the estate in fee became vested in the three children equally upon the death of their grandmother, subject to be devested by death before 21, as afterwards provided, yet the time for possession of this estate by the children, and its division between them, was expressly postponed to another date, up to which time it was to be kept intact. The directions of the will are express and positive, postponing the time of payment and distribution until all of the children become of age. "To be kept for them in safe-keeping by their father until all shall become of age" is the first direction as to this time of division. "And when the youngest child shall become of age the whole property shall be equally divided" is the next, with cross limitations over in case of the death of either. In the next clause follows the direction for the payment to each of his children of \$500 as they respectively reach 21, and the final direction is, "And when Emil Streib shall be 21 years \$500, and then the remainder property be equally divided as aforesaid." The whole scope of these provisions is to prevent any child receiving more of the principal or corpus than \$500 until the youngest child comes of age, and these directions are so clearly expressed and repeated that their force cannot be impaired or overcome by any difficulty, or supposed difficulty, of suspending the payment or possession after the death of John Streib, arising out of the application or construction of other portions of the will.

The main contention of complainant is that the postponement of the division was solely for the purpose of having John Streib receive the income for his and his children's support, and that, this purpose having failed, the estate limited to children on the death of the grandmother became vested in possession at once on the death of John Streib, Sr. But this would magnify the purpose of this provision in favor of John Streib, and give it the effect, by implication, to override express words; and, in my judgment, the provision cannot be so magnified or extended. While the death of John Streib may prevent the income, or part of it, being applied to his children's support by the person indicated for that purpose by the testator, yet another trustee may be, and has been, appointed to carry out this purpose, as to the whole of the income (now that John Streib's interest has ceased), and, when this is done, all of the provisions of the will are carried into effect. To pay over now to the child over 21 would, as it seems to me, ignore the express provisions as to the time of payment, and the contingent interests provided for in case of the death of any child before the time fixed, and do this solely by reason of uncertain implications. I will therefore advise a dismissal of the bill.

FOWLER v. TOVELL et al.

(Court of Chancery of New Jersey. June 17, 1897.)

MORTGAGES—FORECLOSURE—BOND—CONDITION—WHEN PAYABLE—REASONABLE TIME.

1. A condition in a mortgage bond, which provided that the obligors were to pay the obligee the proceeds of all sales of lands conveyed to the obligors, was not broken by a conveyance made by the obligors, not as an actual sale, but without consideration, and merely for the purpose of making the grantee a depositary of the title.

2. A mortgage bond which fixed no time for payment of the debt provided that, should the obligor request the obligee to foreclose the mortgage, then the debt should become due immediately. *Held*, that said clause did not prevent the bond from maturing before the obligor should request foreclosure.

3. Testator devised property to a daughter, to whom his son was indebted, on a verbal agreement that she should convey one-half of it to her brother, on condition that he should pay the debt. She did so, and took back a bond secured by mortgage for payment of the debt. The bond fixed no time in which the debt should be paid, but provided that, should the obligor request the obligee to foreclose the mortgage, then the debt should become due immediately; that the obligor was to pay the obligee the proceeds of all sales of lands conveyed to the obligor, the same to be applied on the debt; and that, should any default be made in paying over such proceeds, then the debt should become due immediately. *Held*, that the obligor had only a reasonable time to obtain a reasonable price for the property, and when he rejected a reasonable offer such time expired, and the debt became enforceable.

Bill by Elizabeth M. Fowler against Annie P. Tovell and others to foreclose a mortgage. Heard on pleadings and proofs.

D. A. Ryerson, for complainant. Elias F. Morrow, for defendants.

PITNEY, V. C. (orally). I will dispose of the cause at once. The case presented is peculiar and unusual, and I have come to a conclusion which I think further consideration will not change. It is a bill to foreclose a mortgage given to secure a bond with a most peculiar condition. The mortgagor has conveyed the premises to the defendant Smith. I think the complainant cannot recover upon the allegations of her bill that Mrs. Tovell, the mortgagor, sold and conveyed the premises to Mr. Smith, and that she did not pay over the proceeds of the sale to the complainant, because it appears that the conveyance to Mr. Smith was not an actual conveyance, but was merely executed for the purpose of making him a depositary of the title, and no money was received that she could pay over. But that result does not decide the cause against the complainant, because the bill is open to amendment, and the real issue in the cause has been made and tried, and the parties have had their day in court upon it. The case is a peculiar one, and both parties have put in their evidence, as I understand the affair, on the real issue in the cause, and I shall give my opinion upon that. It appears by the condition of

the bond signed by the defendants in this cause, which I will refer to at length directly, that the testator, William W. Price, died seised of the mortgaged premises; that he intended to divide his property equally among his four children, J. Wilbur Price, a son, and father of Mrs. Tovell; the complainant, Elizabeth M. Price, as she was then, now Elizabeth M. Fowler; a daughter, Mrs. Porter; and another daughter, another Mrs. Fowler. But it is fairly inferable from the reading of the condition, that his son, J. Wilbur Price, was embarrassed in circumstances, and was indebted to his father, the testator, and indebted to the daughter of the testator, Mrs. Porter, in a considerable sum of money, and the father was unwilling to give him the property, except upon terms of that debt being paid. He therefore devised one-half of the residue of his estate, including these premises, to the complainant, Mrs. Elizabeth M. Fowler, upon a verbal agreement with her (so far as appears it was purely verbal and voluntary) that she would convey one-half of it to her brother, J. Wilbur Price, upon the condition that J. Wilbur Price should pay this debt. She, properly enough, was willing to fulfill this injunction so laid upon her by her father, and presently arranged with J. Wilbur Price to do so. That arrangement is set out in detail in the condition of the bond, as follows: "Whereas, William W. Price, late, etc., deceased, did in and by his last will and testament give and devise to said Elizabeth M. Price the one-half part of his residuary estate, and said Elizabeth M. Price did verbally promise and agree to and with the said testator to pay to said J. Wilbur Price the one-half part of the share of said residuary estate so devised to her, to wit, the one-fourth part of the whole of said residuary estate remaining in her hands in excess of, and after the payment of, the principal and interest of three certain promissory notes, made and delivered by said J. Wilbur Price, two thereof to said William W. Price, and one thereof to Sarah W. Porter; and whereas, in full discharge and satisfaction of said trust, and at the request of the said J. Wilbur Price, said Elizabeth M. Price has executed and delivered to said Annie P. Price a deed of conveyance of even date herewith for the one equal undivided fourth part of certain lands situate in the said township of Clinton, whereof said William W. Price died seised, the estate and interest so conveyed to be subject to the lien of the mortgage herein-after mentioned, and individually and as executrix of said last will and testament has executed and delivered to said Annie P. Price, a deed of assignment of the one-half part of the distributive share to which she, said Elizabeth M. Price, is or may be entitled under and by virtue of said last will in said residuary estate; and whereas, said Elizabeth M. Price has agreed to accept, and said J. Wilbur Price has agreed to pay, in

compromise and settlement of the amount due on said three promissory notes, for principal and interest, the sum of twenty-eight hundred and twenty-six dollars and ten cents, etc., with interest on the sum of six hundred and fifty dollars only from date hereof, at the rate of six per cent. per annum, the payment thereof to be secured by a mortgage made and executed by said Annie P. Price to said Elizabeth M. Price, upon the estate and interest in the lands so as aforesaid conveyed by Elizabeth M. Price to said Annie P. Price, which said deed of conveyance, deed of assignment, mortgage, and this bond are of like date, and are delivered at the same time, and as part of one and the same transaction: Now therefore, the condition of this obligation is such that, if the above-bounden Annie P. Price and J. Wilbur Price, their heirs, executors, or administrators, or any of them, shall well and truly pay or cause to be paid to the above-mentioned Elizabeth M. Price, or to her certain attorney, executors, administrators, or assigns, the just and full sum of twenty-eight hundred and twenty-six dollars and ten cents, lawful money, aforesaid, with interest from the date hereof on the sum of six hundred and fifty dollars only of the same, at the rate of six per cent. per annum, together with all national, state, county, and township taxes which may be assessed upon the money hereby secured to be paid or upon this obligation, or the indenture of mortgage given to secure the payment of the same, and bearing even date herewith, without any fraud or other delay, then this obligation to be void, or else to be and remain in full force and virtue. [Observe that no time is fixed for payment.] And it is hereby expressly agreed that, should the said Annie P. Price and J. Wilbur Price, or either of them, request in writing the said Elizabeth M. Price, her executors, administrators, or assigns, or any of them, to foreclose said mortgage, then the aforesaid principal sum, with all arrearage of interest thereon, shall become due and payable immediately thereafter. And it is further agreed that the said Elizabeth M. Price shall be entitled to have and receive, and the said Annie P. Price agrees to pay to the said Elizabeth M. Price, her heirs, executors, administrators, or assigns, the proceeds of any and all sales of said undivided part of said lands so as aforesaid conveyed to her, said Annie P. Price, by said deed of conveyance, or any part thereof, the same to be applied towards the payment of said principal sum and interest until the same shall be fully paid and satisfied. And it is further agreed that, should any default be made in the payment of the proceeds of any such sale of lands, or any part thereof, as herein above agreed for the purpose and to the extent aforesaid, then the aforesaid principal sum, with all arrearage of interest thereon, shall become and be due and payable immediately." It is, in

substance, that the one-quarter interest in the property—the half of what she received was one-quarter of the whole—should be conveyed to Mr. Price's daughter, Annie P. Price, now Annie P. Tovell; that Miss Price and her father should execute a bond, and that that bond should be secured by a mortgage on the premises to her to secure the amount due on these promissory notes, which was adjusted at \$2,826.10; and this bond and mortgage were given to secure that debt. It might better, of course, have been put in another shape, viz. that the premises were conveyed subject to the payment of that debt. It was a perfectly meritorious debt. It was as much meritorious as if Miss Elizabeth M. Price had loaned so much money to Mr. J. Wilbur Price, her brother, and her niece, Annie P. Price; and when the transaction was closed there was an ascertained and admitted debt due from them to her, and it must have been intended that such debt should be paid at some future time. It never can be held under the terms of this bond, and the very peculiar provision in the condition of it, that payment of that debt was to be indefinitely postponed.

Had the condition of the bond stopped at this place: "without any fraud or other delay, then this obligation to be void, or else to be and remain in full force and virtue," although no time had been fixed up to that point in the condition for payment, it would have been payable immediately, or upon demand. That I understand to be the law, viz. that if a bond is executed with a condition to pay so much money, without mentioning any time when it shall be paid, it is payable immediately, or in a reasonable time, upon demand; otherwise the whole transaction would fall to the ground, and be of no value, and the maxim of the law is, "*Ut res magis valeat quam pereat.*" The bond must be worth something. Here it is given for a full consideration, precisely as if so much money had been paid and loaned. Moreover, it is consideration money for the very property conveyed; and it is impossible to take any other view of it. Then I say that, although no time has been fixed for the payment of this money up to the point to which I have just referred, yet, if it had stopped there, it would have been payable immediately, or within a reasonable time. Then follow these three peculiar clauses, which make all the trouble there is in this case: "And it is hereby expressly agreed that, should the said Annie P. Price and J. Wilbur Price, or either of them, request, in writing,"—and this is a bond given for the consideration money; bear that in mind,—"*the said Elizabeth M. Price, her executors, administrators, or assigns, or any of them, to foreclose said mortgage, then the aforesaid principal sum, with all arrearage of interest thereon, shall become due and payable immediately thereafter.*" Now, that is a most extraordinary provision to insert in a

bond,—that the bond is to become due when the bondsman who owes the money and executes the bond and the mortgage to secure it, shall request it to become due. Now, I am not sure that a court of law would not treat that clause as absolutely null and void, as being completely inconsistent with the penalty of the bond. You see this bond starts out with this admission (deliberate admission under seal): "That we, Annie P. Price and J. Wilbur Price, of the city of Newark, etc., are held and firmly bound unto Elizabeth M. Price, in the sum of \$5,652.20, lawful money of the United States of America, to be paid to the said Elizabeth M. Price, or to her certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with our seals, and dated the 25th day of February, 1892." That is an absolute acknowledgment of indebtedness, payable immediately. And in a case in the supreme court (*Giles v. Halsted*, 24 N. J. Law, 366), where there was an ordinary bond, with a peculiar condition, in which the scrivener had made a mistake, the court said to the obligor, when he set up that mistake by oyer and demurrer: "Very well, this is inconsistent with the penalty of the bond, and we will strike it out altogether, and you owe the \$2,000 instead of the \$1,000 that you were to pay. The instrument stands as a single penal bond." And I am not sure that the supreme court would not say that the clause I have just read in this bond is absolutely inconsistent with and repugnant to the acknowledgment of indebtedness in the bond itself, to which it is a mere condition, and therefore void as such, leaving the bond to stand as if such clause were not present. But in courts we endeavor to give force and effect to everything found in an instrument. The argument of defendant's counsel is that this clause, standing by itself, amounts, by implication, to a restriction upon the right of the complainant as obligee to take the usual means to enforce her security, and prevents the bond maturing until the obligor shall request its enforcement. I cannot adopt that view.

Then follows after that this other peculiar clause: "And it is further agreed that the said Elizabeth M. Price shall be entitled to have and receive, and the said Annie P. Price agrees to pay to the said Elizabeth M. Price, her heirs, executors, administrators, or assigns, the proceeds of any and all sales of said undivided part of said lands so as aforesaid conveyed to her, said Annie P. Price, by said deed of conveyance, or any part thereof; the same to be applied towards the payment of said principal sum and interest until the same shall be fully paid and satisfied." Well, now, there is no grant of power there, either express or implied, on the part of the complainant here, Elizabeth M. Price, now Mrs. Fowler, to Annie P.

Price, now Mrs. Tovell, to sell and convey that land free of the mortgage, and the clause is, like the previous one, inconsistent with the bond. Elizabeth has conveyed to Annie, and Annie has conveyed back by a mortgage to Elizabeth. I repeat, there is no power of attorney here in this paper, signed by Elizabeth M. Price, now Fowler, to her niece, Annie P. Price, empowering her to convey this land free and clear from this mortgage. Well, Annie had a right to sell it subject to the mortgage, and that clause is as senseless a thing as was ever put in a written instrument.

Then comes the third clause: "And it is further agreed that, should any default be made in the payment of the proceeds of any such sale, or any part thereof, as herein above agreed for the purpose and to the extent aforesaid, then the aforesaid principal sum, with all arrearage of interest thereon, shall become and be due and payable immediately." Well, now, that is another senseless clause, without any possible office or duty whatever in law. Now, these three clauses are certainly the most astonishing and remarkable pieces of writing that I ever read or heard of, to be inserted in the condition of a bond. Now, what is the construction claimed for it by the defendants? As I understand them, they say that, taking the previous recital and these three clauses together, reading between the lines, and drawing inferences, and exerting yourself to give force and effect to every bit of writing found in the paper, you must conclude that there was an exclusive power vested in this young lady to sell this property,—a sort of trust coupled with an interest,—and that, until she exercises that power, this bond and mortgage should not become due. Well, now, there are a great many difficulties in the way of that. In the first place, as I have already shown, how can she sell and make title without having the mortgage paid off? How can she make a clear title without having the mortgage paid off? How can she do anything without having the co-operation of the holder of the mortgage? And she has nothing in writing for it; no power of attorney to make a deed; no release, executed in advance, of the mortgage; not a single piece of machinery put in her hands by which she could make a title to this property. In the next place, the construction is unjust and unreasonable. But there is the writing, and I must deal with it, and that is the construction the defendants would have put upon it. Now, granting that some force must be given to these clauses by way of limiting the right of complainant to enforce that mortgage, still it is clear that there must be a reasonable limit to such limitation. Complainant is not to be kept out of her money indefinitely. What are those reasonable limitations? If we are to make a contract between these parties,—and I do not see but what we must, on the contention of the de-

fendants, because that clause amounts to no contract whatever that can be executed without the aid of a court,—what is the contract? The contract was, presumably and inferentially—and this is the most favorable view I can take for the defendants—that this mortgage was not to be enforced at once; that this property was speculative in value; that the hope was that this one-fourth interest, conveyed to this bankrupt son, if I may use that expression,—I don't know that he is a bankrupt at all, but it looks that way,—might produce something some day or other over and above this indebtedness that he owed to his father and sister, and that he might get something out of it. And his sister, Mrs. Price, who was intrusted by her father to do justice to her brother, by a verbal arrangement which is recited here, says to him, "I will give you a chance to sell this property, and to make something out of it after paying my mortgage, and I will give you the interest on a part of it for a while (for a reasonable time) until you can have a chance (a fair opportunity) to make a sale of it; I will do that for you; and I will let you try to sell it, and, if you can make a sale all right, sell, and pay me off; I will release the mortgage, and take the money." Now, when that was said, how long a time was meant? How long a time was he to have in which to make a sale? Not a word is given as to that in the paper. There is not a slip anywhere in this writing as to how long a time they were to have in which to accomplish that result. On the one hand, here this defendant comes into a court of equity, and asks that court to infer an agreement where there is not really any that could be made out in law, and says: "I am to have time until I get a price satisfactory to me. I bring in a real-estate agent, and he says that the property is worth \$2,000 an acre, and that my one-fourth interest is worth at least \$10,000, and until I can get that price I am going to hold that property, and you must hold your mortgage without interest as to \$2,200 of it. I am not only to keep you out of your money, but also the interest." Now, is that a reasonable proposition? A court, when it is making a contract, must make one that is reasonable, and in the view of a chancellor it is not reasonable to ask this lady to wait without interest, either paid in present or to be paid in futuro, on the sum of \$2,200, until this defendant can get a fancy price for this property. Now, I shall not adopt that view of this writing. The construction that I shall adopt here—and it is the most favorable one I can adopt for this defendant—is that the defendants should have a reasonable time to sell this property, and until they could get a reasonable price for it, all things considered. The court must look at the interests and rights of all parties, not only of this young lady, Mrs. Annie P. Tovell, and her father, but of his sister, to whom the mortgage was given.

Her rights and interests are to be taken into consideration.

Now, the question is, has that reasonable time arrived? If it has, then you are right in filing your bill, and you are entitled to close the affair. If it has not, then you are wrong. Let us see. This was a family affair. This property was owned by three sisters and a brother, and the three sisters tried to sell their three-fourths interest, and they employed proper persons to sell it, and they took the advice of real-estate men, and they put it on the market, and they got an offer, and, after full consideration, in good faith, giving it the best judgment they could, they sold it. They have sustained the position that it was a good sale by the evidence of the witnesses. Mr. Devine, a real-estate agent, and other witnesses, say that what they got was a fair price for it at that time; and they actually sold it. They did not make a mere wash sale, in order to corner and force J. Wilbur Price and Miss Price, the owners of the other one-quarter interest. They did not make a false sale. They made an actual sale, and got the money; parted with the title. And at the time they did it they notified the nominal owner of the quarter interest, Mr. Smith, who held the title for Miss Price; said to him: "Now, we have sold, or are about to sell, this property for so much,—our three-quarter share, at such a rate. Don't you want to sell your quarter interest at that rate?" Mr. Smith replied: "No, no; I won't sell at that rate. I want \$10,000 for my quarter share, and at the rate you sell I would only get \$6,000; and I want \$10,000. I am unwilling to sell. It is worth a great deal more." But in point of fact it was not worth more, because nobody would give more. Nobody has given or offered more to this day, and I cannot say it is worth any more. On the evidence, I think it was a good sale. I rely in a great measure on Mr. Devine's evidence, and upon the evidence of the other witnesses, too, that it was a good, full price; and I think that it was Miss Price's duty at the time to have accepted that price, or, if she wanted to hold out for a better price, then to have paid off this mortgage. The time had come when the limit of reasonable indulgence to this bondsman had been reached, and she ought to have paid the mortgage. If she was not willing to sell the property then, and pay this mortgage, then she should have paid the mortgage and held the property. But she could not hold the property at speculative prices, at the expense of this complainant, without paying her a cent of interest, and come here into court in the face of that, and say: "Why, you cannot do anything. You cannot get your money. To be sure, this was a debt that J. Wilbur Price owed, and this property was conveyed upon the condition that it should be paid. But I am not obliged to pay you. I have caught you on the strict terms of this contract, and I can hold you

off as long as I can get a real-estate man to swear that the property ought to bring more money than it will bring now." That will not do in a court of equity. It certainly will not do before me on the evidence in this case. I think the price was a fair one, and, if they did not choose to take it, the alternative was to pay this mortgage."

(61 N. J. L. 280)

LEE v. HEATH.

(Court of Errors and Appeals of New Jersey.
Feb. 28, 1898.)

APPEAL—FINAL JUDGMENT—BILL OF PARTICULARS —EVIDENCE.

1. A judgment of the supreme court, reversing a judgment of the circuit, and remitting the record for further proceedings according to law, is final so far as to render it subject to review by writ of error in this court.

2. A bill of particulars delivered by one party in a cause to the other is legitimate evidence for the latter, on the trial of the issue to which it relates, not only for the purpose of limiting the proofs to be offered by the party who delivered the bill, but also as an admission by him to be considered by the jury.

(Syllabus by the Court.)

Error to supreme court.

Action by John O. Lee against Samuel Heath. The judgment for plaintiff was reversed, and the record submitted for further proceedings. Plaintiff brings error. Affirmed.

B. B. Hutchinson and Edwin Robert Walker, for plaintiff in error. Buchanan & Relstab, for defendant in error.

DIXON, J. In an action upon contract, brought in the circuit court of Mercer county, the plaintiff recovered judgment on the verdict of a jury. Afterwards the defendant sued out a writ of error from the supreme court, and thereupon that court rendered judgment reversing the judgment of the circuit for alleged errors at the trial, and remitting the record to the court below for further proceedings according to law. That judgment of the supreme court the plaintiff has brought into this court by writ of error, and the defendant now asks for the dismissal of the writ, because, as the judgment of the supreme court contemplates a new trial in the circuit, it is not, he insists, a final judgment.

In the supreme court of the United States such judgments in state courts are not considered final, so as to warrant their removal into the federal tribunal. *Brown v. Bank*, 4 How. 465; *Tracy v. Holcombe*, 24 How. 426. One ground for this opinion seems to be that in the new trial the federal question may be eliminated, and thus the basis for federal jurisdiction may ultimately be lacking. *Parcels v. Johnson*, 20 Wall. 653. But in *Baker v. White*, 92 U. S. 176, the same opinion was expressed with regard to a judgment of reversal in a federal court. Elsewhere, however, a different view has prevailed, resting apparently on the idea

that, by the writ of error, a new suit has been instituted (*Batchelor v. Ellis*, 7 Term R. 337; 2 Tidd, Prac. 1064), and in that suit the judgment of reversal is the final judgment of the court in which that action is pending (*Bac. Abr. "Error,"* 1; 1 Chit. Archb. Prac. 511, 518; *Hartung v. People*, 26 N. Y. 154, and cases cited). In accordance with this view, the practice in New Jersey has been regulated. *Van Kleek v. O'Hanlon*, 21 N. J. Law, 582; *Brundred v. Muzzy*, 25 N. J. Law, 268, 671; *Todd v. Jackson*, 26 N. J. Law, 525; *Perrine v. Cooley's Ex'rs*, 42 N. J. Law, 623; *Snyder v. Insurance Co.*, 59 N. J. Law, 544, 37 Atl. 1022. This practice is justified by the fact that the substantial matter for consideration is the legality of the original judgment, which unquestionably was a final judgment, and, if legal, ought to be restored. The writ of error, therefore, should not be dismissed, and consequently we must examine the merits of the case.

One of the grounds on which the supreme court reversed the judgment of the circuit is that at the trial the judge refused to permit the defendant to put in evidence a bill of particulars which on demand the plaintiff had delivered to the defendant. The primary object of such a bill is to give the defendant notice of the claim which the plaintiff proposes to set up at the trial, so that the defendant may properly prepare his defense; and, in order that its object may be attained, the effect of the bill is to limit the plaintiff's proof to the matters therein specified. But, since a bill so furnished on demand does not form part of the record or files in the cause, it can serve its purpose only by being put in evidence at the trial. That for this purpose the defendant is entitled to offer it is beyond question. *Clinton v. Lyon*, 3 N. J. Law, 755; *Starkweather v. Kittle*, 17 Wend. 20.

But the bill has also a further legitimate effect. On the trial of the issue to which it relates, it becomes evidence, as an admission, against the party delivering it, and as such, is proper for the consideration of the jury. *Kenyon v. Wakes*, 2 Mees. & W. 764; *Rowland v. Blaksley*, 1 Q. B. 403; *Hart v. Middleton*, 2 Car. & K. 9. It would seem to be unreasonable that, while a statement casually made by a party is receivable as evidence against him, a statement deliberately made, in response to a demand for the exact truth, should be deemed incapable of probative force. In the present case the bill of particulars claimed \$100 for moneys expended by the plaintiff for the use and at the request of the defendant. On the trial the plaintiff testified that he thought he had spent in the neighborhood of \$200 in the defendant's business; and the judge charged the jury that, if they rendered a verdict for the plaintiff, it should be such as would reimburse him for the money which he had expended. It thus appears that, by the exclusion of the bill of particulars, the defend-

ant was deprived of the benefit of it, both as a restriction of the plaintiff's claim and as an aid to the jury in the ascertainment of the truth on a substantial matter. For this reason, the judgment of the supreme court reversing the judgment of the circuit should be affirmed.

(61 N. J. L. 224)

WEGER et al. v. INHABITANTS OF TOWNSHIP OF DELRAN.

(Court of Errors and Appeals of New Jersey.
Feb. 28, 1898.)

APPEAL — FINDINGS OF FACT BY COURT — EJECTMENT.

1. Upon writ of error, the finding of facts of a judge trying an issue without a jury is as unassailable as the verdict of a jury would be. It cannot be attacked because unsupported by the weight or sufficiency of the evidence, if there was evidence before him on the matter.

2. When lands have been dedicated to public uses, the municipal corporation within which they lie, as the representative of the public in which the right of possession inheres, may maintain an action of ejectment therefor.

(Syllabus by the Court.)

Error to supreme court.

Ejectment by the inhabitants of the township of Delran against Charles Theis Weger and another. A judgment for plaintiff was affirmed, and defendants bring error. Affirmed.

S. H. Grey, Atty. Gen., for plaintiffs in error. Mark R. Sooy, for defendant in error.

MAGIE, C. J. The writ of error in this case has brought before us a judgment of the supreme court affirming a judgment of the Burlington circuit court in favor of the municipality which is the defendant in error. The record returned exhibits an action of ejectment in which the defendant in error was plaintiff and the plaintiffs in error were defendants. The land, the possession of which was in dispute, was a rectangular plot, lying within the boundaries of the township of Delran, in the county of Burlington. The plea interposed by plaintiffs in error was the general issue. By the bills of exception before us it appears that the issue thus joined was tried by the circuit judge without a jury, and by consent of the parties. It appeared in evidence before him that plaintiffs in error had acquired the legal title to the land in question by conveyances from the executors of one Samuel Bechtold, deceased, a former owner, under authority to sell conferred on the executors by the last will and testament of said Bechtold. The acquisition of such title drew to the owners the right of possession of the locus in quo unless the defendant in error established by evidence a right of possession superior to that of the owners of the fee. The bills of exception also show that defendant in error claimed a right of possession by reason of a dedication of the land to public use as a public square, or park, or

pleasure ground, which dedication was claimed to have been made by Samuel Bechtold long prior to his death. The question thus raised and questions incident to it were considered by the trial judge, who, upon the evidence before him, found (1) that Samuel Bechtold did dedicate the locus in quo to the use of the public; (2) that the persons under whom plaintiffs in error claim, and who were the purchasers from Bechtold's executors, were not bona fide purchasers of the locus in quo, without notice of such dedication; and (3) that defendant in error had power and authority to maintain the action of ejectment. The circuit judge allowed and sealed exceptions taken to these findings, and the argument before us has been mainly directed to those exceptions.

It was first argued that there was no sufficient evidence to warrant the finding that Bechtold had thus dedicated the locus in quo. But this argument is based upon an erroneous view of the power of a court of review over findings of fact by a trial judge sitting without a jury. It is thoroughly settled that the weight and sufficiency of the evidence to support the finding cannot be considered on writ of error. If any evidence was presented capable of supporting it, the finding is as unassailable on error as the verdict of a jury would be. *Bridge Co. v. Gelsse*, 38 N. J. Law, 39, 580; *City of Elizabeth v. Hill*, 39 N. J. Law, 555; *Kalbfleisch v. Oil Co.*, 43 N. J. Law, 259; *Blackford v. Gaslight Co.*, Id. 438; *Mills v. Mott*, 59 N. J. Law, 15, 34 Atl. 947. It is impossible to contend that there was no evidence before the trial judge in respect to dedication, for it appeared that about 1853 Bechtold had purchased a tract of land which included the locus in quo; that he had made a map of it, laying it off by streets into blocks; that he named it "Plan of Bechtold's Fourth Addition to the Town of Progress"; that all the blocks except the locus in quo were divided into numbered lots; that it was distinguished from the other blocks by a different coloring, by the delineation of trees and of paths, and by a rough representation of a fountain in the center; that he had lithographed copies of the map made; that one copy had been attached by wafers to page 35 of Deed Book E5 of Burlington County, and in a great many deeds for portions of the said tract the description of the granted premises was by the numbered lots and blocks on the map, which was referred to as being recorded in that book, and at that page; that he had another copy of the map hanging in his office, and referred intending purchasers to it, and that he declared to many persons—as well to some who became purchasers as others—that his intent was that the locus in quo should be and remain for public use as a place for recreation and pleasure to the public. Although the map did not designate this block in words as a "square" or "park," yet it contained persuasive evidence that it

was intended for a different use than that to which the other blocks were designed to be put; and from Bechtold's acts and declarations, which were admissible evidence, there was the plain inference capable of being drawn that he intended to dedicate the block to public use, as was found by the trial judge in accordance with the cases in this state respecting the dedication of lands to public uses. Trustees of Methodist Episcopal Church v. Mayor, etc., of Hoboken, 33 N. J. Law, 13; Hoboken Land & Improvement Co. v. Mayor, etc., of Hoboken, 36 N. J. Law, 541; Clark v. Elizabeth, 40 N. J. Law, 172; Price v. Inhabitants of Plainfield, Id. 608; Mayor, etc., of Bayonne v. Ford, 43 N. J. Law, 292. This contention cannot prevail.

It was next contended that there was no sufficient evidence that plaintiffs in error or their predecessors in title were not bona fide purchasers without notice of the dedication by their grantor. This contention involves the same error as to the power of the court to consider the sufficiency of evidence to support the finding of a trial judge trying an issue without a jury. It is sufficient to say that there was evidence before the trial judge upon that subject, and his finding cannot be reviewed on error. In stating this conclusion it is not intended to indicate any opinion on the question whether, if plaintiffs in error had been shown to have been bona fide purchasers without notice of Bechtold's previous dedication, they could have maintained possession as against the public. That question is not presented.

It is next contended that there was error in the finding that the action of ejectment for the locus in quo could be maintained by defendant in error. This was a mixed question of fact and of law, for whether the action could be maintained depended on proof that the locus in quo was within the boundaries of the township, and then, on the power of this municipality, to assert the right of possession of lands thus dedicated to public use. The exception, which is general, is therefore too broad. Mills v. Mott, ubi supra. But no objection on this ground was made at the argument, and, as there seems to have been no dispute in respect to the locality of the land, the contention has been considered. It is that a township is not empowered to acquire land for public parks, or charged with any duty in respect to land dedicated to such public use, and therefore does not need the possession thereof. Without looking into the township laws on the subject, and assuming that the contention in respect to them is correct, yet the inference drawn therefrom does not follow. The precise question was raised and settled in this court adversely to such a contention in Price v. Inhabitants of Plainfield, 40 N. J. Law, 608, and it was there held that a municipality, though charged with no right or duty respecting lands dedicated to public uses, was

yet entitled to gain possession of such lands, because it represents the public in which is the right of possession.

The exceptions to the admission or rejection of evidence have not been pressed, but upon examination no injurious error is discovered. The judgment of the supreme court should be affirmed.

(1 Pen. 224)

PRETTYMAN v. WILLIAMSON.

(Superior Court of Delaware. Newcastle.

March 1, 1898.)

CRIMINAL CONVERSATION—ALIENATION OF AFFECTIONS—DAMAGES—MEASURE—MITIGATION—CONNIVANCE—DIVORCE.

1. In an action for criminal conversation, the husband may recover for his mental suffering, and the loss of his wife's affection and society, as well as for the pecuniary loss of her services.

2. In an action for alienating the wife's affections, the husband may recover the value of her services, the loss of her society, affections, and assistance, less the value of the performance of the husband's duty to support, clothe, and care for her.

3. An action for criminal conversation may be maintained without proof of pecuniary loss.

4. Pecuniary loss is not a prerequisite to the maintenance of an action for alienating a wife's affections.

5. The consent of the husband to the act complained of is a complete bar to an action for criminal conversation.

6. It is also a bar to an action for alienating the wife's affections.

7. In an action for criminal conversation, facts showing that the relations between plaintiff and his wife were unhappy, that he failed to support her, and that he is living apart from her, may be considered in mitigation of damages.

8. Such facts may also be shown for the same purpose in an action for alienating the wife's affections.

9. An act of the legislature divorcing husband and wife is not a bar to an action for previous criminal conversation.

10. Nor to an action for previously alienating the wife's affections.

11. But such divorce may be considered in mitigation of damages in either action.

12. A husband cannot recover for the alienation of his wife's affections if the injury was the result of his own cruelty or misconduct, unless it appear that defendant prevented a reconciliation.

13. In an action for criminal conversation, exemplary damages may be awarded, based on the enormity of the offense, and its malicious, willful, and aggravated character.

14. Such damages may also be awarded for alienating the wife's affections.

Action by William F. Prettyman against Edwin B. Williamson to recover damages for criminal conversation and for alienation of affections.

James W. Ponder, for plaintiff. Peter L. Cooper, Jr., for defendant.

PENNEWILL, J. (charging jury). This action, which has been tried with so much ability, and which you have so patiently heard, and will no doubt carefully consider and determine, is brought by William F. Prettyman, the plaintiff, against Edwin B. Williamson, the defendant, for damages

which he alleged he has sustained by reason of an injury or wrong committed by the said defendant. In the declaration filed in the case the plaintiff in certain counts charges the defendant with criminal conversation or adultery with his wife, and in other counts the defendant is charged by the plaintiff with alienating the affections of the wife without the aggravation of criminal conversation. It may be of assistance for you to be informed at the outset that criminal conversation, in legal contemplation, means adultery, which is sexual intercourse by a man and a woman, one of whom is lawfully married to another person. To the declaration of the plaintiff the defendant has entered the following pleas, viz.: First, not guilty, which is called the general issue, and constitutes an absolute denial of the commission of the injury or wrong complained of by the plaintiff; second, the statute of limitations, which is a bar to the recovery by the plaintiff for any injury committed prior to the three years immediately preceding the commencement of the present suit; and, third, an act of the general assembly of the state, passed May 26, 1897, divorcing the said William F. Prettyman and his wife from the bonds of matrimony, and which act the defendant contends constitutes a bar to the present action which was commenced May 5, 1897. It is perhaps true that this is a case of first impression in the courts of this state, and certainly our reports do not show that any action of the kind has ever been tried before a Delaware tribunal. It is necessary, therefore, we think, that the court should take some pains to explain to you the law applicable to such case, in order that you may apply the law to the facts as you have heard them, and arrive at a just conclusion.

Although a case of criminal conversation, or of the alienation of a wife's affections, in our courts is a new one, nevertheless the action is an old one, and has been frequently resorted to in other jurisdictions. The husband is entitled to the society, comfort, fellowship, assistance, and services of his wife, and whoever, by the alienation of her affections, deprives him thereof, commits a wrong against the husband for which he is liable to respond in damages. Criminal conversation, as above stated, is an action for damages caused by adultery with the wife, and the husband's injury by the wrong consists in his mental suffering from the dishonor of the marriage bed, and the loss of the affections of his wife and the comfort of her society, as well as the pecuniary loss of her services. Where the basis of the action is the alienation of the wife's affections, the measure of damage is the value of her services and marital consort; that is, her conjugal society, affection, and assistance, less the value of the performance of the husband's duty to support, clothe, cherish, and care for her. 8 *Suth. Dam.* § 1285; *Rudd v.*

Rounds (Vt.) 25 *Atl.* 438. In either case, according to the modern doctrine and the later decisions, the action is based mainly on what is termed the "loss of the consortium,"—that is, the loss of the conjugal society, affection, and assistance of the wife,—and it is not essential to the maintenance of the action that there should be any pecuniary loss whatever. In actions of this character there are two kinds of defense, the one going to the complete bar and absolute defeat of the action, and the other going not to the bar of the action, but in mitigation or reduction of the damages. A defense of the first kind is the consent of the husband to the act complained of, for it is a general rule of law that no one can maintain an action for a wrong when he has consented or contributed to the act which occasions the loss. When an action is brought, like the present, the law is now clearly settled to be that, if the husband consents to his wife's acts, it goes in bar of the action. *Bunnell v. Greathead*, 49 *Barb.* 106. And such a rule of law is supported by the clearest reason, and is based on the soundest principles, because it is abhorrent to every principle of justice and right that a husband should procure, or even consent, to the infamy or misconduct of his wife, and seek to profit by the wrong, for which he is responsible. In the matter of mitigation of damages, which is the second class or kind of defense referred to, there are many things which may be considered, and which it is right and proper that the jury should consider so far as disclosed by the testimony produced in the case. The extent of the actual injury to the husband will, of course, depend on the prior relations between him and his wife, and the practical consequences between them of her defection. Evidence in mitigation or reduction of damages will therefore be received which tends to show that the plaintiff has, in fact, suffered less injury than would otherwise be a probable inference from the act complained of. It is proper, therefore, for you to consider, in mitigation of damages, any evidence which shows that prior to the wife's relations with the defendant the relations between her and her husband were unhappy; that they were wanting in affection for each other; that there was but slight intercourse between them; that he was cruel or unkind in his treatment of her; that he failed to support her; and any misconduct on his part tending to show their unhappy relations or lack of affection. And if the husband be guilty of negligence or loose and improper conduct respecting the wrongful act of the wife, but not amounting to consent, it goes in mitigation or reduction of damages. The fact that a husband is living apart from his wife may likewise be shown in mitigation of damages, but it is not a bar to the action itself, and certainly not if he has not renounced his marital rights, and permanently and totally given up all advan-

tage to be gained from the society of his wife. *Cross v. Grant*, 62 N. H. 675. And the reason of the rule is that any unhappy relations existing between the plaintiff and his wife, not caused by the conduct of the defendant, may affect the question of damages, but they are in no sense a justification of the defendant's conduct. They are allowed to affect the damages, not because the acts of the defendant are less reprehensible, but that the condition of the husband is such that the injury which such acts occasion is less than otherwise it might have been. As was well said by the learned judge in the case of *Cross v. Grant*: "By a separation the husband may, as to his wife, have lost his legal right to the comfort and solace of her society, but not as to all the world. Although separated from her husband, and by his fault, she remained his wife until divorced, and for her support he is liable." The separation does not release him from his marital duties. There is always a hope of reconciliation. The proper nurture, training, and instruction of children require the united labor and affection of both parents. Their mutual comfort and support and the good of society require that they should live together in one family. The policy of the law encourages them, if living apart, to come together again. Reconciliation would or should be followed by purity in their marriage relations, and happiness in their home. The fact of the separation, however, and the circumstances under which it occurred, may be very material to be considered by the jury as showing the relations of the husband and wife, and whether on account of such relations the husband lost much or little by reason of the acts and conduct of the defendant.

We will not enter into a discussion of certain of the legal questions raised by the prayers in this case, because such a discussion would probably confuse rather than aid you in the discharge of your duties. We will therefore content ourselves with the statement of our conclusions upon such questions, without setting forth at length the reasons upon which such conclusions are based. The divorce granted by the legislature to Mrs. Prettyman, May 26, 1897, may be and should be considered by you in mitigation of damages, if you should think the plaintiff entitled to recover damages, because the plaintiff would not be entitled to any compensation for the loss of the affection, society, and services of his wife after she ceased to be his wife. Although it is true, as Mr. Bishop has said in his valuable work on *Marriage and Divorce* (volume 1, § 1465): "That a legislative divorce, equally with a judicial one, snaps the vinculum of the marriage, and that whatever hangs upon it falls,"—yet the learned author in laying down that proposition illustrates its meaning by referring to the next section, which is as follows: "If the man dies, the woman

will not be his widow, entitled to dower, and a portion of his personal property. He will not, on her death, be authorized to hold her lands as tenant by the courtesy; but, on the contrary, his interest and that of his grantees and representatives, in them and in her choses of action, ceases. This is not a divesting of vested rights." The learned writer did not mean, and it cannot be the law, that the divorce would be a bar to an action like the present, brought for an injury to the marital relation prior to the divorce, and which action is not based upon the existence of such relation at the time of the commencement of the suit. See, also, sections 1440, 1441, of the same volume. In the case of *Wales v. Miner*, 89 Ind. 121, which was an action for criminal conversation, the supreme court says: "The fact that a divorce may have been granted to the plaintiff a few days before the bringing of the suit would not destroy the appellee's right of action. That might be the means of perfecting it. * * * The action is brought for the injury and destruction of the plaintiff's marital relations, and is not based upon their then existence." In *Michael v. Dunkle*, 84 Ind. 544, which was an action by the husband for criminal intercourse with his wife, accomplished after a final separation from her, which is followed, before the commencement of the action, by a divorce granted to her on account of his cruelty, it was insisted that upon the facts the husband was not entitled to recover. The court said: "We think otherwise. * * * It would not be in the interests of good order and the public morals to permit the seducer of a wife to set up a disagreement, or even a separation, between her and her husband, as a complete defense to an action by the latter for the wrong." In this case the husband permitted his wife, without resistance, to obtain a divorce. But, gentlemen of the jury, in order to find a verdict for the plaintiff in this case, you must be satisfied from the testimony, and you must be satisfied by the preponderance—that is, the weight—of the testimony that the defendant committed the injury or wrong of which the plaintiff complains. If you believe that the acts and conduct of the defendant were the controlling cause of the wrong or injury complained of, and without which it would not have occurred, the action could be maintained, although there were other causes contributing thereto. Such is the rule laid down in the case of *Hadley v. Heywood*, 121 Mass. 236, and we think it is a very correct statement of the law. But if, on the other hand, you believe that such wrong or injury occurred by reason of the cruelty or misconduct of the husband, the plaintiff, and are not satisfied from the testimony that the acts and conduct of the defendant were the controlling cause, then your verdict should be for the defendant, unless you believe that the defendant, by ob-

taining the affections of the wife, prevented or obstructed a reconciliation between the husband and his wife, which the policy of the law, as well as the good of society, encourages and demands; because, even if the wife had no affection for her husband, another person has no right to interfere to cut off all chance of its springing up in the future. *Fratini v. Caslani* (Vt.) 29 Atl. 252; *Dallas v. Sellers*, 17 Ind. 479. The fact, however, that the plaintiff and his wife lived unhappily together before the defendant appeared, and even were much estranged, would not constitute a bar to the plaintiff's action, but would go, as we have already said, in mitigation of damages. If, however, the conduct of the husband has been such as to justify the wife in leaving him, he cannot maintain an action against another, who assists her, or receives or harbors her, provided his assistance is rendered from motives of humanity, and not from an evil motive or purpose, or in bad faith towards the husband. 1 Bish. Mar. & Div. § 1362. If you should conclude, after carefully and fairly considering and weighing all the testimony as you have heard it from the witnesses, and applying the law as the court has declared it to you, that the defendant committed adultery with the wife of the plaintiff, then your verdict should be for such amount as, in your judgment, will compensate the plaintiff for his mental suffering from the dishonor of the marriage bed, and the loss of the affection of his wife and the comfort of her society, as well as the pecuniary loss of her services. It is for you to say whether, from the evidence, it is shown that the defendant did commit adultery with the wife of the plaintiff. If you should believe that there is no proof of adultery in this case, but are satisfied that the defendant did alienate the affections of plaintiff's wife, your verdict should be for such amount as, in your judgment, will compensate the plaintiff for the loss of his wife's services and marital consort, less, in either case, the value of the husband's duty to support, clothe, cherish, and care for her; provided, however, that in no event can you award damages for any wrong or injury committed prior to the 5th day of May, 1894; that being three years before the commencement of the present action, which was entered on the 5th day of May, 1897. We will say to you, gentlemen of the jury, that if you believe from a preponderance of the evidence that the defendant willfully and maliciously committed the injury or wrong complained of in this action, you may, in addition to any compensatory damages that you think him entitled to, award to the plaintiff such damages as you may consider proper as a punishment to the defendant, and an example to others. But we say to you that such damages are based on the enormity of the offense, and its malicious, willful, and aggravated character, and you must be satisfied that such

was the character of the offense before you can award damages of this kind. It has been held by this court heretofore that it was a question for the jury to say whether there were circumstances of aggravation in the case, which ought, in their judgment, to require a departure from the general rule of compensatory damages, and which called on them to add anything by way of public example or punishment.

(70 Conn. 363)

In re CHAPMAN'S ESTATE.

Appeal of CHAMBERLIN.

(Supreme Court of Errors of Connecticut.
March 2, 1898.)

ADMINISTRATORS DE BONIS NON — RIGHT TO UN-DISTRIBUTED ASSETS — COURTS — POWER TO CONSTRU E WILLS — PRIMA FACIE RIGHTS.

1. As to the surplus of the personal estate of a decedent after the payment of debts, an executor or administrator is a mere trustee for those beneficially entitled to the property as creditors, legatees, heirs, or distributees.

2. An administrator de bonis non is entitled to recover, and administer as assets of the estate, undistributed personal property which is in fact intestate, though decedent's debts have all been paid, and the property has been delivered by the executor to a testamentary trustee.

3. In such case an administrator de bonis non is necessary, since an estate must be pending for settlement in the probate court, before that court, which alone can decide the question, can determine who are the distributees.

4. Testator, C., gave the life use of all his property to his wife, E., with power of testamentary disposition. On the death of the wife she left the life use of the property in question to her son, with remainder over to his heirs, and appointed a testamentary trustee. Testator's estate was duly settled by his executor, and passed under his will to his wife. Her estate, in turn, was duly settled, and passed to her testamentary trustee. On the death of the son, his representative, claiming that the property in the hands of the trustee was in fact intestate property, because the remainder over was void under the statute against perpetuities, applied for the appointment of administrators d. b. n. for the estate of testator and his wife. The probate court refused to make the appointments, and applicant appealed to the superior court. *Held* that, though these courts could not pass finally on the validity of applicant's claim that the gift over was void, they could look at the wills, and construe them to the extent of determining whether the claims were made in good faith, and whether they had any foundation in law or in fact.

5. If the claims were made in good faith, and the appointments might avail applicant, it was the duty of the probate court to make them.

Appeal from superior court, Tolland county; Samuel O. Prentice, Judge.

Application by James F. Chamberlin, executor of the estate of Doremus D. Chapman, deceased, for the appointment of administrators de bonis non for the estates of Elijah S. Chapman and Eunice Chapman, deceased. The applications were denied by the probate court, and applicant appealed to the superior court. The cases were tried together to the court, facts found, judgment rendered in both in favor of applicant, and appellees below

appeal for alleged errors in the ruling of the court. No error.

The material facts found in both cases are the following:

In March, 1879, Elijah S. Chapman died, leaving a will, which was in the same month duly approved. The following is a copy of its material parts: "Second. I give, devise, and bequeath unto my beloved wife, Eunice Chapman, the use and improvement, rents, profits, and income of all my estate, real and personal, and wheresoever the same may be situated, to her during her natural life. Third. I give, devise, and bequeath all my said estate, at the decease of my said wife, unto such person or persons, and in such shares or portions, as my said wife, Eunice Chapman, by her last will and testament duly executed, shall name, designate, and appoint (provided she shall not give the same to Otis and Ambrose D. Snow, or either of them), to them and their heirs, forever."

Gelon W. West, who was named as executor in the will, accepted said office, and duly qualified as executor. In February, 1880, said executor filed an account, purporting to be a final account of his administration of the estate, which account, after due notice and hearing, was approved and allowed.

In April, 1884, Eunice Chapman, widow of Elijah S. Chapman, died, leaving a will, which was duly proved and approved, the material parts of which are the following: "Third. Whereas, my late husband, Elijah S. Chapman, did by his last will and testament, dated the 8th day of August, 1877, and admitted to probate in the probate court for the district of Ellington, on the 22d day of March, A. D. 1879, give, devise, and bequeath all 'his estate, at my decease, unto such person or persons, and in such shares or portions, as I, by my last will and testament 'shall name, designate, and appoint,' therefore I, the said Eunice Chapman, do give, devise, and bequeath all said estate of my said husband, Elijah S. Chapman, and also all the rest and residue of my own estate not hereinbefore disposed of, unto Gelon W. West, of said town of Vernon, his heirs and assigns, forever, and do hereby name, designate, and appoint the said West as the person to receive all the estate of said Elijah S. Chapman, deceased, according to the provisions of said will of said Elijah S. Chapman, all of which said estate of said Elijah S., and said residue of my own estate, shall be to said West, his heirs and assigns, in trust, for the uses and purposes following, to wit: To have the sole care and management of all said property, real and personal, and to pay over and deliver to my son, Doremus D. Chapman, during his natural life, all the rents, profits, interest, and income of said trust estate, after deducting the expenses incident to said trust, for the use and benefit of my said son; and if said rents, profits, interest, and income shall at any time be insufficient to provide my said son with a good and comfortable support in sickness and in health,

then and in that case I fully authorize and empower said trustee to use and expend so much of the principal of said trust estate as shall be necessary for that purpose, in his discretion. And I fully authorize and empower and direct said trustee, when in his judgment it shall be for the interest of said estate, to sell and convey any portion or all of said trust estate, real and personal, and to invest and reinvest the same in such manner as he shall deem best for the interest of said estate, and in like manner to invest and reinvest all moneys belonging to said estate. Fourth. If, upon the decease of my said son, Doremus D. Chapman, any portion of said trust estate shall be remaining in the hands of said trustee undisposed of, I authorize and direct said trustee to distribute, transfer, and convey all said remaining estate absolutely to such persons as would then be entitled to the same as heirs at law of the said Doremus D. Chapman, if said estate belonged to him, under the statute laws of the state of Connecticut then in force, if the same were intestate estate; that is to say, said trustee shall distribute said estate as aforesaid to those persons who are the natural heirs at law of my said son at the time of his decease."

In the will of Eunice, Gelon W. West was named as executor, as well as trustee, and he accepted said office and said trust, and duly qualified both as executor and trustee. In November, 1889, West filed an account of his administration of the estate of Eunice, as executor, and also as trustee under her will. These two last-named accounts are the only ones ever filed by West in any capacity in connection with the estate of Eunice, and after due notice and hearing they were approved and allowed by the court. Both accounts showed a balance of \$15,885.88 belonging to the trust fund, which consisted of both real and personal estate. In November, 1889, George M. Paulk received from West said trust fund created by the will of Eunice, and has ever since continued to manage said fund, and to act as the trustee thereof, under the provisions of said will, and now has said fund in his hands. There is no record in the proper probate court of the resignation of West as executor of Eunice, nor as trustee under her will, nor of the substitution of Paulk for West in any capacity connected with said will, estate, or fund, except what is contained in said records in a certain bond executed by Paulk on the 23d of November, 1889, reciting that he had been appointed executor and trustee on the 18th of November, 1889, in place of West, resigned. In fact, Paulk was never appointed other than as trustee of said fund, and has never claimed or assumed to act otherwise than as trustee. West died in January, 1890.

Elijah and Eunice Chapman left, surviving them, three children, to wit: Adeline L., now the wife of Ambrose Snow; Mary E., now the wife of Otis Snow; and Doremus D.

Chapman, who was unmarried at the death of his mother. After his mother died, Doremus married, and in December, 1896, died, leaving a widow, Ella H. Chapman, but no issue. He left a will, which has been duly approved, by which he gave all of his property and estate of every kind to his wife, and appointed James F. Chamberlin as his executor, who has duly qualified and is now acting as such executor. No administrator *de bonis non* has ever been appointed, either upon the estate of Elijah or Eunice Chapman, and no executor or administrator upon either of their estates has ever been appointed, except as before stated. There is now in the hands of Paulk, acting as trustee as aforesaid, after deducting all rents, profits, interest, and income, during the life of Doremus, and all expenses incident to said trust, certain real and personal property, originally belonging to Elijah S. Chapman, which came into the hands of the trustee of Eunice under her will, and certain real and personal property, originally belonging to Eunice, which came into the hands of West, her executor and trustee.

In March, 1897, the executor of Doremus, claiming that said property in the hands of Paulk was intestate property, belonging to the estates of Elijah and Eunice, respectively, which had never been administered, applied to the court of probate for the appointment of an administrator *de bonis non* upon each estate, and that court denied the applications. The executor of Doremus took an appeal to the superior court. In that court he made the following claims: "(1) That the attempted exercise of a power of appointment by said Eunice Chapman, in said clause of her will above set forth, was in violation of the statute of perpetuities, which was in force at the time of the death of said Eunice Chapman, in so far as the gift over of the remainder upon the death of Doremus D. Chapman is concerned, and that said appointment is therefore to that extent invalid, and the attempted disposition of such remainder was of no effect in law. (2) That the estate remaining in the hands of said acting trustee, so derived from the estate of said Elijah S. Chapman, was by reason of the premises intestate estate, and must be distributed in accordance with the provisions of the statute law of this state. (3) That, in order that the property and estate in the hands of said acting trustee may be distributed among the persons entitled thereto, it was necessary that an administrator *de bonis non* with the will annexed be appointed on said estate."

The claims of the present appellants in the superior court were as follows: "(1) That the issue involved in the appeal from the decree of the probate court refusing to appoint an administrator *de bonis non* with the will annexed on the estate of said Elijah S. Chapman was whether there was an administrator competent to act, and whether there was

any property which had not been administered, belonging to said estate. (2) That, inasmuch as the only property in question was property which formerly belonged to the estate of Elijah S. Chapman, and that said estate, as well as the estate of Eunice Chapman, had been settled, and final account rendered by the executors thereof, and the property in question delivered to the trustee under the will of Eunice Chapman, the administration upon the estate was complete, and there was no property belonging to it which an administrator *de bonis non* with the will annexed would have any jurisdiction over, if appointed. (3) That an administrator *de bonis non* could not properly be appointed, inasmuch as there was no property belonging to said estate which had not been administered upon by the former executor thereof. (4) That the appointment of George M. Paulk, as trustee under the will of Eunice Chapman, successor to Gelon W. West, deceased, and also as executor, was, in effect, an appointment of Paulk as administrator with the will annexed, and there was therefore no vacancy in the office. (5) That neither the will of Elijah S. Chapman or Eunice Chapman, nor the construction of any clause in either of those wills, was properly before the court, and that the status of the property, as it might be ascertained by the construction of the wills referred to, could not affect the question at issue, because, whoever might be entitled to the property now in the hands of the trustee after the death of the life tenant, it was nevertheless property which had been fully administered, and the same could not be recovered by an administrator *de bonis non* with the will annexed on the estate of Elijah S. Chapman and Eunice Chapman, if one should be appointed. (6) That the property in question in the hands of the trustee, under the will of Eunice Chapman, was within the jurisdiction of the probate court, and within the jurisdiction of a court of equity; and it was competent for any persons who claimed an interest in said property to bring a petition to the probate court or an action against the trustee, and thus determine their rights to the property, without the intervention of an administrator *de bonis non*. (7) That, although neither the will of Elijah S. Chapman nor of Eunice Chapman was properly before the court in this appeal, if the construction of those wills, or either of them, was to be considered by the court, then the appellees are entitled to the property in question, under the will of Eunice Chapman, as the only heirs of Doremus D. Chapman, and that the same was not in violation of the statute of perpetuities."

That court in effect sustained the former and overruled the latter claims, and rendered judgment in favor of the executor.

Lewis Sperry and Charles Phelps, for appellants. William Waldo Hyde and Joel H. Reed, for appellee.

TORRANCE, J. In 1879, Mr. Chapman died, leaving a will, in which he gave the life use of all his property to his wife, and at her death he gave it to such person or persons as she by her will should appoint. In 1880, the executor under this will rendered his final administration account, which was accepted and allowed. In 1884, Eunice, the wife of Mr. Chapman, died, leaving a will, in which she appointed Gelon W. West as the person to receive all the estate of her husband in her possession at her decease, and also gave to him the entire residue of her own estate, in trust to pay the rents and profits of the entire property to her son, Doremus, during his life, and at his decease to distribute the trust property to those persons who should then be his natural heirs at law. In November, 1889, West, the trustee and executor under the will of Eunice, filed his accounts as trustee and as executor, which were duly allowed and accepted. He then had in his possession something over \$15,000 belonging to the trust fund, consisting of both real and personal estate. He resigned his office of trustee, and Mr. Paulk was appointed his successor in that office. West died in 1890. Paulk has acted as trustee under the will of Eunice since his appointment. In December, 1896, Doremus died, leaving a will, in which he left all his property to his widow. The executor under that will claimed that the trust property in Paulk's hands at the death of Doremus was intestate property belonging to the estates of Elijah and Eunice, in which he had an interest, and that an administrator de bonis non upon each estate should be appointed, in order that said claim might be tried and determined. The superior court took the executor's view of this matter, and the principal question here is whether it erred in so doing.

The claim that the property in Paulk's hands is intestate property is based upon the assumption that the gift over to the heirs of Doremus, in his mother's will, is void. The appellants, in substance, claim (1) that, even on the assumption that the property in Paulk's hands is intestate estate, it would not be assets in the hands of an administrator de bonis non, because it has been already fully administered, and consequently such an administrator ought not to be appointed, for he would have nothing whatever to do; (2) that the question whether the property is or is not intestate estate was not properly before the lower court, and could not be determined by it; (3) that, if such question was before it for determination, it should have held the gift over to be valid, and not void.

The first claim is not tenable. It is based mainly upon rules of the common law which were never adopted in this state, or have been changed or modified by statute, or have little or no application in these cases. At common law "executors and administrators took the legal title to the goods and chattels of the deceased; nor were they, before the statute of distribution (22 & 23 Car. II. [1670] c. 10),

bound to distribute the surplus after payment of debts. Both held in *autre droit*, and therefore neither could dispose by will of the property remaining in specie; both had the power, while living, of changing, altering, and converting the property, and whatever was thus altered or converted became their own goods, and descended on their deaths to their own representatives. Such change or conversion of the goods was (so far as regards the administrator de bonis non) a complete administration, and put them as effectually beyond the reach of his commission as if they had never belonged to the testator or intestate." *Coleman v. McMurdo*, 5 Rand. (Va.) 51; *Potts v. Smith*, 3 Rawle, 361; *Beall v. New Mexico*, 16 Wall. 535; and cases cited in note in 24 Am. Dec. 379. A somewhat technical meaning was thus given to the word "administered," so far as regarded the administrator de bonis non. As to him, goods, chattels, or credits of the decedent, changed, altered, or converted by the executor or administrator, were "administered." The administrator de bonis non succeeded only to goods, chattels, and credits of the decedent which had not been administered; and goods, chattels, and credits "not administered" meant goods, chattels, and credits which had been the property of the decedent at his death, and remained in specie, unchanged and unconverted, when the administrator de bonis non was appointed. Thus, money received by the former executor or administrator in his representative capacity, and kept by itself separate from his own money, is regarded as "not administered"; but, if mixed and mingled with his own money, so that its identity is gone, it is regarded as converted, and so "administered," so far as the administrator de bonis non is concerned. *Beall v. New Mexico*, supra; *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566. The administrator de bonis non was regarded as taking the specific property of the decedent as his immediate successor, and not as succeeding to a prior executor or administrator; hence there was said to be no priority between them. Suits brought by or against the predecessor could not, as a rule, be prosecuted by or against his successor, and judgments obtained by or against the predecessor were not available in favor of or against the successor. *Alsop v. Mather*, 8 Conn. 534; *American Board of Commissioners for Foreign Missions' Appeal*, 27 Conn. 344.

These rules of the common law have been changed or modified to some extent in many, if not most, of the states, including our own. The rule that an executor or an administrator was entitled to the surplus of the personal estate after the payment of debts was never adopted in this state. *Bacon v. Fairman*, 6 Conn. 121-129. They are regarded here as mere agents or trustees for those beneficially entitled to the property as creditors, legatees, heirs, or distributees. *Woodhouse v. Phelps*, 51 Conn. 521-523; *Robbins v. Coffing*, 52 Conn. 118, 143; *Wilmerding v.*

Russ, 33 Conn. 67. And it is now made a crime for any executor or administrator to "wrongfully appropriate and convert to his own use the money, funds, or property" of the estate. Gen. St. § 1579. At the very beginning of this century it was by statute made the duty of an administrator *de bonis non* "to ask for, demand, and receive" of his predecessor, "his heirs or administrators, all the goods and effects of the deceased, and also all the books of accounts, bonds, notes, or other securities, documents, or papers whatsoever, touching the estate, which may be needed in the settlement thereof"; and it was further then provided that all actions at law or in equity, pending against such predecessor when he went out of office, should survive, and might be prosecuted by or against his successor. Revision 1806, p. 271. These provisions, in substance, have been law ever since, and other changes in the same direction have been made from time to time, as shown by the General Statutes. An executor of an executor is no longer, as at common law, entitled to administer the estate of the first testator. Gen. St. § 553. When a will disposes of only a part of the estate, the executor or administrator with the will annexed is *ex officio* the administrator of the intestate estate. Id. § 564. When an executor or administrator dies before completing or accounting for his trust, his personal representative must settle the account in the court of probate, and pay the amount found due to the successor. Id. § 617. Courts of probate, after the removal of an executor or administrator and the appointment of his successor, may enforce the delivery of property, held by the former, to the latter "in the same manner as a court of equity might do." Id. § 612. Under section 445, an executor or administrator paying money or delivering property pursuant to the order of a court of probate having jurisdiction is protected from personal liability, even if the order is subsequently set aside, but the property so delivered or money paid may be recovered, "by the person entitled, from any person receiving or in possession of the same." These and other statutory changes, which it is unnecessary to refer to, have modified the doctrines of the common law with reference to the rights and duties of an administrator *de bonis non*. Under the changes thus made in our law, this court, in *Pinney v. Barnes*, 17 Conn. 420, held that money of the estate in the hands of an executor removed from office, "no matter from what source received, nor for whom ultimately destined," belonged to the administrator *de bonis non*, and that he was the proper party to institute proceedings to recover the same against his predecessor in office. In *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313, it was held that, where an executor had paid over money of the estate by mistake to a creditor, the administrator *de bonis non* could sue for and recover from

the creditor the money so paid. In that case the money so paid by the executor wrongfully or mistakenly was an asset of the estate which had been "administered" by him, within the technical common-law meaning of that word; but this fact was not allowed to defeat the right of the administrator to sue for and recover it.

If, then, the property here in question is intestate estate, and has already been "administered," within the common-law meaning of that term, so that under the rules of that law an administrator *de bonis non* could not claim it, nor administer it, still we think that under our law such an administrator would be entitled to claim and recover and administer it. It does not appear to be wanted to pay debts, but, if it be intestate property, it is wanted for distribution, and administration is never complete until the assets of the estate have been turned over to those rightfully entitled to them. But, even if the strict rules of the common law are to govern in this matter, we think, on the facts found, that the administrator *de bonis non* would be entitled to recover, hold, and administer this property if intestate. It is found that the property in Paulk's hands is substantially the same identical property which belonged to Elijah and to Eunice Chapman. It still exists in specie, unchanged and unconverted, so far as appears, in the hands of a third person, who, if it be intestate property, has no legal right to it. Under these circumstances, it would, even under the rules of the common law, go to the administrator *de bonis non*. *Beall v. New Mexico*, supra. In either view of this matter, then, if the property is in fact intestate, we think the administrator *de bonis non* of the estates of Elijah and Eunice Chapman is entitled to recover, hold, and administer it as assets of those estates. Indeed, he is the only person who can properly do so. *Pinney v. Barnes*, 17 Conn. 420. The appellants say that the distributees of Elijah and Eunice can sue for and recover it, and divide it among themselves, all the debts having been paid. But who are the distributees? That question must be settled by the court of probate, and, in order that it may do so, "it is plainly essential that an estate should be pending for settlement in said court, in the orderly and prescribed way." *Connecticut Trust & Safe-Deposit Co. v. Security Co.*, 67 Conn. 438, 442, 35 Atl. 342. And, to secure this essential in the cases at bar, the executor of both estates being dead, and no successor ever having been appointed, it is necessary that an administrator *de bonis non* upon each estate should be appointed. The claim of the appellants that Paulk was appointed as the successor of West in the administration, and was now administrator, is not borne out by the finding, and need not be further considered.

The other two grounds of error claimed

may be considered together. They are, briefly, first, that the court below erred in construing the wills at all; and, second, that it erred in holding that the gift over in Eunice's will was void. The power to determine directly and conclusively the construction to be given to wills is not committed to the court of probate, nor to the superior court sitting as an appellate court of probate. Such a power involves the right to try and finally determine disputed titles to property, real and personal, and this is not given to those courts. *Hewitt's Appeal*, 53 Conn. 24, 1 Atl. 815; *Mallory's Appeal*, 62 Conn. 218, 25 Atl. 109; *Cone's Appeal*, 68 Conn. 84, 35 Atl. 781. But, though the court of probate cannot directly try and finally determine questions of title to personal property, it has the power to pass upon them incidentally and indirectly, and for some specific purpose, whenever such an incidental power is necessary to the exercise of a jurisdiction confessedly conferred upon it. Thus, it has been held that, although it is not competent for the court of probate to determine directly the amount or validity of creditors' claims, it had power, in its settlement of the administration account, to decide on the validity of the claims of creditors paid by the administrator or executor, so far as it respects the allowance of such payments in his account (*Edmond v. Canfield*, 8 Conn. 87); and that it had the incidental power to determine who the heirs are "for the particular purpose of completing the settlement of the estate, and in order that the executor may be protected" (*Davenport v. Richards*, 16 Conn. 310, 319). The court of probate has the exclusive power to appoint executors and administrators, under conditions prescribed by law; and, in determining in a given case whether it will exercise that power, it must possess the incidental power to decide, subject to review on appeal, whether the conditions for the exercise of its power to appoint exist; and this may include, in cases like the present, the power to construe wills, for the purpose of deciding whether the claim made under them is made in good faith, and whether it is or is not *prima facie* utterly without any foundation in law or in fact.

In the cases at bar, the executor of Doremus claimed before the probate court that the property in question here was intestate estate because the gift over in the will of Eunice Chapman was void; that, if that were so, part of said property belonged to him as the representative of Doremus; that the executor upon both estates was dead, and no one had been appointed in his stead; and that he desired to have an administrator *de bonis non* appointed upon each estate, to the end that he might properly prosecute his claim. These claims he also made in the superior court. It was the province and duty of both courts to look at the wills, and to construe them, to the extent and for the purpose of determining whether the claims were

made in good faith, and whether they were or were not utterly without foundation in law or in fact. Further than this they were not bound to go. It was not within the province of either court, nor was it its duty, to pass finally upon the validity of the executor's claim that the gift over was void, nor did the superior court, we think, attempt to do this. In *Woodhouse v. Phelps*, 51 Conn. 521, an administrator *de bonis non* was appointed, though it turned out that there was nothing for him to do. In *State v. Smith*, 52 Conn. 557, such an administrator was appointed, although it turned out that there was no property belonging to the estate. In *Connecticut Trust & Safe-Deposit Co. v. Security Co.*, 67 Conn. 438, 35 Atl. 342, such an administrator was appointed, although it was claimed that the property sought to be recovered through him had never vested in his decedent. In these and cases like them it is not the duty of the court of probate, when asked to appoint an administrator *de bonis non*, to pass upon the legal validity of the claims sought to be made available through such an appointment. *Mallory's Appeal*, 62 Conn. 218, 25 Atl. 109. It is enough that the claim is made in good faith, and appears to have some foundation in fact or in law. If the claim of the executor was made in good faith, and did not *prima facie* appear to be utterly without reason or foundation in fact or in law, and if the appointments might avail the executor, then we think that, upon the other facts found, it was the duty of the probate court to make them. In this view of the law, there is no error apparent on the record. The other judges concurred.

(70 Conn. 357)

BENNETT v. PACKER et al.

(Supreme Court of Errors of Connecticut.
March 2, 1898.)

WILLS—GIFT DURING WIDOWHOOD—DOWER—INTESTATE ESTATE—DISTRIBUTION—RESERVATION TO SUPREME COURT.

1. After certain bequests, a testator gave to his wife all the residue of his estate for her separate use, and provided that, if she should again marry, "I give, bequeath, and devise to her one-third of my real estate and personal property, for herself and her heirs." *Held*, that the widow was not entitled to an absolute estate in fee in either the entire real or personal estate.

2. The conditional limitation imposed was not void as in *terrorem*, and as placing a restraint on marriage.

3. On the remarriage of the widow, two-thirds of the entire estate became intestate.

4. The provisions for the widow were impliedly in lieu of dower, and hence she was not, on remarriage, entitled to any part of the real estate of the intestate estate.

5. A widow, having enjoyed the provisions of the will for 10 years, was estopped from exercising her election.

6. The widow, on remarriage, was entitled, as a distributee, under the statute, to one-third of the personal intestate estate.

7. Where a suit to determine the validity and construction of a will, brought to the superior court, is by it reserved on a finding of facts, for the consideration and advice of the supreme

court of errors, questions not involved in the construction of the will will not be decided.

Case reserved from superior court, Windham county; Milton A. Shumway, Judge.

Suit by Origen Bennett, executor, against Emma A. Packer and others, for the construction of a will, brought to the superior court, and, on facts found, reserved for the consideration and advice of the supreme court of errors, by consent of several parties.

The will of Lothrop H. Hooker is as follows: "I, Lothrop H. Hooker, of Mansfield, county of Tolland and state of Connecticut, being of sound mind and memory, do make and ordain this my last will and testament, in manner and form as follows, viz.: Item 1. It is my will that all my just debts, funeral charges, and expenses of erecting suitable monuments be paid and discharged by my executor, hereinafter mentioned. Item 2. I give and bequeath to my daughters, Jennie L. Bacon, wife of Joseph H. Bacon, to Mary Eva Byles, wife of George S. Byles, to Emma A. Hooker and Adele M. Hooker, each one hundred dollars for their own separate use. Item 3. I give, bequeath, and devise to my beloved wife, Susan M. Hooker, all the residue of my personal property and real estate owned by me at the time of my decease, for her own separate use and behoof. Item 4. It is my will that, if the said Susan M. Hooker again marries after my decease, I give, bequeath, and devise to her, the said Susan M. Hooker, one-third of my real estate and personal property for herself and her heirs. Item 5. I hereby appoint Origen Bennett the executor of this, my will and testament. In witness whereof, I have signed, sealed, and published, and declared this instrument as my will, at Mansfield, Conn., on this twenty-eighth day of December, A. D. 1882. Lothrop H. Hooker. [Seal.]" The testator died April 24, 1888. The value of the personal estate left by him is \$3,797.53; the value of the real estate, \$6,075. His will was admitted to probate in May, 1888, and the plaintiff duly qualified as executor. The daughters of the testator named in the second clause of the will were his children by a former wife. The said Susan M. Hooker was the second wife of the testator. They were married in May, 1862. After the death of the testator, she, in January, 1897, married John W. Griggs, who died in November, 1897. Our advice is asked upon the following questions: "Whether, by the provisions of said will, and of items 3 and 4 thereof, the testator's widow became entitled to an estate in fee simple in the real property of said estate; whether, by the provisions of said will, and of items 3 and 4 thereof, said widow became entitled to a life estate in and life use of two-thirds of the property of said estate, or whether said two-thirds became, at her said marriage, intestate estate; whether, if said two-thirds of said property is intestate estate at

her said marriage, said widow became entitled to one-third of the same; whether the widow, under item 3 of said will, became entitled to the personal property of said estate absolutely; whether, if two-thirds of the property belonging to said estate became intestate upon the said marriage of the testator's widow, the real estate other than that in which the widow has a dower interest may be sold by the executor, and the avails thereof be used to pay the expenses of settling the said estate."

Samuel B. Harvey, for executor. Elliot B. Sumner and Huber Clark, for Susan M. Griggs. Charles E. Searls and William A. King, for testator's children.

HALL, J. The only claim made by Susan M. Griggs (formerly Susan M. Hooker) to the estate in question, in her written statement filed in the superior court in obedience to an order of that court, is that, as widow and as devisee and legatee under the will, she has an absolute title to all the real and personal property of the estate after the payment of claims and of the legacies given to the daughters. The third clause of the will, considered independently of the other provisions, gives to the widow such absolute title to the residuum. But the several clauses of the will must be construed in relation to each other; and, reading the third and fourth clauses together, it is clear that the fee to two-thirds of the residue is a gift *durante viduitate*. Upon the fee to such two-thirds the fourth clause imposes a conditional limitation, by which, upon the subsequent marriage of the widow, the estate determines *ipso facto*, without any re-entry or other act by the heirs of the testator. 2 Washb. Real Prop. (4th Ed.) 24; Phillips v. Medbury, 7 Conn. 568, 573; Sheldon v. Rose, 41 Conn. 371. Such a limitation is not void as in *terrorem*, and as placing a restraint upon marriage. Jarm. Wills (6th Am. Ed.) *885, *886, and note; Phillips v. Medbury, *supra*.

The provisions for the widow by the third and fourth clauses of the will were in lieu of dower. The intention of a testator that a provision of his will for the benefit of his widow shall be a substitute for her dower right need not be expressly stated in the will. No technical words or terms are required to express such intention. Where such a provision is not expressly stated in the will to be in lieu of dower, the intention may be gathered from a consideration of the entire will, but it should be "demonstrated by clear and manifest implication." And, unless such intention clearly appears from the will, the widow is not put to her election. 2 Scrib. Dower (2d Ed.) 443; Lord v. Lord, 23 Conn. 327; Alling v. Chatfield, 42 Conn. 276. In Lord v. Lord, *supra*, the devise to the wife was not expressed to be in lieu of dower. The testator gave to his

wife, during her widowhood, the use of his dwelling house, garden, and lot adjoining, one-half the use of his fishery, the use of one-half of his household furniture, the income from certain bank stock, and charged upon his farm the annual payment of certain products, and gave her certain bank stock. The provision was held to be in lieu of dower. In *Evans' Appeal*, 51 Conn. 435, 440, a gift to the widow of the life use of the entire estate of the testator was held to be necessarily in lieu of dower. In *Anthony v. Anthony*, 55 Conn. 256, 11 Atl. 45, a gift to the wife of about two-thirds of the income of the personal property and the use of nearly half the real estate was held to exclude dower, though not expressly stated in the will to be in lieu of dower. In the case at bar the testator gave to his wife, during widowhood, the fee to about nine-tenths of his entire property, and, in the event of her remarriage, an interest in his estate much greater in value than her dower right. We think it clearly appears from the entire will to have been the intention of the testator that the gift to the widow should be in lieu of dower, and that by her acceptance and enjoyment for nearly 10 years, without claiming dower, of the benefit of a provision giving to her the fee of the residuum during widowhood, and thus placing it within her power to enjoy that estate during her life, and giving to her one-third of the residuum absolutely in case of her remarriage, she is estopped from claiming dower in the estate which has become intestate by her marriage.

Is the widow entitled to share in the personal property of the intestate estate, under the statute of distribution? Some expressions in the opinion in *Leake v. Watson*, 60 Conn. 498, 513, 21 Atl. 1075, 1080, would seem to indicate that she was not. But the question was not really involved in the decision of that case, and the statement in the opinion that the widow was not entitled to share in the intestate estate "resulting from the failure of the remainder over to the heirs of the daughters" is based upon the peculiar circumstances of that case, among which were the facts that the testator did not contemplate that any part of his estate would become intestate, and that the widow did not claim the right to share in the intestate estate. In *Huntington's Appeal*, 30 Conn. 526, it was made a quere whether the will containing a provision for the benefit of the widow could be considered as affecting the rights of her heirs under the statute of distribution to share in intestate estate. The case of *Sheldon v. Rose* was quite similar to the present case. There the testator bequeathed to his wife the use of all his estate so long as she remained his widow, and, in case of her remarriage, the life use of one half of his property, the other half to brothers and sisters, but with no disposition of the remainder after the termination of the widow's life estate. The widow remarried.

After her death it was held that one-half the intestate estate should be distributed to the heirs of the widow. In *Evans' Appeal*, supra, the testator, having no children, gave to his widow the life use of his entire estate after the payment of debts, without an express statement that it was in lieu of dower. The widow declined in writing to accept the provision of the will, upon advice that her acceptance of it would not only bar her dower right, but also her right under the statute of distribution. This court held that she might revoke her election, and claim under the will the use of the entire estate for life, and, under the statute of distribution, one-half the personal estate absolutely, and that notwithstanding her acceptance of the provision of the will, which was held to be in lieu of dower, she was entitled, as distributee, under the statute, to one-half the personal property absolutely. In the recent case of *Nelson v. Pomeroy* (Conn.) 29 Atl. 534, it was held that the acceptance of the bequest to the widow, which was expressed to be in lieu of dower, did not bar her from claiming her share of the intestate personal estate, under the statute. In giving the opinion of the court, Judge Hammersley says: "*Pinckney v. Pinckney*, 1 Bradf. Sur. 276, seems to support the broad rule that a bequest to a widow 'in lieu of all right she may have in my real or personal estate, except as hereinafter mentioned,' does not exclude the widow from her distributive share of any property undisposed of by the will. Doubtless, such a statement should be taken subject to the modification that a bequest to his wife in lieu of all claim upon the testator's estate may be so framed that, if she elect to take the bequest, she will be estopped from claiming any share even of intestate property." The widow's right to share in the personal property, unlike her right of dower, could have been defeated by the testator by a disposal of his entire estate by will. As it appears upon the face of the will that, in the event of the marriage of the widow, a part of the estate would become intestate, we think she may justly claim that she accepted the gift to her as a substitute for her right of dower only, and not in lieu of her statutory right to share in the intestate personal estate.

The superior court is advised: (1) That, by the provisions of the will, the testator's widow did not become entitled to an absolute estate in fee in either the entire real or personal estate; (2) that, upon the remarriage of the widow, two-thirds of the entire estate became intestate; (3) that the widow is not entitled to any part of the real estate of said intestate estate, but is entitled as a distributee, under the statute, to one-third of the personal intestate estate. Upon the question asked in the amendment to the complaint we give no advice, as it is not involved in the construction of the will. The other judges concurred.

(87 Md. 232)

STOCKSLAGER v. MECHANICS' LOAN & SAVINGS INSTITUTE.

(Court of Appeals of Maryland. March 3, 1898.)

FRAUDULENT CONVEYANCES—CONSIDERATION—EVIDENCE—BURDEN OF PROOF—HUSBAND AND WIFE—IMPLIED CONTRACTS.

1. As against the husband's creditors, whose rights accrued prior to a transfer of real property by the husband to the wife in payment of an alleged debt, the burden is on the wife to establish that she was a bona fide creditor of the husband.

2. The consideration expressed in a deed from a husband to his wife was "\$2,100 heretofore received" by him, and the property, which was worth \$4,100, was taken subject to mortgages for \$2,000. The deed was executed November 14th, and recorded December 30th, following. The firm of which the husband was a member was insolvent, and was being sued, principally in November. A note for \$2,200 for prior indebtedness was executed to creditors three days before the deed was recorded. After the conveyance the husband apparently had nothing, and his administrator returned no assets. The wife was not shown to have had any property at her marriage, or means of acquiring any, except by keeping a few boarders during a part of six or seven years. She had a bank account during this time, and deposited amounts for more than she probably made from boarders about the time her husband executed the deed and became insolvent. She was known to have had his notes in various amounts prior to the deed, several amounting to \$177, which might have been the basis of a claim against him when the deed was made; but there was no evidence that they were unpaid, or connecting them, or checks given him by her at various times, with the consideration mentioned in the deed. *Held* that, against antecedent creditors, the deed was not shown to be bona fide.

3. If a husband receives his wife's money or other separate property with her knowledge and acquiescence, and without an express promise at the time to repay it, no implied assumpsit, either legal or equitable, arises to support a claim against him.

4. The recital of the consideration expressed in a deed from a husband to a wife as the sum of \$2,100 "heretofore received" by the husband from his wife in extinguishment of the debt "thereby created," does not evidence an obligation on the part of the husband that the wife could have enforced against him or his estate, and therefore cannot be relied on as evidence of a valuable consideration against his creditors.

Appeal from circuit court, Washington county.

Bill in equity by the Mechanics' Loan & Savings Institute against Sarah M. Stockslager and others. From a decree in favor of plaintiff, defendant Sarah M. Stockslager, by her committee, J. Augustus Mason, appeals. Affirmed.

McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, BOYD, and PEARCE, JJ.

J. A. Mason, for appellant. N. B. Scott, Jr., for appellee.

BOYD, J. The object of the bill of complaint which was the beginning of the proceeding before us for review was to set aside a deed executed by William E. Stockslager to his wife, Sarah M. Stockslager,

conveying a house and lot in Hagerstown, and to subject the property to the payment of the debt due the appellee by him. The indebtedness commenced in 1890 and 1891 on several notes of the firm of J. C. Dayhoff & Co., of which Mr. Stockslager was a member, which were renewed from time to time until December 13, 1893, when there was a balance due on one note, signed by the firm, William E. Stockslager, and J. W. Stonebraker; and on December 27, 1893, other notes were consolidated into one of \$2,200, which was given by the firm, with Mr. Stockslager and the other two members as sureties. On May 14, 1894, judgments were entered for the balances due on these respective notes against the firm and the individual sureties, including Mr. Stockslager. The firm of J. C. Dayhoff & Co. became embarrassed, and receivers were appointed on April 7, 1894. Some payments were made by the receivers, and the trustees of one of the firm, who was insolvent, on the judgments, but there is considerable balance still due on them. Unfortunately William E. Stockslager died in May, 1894, and in December of that year his widow was placed in an insane asylum, where she is still confined, and the case on her part was defended by her committee, who was thus deprived of the benefit of the testimony of both parties to the deed, which is alleged to be fraudulent as against the creditors of the husband. The consideration stated in the deed is "the sum of twenty-one hundred dollars heretofore received by him, the said William E. from his wife, Sarah M., Stockslager, and in payment and extinguishment of the debt from the said William E. to the said wife thereby created," and the property was conveyed subject to mortgages amounting to \$2,000. It was the only real estate owned by him, and was worth about \$4,100,—the consideration named in the deed, including the mortgage debt. The deed was placed on record on the 30th day of December, 1893, just three days after the \$2,200 note was given, although it had been executed on November 14th of that year. The testimony also shows that the firm was insolvent, and was being sued in 1893, principally in November. After Mr. Stockslager conveyed to his wife the only real estate he had, he apparently had nothing, and his administrator returned no assets to the orphans' court.

This court has held in a number of cases that a wife may become a creditor of her husband, and it was said in *Crane v. Barkdoll*, 59 Md. 534, that "if she is, in fact, such creditor, the law regards her rights with as much favor as those of other creditors." But there must be proof of the clearest and most satisfactory character of the existence of the relation of debtor and creditor between them when a husband undertakes to prefer his wife to the exclusion of others. It may be worthy of consideration whether there ought not to be a statute requiring any

indebtedness from a husband to his wife to be made a matter of record, within some reasonable time after it is created, in order to affect creditors, as there is no greater opportunity for fraud, or easier means of imposing on third persons, than permitting husband and wife to secretly occupy and continue the relation of debtor and creditor, and then, when the former has become financially embarrassed, to permit him to prefer his wife, and thus possibly provide a home or support for himself, as well as his wife and family. But, even under the law as it now exists, when the bona fides of the transfer is questioned by a creditor of a husband, the burden is on the wife. *Hinkle v. Wilson*, 53 Md. 287; *Levi v. Rothschild*, 69 Md. 348, 14 Atl. 535; *Nicholson v. Condon*, 71 Md. 620, 18 Atl. 812. As the supreme court of the United States said, in *Seltz v. Mitchell*, 94 U. S. 580, which has been quoted with approval by this court in the above cases, and more recently in *Manning v. Carruthers*, 83 Md. 1, 34 Atl. 254: "Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud,—that they require close scrutiny. In a contest between the creditors of the husband and the wife, there is, and there should be, a presumption against her, which she must overcome by affirmative proof."

Let us apply those principles to this case. The recital in the deed does not show how or when the debt therein referred to was created. The appellant has attempted to account for it by the introduction of certain notes, signed by William E. Stockslager, payable to his wife, and of a number of checks of Mrs. Stockslager on the Mechanics' Loan & Savings Institute, payable to the order of her husband, and indorsed by him. It was also shown that she kept an account in her name with the appellee, beginning with July 21, 1884; the deposits being made quite regularly until August 29, 1887. There was then an interval until July 25, 1891, when she again opened an account, which was continued until 1894. Where the money which was deposited from time to time came from is not shown with any certainty. It is claimed that she kept boarders, and in that way saved it. Matthias E. Kayhoe, her brother, testified that his sister was married in the winter of 1883-84, and that he lived with her until May, 1887 (when he went to Washington), paying board that averaged about \$2.50 per week, and that during that time she had three other boarders, but had none for about two years after he left. As she drew the balance of her account on August 29, 1887, by check to G. R. Bowman, which we will refer to directly, any money she may have earned prior to that time is

not very material. It is true that during those three years she gave checks to her husband amounting to \$204.50, but it is not shown what they were for, and it may be they were to reimburse him for expenses in keeping the boarders, as the testimony shows that he bought groceries and other articles for the house. After the death of William E. Stockslager, Mr. Kayhoe saw Mrs. Stockslager have the checks and notes which were offered in evidence in her possession. There are 23 checks, all signed by her, excepting one or two, which were signed by her husband in her name, and all were indorsed by him, excepting the G. R. Bowman check. There are five notes, all signed by him. The first is for \$784.50, and is dated November 19, 1884,—about a year after their marriage,—payable 90 days after date. The record is absolutely silent as to what that was given for. It is not shown that she had any money when she was married, or afterwards received any, excepting from the board we have spoken of. The next note is for \$40, is dated October 2, 1891, and payable 10 days after date. On that date she gave him a check for \$40. On December 4, 1891, another note was given for \$27, payable 90 days after date. There are two checks, for \$9 and \$18, respectively, dated November 7 and December 1, 1891, which might have been covered by that note. January 10, 1893, is the date of the next note, which is for \$300, payable 90 days after date. On that day he withdrew from her account \$100, and had withdrawn on June 11, 1892, \$125, on August 9th \$30, and September 2d \$50. There is nothing to show whether these last three items were intended to be included, but it is contended on the part of the appellant that such was probably the case. The last note is dated November 13, 1893, and is for \$10, payable 60 days after date. It would seem reasonable to assume that the notes of October 2, 1891, December 4, 1891, November 13, 1893, and that of January 10, 1893, to the extent, at least, of \$100, were given for sums drawn out of the bank account, as the dates correspond; but there is nothing to show in whose possession they were when Mr. Stockslager died, or whether they had not been, in point of fact, paid. The only evidence on the question is that of Mr. Kayhoe, who saw them in his sister's possession some time after her husband's death. Nor does the evidence connect them with the consideration mentioned in the deed. There is a very striking circumstance shown by the account of Mrs. Stockslager with the appellee, suggesting that her husband, or some one, was paying her money in sums of some size. During the first year after she opened the account for the second time, July 25, 1891, she deposited \$278.25, during the second \$148.25, and during the third, from August 5, 1893, to May 26, 1894, \$700,—there having been deposited two amounts, for \$145 and \$279, respectively, on the last-mentioned

date. It is true she had three boarders, besides her mother, for a year before her husband's death; but it was during the time that he was so embarrassed, when it can be fairly assumed that he could not furnish supplies for the house as readily as he could when he was more prosperous. The money he had belonging to his wife's father's estate, in trust for her mother during her life, to use the language of the witness Kayhoe, "is gone, and has not been accounted for as yet to the present administrator. The present administrator is engaged in efforts to secure the said money." This witness also said he did not know whether his mother paid her board in money, or was only credited with the amount of it. If the money was "gone," the latter was more likely the case. But at any rate it was not probable, if possible, that she could have cleared, from three or four boarders, \$700 in less than 10 months, and still less so that she could have had from that source \$434 to deposit in one day. Where did it come from? The record is silent. The fact is at least suspicious and suggestive.

As to the Bowman check for \$530, dated August 27, 1887, there is absolutely no evidence to show that it was given under such circumstances as would permit it to be charged against Mr. Stockslager. If the appellant's theory be correct, that she took notes to represent what he owed her, it is singular that an indebtedness for a sum of that size should not have been evidenced by a note; but there is no evidence that he ever promised to repay her that sum. The law of this state is settled beyond all controversy on that point. In *Grover & Baker Co. v. Radcliff*, 63 Md. 496, the former decisions of this court were referred to, and the doctrine was reiterated that, if a husband receives his wife's money or other separate property, with her knowledge and acquiescence, without an express promise at the time to repay it, no implied assumption, either legal or equitable, will arise to support a claim against him or his estate. Alvey, C. J., in delivering the opinion of the court, said: "The wife having the *jus disponendi* of her separate property, if she thinks proper to let her husband have it, or appropriate it, without any express promise or agreement at the time to account for or repay her the amount so received or appropriated, she cannot afterwards set up a claim against the husband upon the footing of a creditor. In such case she is taken to have acquiesced in the appropriation of the fund for the common benefit of herself and husband, or for the benefit of her family."

We have said above that the burden is on the wife to establish the fact that she was a bona fide creditor of her husband. In doing so, we have not overlooked the cases in this state which hold that the consideration stat-

ed in a deed from the husband to his wife is to be taken as *prima facie* true, as is the case in deeds between other parties. *Stock-et v. Holliday*, 9 Md. 480; *Mayfield v. Kilgour*, 31 Md. 240; *Grover & Baker Co. v. Radcliff*, supra. But, as was held in the last-mentioned case: "To constitute a valuable consideration, as against subsisting creditors, the consideration thus recited, if relied on, must be such as will evidence an obligation on the part of the husband that the wife could have enforced against him or his estate. Otherwise, it could not be regarded as a valuable consideration." The recital in this deed, that in consideration of the sum of \$2,100, "heretofore received" by the husband from his wife, and in payment and extinguishment of the debt "thereby created," is not sufficient to make a *prima facie* case, as against creditors. It should have shown that there was a promise to repay the money when it was received, and that there was such a debt as could be enforced against him. The recital of the consideration in this deed is very similar to that in *Grover & Baker Co. v. Radcliff*, 63 Md. 496, where it was held to be insufficient. There is, then, nothing in the evidence offered that approaches the requirement of the law to enable the wife to successfully assert a claim against her husband, to the detriment of subsisting creditors, excepting, perhaps, the notes for \$40, \$27, \$10, and \$100 of the note of January 10, 1893. But there is nothing to connect either of the notes or the Bowman check with the pretended consideration mentioned in the deed, or to show that they were still subsisting, unpaid obligations when the deed was executed. We regret that the death of the husband and the affliction of the wife prevents us from having their explanation of the transaction; but, although greatly deploring her unfortunate condition, we cannot deviate from these well-settled principles of law, which are so necessary for the protection of the creditors of those in failing circumstances, because of a mere possibility that she may have helped her cause, had not her reason been dethroned. There are suspicious circumstances shown by the record which we might have commented on more fully, had not the death of one and that which is worse than death to the other of the two parties to the deed made it impossible for them to explain, if susceptible of explanation; and we therefore forbear to say more on that subject.

As we have already said that we are not satisfied that there was any bona fide debt, such as the law recognizes, existing when the deed was made, it is, of course, unnecessary to discuss the other suggestion of the appellant that a lien be declared in her favor, if the deed be set aside. The decree must be affirmed. Decree affirmed, with costs.

(87 Md. 284)

SIECHRIST v. BOSE.

(Court of Appeals of Maryland. March 8, 1898.)

EXECUTORS—DISCHARGE.

B. bequeathed to S. a certain sum for life, and after S.'s death "to be equally divided among her children then living, and the descendants of any who may have died." Held that, where the executors invested the money in certain stock in the name of the life legatee, subject to the provisions of the will, in compliance with an order of court, and secured an allowance of the amount so invested in their "first and final account," the administration terminated.

Appeal from orphans' court of Baltimore city.

Action by Jacob H. Siechrist against Elizabeth Emma Bose, executrix of William Bose. From an order dismissing plaintiff's petition, he appeals. Affirmed.

Argued before McSHERRY, O. J., and BRISCOE, PEARCE, FOWLER, ROBERTS, and BOYD, JJ.

John S. Young and H. Arthur Stump, for appellant. Arthur W. Machen, for appellee.

PAGE, J. By his last will, admitted to probate on the 29th January, 1876, William Bose bequeathed to Margaret Siechrist the sum of \$3,333 for life, and after her death "to be equally divided among her children then living and the descendants of any who may have died, such descendants taking the portion their parent would have taken had he or she been then living." The executors, the late Judge Dobbin and Elizabeth E. Bose (widow of the decedent), on the 25th January, 1877, filed a petition in the orphans' court for Baltimore city, in which, after stating their readiness to pay the said legacy, they prayed for an order directing them to invest the money "so as to meet the requirements of said will, and protect the interest of all the parties interested therein." On the same day the order was passed, directing the executors to invest the sum in United States, state, or city stock "in the name of Margaret Siechrist, legatee for life, subject to the provisions of the will of William Bose declared as to the remainder." Subsequently the executors passed their "first and final account," in which they were allowed the amount "invested under an order of the orphans' court * * * for the benefit of Margaret Siechrist for life, * * * and subject to the provisions" of the will of the decedent. The record shows that, in carrying out the requirements of the order of the orphans' court, they purchased \$2,900 of the Western Maryland city stock, redeemable in 1902, and caused the certificate to be issued "to Margaret Siechrist for life, subject to the provision of the will of William Bose in this behalf." All interest accruing on this amount was paid until July, 1878, when, in consequence of the discovery that \$1,100 of the stock was part of the "Bishop forgery,"

the city refused to pay interest on that portion of the stock, but continued to pay on the residue. Subsequently, however, the city, by ordinance passed in 1882, authorized its comptroller to issue a new certificate for \$1,800, and pay \$1,465.76 (this sum being the \$1,100 and accrued interest), on the surrender of the original certificate for \$2,900. This was accordingly done. On the 9th of May, 1882, the executors reported the facts to the orphans' court. They state, in their report, that they "will now hand over to the life tenant the new certificate for \$1,800, and will pay them [sic] the accrued interest which has been paid by the city, but under the terms of said will of William Bose must reinvest the principal." In compliance with the order passed on the same day, they invested the amount of principal in their hands in city stock in the manner directed; that is to say, \$800 in the name of "Margaret Siechrist for life, subject to the will of William Bose in this behalf." In 1890, this stock having fallen due and been called for redemption, Margaret Siechrist obtained an order from the orphans' court, permitting her to surrender the certificate and receive the money. The order, which was passed on the 27th of September, 1890, does not require her to bring the money into court, and, though she received the check of the city for \$800, the record does not show that she has ever made a report of the transaction or reinvested the fund. Upon these facts, the children of Margaret Siechrist, with the husbands of her daughters, pray the orphans' court to require the appellee, as the surviving executor of the will of William Bose, to show how the legacy in question is invested; if invested, to bring into court the evidences of the investment; and, if not, to bring the money into court. The answer of Mrs. Bose, among other things, sets up the defense that the said sum has been fully administered, and, as surviving executrix, she has no further concern therewith, and that the court is without jurisdiction in the premises. The court dismissed the petition, and from its order this appeal is taken.

The principle is well established in this state that, "where a legacy consists of money or property whose use is the conversion into money, it is the duty of the executor to invest the same in some productive fund, or it must be put out on adequate securities, and most properly under the direction of the orphans' court or a court of equity, so that the dividends or income may be received by the legatee for life, and the principal, after the death of the legatee for life, may be received by the legatee in remainder." *Evans v. Iglehart*, 6 Gill & J. 196; *Wooten v. Burch*, 2 Md. Ch. 196. This duty rests upon the executor, independently of the provisions of section 10, art. 93, of the Code. It is founded upon the obligations "devolving upon the executor with reference to the property in his hands as bequeathed, and to which his assent is necessary to perfect the

title." *State v. Robinson*, 57 Md. 495. That section, indeed, seems to be an application of the general principle, just stated, to cases where it is necessary for the executor to retain in his hands the personal estate, or any part thereof, "as where money or some other thing is directed to be paid at a distant period or upon a contingency." In a case where money was bequeathed to James Hewlett, upon condition he should pay to Jack Hewlett a particular sum when the latter should arrive at the age of 25 years, it was held not to be within the section, because the will, in terms or by implication, did not require that the fund should remain in the hands of the executor, but was expressly bequeathed to James. *State v. Hewlett*, 48 Md. 144. The fundamental idea that underlies the rulings of the court, as well as the main design of the statute, is the preservation of the fund, so as to secure it to those who, under the will or by-law, shall be thereafter entitled to it. "To this end," to quote from the opinion of the court in *Gunther v. State*, 31 Md. 30, "it is made the duty of the executor or administrator having the money or property in hand to apply to the court for direction in the premises, and on such application the court is clothed with full power to decree or direct in what manner it shall be disposed of to effect the contemplated purpose." Even if it could be held that this case is within the provisions of the section, it would not follow therefrom that the safe-keeping of the investment necessarily devolved on the executors. The section does not so provide. On the contrary, as was said by Judge Miller in *Gunther v. State*, supra, "the mode of disposition for safe-keeping and security is not prescribed, but left in each case to the sound discretion and judgment of the court." But we do not think the provisions of section 10 of article 93 apply to this case. Those are applicable, as already has been said, to cases where the money or some other thing is to be paid at a distant day, or upon a contingency, and must either by the terms of the will or of necessity remain in the hands of the executor. But the will of Mr. Bose imposed no necessity upon the executors to retain the fund or to secure the payment of the interest to the legatee for life. What they were bound to do was to invest the fund in such a manner as to secure to the legatee for life the interest or dividends, and to the remainder legatees the principal fund, when they became entitled to receive it. Where, under the terms of the will, there are active duties to be performed with reference to a legacy, and no one has been designated to perform them, in such case the performance of such duties devolves upon the executor, and he cannot divest himself of them while holding a representative relation to the estate, nor can he be divested of them by order of the orphans' court. *Hindman v. State*, 61 Md. 475. In this case, it was the duty of the executors to invest the fund in accordance with the directions of the orphans' court, and, when so invested, no right remained in the executors to retain it. The bequest was

to Mrs. Siechrist for life. The testator intended it should be her property for that period. She therefore was entitled to have the possession of it for that period on such terms as would protect the interests of those who were also interested in the fund. What she did with it, after she received it, was a matter that could not concern any one else than those who were to take the fund at her death. If her treatment of it was such as to jeopardize its safety, a court of equity, on proper application, has full power to require such security to be given as might be needed. The executors fully discharged their duty in making the investment according to the requirements of the order of the court. They were acting, in so doing, under the authority of a court of competent jurisdiction (*Gunther v. State*, supra), and are therefore now fully protected by its order. When the investment was made, and the allowance therefor had passed the court, the estate, so far as this fund was concerned, was fully administered, and all rights of the executors over it terminated. In the case of *Myers v. Trust Co.*, 73 Md. 415, 21 Atl. 56, a testator gave the residue of his estate to his widow for life, and at her death to pass to such of his children and grandchildren as she should appoint by will, and in default of such appointment to his children and descendants, in the same manner as if he had died intestate. The widow, who was the executrix, passed an account in which she was allowed "for the residue of the estate detained by her as widow of the deceased for the purposes and subject to the conditions set forth in the will," etc. The court held that "that was a most effectual way of making the final distribution. Thereafter she held, not as executrix, but as tenant for life. * * * The estate was entirely closed, and her administration was at an end." Other cases could be cited to the same effect.

It is not important, for the purposes of this case, to discuss the effect of the subsequent occurrences disclosed by the record in reference to the fund in question. We are of opinion that, after the investment of the money in compliance with the order of the court, and the allowance in the account of the executors of the amount so invested, the administration terminated, and the executors became discharged from all further liability as to the legacy. Margaret Siechrist then held the fund as tenant for life, and the duty of protecting the fund was upon her, and not upon the executors. The order must, therefore, be affirmed. Order affirmed.

(86 Md. 635)

FT. WORTH PACKING CO. v. CONSUMERS' MEAT CO.

(Court of Appeals of Maryland. Jan. 4, 1898.)

STATUTE OF FRAUDS—SALES—DELIVERY.

Where the buyer agreed to pay for the goods on their delivery, and the goods were shipped to the place of the buyer's residence on the seller's order, and the buyer refused to pay a draft for the price, there was no such delivery

as would take the case out of the statute of frauds, the contract being oral, and the value of the goods being in excess of £10.

Appeal from superior court of Baltimore city.

Action by the Ft. Worth Packing Company against the Consumers' Meat Company for the price of a car load of beef. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

Barton & Wilmer, Randolph Barton, Jr., and Herbert B. Stimpson, for appellant. Henry C. Kennard and Howard Bryant, for appellee.

BRYAN, J. This is a question under the seventeenth section of the statute of frauds. According to the evidence, in July, 1894, the Consumers' Meat Company made a contract with the Ft. Worth Packing Company for the purchase of a car load of dressed beef. The contract was made at Ft. Worth, Tex., by H. C. Rohr, the president of the Consumers' Company. It was not in writing, and nothing was given in earnest, nor in part payment. Rohr saw the cattle killed, dressed, and packed, superintended the loading of the beef, and expressed himself as satisfied with its quality and condition. He agreed that it would be paid for when it arrived in Baltimore. The beef was shipped to the order of the Ft. Worth Packing Company, Baltimore. The bill of lading was marked: "Shipper's order. Notify Consumers' Meat Co., Baltimore, Md." A draft was drawn by the Ft. Worth Packing Company on the Consumers' Meat Company for the price of the beef. The drawee refused to accept the draft, and levied an attachment on the meat when it arrived in Baltimore. By the seventeenth section of the statute of frauds no contract for the sale of any goods, for the price of £10 or upward, shall be allowed to be good unless the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest or in part payment, or unless some note or memorandum in writing is signed by the parties, etc. The Consumers' Company never received the beef into its possession. It was shipped to the order of the Ft. Worth Company, and the Consumers' Company could not obtain possession of it without paying the draft drawn upon it. It had agreed to accept the draft, and pay it, on the arrival of the beef in Baltimore. But possession was not to be delivered to it except on the condition of paying the draft. By the express terms of the statute the contract to purchase and pay for the beef was not valid unless the buyer actually received it. It has often been decided that, "in order to satisfy the statute of frauds, there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter with intent to take pos-

session as owner." Corbett v. Wolford, 84 Md. 426, 35 Atl. 1088, and many other cases. There was in this case no delivery of the beef. There never was any purpose to vest the right of possession in the purchaser unless he should pay the draft. The purchaser never took possession of it, and never paid the draft. An action was brought by the appellant against the appellee, and the court below decided, in substance, that the contract was void. Judgment affirmed.

(87 Md. 298)

HUGHES v. STATE.

(Court of Appeals of Maryland. March 3, 1898.)

FISHERIES—CONSTITUTIONAL LAW.

1. Code Pub. Loc. Laws, art. 3, § 101, declaring it unlawful for any person to fish in certain rivers in Baltimore county, or in Chesapeake Bay within one mile of the entrance of said rivers into the same, with seine or nets, except from the shore, in the usual and customary manner, is within the police powers of the state, and not unconstitutional.

2. The prohibition of article 3, § 101, Code Pub. Loc. Laws, declaring it unlawful for "any person" to fish in certain rivers and tide waters of Baltimore county, is not confined to a particular class, and therefore unconstitutional, but prohibits all persons from fishing there, including the owners and occupiers of the adjacent shores.

Appeal from circuit court, Baltimore county.

Thomas H. Hughes, convicted of illegal fishing, appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, BOYD, and PEARCE, JJ.

Frank X. Ward, for appellant. Atty. Gen. Clabaugh and John S. Ensor, for the State.

BRISCOE, J. The appellant, Thomas H. Hughes, was tried and convicted in the circuit court for Baltimore county, under a criminal information for illegal fishing, contrary to section 101, art. 3, Code Pub. Loc. Laws, tit. "Baltimore County," subtit. "Fish." The act reads as follows: "It shall not be lawful for any person to fish in the waters of Gunpowder river, Middle river or Back river or their tributary streams, except Bird river, situated in Baltimore county, or in the waters of the Chesapeake Bay, within one mile of the entrance of said rivers into the same with seine or nets, except from the shore in the usual and customary manner." The information contains three counts. A demurrer to each of these counts was interposed by the traverser—First, because the act upon which each and every one of said counts is based is unconstitutional; and, secondly, for the reason that the second count charges an offense unknown to the law. The demurrer was sustained as to the first and third counts, but overruled as to the second. The second count charges that the appellant did unlawfully fish in the Saltpetre, a tribu-

tary of the Gunpowder river, with seine and nets, not fishing with these seines and nets from ashore in the usual and customary manner. The traverser was tried and sentenced under this count, and from the rulings of the court in overruling the demurrer to this count, and to the rejection of certain testimony offered upon his part, this appeal has been taken.

As there is no appeal upon the part of the state, we are confined in our consideration to the question raised by the traverser's appeal, and that is whether Act 1878, c. 242, which has been codified as section 101, art. 3, Code Pub. Loc. Laws, is a valid exercise of legislative power, or whether it is open to the objection urged by the appellant that it is unconstitutional, because it discriminates in favor of the owners and occupiers of the shores of the Saltpetre, a tributary of the Gunpowder river. The sole question, then, is as to the validity of the act of 1878. Now, the law has been well settled that each state owns the beds of all the tide waters within its jurisdiction, unless they have been granted away, subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. Mr. Justice Curtis in delivering the opinion of the supreme court in the case of *Smith v. State*, 18 How. 75, says that the state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery; in other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held; and this principle has been reaffirmed by the same court in the more recent case of *McCready v. Virginia*, 94 U. S. 394, wherein Chief Justice Waite said: "The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. In like manner the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents the people, and the ownership is that of the people in their united sovereignty." And our own court, in the cases of *Bradshaw v. Lankford*, 73 Md. 428, 21 Atl. 66, and *State v. Applegarth*, 81 Md. 293, 31 Atl. 961, following the cases of the supreme court, has adopted and reaffirmed the principle established by those cases. Indeed, the power to enact such laws has been so long exercised, and has proven of such benefit to the public generally, that it ought not at this date to be called into question. Nor do we regard the objection made by the appellant that the act

is unconstitutional because it discriminates in favor of the owners and occupiers of the shores of the Saltpetre, as well taken. The prohibition of the act is not confined to any particular class, but it restricts "any person or persons" from fishing in the waters of the rivers mentioned in the act with seine or nets, except from the shore, in the usual and customary manner. In other words, it prohibits all persons from fishing except in the mode and manner prescribed by the act. There is nothing in the act itself which will sustain the contention of the appellant. The manifest object and intention of the act is the preservation of the fish in the streams mentioned therein, and such acts have always been treated as within the proper domain of the police power of the state. We find no error in the admission of the testimony set forth in the appellant's first and second bills of exceptions. For the reasons we have stated, this evidence was clearly material and competent to establish the state's case, and admissible for that purpose. Finding no error in the rulings of the court below, the judgment will be affirmed. Judgment affirmed, with costs.

(70 Vt. 111)

FAIRMAN v. FORD.

(Supreme Court of Vermont. Caledonia. Jan. 31, 1898.)

PLEADING AND PROOF.

Under a declaration alleging that defendant failed to lay plaintiff's roof "skillfully, shutting out all rain," as he had agreed to do, plaintiff cannot recover for leakage resulting from defects in the plan of construction.

Exceptions from Caledonia county court; Taft, Judge.

Assumpsit by E. P. Fairman against L. S. Ford. Judgment for defendant, and plaintiff brings exceptions. Affirmed.

The second count of the declaration alleged that the defendant, in consideration of his employment by the plaintiff, undertook to lay upon the plaintiff's roof a certain quality of tin, "well, carefully, and skillfully, shutting out all rain and water," and that he failed therein, and laid the tin "so negligently and unskillfully that it did not stop the rain and water from going through said roof," whereby the plaintiff was damaged as particularly set forth. The plaintiff's evidence tended to show that the defendant undertook absolutely to make a tight roof.

W. P. Stafford, for plaintiff. Albert Perley and Bates, May & Simonds, for defendant.

MUNSON, J. The plaintiff claimed that he could recover, under his second count, for the failure to make a tight roof, whether the leakage resulted from negligent and unskillful workmanship, or from defects in the plan of construction; but the court charged otherwise. It is probable that the plaintiff's

evidence was such as entitled him to the charge requested if the allegations of his declaration permitted a recovery on the ground indicated; for his evidence tended to show that the defendant undertook the work with special reference to the character of the roof, and guarantied a tight covering. It is clear that the count relied upon proceeds on the ground of unskillful workmanship, and not for the breach of a special agreement. But the plaintiff claims that the count is so framed as to make the defendant chargeable with insufficient skill if he failed to make the roof tight, whatever the cause of the failure. The defendant's undertaking is alleged to have been "to lay and put on said tin roofing well, carefully, and skillfully, shutting out all rain and water, and in every way in a good and workmanlike manner." The plaintiff's theory is that the reference to keeping out rain measures the skill which the defendant undertook to exercise, and that, if he failed to keep out the rain, his work was not done with the required skill. But we think the words relied upon can be given no other effect, as used, than to require work that would keep out the rain as completely as the construction of the roof would permit. The count contains no allegation of a special undertaking to give the words a broader meaning. It charges nothing on the ground of an obligation distinct from the requirements of good workmanship. The plaintiff's claim is, in effect, to recover upon an express undertaking to overcome the faults of construction. The declaration will not permit this. Judgment affirmed.

(70 Vt. 108)

WELCH v. MILLER.

(Supreme Court of Vermont. Orleans. Oct. 14, 1897.)

HOMESTEAD—LEASE—VALIDITY—COVENANTS—ACCORD AND SATISFACTION.

1. Though V. S. § 2189, provides that no homestead, nor interest therein, shall be conveyed by the owner, if married, unless the wife joins therein, a lease of a homestead and personal property, not signed by the wife, is valid as to the personal property.

2. Although a lease of a homestead not signed by the wife is inoperative to convey any interest, under V. S. § 2189, providing that no homestead, nor interest therein, shall be conveyed by the owner, if married, unless his wife join therein, the covenant of quiet possession in the lease is valid, and an action will lie for breach thereof.

3. An agreement to submit a matter in dispute to arbitration, which is not followed by its submission, is an accord without a satisfaction, and is not a bar to an action.

Exceptions from Orleans county court; Taft, Judge.

Action of covenant by E. E. Welch against O. F. Miller. Plea, the general issue, with notice. Trial by jury, and verdict and judgment for the plaintiff. The defendant excepted. Affirmed.

J. W. Redmond and E. A. Cook, for plaintiff. A. D. Bates and W. W. Miles, for defendant.

START, J. This is an action for breach of covenant. It appeared that the defendant leased his homestead and certain personal property to the plaintiff for one year. The defendant objected to the admission of the lease, because it was not signed by his wife, and at the close of the evidence moved that the court order a verdict for him for the same reason. The defendant's counsel insists that the lease was voidable, under V. S. § 2189, which provides that no homestead, nor an interest therein, shall be conveyed by the owner thereof, if a married man, unless the wife joins in such conveyance. Assuming that the lease was voidable as to the homestead, it was valid as to the personal property, and was admissible in evidence; and the defendant's motion for a verdict was properly denied.

Also, the defendant's covenant that the plaintiff should quietly occupy the premises during the term was valid and binding upon the defendant, notwithstanding the lease was inoperative to convey any interest in the premises. He was under no disability that would exempt him from liability on his covenant, if he was unable to keep it, or chose not to do so. The lease was executed in August, 1895, and the term was to commence February 1, 1896; and the covenant was that the plaintiff should quietly enjoy the premises for the term of one year. The covenant may have been entered into with the expectation that the wife would consent to the plaintiff's occupancy, or with the intention of acquiring another homestead before the time for the performance of the covenant arrived, or under a belief that he could lawfully lease the premises without his wife's consent. There is nothing in the record that shows that the defendant contemplated doing an unlawful act. The covenant was that the plaintiff should have the occupancy of the premises at a future day. This was not an illegal undertaking. He could covenant that the plaintiff should have quiet enjoyment of the premises at a future day; and if, when the time of performance arrived, he could not give lawful possession, or preferred not to do so, and did not, there is no good reason why he should not be liable in damages for the breach of his covenant. In *Brewer v. Wall*, 23 Tex. 585, it is held that a husband's bond to convey title to the family homestead at a future day is valid, and that damages are recoverable for a breach of its condition. The plaintiff's evidence tended to show that, after the making of the lease, on the 18th day of January, 1896, the defendant told him he could not let him have the place; but that the plaintiff went to the premises the day his term was to commence for the purpose of taking possession, and the defendant refused to give him possession. The testi-

mony of the defendant tended to show that, on the day the term was to commence, he was ready and willing to let the plaintiff have possession of the premises, but that the plaintiff would not take possession.

The defendant requested the court to charge the jury that if, on the 1st day of February, 1896, the parties agreed that the plaintiff was not to have possession, and that they were to submit the matter of damages to arbitration, it became a new trade; and the plaintiff could not recover on the lease. The court told the jury that, if the plaintiff could have had possession of the premises, but did not take it, did not want it, or for any reason would not take possession, he was not entitled to recover. This instruction was all that the defendant was entitled to on this branch of the case. The evidence did not tend to show that the parties mutually agreed that the plaintiff should not take possession of the premises, nor did the defendant's evidence tend to show that he agreed to arbitrate the plaintiff's claim for damages. The plaintiff's evidence tended to show that, after the defendant refused to give him possession of the premises, there was talk about leaving the question of damages to two men; but this was not done, and the agreement, if there was one, to submit the matter to two men is not a bar to this action. Such an agreement would be an accord without satisfaction. *Cutler v. Smith*, 43 Vt. 577; *Rising v. Cummings*, 47 Vt. 345. Judgment affirmed.

(70 Vt. 130)

In re NELSON'S WILL.

(Supreme Court of Vermont. Orleans. Dec. 2, 1897.)

WILLS—DEVISE TO WIFE.

Real estate devised by will to a married woman does not become her separate estate, as the husband is entitled to the rents and profits thereof during coverture.

Exceptions from Orleans county court; Rowell, Judge.

Appeal by Lizzie G. Davis and George H. Davis, her husband, from decree of probate court establishing the will of B. M. R. Nelson. Motion to dismiss appeal as to George H. Davis overruled. Proponents excepted. Affirmed.

It was conceded, and agreed to be treated as apparent of record, that Nelson was the owner of real estate at the time of his death. Said Lizzie G. Davis is his daughter. The motion was based upon the grounds that the appellant wife was entitled to prosecute the appeal in her own name, without joining her husband; that her husband had not, as such, any right to appeal; and that it did not appear that he had any other interest.

John Young and W. W. Miles, for proponents. F. W. Baldwin and Bates & May, for respondents.

TAFT, J. Any real estate which the appellant Lizzie may take as heir of the testator will not be her separate estate, which involves, as the characterizing fact, that she will hold it to her sole use, in exclusion of the marital rights of her husband (*Frary v. Booth*, 37 Vt. 78; *Hubbard v. Bugbee*, 58 Vt. 172, 2 Atl. 594), and her husband, the appellant George H., will be entitled to the rents and profits of it during coverture (*Hackett v. Moxley*, 68 Vt. 210, 34 Atl. 949). He, therefore, properly joined in the appeal. Judgment affirmed, and cause remanded.

(20 R. I. 408)

RHODE ISLAND HOSPITAL TRUST CO. v. HARRIS et al.

(Supreme Court of Rhode Island. March 9, 1898.)

EQUITABLE CONVERSION—WILLS—CONSTRUCTION—DESIGNATION OF BENEFICIARIES—CONTINGENT REMAINDERS—DOWER.

1. Where a testamentary trustee, being directed to convey the land to certain persons on the death of testator's wife, sold the land subsequent to such event, the proceeds should be treated as real estate, and distributed as such to those entitled thereto.

2. Where a testamentary trustee holding land for the widow, with directions to convey it on her death to persons named, sells the same subsequent to such event, the rents accruing between her death and the sale are to be applied to the remainder-men's share of the taxes assessed prior to the former event, the excess to go to the remainder-men, or the deficiency to be paid out of the proceeds of the sale.

3. Where a testator devised land in trust for his wife, and, on her death, a part to his brother, and, on the latter's death, to the brother's children then living, or the descendants of such children who may then have deceased, the children's estates were contingent on their surviving the widow.

4. Where a remainder-man's estate was contingent on his surviving the determination of the prior estate, his deed containing a special warranty, made prior thereto, conveyed an estate transmissible in equity, but the grantee dying before the determination of the prior estate, his widow had no dower right in the land.

5. Testator devised land, on the determination of a prior estate, to the children of testator's brother then living, and the descendants of any who might then have deceased, in equal shares, the descendants taking the share their parents would have had if then living. *Held*, that the descendants took by right of representation.

Bill by the Rhode Island Hospital Trust Company against Nathan B. Harris and others.

James, Wm. R. & Theodore F. Tillinghast, for complainant. C. U. Salisbury, F. P. Owen, D. B. Potter, Edwards & Angell, H. J. Dubois, and C. A. Aldrich, for respondents.

MATTESON, C. J. This is a bill for instructions. Some of the questions raised by it were decided by our opinion in 20 R. I. 162, 37 Atl. 701. Since then the remaining questions involved have been submitted to our consideration on briefs filed by the parties. Our conclusions are as follows:

1. We are of the opinion that as the real estate was sold by the trustee subsequently to the death of the widow, not in pursuance of any direction by the testator, but merely for the purposes of the trust, its proceeds are to be treated as real estate, and are to be distributed among the persons who would have been interested in the real estate had it not been sold.

2. We are of the opinion that the rents of the real estate which accrued between the death of the widow, on August 10, 1896, and the sale of the real estate, on October 8th following, should be applied to the payment of so much of the tax assessed on the real estate as of July 1, 1896, and paid by the complainant, as was not properly chargeable to the estate of the widow in the apportionment of that tax between her estate and the remainder-men; that, if these rents were more than sufficient for such payment, the excess should be distributed in the same manner as the proceeds of the real estate; and that, if insufficient for the payment of the portion of the tax specified, the deficiency should be paid out of the proceeds of the real estate.

3. We are of the opinion that the remainders in the trust estate, to be taken by the children of William Harris, the brother of the testator, on the determination of the widow's estate, were contingent. The gift is to them and the descendants of any of them who may then have deceased, etc. It could not be known until the determination of the widow's estate who of the children would survive that event, and thereby become entitled to the benefit of the gift. The estates in remainder to be taken by the children of William Harris being contingent upon their surviving the determination of the widow's estate, it follows that William Harris, Jr., one of the children of the testator's brother William, who died before that event, took no interest in the trust estate, and, consequently, that no interest in it passed under his deed of June 2, 1877, to Albert N. Parker, nor under his will to his brother Nathan B. Harris, and that his widow, Sophia Harris, has no interest in the proceeds of the real estate in lieu of dower. As Nathan B. Harris, another of the children of the testator's brother William, survived the determination of the widow's estate, his deed to said Parker of July 5, 1877, which contained a covenant of special warranty,—i. e. a covenant against the lawful claims and demands of all persons claiming by, through, or under him,—though inoperative in law, was nevertheless operative in equity, and the right or estate taken by Parker was, in equity, transmissible to his heirs and legal representatives, according to the quality of the estate, real or personal. *Bailey v. Hopkin*, 12 R. I. 560. Inasmuch, however, as Parker himself died on the — day of —, 18—, prior to the determination of the widow's estate, and therefore while the right or estate conveyed to him remained contin-

gent, we do not think that his widow, Ellen A. Parker, has any interest in the proceeds of the real estate in lieu of dower.

4. We are of the opinion that so much of the one-half of the estate given to the children of the testator's brother William Harris as constitutes the share of Abby Rood, wife of Elias Rood, should be paid to her sister Maria Harris, as her trustee.

5. We are of the opinion that so much of the four-tenths of the trust estate given to the children of Harden Harris as constitutes the share of Abbie J. Howard, wife of Ora C. Howard, should be paid to Henry J. Dubois, as her trustee.

6. We are of the opinion that the grandchildren of Caleb A. Harris took per stirpes, and not per capita. The bill shows that Caleb A. Harris, one of the children of the testator's brother William, died before the testator, leaving two children, viz. Walter S. Harris and Sarah A. (Harris) Walch, both of whom died during the lifetime of the testator's widow, but left children, who survived the death of the widow, viz. Henry A. Harris, Nellie J. (Harris) Miner, and Walter S. Harris, Jr., children of Walter, and Clinton A. Walch, son of Sarah. The gift of the trust estate on the determination of the widow's estate was to the children of the testator's brother William, and the descendants of any of them who might then have deceased in equal shares, the descendants taking the share his or her parent would have taken if then living. As Caleb A. Harris and his children Walter and Sarah were all dead at the decease of the testator's widow and the determination of her estate, the children of Walter and Sarah took immediately under the devise the share of the estate which their parents, respectively, would have taken had they then been living, to wit, an undivided half of the share to which Caleb A. Harris would have been entitled if he had been alive when the gift took effect.

(20 R. I. 404)

BACON v. BULLARD.

(Supreme Court of Rhode Island. Feb. 28, 1898.)

DAMAGES TO REVERSION — ACTION ON THE CASE.

Case is the proper remedy for the breaking of a window in a store owned by plaintiff, but occupied by a tenant.

Exceptions from district court, Providence county.

Action by Alice Bacon against Irving Bullard in trespass for breaking a plate-glass window. From a nonsuit, plaintiff brings exceptions. Exceptions overruled.

Thomas F. Farrell, for plaintiff. Arthur Cushing, for defendant.

PER CURIAM. The plaintiff sues in trespass for damages for the breaking of a plate-glass window in a store owned by her, but in the occupation of a tenant from year to

year. The district court of the Sixth judicial district, in which the suit was brought, nonsuited the plaintiff, holding that, as the suit was for an injury to the reversion, the plaintiff's action was case, and not trespass. Assuming the testimony to have been as allowed by the court below, its ruling was correct. That case, and not trespass, is the proper remedy for injuries to a reversion, is elementary. The plaintiff, however, contends, and has submitted the affidavit of her agent to the effect, that he testified at the trial that the plaintiff had control of the outside of the building. We are not convinced by the affidavit that the statement was made by the witness. The window which was broken being a part of the store in the occupation of the tenant, the assertion of a control over it, as part of the outside of the building, by the plaintiff, would have been inconsistent with the right of the tenant, since such control would have implied the right of the plaintiff to remove the window, contrary even to the wish of the tenant. So important a statement, if made, could scarcely have failed to impress itself on the mind of the justice who tried the case. Exception overruled, and case remitted to the district court of the Sixth judicial district, with direction to enter judgment for the defendant for costs.

(20 R. I. 405)

LODGE v. O'TOOLE.

(Supreme Court of Rhode Island. March 2, 1898.)

SLANDER—CHARGE OF INTOXICATION.

1. Words charging intoxication to such a degree as to amount to a violation of decency, not being an offense at common law or by statute, but only by ordinance of the town, are not actionable per se.

2. Where the slander complained of was charging plaintiff with intoxication, and no special damages are alleged, the action will not lie.

Action by Joanna Lodge against Alexander J. O'Toole for slander. From a judgment for plaintiff, defendant moves in arrest thereof. Judgment arrested.

C. Frank Parkhurst, for plaintiff. James A. Williams, for defendant.

MATTESON, C. J. The slander complained of is that the plaintiff was intoxicated to such a degree as to amount to a violation of decency. The offense of intoxication, amounting to a violation of decency, is not an offense at common law or by statute. It is made such merely by ordinances of the several towns and cities. In *Seery v. Viall*, 16 R. I. 517, 17 Atl. 552, it was held that though words charging an offense involving moral turpitude, and liable to punishment at common law or by statute, are actionable per se, a charge of drunkenness, as it does not involve moral turpitude, and is not an offense either at common law or by statute, but only by ordinance, is not actionable per se. We are of opinion that

the present suit is within this decision, and consequently that, as the declaration alleges no special damages, the motion in arrest of judgment must be sustained. Judgment arrested, and case remitted to the common pleas division.

TILLINGHAST, J. I concur in the foregoing opinion, as it doubtless states the law correctly. But, while this is so, I can but express regret that there is practically no redress for such a wrong as that which is set out in the plaintiff's declaration. It alleges that the defendant publicly, falsely, and maliciously accused the plaintiff, who is a married woman and the mother of a family of children, of being drunk in a liquor saloon in North Providence, in such circumstances as to amount to a violation of decency; and the jury have found the defendant guilty as charged in said declaration. But as it is not an offense, either at common law or under our statute, for a person to be intoxicated, even though it be in a public place and in such circumstances as to violate the rules of common decency, it is therefore not actionable per se to falsely and maliciously accuse a person of being in such a condition. In other words, so long as it is only by virtue of a town or city ordinance, and not by virtue of any statute of the state, that one can be punished for drunkenness, it is no legal wrong to falsely and maliciously accuse a person, even though that person be a married woman and the mother of a family, with the offense of being indecently drunk in a public saloon, unless "special pecuniary damages" (Sedg. Dam. [6th Ed.] p. 675, note 3) result therefrom, which could seldom be proved. It seems to me that such a state of things may without impropriety be called to the attention of the legislature of the state.

(20 R. I. 414)

O'KEEFE v. ALLEN.

(Supreme Court of Rhode Island. March 11, 1898.)

ASSIGNMENT OF WAGES—VALIDITY.

A written order for a year's wages of a workman, employed as a molder, does not apply to wages earned under a new hiring with the same employer, after having quit for two months in the said year, since at law the assignment of the benefits of the new contract was the assignment of a mere possibility, and hence inoperative.

Exceptions from district court, Providence county.

Action by John A. O'Keefe against William Allen. An order denying a motion to discharge the garnishee, and plaintiff excepts. Exceptions sustained.

T. F. Farrell, for plaintiff. J. M. Gilbrain, for defendant.

MATTESON, C. J. This is assumpsit on book account. The action was brought in the district court for the Sixth judicial dis-

strict. Attachments by trustee process were made of the defendant's wages in the possession of the Miller Iron Works, by which he was employed. The answer of the garnishee disclosed that on June 24, 1895, the defendant, by his deed of that date, assigned to James Cunningham all moneys which should become due to him from the garnishee for services as a molder between that date and June 24, 1896; that at the date of the assignment he was in the employment of the garnishee, and had been so employed for a number of years, but that he left the garnishee's employment in October, 1895, and entered their employment again in the month of December following. On these facts the plaintiff moved that the garnishee be discharged. The court denied the motion, and the plaintiff excepted. We think that the district court erred in its rulings. It is well established that wages to be earned under a subsisting contract may be assigned, and that an assignment in good faith is valid against a subsequent garnishment. *Tiernay v. McGarity*, 14 R. I. 231. The moment, however, that the defendant left the employment of the Miller Iron Company, in October, 1895, the contract of employment, on which the assignment of wages of June 24, 1895, rested, was at an end. His subsequent return to the employment was not by virtue of the old, but under a new, hiring. As to this new contract, the assignment at law, however it might be in equity, was the assignment of a mere possibility, and therefore, at law, inoperative. *Tiernay v. McGarity*, 14 R. I. 232; *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936. The case which comes nearest to sustaining an opposite doctrine of any which we have found is *Wallace v. Chair Co.*, 16 Gray, 209. In this case it was held that a written order for the payment of a certain sum out of his wages, drawn for a sufficient consideration, by a workman employed under a subsisting engagement for a certain time, upon his employer, and accepted by the latter, and made "payable when earned," applied to wages earned under a new engagement, entered into by the workman immediately on the expiration of the first, for lower wages, with the same employer. The court admitted the rule stated above, but seemed to think that the fact that the new arrangement immediately followed the old, so that the service was continuous, was sufficient to prevent the operation of the rule. It evidently regarded the new arrangement rather as a modification of the old, and the old as still subsisting, than as a new and independent employment. The case at bar is in this respect totally unlike *Wallace v. Chair Co.*, for here there was no continuity of service, and the return to the employment was, so far as appears, under a new and distinct hiring.

The answer of the garnishee also disclosed that before the service of the writ of meane process, the defendant, on June 24, 1896, had executed a second assignment of his wages

to Cunningham, which was operative, under the new hiring in the preceding December, as against the service by trustee process on that writ on July 8, 1896.

Exception sustained, and case remitted to the district court for the Sixth judicial district, with direction to charge the garnishee to the extent of the moneys in its possession at the time of the attachment on the original writ, to wit, June 20, 1895.

(20 R. I. 425)

RILEY v. LA RUE.

(Supreme Court of Rhode Island. March 16, 1898.)

TRESPASS ON THE CASE.

Trespass on the case will not lie for money had and received for plaintiff's use.

Action by Walter F. Riley against J. George La Rue. From a judgment for plaintiff, defendant petitions for a new trial. Petition granted.

J. W. Mathewson, for plaintiff. F. P. Owen, for defendant.

PER CURIAM. The plaintiff has misconceived his form of action, the allegations contained in the declaration showing that it should have been assumpsit or debt, instead of trespass on the case. The evidence also shows that the only claim the plaintiff has against the defendant is for money had and received to the plaintiff's use. The declaration differs from the second count in the case of *Royce v. Oakes*, 20 R. I. —, 38 Atl. 371, which we held amounted to a charge of larceny under the statute, in that it shows that 25 per cent. of the money collected belonged to the defendant, while in that case it appeared that all of the money collected belonged to the plaintiffs, so that there no accounting was necessary in order to determine the ownership. We do not see, therefore, that, in view of the facts set out in the case at bar, any criminal complaint for embezzlement could be sustained, so as to form the basis of a tort action under the statute. The case is clearly within the second decision in *Royce v. Oakes*, 20 R. I. —, 38 Atl. 371. Petition for new trial granted.

(20 R. I. 427)

STONE v. PEOPLE'S SAV. BANK.

(Supreme Court of Rhode Island. March 16, 1898.)

ATTACHMENT — RELEASE BY BOND — CHANGE OF VENUE — EFFECT.

1. Certifying a case to the common pleas division for jury trial does not prevent the clerk of the district court, before final judgment, from releasing an attachment on personal property of the defendant in the hands of trustees, and delivering a certified copy of the writ, with his indorsement thereon, that the property is released, upon receiving a bond therefor, as is provided in Gen. Laws, c. 253, §§ 23-25.

2. In such case, the copy of the writ may be certified by the clerk of the common pleas division and indorsed by the clerk of the district court.

Exceptions from district court, Providence county.

Action by William H. Stone against the People's Savings Bank. From an order overruling demurrers to plaintiff's replications, defendant brings exceptions. Exceptions sustained.

Marquis D. L. Mowry, for plaintiff. James, Wm. R. & Theodore F. Tillinghast, for defendant.

MATTESON, O. J. One of the questions presented by the pleadings, and the only one which it is necessary to consider, is whether the clerk of the district court for the Sixth judicial district, to which the writ in the case of the plaintiff against Laselle was returnable and had been returned, had power to take the action prescribed by Gen. Laws R. I. c. 253, §§ 24, 25, after the case had been certified to the common pleas division for jury trial, but before final judgment had been rendered. We think the question must be answered in the affirmative. Gen. Laws R. I. c. 253, §§ 23-25, provide that, whenever a writ shall command the attachment of the personal estate of a defendant in the hands or possession of a person, co-partnership, or corporation, as trustee, the defendant may, at any time after service of it upon the trustee and before final judgment, deliver to the officer who served the writ a bond, in the penal sum of the amount of damages laid in the writ, signed by the defendant or some one in his behalf, with surety or sureties to the satisfaction of the officer, with condition that the same shall be null and void if the final judgment in the action or cause in which such writ was served shall forthwith be paid and satisfied after the rendition thereof; that, in case the writ shall have been returned to the court to which it is returnable, and duly entered therein, such bond shall be delivered to the clerk of the court to which the writ is returnable, and such clerk, on the acceptance of such bond, shall forthwith deliver to the person, co-partnership, or corporation named as trustee in the writ a certified copy of the writ, with an indorsement thereon, signed by him, setting forth that he has accepted such bond, and released the personal estate in the hands of the trustee from attachment, and that thereupon the personal estate in the hands or possession of the trustee shall become discharged from the attachment. There is no provision depriving the clerk of a district court of authority to take the action because the case has been certified to the common pleas division for jury trial.

It is suggested that he has not the authority because he no longer has custody of the papers, and consequently cannot certify the copy of the writ to be delivered to the trustee. The statute, however, does not require that the copy shall be certified by the clerk of the district court, but merely that it shall

be a certified copy. If the case has gone to the common pleas division, we see no reason why the copy of the writ may not be certified by the clerk of that division, as was done in the case of *Stone v. Laselle*, and indorsed by the clerk of the district court, as the statute requires. It is quite probable that the framer of the statute did not have in mind that the suit might be certified to another court before final judgment should be rendered, and therefore failed to provide that the procedure for the discharge of the attachment after it had been so certified should be taken by the clerk of the court in which the suit should be pending. But, so long as the statute provides for a discharge of an attachment by the procedure taken by the clerk of the district court, we cannot say that his authority has been ousted by the certifying of the case to the common pleas division. The attachment having been discharged, the common pleas division was without jurisdiction to make the order charging the defendant as garnishee.

Exceptions to the rulings of the district court for the Eighth judicial district overruling the demurrers to the replications to the second plea sustained, and case remitted to said court for further proceedings.

(30 R. I. 412)

MATTESON et al. v. WHALEY et al.
(Supreme Court of Rhode Island. March 9, 1898.)

EQUITY JURISDICTION—STATUTORY REMEDIES.

Failure to prosecute an appeal, taken from the declaration of a committee appointed by the town council to ascertain the line of an existing road and to plat it, that the road was as shown in the plat, from which an appeal did not lie, is not a bar to subsequent relief in equity.

Bill by Oliver R. Matteson and others against Thomas G. Whaley and others, representing the town of Coventry, to prevent continuing trespasses. Relief granted.

D. B. Potter, for complainants. O. Lapham and E. K. Parker, for respondents.

STINESS, J. The question in this case is whether a triangular strip at the eastern corner of the Phenix and Quidnick roads, in the village of Anthony, belongs to the complainant or is a part of the highway. The highway in question was formerly the Coventry and Cranston turnpike, authorized to be built by the general assembly in 1813, a plat of which was filed in the clerk's office of the court of common pleas. The town of Coventry, represented by the respondents, claims the strip under this plat, which shows a straight line at the place in dispute. In 1815 the general assembly amended the charter, altering the line through the farm of Theodore Foster according to the terms of a deed which cannot now be found. How much change was made in the lines at this time it is

impossible to say, but, in view of the change, the lines of the plat are an uncertain guide. The only evidence of the line of the road which can now be relied on is that which shows where it was built. The strong point for the town is the fact that the plat lines are straight, while the line which the complainants claim bends at the apex of the triangle. We often find, however, that old roads were not built according to their platted lines, and that it would result in great damage to private rights to hold strictly to a plat. Hence, in *Almy v. Church*, 18 R. I. 182, 26 Atl. 58, it was held that, while the public cannot be ousted of its right in a highway by adverse possession, yet another way equally convenient may be substituted, by general and long-continued acquiescence, for the original way. The plat of 1813 cannot be relied on because of the change in the road, and no other official plat appears. A private plat, in 1822, shows a straight line on one side and a bend on the other side. We are of opinion that the road was built with a bend at the place in question. Not only does the testimony show this, but there are several reasons why it should be so. The land at this corner was wet, and it would be quite natural to avoid it. The straight line left a triangular piece on the opposite side, and the plat of 1822 indicates that it was taken into the road. It is hardly probable that the elm tree would have been left nearly in the middle of the road, as it would have been without the bend. The land was used as private property long ago, being bricked over as a space in front of the tavern door. A gutter was laid in it by the town, which took the water from the road; but this fact is hardly significant in favor of the town, because the place was wet, and the gutter kept the water from washing across the owner's yard, to which he would not be likely to object. Except the making of the gutter, the surveyor of highways did no work upon it as a road. People drove across it to some extent, before it was fenced, but the traveled way was west of the tree, and the use of this piece was not enough to show that it was a part of the road or that it was dedicated as such. Our conclusion is that the road was built substantially as claimed by the complainants, and that there is no conclusive testimony to show that it was otherwise located.

The defendants urge that the complainants have no remedy in equity, because they took an appeal from a vote of the town council, passed March 3, 1890, receiving the plat of a committee appointed to lay out and plat that portion of the highway at this corner, and establishing the road as shown thereon, and that, as they did not prosecute their appeal, they have lost their remedy. This would undoubtedly be so if the complainants had taken an appeal from any action of the town council for which an appeal was provided. One cannot neglect or abandon a statutory remedy for a statutory liability, and then

set up the same right in another way. *Inman v. Tripp*, 11 R. I. 520; *Smith v. Tripp*, 14 R. I. 112. The town council in this case did not lay out or declare a highway as provided by statute, for which an appeal would lie, but it appointed a committee to ascertain the line of an existing way and to make a plat of it, which was received, with a declaration that the way was as shown thereon. This was simply an ex parte proceeding. Such an appeal, if prosecuted, would have been dismissed for want of jurisdiction, because it was not an appeal provided for by statute. *Whittier v. Town Council*, 10 R. I. 266. No new road was laid out. Hence, if the fence ordered to be removed was in the highway, that fact would justify the town officers in carrying out the order of the council; if it was not in the highway, the removal would be a trespass, for which an action would lie. As the court is of opinion that the fence was not in the highway, and has held on demurrer (19 R. I. 648) that the bill is maintainable upon the ground of preventing continuing trespasses, it follows that the complainants are entitled to the relief prayed for in this bill.

(20 R. I. 400)

ROGERS v. ROGERS.

(Supreme Court of Rhode Island. Feb. 25, 1898.)

STATUTE OF FRAUDS—PLEADING—TRUSTS—EVIDENCE.

1. Where defendant's grantor, in a suit to enforce a parol trust in respect to the land, denies the existence of the trust, it cannot be enforced, even though defendant has failed to set up the statute of frauds.

2. A father gave his home to two daughters, and afterwards, at his request, and for the reason that one of them was intemperate, she conveyed her interest to the other without a valuable consideration. Thereafter the grantor was given a home with the grantee, who testified that she did not hold the property in trust, but that she intended to give the grantor a home, and, if the grantor did right, to give her half the property. *Held*, that the evidence did not show a trust in favor of the grantor.

Bill in equity by Mary Rogers against James Rogers to establish a trust. Dismissed.

Charles E. Gorman, for complainant. Albert A. Baker and William B. Greenough, for respondent.

STINESS, J. In 1891, Bernard Rogers, the father of the parties to this suit, owned a house and three lots of land. With a view to arranging his affairs, he conveyed the house and lot to his wife, and a lot to each of his two sons. His wife died in October of that year, and then, at his request, the children conveyed the estate to his two daughters, Mary and Ellen, to secure a home for them, and in recognition of their equitable claim on the estate. In January, 1892,

also at the request of the father, Mary conveyed her interest to Ellen, who, in October, 1896, conveyed the estate to the respondent. All of these conveyances were without pecuniary consideration, except that James says that he agreed to look out for Ellen, and to see that she had a home, and that he assumed the payment of a mortgage on the land for \$250, which she had given. The bill seeks to establish a trust for one-half of the estate, and prays for a conveyance accordingly. The respondent claims that there is no memorandum in writing creating a trust, as required by Gen. Laws R. I. c. 233, § 6, which is practically the same as the statute of frauds, to which the complainant replies that the deposition of Ellen in this case sufficiently manifests the trust. It is evident that want of consideration does not, of itself, imply a trust, for, if it did, every gift would simply be a trust. While this may be a significant fact, there must be some other evidence. 1 Perry, Trusts (4th Ed.) § 163. If a trust was created, it was between Mary and Ellen; and the case is put upon the deposition of Ellen, as there is no other memorandum in writing to evidence it. The complainant cites, in support of his claim that the trust may be proved by an answer or deposition, *Metcalf v. Brandon*, 58 Miss. 841; *Barron v. Barron*, 24 Vt. 375; *Reid v. Reid*, 12 Rich. Eq. 213; and *Barkworth v. Young*, 4 Drewry, 1. We are not called upon to decide this point, as the case stands, and we see no reason to question it. If one admits a trust in his answer, or swears to it in a deposition, certainly the element of satisfactory proof in writing cannot be lacking. Ellen Rogers is not a party to this suit, but she has given her deposition as a witness. Assuming the complainant's position, we have only to inquire whether she has admitted a trust. It appears from the testimony that Bernard Rogers, the father, got Mary to make the deed to Ellen because he was dissatisfied with Mary's habit of drinking, and fearful that half of the estate would be wasted if she should continue to own it. Ellen says in her deposition that she took no part in the matter, and made no promise to hold for the benefit of Mary. She denies that she was under any trust for Mary, and states that she held it as an absolute owner for her own benefit, but that she wanted Mary to have a home, and allowed her to live there after the deed to her, as James has also done since the deed to him. Ellen also stated that, if her sister did right, she and James were willing to let her have her home there in half of the estate, but she did not admit that there was any obligation to do so. This is the substance of her testimony, which is very far from a statement manifesting a trust. But the complainant contends that certain answers evince the trust, as follows: "Q. 8.

Was there any understanding what he [James] was to do with the property after he paid the mortgage? Ans. He was going to have a house for the both of us. That is what I left it in his hands for. Q. 23. As a matter of fact, was it not always understood between you and Mary that each of you had an equal interest in the house and lot? Ans. Well, of course, the both of us had our equals, and, the way it is fixed now, she cannot get hers unless she has a guardian over her, and I will get mine. Q. 24. Am I to understand that, when you conveyed the house and lot to your brother James, you had no intention of depriving Mary of her half interest in said house and lot, but intended simply to protect it for her? Ans. Well, I had it fixed this way in his name: if she did right, or half right, she was to have her share of it, but not till then." While all this is consistent with a trust, it is also consistent with a kind intent on the part of Ellen to provide a home for Mary upon the ground of sisterly favor, and not of legal obligation. By the wish of the father the estate was conveyed to the two sisters; by his wish again it was conveyed to Ellen. In neither case does a trust appear. The father evidently had confidence in Ellen's ability to retain the property, and an equal confidence that she would look out for Mary, but neither he nor she expressed a trust to that effect. In *Metcalf v. Brandon*, 58 Miss. 841, the court says: "It is impossible for the court to enforce a contract which is denied by the defendant. It is only where the defendant admits the contract, or at least fails to deny it, and also fails to set up the statute, that it can be enforced. If he admits it in writing, by pleadings over his signature, the terms of the statute are met, and the court will proceed to investigate and determine the further facts that may be set up in avoidance of it as in other cases. So, also, where he fails to deny it, and, instead of pleading the statute, relies upon other facts in avoidance of his contract, the same result will follow. But if, admitting the contract, he sets up the statute, or if, denying the contract, he puts the plaintiff to his proof, he must, in either case, prevail. In the first case, because the statute is an all-sufficient defense, though the facts be admitted; in the second, because, where the facts are denied, and the plaintiff is put to his proof, he must necessarily fail for want of proof which meets the requirements of the law." The deposition of Ellen denies any trust or obligation. Taken as a whole, it asserts an absolute ownership in herself, with an intention to provide a home for her sister if she does what is right. As this intention is not inconsistent with absolute ownership, we are unable to say that her deposition manifests a trust in favor of the complainant. Our conclusion is that the bill must be dismissed.

(20 R. I. 398)

In re SWEET.

(Supreme Court of Rhode Island. Feb. 23, 1898.)

INSOLVENCY—DISSOLUTION OF ATTACHMENTS.

Gen. Laws, c. 274, § 39, providing that proceedings in insolvency shall dissolve any levy on the debtor's property not more than four months prior to the time of the first publication, applies to nonresident, as well as resident, creditors.

Motion by Kellogg & McDougal for the dissolution of an order granted restraining them from selling the property of Charles R. Sweet, an insolvent, under a levy of execution. Denied.

T. F. I. McDonnell, for petitioners. Geo. T. Brown, for attaching creditors.

MATTESON, C. J. This is a motion to dissolve a restraining order. Prior to the filing of the petition in insolvency, Kellogg & McDougal, residents of Buffalo, N. Y., obtained a judgment of the district court of the Sixth judicial district against the insolvent, which remains unsatisfied, and levied an execution, issued on the judgment, on the personal property of the debtor, and advertised it for sale. These creditors, and the officer who made the levy, now ask for a dissolution of the order heretofore granted restraining them from selling the property under the levy. It is contended, in support of the motion, that, as no discharge can be granted to the insolvent which would be valid as against the levying creditors, because they are nonresidents of the state, unless they shall become parties to the proceeding, the court has no jurisdiction to restrain the sale. We find nothing in the statute (Gen. Laws R. I. c. 274) to warrant such a contention. Section 20 of the chapter provides that "the court may, after the commencement of proceedings by or against any debtor and before adjudication in insolvency thereon, restrain the debtor and all other persons from making any transfer or disposition or interference of or with any part of the debtor's assets, choses in action, rights, credits or estate of any kind or description." Section 39 provides that "the assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed at the time of the first publication of the notice of the adjudication, in case of voluntary proceedings, and at the time of the first publication of notice of the filing of the petition, in case of involuntary proceedings, and shall be effectual to dissolve any attachment, any levy and any lien placed upon his property in fraud of his creditors not more than four months prior to the time of the first publication in either case aforesaid." It is the evident policy of the statute that the assets of an insolvent shall be distributed ratably among his creditors in proportion to their claims, excepting only

those creditors whose claims are preferred by its provisions. The claim of the creditors making the motion is not within the classes of preferred claims. Though the statute cannot compel them to become parties to the proceeding, it can nevertheless distribute the assets of the insolvent among his other creditors, who are residents of the state, or who, not being residents, make themselves parties to the proceeding by proving their claims. In other words, under the statute, nonresident creditors wishing to share in the distribution of the debtor's assets must prove their claims and subject them to the operation of the discharge, if one is granted, thereby putting themselves on the same footing as resident creditors. Certainly it was not intended that a nonresident creditor, merely because he happens to be a nonresident, should be able, by an attachment and levy within four months prior to the beginning of the proceedings in insolvency, to obtain a preference over resident creditors whose attachments and levies are dissolved by the statute. Such a construction would be contrary to the policy of the statute, which, as already stated, is to insure a ratable distribution of the debtor's assets among all his creditors, and consequently in fraud of creditors, within the meaning of the phrase as used in section 39. The motion is denied.

(20 R. I. 407)

In re RED BRIDGE.

(Supreme Court of Rhode Island. March 7, 1898.)

BRIDGES—REPORT OF COMMISSIONERS—EXCEPTIONS—TRIAL.

Under Pub. Laws 1894, c. 1332, § 6, providing that, after the filing of the report of commissioners appointed to apportion the cost of a bridge, the court shall, unless sufficient cause be shown to the contrary by exceptions filed by interested parties, after the trial of said exceptions with or without a jury as the party may elect, accept and affirm said report, and enter judgment thereon, or shall enter judgment on the report as revised and amended by the court, the court must first determine whether sufficient cause exists for not affirming the report, and, if so, the court may determine, and, if need be, correct, any error in law therein, and, if error exists in a matter of fact, the party excepting has a right to a jury trial.

Exceptions taken to the report of commissioners appointed to apportion the cost of Red Bridge.

Francis Colwell and Wm. B. Greenough, for city of Providence. Edward C. Dubois and Edward L. Mitchell, for town of East Providence.

PER CURIAM. Pub. Laws R. I. 1894, c. 1332, § 6, provides that after the filing of the report of the commissioners the court "shall, unless sufficient cause be shown to the contrary, upon exceptions filed by any of the parties interested, after the trial of said ex-

ceptions, with or without a jury as the party excepting may elect, accept and affirm said report and enter judgment thereon, or shall confirm and enter judgment upon said report as revised and amended by the court," etc. It will be observed that the language is that the court shall accept and affirm the report, and enter judgment thereon, unless sufficient cause be shown to the contrary. We think, therefore, that in the first instance the court is to determine whether or not sufficient cause exists for not accepting and affirming the report, and entering judgment upon it; that if, in the opinion of the court, there is reason to suppose that the award of the commissioners is erroneous in matters of law, the court may correct the error; and, if the error consists in a matter of fact, that the party excepting shall have the right to have such matter tried by a jury if it so elects. This view is in conformity with the usual procedure on exceptions, and it will be noticed that section 6 provides for that method of procedure, while section 3, with reference to the damages therein specified, provides for procedure by appeal.

(20 R. I. 418)

ROYCE et al. v. OAKES.

(Supreme Court of Rhode Island. March 14, 1898.)

ACTION—TORT OR CONTRACT.

1. A count, in trespass on the case, alleging that an agent authorized to collect moneys for plaintiff had collected sums, but that, intending to defraud plaintiff, he neglected and refused to pay said money, and that such refusal is fraudulent and in violation of his duty, is demurrable, since the count shows only an action of contract and not an action sounding in tort.

2. An action *ex contractu* for money had and received cannot be changed into an action *ex delicto* by alleging that defendant's neglect to pay the money was with intent to defraud plaintiff.

Trespass on the case by Royce, Allen & Co. against Charles H. Oakes. Demurrer to an amended count of the declaration sustained.

Irving Champlin, for plaintiffs. Van Slyck & Mumford, for defendant.

TILLINGHAST, J. Since the rendition of the former opinion in this case, sustaining the demurrer to the second count in the declaration (20 R. I. —, 38 Atl. 371), the plaintiffs have amended said count so as to allege, in substance, that on the 15th day of January, 1894, they authorized and empowered the defendant, who was in their employ for hire, and acting as their agent and servant in this behalf, to collect and receive for them, from divers debtors of theirs, various sums of money, amounting, in all, to the sum of \$1,714.60, and thereupon to deliver the same to the plaintiffs. And they aver that the defendant thereafter, in pursuance of said authority collected said sum of money, and that thereupon it became his duty to pay over the same to the

plaintiffs; but that, not regarding his duty in that behalf, although duly requested, intending and contriving to injure and defraud the plaintiffs, he neglected and still neglects to pay said money to them. And the plaintiffs declare that said refusal was negligent, fraudulent, and in violation of his duty, and that by reason of the premises they are deprived of the possession and benefit of said money. To this amended count the defendant has demurred, on the grounds (1) that the cause of action, if any, set forth therein, is an action of contract, and not an action sounding in tort; and (2) that the injury alleged to have been suffered by plaintiffs has been suffered by reason of the commission of the crime of larceny, and that it does not appear that any criminal complaint has been made therefor.

We think the demurrer should be sustained on the first ground. The amended count differs from the former one, which we held amounted to a charge of embezzlement, in that it does not allege a fraudulent conversion of the money by the defendant to his own use, but simply alleges a breach of duty in not paying over the same to the plaintiffs after demand made therefor. In other words, when stripped of its formalities, it simply shows a case where a servant or agent has collected money for his principal and neglected to pay it over on demand,—that is, a case of money had and received by the defendant to the plaintiffs' use,—and hence the plaintiffs' remedy, and their only remedy, is by assumpsit or debt. It is true, as contended by plaintiffs' counsel, that the action of trespass on the case is an exceedingly broad and comprehensive form of action, and that it lies, in general, where a legal injury is suffered for which the common law has provided no adequate remedy. 26 Am. & Eng. Enc. Law, 699, and cases in note 5. But, in a case like the one set out in said count, the common law has provided an adequate remedy in an action of assumpsit; and to permit the plaintiffs to maintain their action of trespass on the case would, in effect, be to abolish the distinction between actions sounding in tort and those sounding in contract, and enable a plaintiff in any case, where money has been had and received by another to his use, to sue in a tort action for its recovery.

In *Orton v. Butler*, 2 Chit. 343, the same thing was attempted under a declaration the third count of which was nearly identical with the count now in question, except that there the plaintiff stated a stronger case by alleging a conversion of the money received, as the plaintiffs originally did in the case at bar. In sustaining the demurrer to the third count, Abbott, J., said: "The law has provided certain specific forms of action, suited to the recovery of damages, for certain peculiar injuries. We have a smaller variety of forms in our law than is to be found in the civil law. We have not many,

but it is of importance that those we have should be preserved, and that parties should not be permitted, by their own invention, to convert that which from the earliest times has been considered as peculiarly the subject of assumpsit or debt into an action of tort. We are to look with jealousy at any innovation of that kind, so that nothing like a precedent shall be established, tending to destroy those sound distinctions which have been established by the wisdom of our ancestors." Best, J., added: "I am of the same opinion. This is a departure from all precedents; and, even if I were satisfied that it might not be attended with inconvenience, still I think we ought not to permit any innovation upon the ancient forms of proceeding, which are to be considered as part of the settled law of the land. As well might we alter the doctrine of descents as to freehold property, as alter the long-established forms prescribed for the recovery of debts. We are not at liberty to do so. There is a broad distinction between causes of action arising *ex contractu* and *ex delicto*. This is one arising *ex contractu*. There is no wrong stated, but merely a breach of contract; and the plaintiff is not at liberty to convert a mere matter of contract into a tort. The consequences of a departure from the ancient forms have been well pointed out in argument. In addition to those may be mentioned that, by altering the remedy, the defendant would be deprived of his plea of tender, and also of the advantage of paying money into court. But, if no such consequences were to follow, I think we ought to adhere to those ancient forms, which have been perfected by the wisdom of ages, and confirmed in their utility by the experience of many centuries."

It has never been understood by the bar in this state that a tort action could be maintained for money had and received, even though the person receiving the same has negligently and fraudulently refused to pay over the same to the person to whose use it was received, or has even converted it to his own use, except, at any rate, as provided by statute, after the commencement of a criminal prosecution. Gen. Laws R. I. c. 233, § 16. On the contrary, the understanding has always been that assumpsit and debt are the only actions that can be employed in such cases; and we think this position is clearly in accordance with the well-settled rules relating to common-law actions. The authorities cited by plaintiffs' counsel do not, in our judgment, sustain his position. They are mostly cases of negligence for failing to discharge some common-law duty arising from a contract, and hence are proper subjects for trespass on the case. 1 Chit. Pl. 151, 152. The celebrated and familiar case of *Coggs v. Bernard*, 2 Ld. Raym. 909, is an example. *Dickson v. Clifton*, 2 Wills. 319, was case, for undertaking to carry and deliver some malt for the plaintiff, and for so carelessly dis-

charging his duty that the malt was embezzled and lost. *Elsee v. Gatward*, 5 Term R. 143, was tort, for negligence in regard to the use of new material, instead of old, in the repair of certain buildings, contrary to plaintiff's order, which the court held to amount to a misfeasance, and hence a good foundation for the action. *Brown v. Boorman*, 11 Clark & F. 1 (see 3 Q. B. 511), is a case where the plaintiff employed defendant as a broker to sell and deliver oil for cash, but, not regarding his duty, he sold and delivered the oil without obtaining payment therefor; and the court held that case was a proper remedy, although the duty imposed upon the defendant arose out of an express contract. That decision gave rise to the supposition that every action for a breach of contract might be considered as an action of tort. But in the subsequent case of *Courtenay v. Earle*, 10 C. B. 73, the court effectually disposed of that impression; Williams, J., saying that the judgment in the former case by no means warranted such a conclusion, and that the court did not intend to overrule the case of *Corbett v. Packington*, 6 Barn. & C. 268. In the last-mentioned case, one count in the declaration stated that the plaintiff, at the request of the defendant, had caused to be delivered to him certain boars, pigs, etc., to be taken care of by the defendant for the plaintiff, for reward, and that, in consideration thereof, the defendant undertook and agreed with the plaintiff to take care of the boars, etc., and to redeliver the same on request; and it was held, on motion in arrest of judgment, that this was a count in assumpsit, and could not be joined with counts in case. Jervis, C. J., in referring to *Brown v. Boorman*, in the case of *Courtenay v. Earle*, supra, said: "If the case of *Brown v. Boorman* were an authority to the full extent to which it has been pressed by counsel, no doubt the third and fourth counts here might well be joined with counts in tort. But, upon examination, that case will be found to proceed upon this principle: that where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast. And, if that be so, the case is reconcilable with the other cases with which it has been supposed to be in conflict." In *Burnett v. Lynch*, 5 Barn. & C. 589, cited by plaintiffs, an action of tort was sustained where it appeared that defendant was the assignee of a lease with covenants for certain repairs, which defendant neglected to make. *Godefray v. Jay*, 7 Bing. 413, was tort against an attorney who undertook to defend an action, and so negligently conducted himself with reference thereto that judgment was signed against the defendant. See, also, *Zell v. Arnold*, 2 Pen. & W. 292; *McCall v. Forsyth*, 4 Watts & S. 179; *McCahan v. Hirst*,

7 Watts, 173, cited in *Reeside's Ex'r v. Reeside*, 49 Pa. St. 322.

These cases, and others of like character which are cited, are clearly distinguishable from the case at bar, which is not based upon negligence proper, as that term is understood in the foregoing cases and in analogous cases, nor upon any common-law duty arising out of a contract, but upon a simple neglect to pay over money when due, as that term is ordinarily used and understood in declarations in actions of debt or assumpsit. The case of *Ashley v. Root*, 4 Allen, 504, seems to be an authority in support of the plaintiffs' position. But, in view of the fact that, in Massachusetts, the common-law distinction between actions of contract and actions of tort has been abolished by statute, so far, at any rate, as to allow the two forms to be joined in the same action, as it appears that they were in the writ in that case, the writ averring that the action was "an action of contract or an action of tort, both being for one and the same action," we do not think the case is entitled to that weight which it would be if decided by a court where the common-law distinction between such actions prevails, as it does with us. But, if that case was decided upon common-law principles, and not by reason of the statutory modification referred to, as it would seem to have been, then we have to say that the decision does not commend itself to our judgment as one which we should follow. All of the cases, save one, cited by the court in support of the opinion, are really cases of negligence, and, as we have above suggested, such cases are not analogous to a case of money had and received to the plaintiff's use which the defendant neglects to pay over. The very instructive case of *Courtenay v. Earle*, 10 C. B. 73, cited by the court in *Ashley v. Root*, supra, does contain some general language which, if taken apart from the facts of the case, tends to support the decision; but when taken, as it must be, in connection with the question before the court, we do not think it does. The declaration in that case contained counts which, as construed by the court, merely alleged a promise to pay money upon a good consideration, unconnected with any common-law duty, and alleging, for breach, the nonpayment thereof. It also contained a count in trover. The defendant demurred on the ground of misjoinder, and the demurrer was sustained. A careful study of the case shows that it is not only not an authority in support of *Ashley v. Root*, but is quite clearly to the contrary. *Reeside's Ex'r v. Reeside*, 49 Pa. St. 322, cited by plaintiffs, is different from the case at bar, in that the declaration there alleged that certain money was intrusted to the defendant by the plaintiff, who was the executrix of a will, to be used by him in paying the debts of the estate, and to return the balance, if any, to her. The declaration also alleged that the

defendant accepted and received said money for the purposes of the trust, and entered upon the professional employment of the settlement of the estate, but, notwithstanding his duty in the premises, he fraudulently appropriated the money to his own use. The court, by Agnew, J., held that the declaration was good, saying that: "Where a duty arises out of an implied undertaking to do an act requiring skill or fidelity, a breach of the duty may be the subject of an action of assumpsit upon the implied promise, or of an action upon the special case for the tort. * * * The breach of duty, and not fraud, is the foundation of the action. If, therefore, this were a case where the agent, having received the money of his principal to perform a certain trust, had wholly omitted to perform his duty, and converted the money to his private use, the entire breach of duty, no doubt, would expose him to an action in form *ex delicto*, or to an action of assumpsit for money had and received for the use of the plaintiff." From the cases cited in support of the opinion, it would seem that the court treated the duty of the defendant regarding the money intrusted to him as a common-law duty, arising out of a contract for professional skill, and hence that the breach thereof would give rise to an action of tort. The reasoning of the court is not entirely satisfactory. But, even admitting that the decision is correct, the facts set up in the declaration were so different from the case at bar that we cannot treat it as strongly militating against the position we have taken.

Finally, we do not think that the mere fact that the plaintiffs in the case at bar allege in their declaration that the neglect complained of was with the intent to defraud changes such neglect into a tort. *Howe v. Cooke*, 21 Wend. 29. If this were so, we see no reason why any debtor might not be sued in a tort action if the plaintiff should see fit to allege that he had fraudulently neglected to pay his debt, and thus revive imprisonment for debt. Demurrer sustained, and case remitted to the common pleas division for further proceedings.

(56 N. J. E. 398)

ISHAM v. COOPER et al.

(Court of Errors and Appeals of New Jersey.
Feb. 23, 1898.)

PAROL EVIDENCE—INTERLINEATION IN CONTRACT.

When, on the face of a written instrument, it is doubtful whether a person's initials, written by him, were intended to witness an interlineation, or to be incorporated in the instrument as part of the interlineation, a question is presented over which a court of law has jurisdiction, and which may be decided on extrinsic parol evidence.

(Syllabus by the Court.)

Appeal from court of chancery; McGill, Chancellor.

Action by John W. Cooper and others

against Henry H. Isham. Plaintiffs had judgment, and, from an order refusing to grant a preliminary injunction to restrain its enforcement, defendant appeals. Affirmed.

Mr. Lindabury, for appellant. Cross & Noe and C. L. Corbin, for respondents.

DIXON, J. This is an appeal from an order of the chancellor refusing to grant a preliminary injunction to restrain the defendants from enforcing a judgment which they had obtained against the complainant in the supreme court of this state. The judgment was based upon a contract which, it was claimed, the complainant had made by placing his initials upon a written document. The bill alleges that the complainant placed his initials there, not for the purpose of contracting, but only to attest an interlineation then made upon the instrument; that his placing them in such a position as to lead a court of law to read them into the contract was the result of inadvertence and mistake, from which the court of chancery should give him relief. The answer avers that, in the trial at law upon which the judgment was rendered, the complainant likewise insisted that he had placed his initials upon the instrument, not for the purpose of contracting, but merely to attest the interlineation, and relied upon that proposition of fact as a legal defense to the suit; that the trial court accepted the proposition as a legal defense, and submitted its truth to the jury, who by their verdict found it to be untrue; and the defendants thereupon insist that the fact is *res judicata* against the complainant, and cannot be retried in equity. In response to this, the positions of the complainant are: First, that the question of fact was not tried at law; and, second, that, even if it was, it presented an issue over which a court of law had no jurisdiction, and hence the decision of that court is not binding upon him.

As to the first position, it must suffice to state that, after examining carefully the evidence submitted on the motion for injunction, including the proceedings on the trial at law, we think the averments of the answer are substantially correct.

As to the second position, it is not now necessary to decide whether, when, at the instance of a defendant, a court of law has received a proposition of fact as a legal defense, and, because of its untruth, has rendered judgment against him, a court of equity should, at the instance of the same party, determine for itself whether the proposition was admissible as a legal defense, and, if it answers that question in the negative, should interfere with the judgment, because the proposition, if true, constitutes an equitable defense; for the order under review can properly be supported on the ground that the proposition set up in this case was, if true, a legal defense. In *Kean v. Davis*, 21 N. J. Law, 683, Chief Justice Green, delivering the opinion of this court sitting as a

court of law, declares that the cases "fully establish the principle that when it is doubtful, on the face of the instrument, whether it was designed to operate as a personal engagement of the party signing it, or otherwise, parol evidence is admissible to show the true character of the transaction"; and upon that principle this court reversed a judgment, because, at the trial in a law court, evidence offered by the defendant to show in what capacity he had written his signature upon the instrument was rejected.

An inspection of the writing now in controversy satisfies us that it is doubtful, on the face of the instrument, whether the complainant's initials were written by him for the purpose of binding him to a contract, as the defendants claim, or for the purpose of attesting an interlineation, as he claims. The initials appear in the body of a letter addressed by the complainant to the defendants, and the important words are written as follows:

the company and by H. H. I.

"and shall be cared for by ~~A~~ until," etc.

On the suggestion being made, the probability is perceived at once that the initials may have been written with either intent; and which actually existed must be decided on extrinsic evidence. No doubt, in reaching a decision, the mind would be strongly influenced on ascertaining whether the word "you" was crossed out when the initials were written or afterwards; but this latter question would not be the same question as the former; it would be only subsidiary, and we think it was so treated at the trial. Our conclusion is that the question of fact between these parties was submitted by them to the appropriate tribunal, and its judgment thereon precludes further controversy. The order appealed from is affirmed.

(56 N. J. E. 553)

LAWS v. WILLIAMS et ux.

(Court of Chancery of New Jersey. March 12, 1898.)

Trusts—Following Funds.

Where an executor and trustee under a will probated in the surrogate's court of New York was found, in a compulsory accounting in that court, to be indebted in a certain sum to a devisee under the will, and the trustee invested said sum in land in New Jersey in his own name, and transferred title to his wife, the devisee was entitled to have said sum declared a lien on the land, without first obtaining a personal money judgment against the trustee in New Jersey.

Bill by Elijah Laws against Elihu Williams and wife to subject certain land to payment of a trust debt. Defendants moved to strike out bill for want of equity. Denied.

W. D. Daly, for the motion. Frank P. McDermott, opposed.

PITNEY, V. C. The bill alleges that the defendant Elihu Williams is the sole acting

executor and trustee under the will of one George Laws, of New York, by virtue of letters testamentary issued upon said will by the surrogate of the city and county of New York; that \$4,000 of the estate was set aside by the testator as a fund for the use of a certain person for life, and after the death of the tenant for life then to go in part to the complainant. It further sets out the death of the tenant for life, and a compulsory accounting in the surrogate's court of the city of New York, in which a sum of over \$3,000 was found due from the executor to the complainant. It further alleges that the whole of this fund of \$4,000 was invested by the executor in the purchase, in his own name, of certain real estate, specifically described, situate in the county of Monmouth, which real estate the defendant Ellihu Williams afterwards conveyed, through an intermediary, to his wife, the other defendant, Albina Williams. The prayer is that the complainant's share of the funds of the estate ascertained by the decree of the surrogate of New York may be declared to be a lien upon those lands, notwithstanding the conveyance to the wife, which is alleged to be without consideration and fraudulent.

The equity of the complainant consists in the fact that his funds were invested by the trustee in the purchase of lands, and the title taken in his own name. It is objected by the counsel of defendants that, preliminary to relief, there should have been a suit brought in the courts of this state, and a judgment obtained, against Williams, and that the decree of the surrogate of New York cannot be dealt with by this court as a judgment which gives the complainant a lien upon the lands of Williams in this state. The complete answer to that is that the complainant's equity does not rest upon a lien obtained or sought to be obtained, by a judgment, but upon the fact that his funds, with others, were invested in this land. The function of the New York decree is simply to establish the fact that the funds in question did belong, to an ascertained extent, to the complainant. That being established conclusively by the decree in the New York court, the right of the complainant to follow those funds in whatever shape the trustee may have put them is a matter of course. 2 Lewin, Trusts (Flint's Ed.) p. 892. The motion to strike out is denied, with costs.

(56 N. J. B. 424)

HERVEY v. HERVEY (two cases).

(Court of Errors and Appeals of New Jersey.
March 14, 1898.)

EQUITY—JURISDICTION—SUIT FOR MAINTENANCE—SERVICE OF PROCESS—VALIDITY.

1. To the effectual initiation of a suit brought in the court of chancery by a wife against a husband for maintenance under the twentieth section of the act concerning divorces two things are necessary: jurisdiction of the subject-matter of the controversy, and jurisdiction of the person of the defendant.

2. The method by which the state has authorized the court of chancery to acquire jurisdic-

tion of the person of the defendant in a suit brought under said twentieth section is that prescribed by the act respecting the court of chancery.

3. The subpoena was served neither by delivering a copy personally to the defendant nor by leaving a copy at his dwelling house or usual place of abode, but, after he had departed from the state without intention of returning, by leaving a copy at his former place of abode. No step was taken to serve the defendant as a non-resident by publication and notice. *Held*: (1) That the service of the subpoena was void; (2) that because the service of the subpoena was void, the court did not acquire jurisdiction of the person of the defendant; (3) that, since the court did not acquire jurisdiction of the person of the defendant, orders and proceedings made and taken in the suit did not bind him, and, on his application, made under special appearance entered for that purpose, must be set aside.

(Syllabus by the Court.)

Cross appeals from court of chancery.

Suit by Eva May Hervey against Lee A. Hervey for maintenance. From an order setting aside the service of the subpoena, plaintiff appeals, and from so much of the order as denied an application to set aside an order for alimony, counsel fees, and other proceedings, defendant appeals. 38 Atl. 767. The part setting aside the service of the subpoena affirmed; the other part reversed.

J. E. Howell, for Eva May Hervey. C. W. Riker, for Lee A. Hervey.

ADAMS, J. In this suit, brought by a wife against a husband for maintenance, by bill filed under the twentieth section of the act concerning divorces, the wife has appealed from so much of an order, dated November 1, 1897, as set aside the service of the subpoena; and the husband, by virtue of special appearance and leave for that purpose, has appealed from so much of the same order as denied an application to set aside an order for alimony pendente lite and for counsel fees, and other proceedings. In other words, both parties are dissatisfied with the action of the court of chancery, which annulled the service of the subpoena, but upheld orders and proceedings made and taken in the same suit.

The service of the subpoena was properly set aside. The writ, of which a copy should have been served on the defendant in person, or left at his dwelling house or usual place of abode, was served after the defendant had departed from the state without intention of returning, by leaving a copy at his former place of abode. No step was taken to serve him as a nonresident by publication and notice. The service of the subpoena did not comply with section 136 of the act respecting the court of chancery. The facts are fully stated, and the correct conclusion declared, in the vice chancellor's opinion.

The remaining question is as to the validity of orders and proceedings in a suit in which the service of process was void, and the defendant did not appear, and was not proceeded against as a nonresident by publication and notice. The court of chancery

is not an ecclesiastical tribunal, and has no inherent jurisdiction of divorce, alimony, or maintenance. *Anon.*, 24 N. J. Eq. 19, 24; 2 Bish. Mar. & Div. 291. Its power is what the statute gives it. The first section of the act concerning divorces declares "that the court of chancery shall have jurisdiction of all causes of divorce and of alimony or maintenance, by this act directed and allowed." Several sections empower the court to grant alimony or maintenance as an incident to a divorce suit. Under the twentieth section, a wife, when unjustifiably abandoned by her husband, who refuses or neglects to maintain and provide for her, may have suitable support and maintenance decreed to her. The power of the court to deal with alimony and maintenance does not extend beyond these statutory cases. *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Rockwell v. Morgan*, 13 N. J. Eq. 119, 121. The statute that confers the jurisdiction also prescribes the procedure by declaring in its sixth section that the like process and course of practice and procedure shall be had and pursued as in causes on the equity side of the court, except that the answer of defendants shall not be under oath. The process and course of practice and procedure in causes on the equity side of the court are prescribed by the act respecting the court of chancery, and are, briefly, that a defendant may come into court by appearance, or be brought in by a subpoena to answer, or equivalent statutory publication and notice. The state has a right to say what procedure shall be necessary to give jurisdiction of the person of a defendant. *Insurance Co. v. Pinner*, 43 N. J. Eq. 52-57, 10 Atl. 184. In the words of Chief Justice Beasley: "Every independent government is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals." *MacKay v. Gordon*, 34 N. J. Law, 291. To the effectual initiation of a chancery suit two things are necessary: jurisdiction of the subject-matter of the controversy, and jurisdiction of the person of the defendant. In the recent case of *Buckley v. Perrine*, 54 N. J. Eq. 285, 34 Atl. 1054, the proposition was thus stated by Chancellor McGill: "Jurisdiction of the parties to a controversy, as well as of the subject-matter thereof, is necessary to the validity of a judgment of a court therein." This was a habeas corpus proceeding, begun, not in the court of chancery, but, under the statute, before a vice chancellor. 2 Gen. St. p. 1631, par. 59. The function of this writ is to test the legality of personal restraint. Both parties filed pleadings in the court of chancery, and thereby framed a wider issue, of equitable cognizance, touching the permanent custody of infants who were the subjects of application. No process had been served on the respondents, nor had any equivalent notice been given them. The chancellor held that

the court of chancery, by reason of the want of notice or process, never acquired jurisdiction of the persons of the respondents, though it admittedly had jurisdiction of the issue between the parties. This court held, on appeal (55 N. J. Eq. 514, 36 Atl. 1037, 1038), that both parties had consented to the transfer of the controversy to the court of chancery, which thus acquired complete jurisdiction. In the case of *Karr v. Karr*, 19 N. J. Eq. 427, Chancellor Zabriskie, in setting aside a defective service and publication of a notice to a nonresident defendant, said: "The defendant is not brought as yet in the jurisdiction of the court, and no decree against him can be made, or would have validity, if made." It seems to follow from these considerations that service of process or of substituted statutory notice was necessary to give the court jurisdiction of the person of this defendant, and that, because such service was not made, the orders and proceedings made and taken in this suit did not bind him. The learned vice chancellor upheld the orders and proceedings in this case, notwithstanding the failure of process, because the court had jurisdiction of the marital status, and because the parties were domiciled and the defendant had property in New Jersey. We think that the reasons do not support the conclusion. The regulation of the institution of marriage is a matter of high public policy. The persons subject to this regulation are naturally, and by general law, those who are domiciled within the borders of the state. Specifically, they are those who have therein such a domicile as the state may positively prescribe. The first section of our act concerning divorces harmonizes with the general law on this subject. The parties to this suit are within the provisions of this section. To declare that the court, in this case, had jurisdiction of the marital status, and that the parties were domiciled in New Jersey, is merely equivalent to saying that the court had jurisdiction of the subject-matter of the controversy. Granting that jurisdiction existed to this extent, how was void service made thereby effective?

The other circumstance relied on to support the orders and proceedings in question is the possession by the defendant of real and personal property in New Jersey. The bill, as originally drawn, contained a general allegation that the defendant possessed real and personal property worth \$12,000, and that he was able, out of his income, to maintain and support his wife. On or after the return of the subpoena, and after the order for alimony had been made, the bill was amended by adding a paragraph specifying real and personal property of the defendant, alleging that he had turned it over to his father and partner without consideration, and praying that it be sequestered. Let the truth of these allegations be assumed. No lien arises thereby. A conveyance of real

estate before sequestration issued, although after the decree upon which it is founded, is valid, in the absence of any proof of mala fides. *Vreeland v. Jacobus*, 19 N. J. Eq. 231. The legislature has not conferred jurisdiction, in a suit brought under the twentieth section, based on the seizure of property in New Jersey as the foundation of the suit. Neither the act concerning divorces nor the act respecting the court of chancery gives the remedy of a proceeding in rem. The proceeding must therefore be in personam, whether there is or is not property within the state, and must be governed by whatever statutory rule the legislature has prescribed for the bringing in of parties.

The learned opinion of the vice chancellor suggests important questions that might arise as to the decree in this case and its effect. In the case of *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641, the defendant was a nonresident, and was brought in by the usual statutory mailing and publication of notice. There was no appearance, and no property of the defendant under the court's control. The decree for divorce was amended, on motion of the petitioner, by the addition of a clause reserving to the court the right to allow alimony. This decree was affirmed in this court (55 N. J. Eq. 591, 39 Atl. 1114) for the reasons given by the chancellor, who, somewhat incidentally, said that under the circumstances the court could not have given judgment in personam for alimony in favor of the petitioner. In our view, questions such as this need not now be considered. That portion of the order of November 1, 1897, which set aside the service of the subpoena is affirmed, and that portion of the same order which denied the application to set aside the order for alimony pendente lite and for counsel fees, and other proceedings, is reversed. The appellant, *Lee A. Herve*, is not entitled to costs.

(61 N. J. L. 253)

MOONEY v. BELLEVILLE STONE CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey. Feb. 28, 1898.)

INJURY TO EMPLOYE—NEGLIGENCE OF FOREMAN.

The plaintiff was employed by the defendant to work in a quarry. It was a part of the system under which the quarry was operated that the foreman should supervise the preparation of each blast, and light the fuse to fire it, giving warning by a cry of "Fire," so that the workmen in the quarry might run out of danger. The plaintiff was injured by a piece of rock thrown out from a blast, because the foreman had, through negligence, failed to give timely warning. *Held*, that the giving of warning was embraced in the duty, owed by an employer to his employes, that the place where he sets them to work shall be kept safe; that the failure of the foreman to perform this duty carefully was imputable to the defendant as employer; and that such failure was not one of those obvious dangers of which the plaintiff as employe assumed the risk.

(Syllabus by the Court.)

Error to supreme court.

Action by Henry Mooney against Belleville Stone Company of New Jersey. Plaintiff had judgment, which was affirmed in supreme court (38 Atl. 835), and defendant brings error. Affirmed.

Howard W. Hayes and Joseph Coult, for plaintiff in error. Samuel Kallsch, for defendant in error.

DIXON, J. The plaintiff was struck by a piece of rock thrown out by a blast in the quarry of the defendant, and brought this suit to recover compensation for the injury. At the time he was in the employ of the defendant at the quarry, and was engaged as an attendant upon another workman who was painting a high derrick, and whom the plaintiff raised or lowered so as to facilitate his operations. The blasting was in charge of a foreman, whose duty it was to superintend the preparation of the blast, to light the fuse, and to warn the workmen, by crying "Fire," in time for them to run out of danger. On the occasion in question this warning was not given soon enough to enable the plaintiff to lower the painter to the ground and escape to a place of safety. Under the charge of the trial court, and the verdict of the jury, we must regard it as established that the plaintiff's injury resulted from the neglect of the foreman to give timely warning, and without any contributory negligence on the part of the plaintiff. This presents the real question of law in the case, which is whether the negligence of the foreman in this respect is imputable to the defendant, the common master of the foreman and the plaintiff. As was said by counsel for the defendant, the judgment must stand or fall on the answer to that inquiry. Under the cases of *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619, and *Comben v. Stone Co.*, 59 N. J. Law, 226, 36 Atl. 473, two views are suggested,—one, on behalf of the plaintiff, that the giving of proper warning was an essential part of the duty, owed by the employer to the workmen, of taking reasonable care that the place where the workmen were engaged should be kept safe, and therefore if, through negligence, the proper warning was not given, the employer's duty was not performed; the other, on behalf of the defendant, that the giving of the warning was only incidental to the foreman's work in preparing the blast and lighting the fuse, in which work the foreman was clearly a fellow servant of the plaintiff, engaged in a common employment, and therefore his negligence in that incidental service was not chargeable upon the common master. On reflection, it will be perceived that the giving of warning bore no direct relation to the foreman's work in preparing and firing the blast. The object of that work was the removal of rock, and such object would be attained as well without the

warning as with it, if we leave out of consideration the safety of the workmen. Quite different are the conditions where a person using a tool or machine is obliged to see that the implement remains fit for use. In such case, the duty to examine is auxiliary and incidental to the duty to use, and, when a servant owes the latter duty to his master, he owes the former also. A failure to perform carefully this incidental duty of examination may result in damage to a fellow servant, but the common master is not responsible for such damage, because the duty neglected was not one owed by him. Outside of that duty there may have been a similar duty of inspection owed by the master to his servants, but the duties themselves are distinguishable from each other. In the present case, however, as already pointed out, the duty to give warning was not in any such sense subservient to the blasting of rock. On the other hand, when we consider the general duty owed by an employer to his employees, to exercise reasonable care that the place where he sets them to work shall be kept safe (*Van Steenburgh v. Thornton*, 58 N. J. Law, 160, 33 Atl. 380), the propriety of including therein the duty of giving warning, in such circumstances as those now before us, becomes at once apparent. The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen, and proper warning given, the quarry became an unsafe place for the workmen, but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast. In selecting the person who was to fire the blast as the person to give the warning, the defendant probably chose the man best able to perform that duty; but, as the defendant's responsibility extended beyond the selection of an agent, and included the warning itself, it must answer for negligence in the giving of warning, no matter how fit was the chosen agent. Nor will the doctrine that servants assume the obvious risks of their employment save the defendant in this case; for that doctrine is not applicable to risk arising from negligence in the discharge of the master's duty to his servants. No doubt the plaintiff took the risks of the system under which he knew the quarry was worked. He would not be heard to complain that places of refuge close at hand were not provided, or that other possible precautions, which he saw were not in use, were omitted. But he had a right to expect that the precaution which the defendant had provided for the security of the quarrymen should be care-

fully observed, and he did not assume the risk of a negligent observance. The judgment under review is affirmed.

(56 N. J. E. 455)

BLUE v. EVERETT et al.

(Court of Errors and Appeals of New Jersey.
Feb. 28, 1898.)

LACHES—FORECLOSURE OF MORTGAGE.

When the legal right of action upon a bond is barred by the statute of limitation, and the legal right of entry upon lands mortgaged to secure the bond is likewise barred, the holder of the bond and mortgage cannot maintain a bill in chancery to collect the debt by sale of the mortgaged premises, unless he can show some pertinent equitable right beyond the ownership of the bond and mortgage.

(Syllabus by the Court.)

Appeal from court of chancery; Emery, Vice Chancellor.

Suit by Jacob L. Blue against John B. Everett and others to foreclose a mortgage. From a decree dismissing the bill (36 Atl. 960), plaintiff appeals. Affirmed.

Gallagher & Richards, for appellant. Blake & Howe and Colle, Swayze & Titworth, for respondents.

DIXON, J. The bill in this case was filed October 25, 1894, to foreclose a mortgage dated June 19, 1872, securing payment of a bond of the same date for the sum of \$1,500, payable in one year from its date. The answer alleged that the mortgage debt had not in any way been recognized by the obligor, or any one claiming under him, for over 20 years before the filing of the bill, and set up the bar of the statute of limitations. On the hearing the complainant endeavored to prove that interest had been paid on the bond on August 9, 1875, but, in the opinion of the vice chancellor, this effort was not successful, and, the delay of over 20 years in filing the bill not being satisfactorily explained, he advised the dismissal of the bill. From the decree accordingly made the complainant appeals.

Without considering the questions decided below, we think the decree should be affirmed on broader grounds. By his bond the complainant acquired only a legal remedy. It gave him no standing whatever in a court of equity. By his mortgage, according to the ancient common law of England, he acquired an immediate legal estate, defeasible by the payment of money in exact accordance with the condition of the bond. On breach of the condition, that law fixed the estate absolutely in the mortgagee; the mortgagor being a mere tenant at will. This legal situation was deemed by the court of chancery unjust, and therefore that court established the rule that at the instance of the mortgagor it would compel the mortgagee to accept payment of the debt after the due day, and, on payment, to reconvey the estate. This was clearly equitable. But the rule went further. In case the mortgagee had entered into possession of the land, the court

of chancery regarded him as a mere trustee, holding him to account for the rents and profits, and, as soon as his debt was thereby satisfied, requiring him to surrender possession and reconvey the title to the mortgagor. The equity of this branch of the rule is questionable, in that it imposed on the mortgagee duties which he had never intended to assume, and it practically precluded him from exercising his legal right to possession. In order to alleviate its harshness, the court then permitted the mortgagee to come in and have the chancellor set another day, instead of that named by the parties themselves, so that, in case the debt was not paid by that day, the legal estate conveyed to the mortgagee might become absolute. Such a proceeding was properly called a foreclosure of the equity of redemption. It contained, however, not much more of equity than did the doctrine of the common law, and soon a really equitable practice obtained, by which the mortgagee, instead of subjecting himself to the risks and inconvenience of a trusteeship, and instead of asserting his legal right to the land, as modified by the chancellor's discretion respecting the time when he might exercise it, brought his estate into the court of chancery, and asked that it should be sold free from the mortgagor's equity, and out of the proceeds his debt should be paid, and the residue turned over to the mortgagor. On reflection it will be observed that all of these equitable remedies naturally grow out of and depend upon the legal situation. Their primary aim was to relieve the mortgagor from the hardness of his own contract; their secondary aim to relieve the mortgagee from the difficulties into which the court's attempt to do justice to the mortgagor had thrown him. But according to the doctrine firmly established in New Jersey, no such legal situation exists. Here the mortgage vests in the mortgagee no estate whatever in the land. It merely gives him a right of entry on breach of the condition mentioned in the instrument. *Sanderson v. Price*, 21 N. J. Law, 646, note A. Until such entry the mortgagor continues to be the legal owner of the land for all purposes. *Montgomery v. Bruere*, 4 N. J. Law, 260; *Id.*, 5 N. J. Law, 865; *Wade v. Miller*, 32 N. J. Law, 296; *Shields v. Lozeur*, 34 N. J. Law, 496, 503; *Kircher v. Schalk*, 39 N. J. Law, 335; *Devlin v. Collier*, 53 N. J. Law, 422, 22 Atl. 201. Under the sixteenth section of our statute of limitations, the mortgagee's right of entry would be barred unless exercised within 20 years next after the breach of the condition upon which it accrued, and, that right being barred, the estate of the mortgagor would be freed from any imperfection created by the mortgage. At law, the bar of the statute could not be obviated by payments made on account of the debt, for the mortgagor does not hold the land under the mortgagee; and the payments could not be deemed rent, or in any sense the price of possession, but would be referred solely to the personal obligation held by the mortgagee.

From these considerations it would seem

that when the mortgagee's right of entry upon the land was legally extinguished the real basis for the jurisdiction of a court of equity had gone, for there would be no longer any legal right by the exercise of which an inequitable condition could arise, and both parties might justly be left to their legal remedies. Such was the situation when the present bill was filed. Under the mortgage the complainant's right to enter upon the land accrued on the due day of the bond, June 19, 1873, and, as nothing occurred to keep it alive, it expired by lapse of time on June 19, 1893, 15 months before the filing of the bill. But there is another view to be taken of the matter. In the contemplation of courts of equity, the mortgage is a mere incident of the debt, and can be used by the mortgagee only as a means for obtaining satisfaction thereof. So completely is the mortgagee's interest in the land annexed to the debt that, in equity, whatever transfers the debt transfers that interest (*Stevenson v. Black*, 1 N. J. Eq. 338; *Banking Co. v. Fisher*, 9 N. J. Eq. 667, 700); and an attempt to transfer the interest without the debt is futile, both at law and in equity (*Devlin v. Collier*, 53 N. J. Law, 422, 22 Atl. 201). Because of this close union between the debt and the security, courts of equity have held that, so long as the debt remains, the right of the creditor to resort to the land for payment of the debt also continues, even though, by the statute of limitations, the legal right of entry is barred. This doctrine arises naturally out of the proposition that the mortgaged interest is only incidental to the debt, for while the principal exists its incidents should also be kept alive. But this doctrine will not suffice to maintain the present suit. As already stated, the bond vested in the obligee only legal rights to be enforced by legal remedies. Of itself it gives the complainant no standing in a court of equity. The debt is a mere legal entity, involving no obligation outside of its legal character, and having intrinsically no quality of which a court of equity can take cognizance. It would seem, therefore, that when, because of such a debt, as the principal thing, a court of equity is called upon to give equitable effect to that which is only incidental thereto, the first inquiry should be, does the principal exist? is there any legal obligation? and when, for any cause, the answer is found to be negative, the court should refuse to act. In the present case the legal obligation had expired by the lapse of 16 years since the last payment on the bond (2 Gen. St. p. 1975. § 6), and with the principal the incident also naturally perished.

But, notwithstanding the logical coherence of these propositions, the court of chancery in this state (in accord with some tribunals elsewhere) has, with respect to debts secured by real-estate mortgages, generally ignored the statute of limitations and the usual equitable rule that in dealing with legal rights

courts of equity will follow the law, and has held that, unless actual payment of the debt be shown, it would apply presumptions of its own, where there had been long delay in taking steps to collect the debt. Had these presumptions been clearly established and long maintained, that might of itself be sufficient reason for declining to disturb them, but an examination of the cases will show that they are not even yet well defined. Thus in *Wanmaker's Ex'rs v. Van Buskirk*, 1 N. J. Eq. 685, Chancellor Vroom said that it had not been clearly settled what length of time would be sufficient to give rise to any presumption against a bond and mortgage, but he expressed himself as willing to adopt a rule that a lapse of 20 years without payment or demand of principal or interest would raise a presumption, subject to be rebutted by circumstances which showed the conduct of the creditor to be a reasonable indulgence to the debtor. In *Evans v. Huffman*, 5 N. J. Eq. 354, the insolvency of the debtor was thought not sufficient to rebut the presumption, and in *Magee v. Bradley*, 54 N. J. Eq. 326, 35 Atl. 103, the close relationship of the parties was held inadequate. In *Murphy v. Coates*, 33 N. J. Eq. 424, the fact that the creditor was the employer of the debtor was mentioned as significant, although the controlling fact was a written acknowledgment of the debt, with full proof that it had not been paid. In *Moore v. Clark*, 40 N. J. Eq. 152, and in *Miller v. Teeter*, 53 N. J. Eq. 262, 31 Atl. 894, a mere acknowledgment of the debt as a subsisting lien was held sufficient to rebut the presumption. In *Rockhill v. Rockhill* (N. J. Ch.) 14 Atl. 760, the presumption was repelled by an arrangement which seems strongly suggestive of a purpose to defraud creditors. These are, I think, all the reported cases in New Jersey where the court of chancery has sustained a bill for the collection of a debt by foreclosure of a mortgage, after the legal remedy on both the debt and the mortgage had been barred by the statute, and when no independent equity appeared. In *Barned v. Barned*, 21 N. J. Eq. 245, the legal right of entry under the mortgage still subsisted when the bill was filed, and in *Stimls v. Stimls*, 54 N. J. Eq. 17, 33 Atl. 468, the fact that very soon after giving the bond and mortgage the mortgagor had come into possession of the instruments as executor of the mortgagee gave rise to new duties. In the present case, on a very careful examination of these decisions and others elsewhere, the learned vice chancellor reached the conclusion that under the equity rule proof in fact of the nonpayment of the debt would not defeat the presumption, but the creditor must go further, and show that, admitting the continued existence of the debt, his conduct in refraining from collecting it has been reasonable. Certainly such a rule has but scant justice and a minimum of precision to recommend it. It inflicts upon a creditor a penalty extending to

the whole amount due him, however large, and no more, however small, because, on consideration of the provable circumstances, the chancellor thinks his conduct was either too indulgent towards his debtor or too considerate of his own convenience. It also lets in the evils so strongly denounced by Mr. Justice Ford in *Ludlow v. Van Camp*, 7 N. J. Law, 113, 118.

On the other hand, there are many cases in equity supporting the declaration of Mr. Justice Carpenter, speaking for this court in *Conover v. Wright*, 6 N. J. Eq. 612: "Whether courts of equity act in obedience or in mere analogy to the statutes of limitations, it has become a settled rule that they will apply them, in similar cases within the sphere of their jurisdiction, equally with courts of law. They have always felt themselves bound by the spirit and meaning of these statutes, and ordinarily act in conformity to them. In cases concurrent with a remedy at law they always allow them to be pleaded, and a party is not permitted to evade their effect by resorting to another forum." Similarly, Chancellor Vroom, in *Wanmaker's Ex'rs v. Van Buskirk*, 1 N. J. Eq. 691, said: "The statute of limitations does not apply in terms to courts of equity, but it is well known that they have always felt themselves bound by the principles of the statute; and, except in cases of strict trust, and matters purely equitable in their nature, have acted in conformity with them." See, also, *Conover's Ex'rs v. Conover*, 1 N. J. Eq. 403, 410; *Marsh's Ex'rs v. Oliver's Ex'rs*, 14 N. J. Eq. 259; *Cowart v. Perrine*, 18 N. J. Eq. 454, 457; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Ruckman v. Decker*, 23 N. J. Eq. 283; *Arnett v. Finney*, 41 N. J. Eq. 147, 3 Atl. 696; *Smith v. Wood*, 42 N. J. Eq. 563, 7 Atl. 881; *Id.*, on appeal, 44 N. J. Eq. 603, 17 Atl. 1104; *Agens v. Agens*, 50 N. J. Eq. 566, 25 Atl. 707; *Ailing v. Ailing*, 52 N. J. Eq. 92, 27 Atl. 655. The principle thus supported should be applied to the case in hand. The claim of the complainant is not, in its nature, equitable at all. It is brought into the court of chancery, not to enforce any equity belonging to him, but that the court may dispose of the equity of the defendant. The complainant's rights, under both his bond and his mortgage, are purely legal in their nature, and, as they have been barred, that under the bond by the lapse of 16 years since the last payment was made, and that under the mortgage by the lapse of 20 years since the breach of the condition, they should be denied in equity as well as at law. For these reasons the decree below should be affirmed.

(61 N. J. L. 358)

CLYNE v. HOLMES.

(Supreme Court of New Jersey. Feb. 21, 1898.)

LANDLORD—REPAIRS—LIABILITY FOR INJURY.

1. In the absence of contract, a landlord is not bound to repair, so as to be liable to a member

of the lessee's family injured by the falling of a mantelpiece.

2. Promise of landlord to tenant and a member of his household, made after the letting, to make repairs, is without consideration as to either.

3. Though a lease require the landlord to make repairs, a member of the tenant's household injured by falling of a mantelpiece out of repair cannot recover therefor from the landlord.

Action by Sarah A. Clyne against Dederick H. Holmes. Heard on demurrer to declaration. Judgment for defendant.

Argued February term, 1898, before the CHIEF JUSTICE and DEPUE, GUMMERE, and LUDLOW, JJ.

Paul R. Lefferts, for plaintiff. George P. Rust, for defendant.

DEPUE, J. This is an action of tort to recover damages for personal injuries. The declaration contains a single count, to which a demurrer was filed. The declaration avers that on the 23d of May, 1894, the defendant was the owner and lessor of a certain house and lot, which said house was known as a tenement or dwelling house, and was divided into floors and rooms, and in the room thereafter mentioned, known and used as a dining room, there was a mantelpiece with a shelf on top setting against the wall, which said mantelpiece was made of slate or marble, and was a fixture in said house, and was a part of the equipment and construction of the house, and was used by persons occupying the same in connection therewith. The declaration then avers that at the time above mentioned (the 23d of May, 1894) one George Clyne was the lessee and tenant of said house, and hired the same of the defendant, with the mantelpiece, fixtures, and appurtenances thereto belonging; and that the said George Clyne, and the members of his household, of whom the plaintiff was one, used and occupied the said house and dining room in which the said mantelpiece was located. The plaintiff then avers that she is a sister of George Clyne, the lessee and tenant of said house, and was living with her brother as a member of his household and family, and acting for her brother in the capacity of housekeeper. The declaration then avers that some time prior to the 23d of May, 1894, the said George Clyne and the plaintiff called the attention of the defendant to different things in the house that were in need of repairs, among which was the said mantelpiece; that the defendant made a personal examination and inspection of the same, and informed and assured the said George Clyne and the said plaintiff that the same was safe, and that there was no danger of its falling, but promised and agreed that he would immediately have the same repaired. The declaration then avers that the defendant was bound in law under his agreement with the said lessee, etc., to properly construct, repair, maintain, and keep in repair and safe condition the said

mantelpiece, etc., so that the said George Clyne and the members of his family and household could safely use and enjoy the said premises and the said dining room without danger of bodily harm or injury from the falling of the said mantelpiece or any other fixtures which the said defendant had promised to repair and maintain. The declaration then charges that the defendant so negligently, carelessly, and unskillfully constructed the said mantelpiece, and so negligently, carelessly, and improperly allowed and suffered the same to remain out of repair, etc., that by reason of the premises, and the improper construction and fastening of the said mantelpiece, and the negligence, carelessness, and indifference of the defendant in allowing the same to remain unrepaired and in an unsafe and dangerous condition, on the said 23d of May, etc., while the said plaintiff was residing in said house with her brother, and acting as his housekeeper, and engaged in the discharge of her household duties, in dusting the mantelpiece, without any fault, etc., on her part, the said mantelpiece, with the shelf fastened thereon, fell over, upon, and against the plaintiff, striking her with great force, knocked her down, and inflicted certain injuries specified. Whereby a right of action hath accrued to the plaintiff, etc.

These propositions may be considered as settled: First. That an allegation of duty is insufficient; that the facts and circumstances from which the duty arises must be set out in the declaration, and the sufficiency of the pleading must be determined from the facts from which the duty is deducted. *Safe Co. v. Ward*, 46 N. J. Law, 19; *Rader v. Township of Union*, 43 N. J. Law, 518; *Brown v. Mallett*, 5 O. B. 599; *Seymour v. Maddox*, 16 Q. B. 326. Second. On demise of a house or lands, there is no contract or condition implied that the premises shall be fit and suitable for the use for which the lessee requires them. *Murray v. Albertson*, 50 N. J. Law, 167, 13 Atl. 394; *Naumberg v. Young*, 44 N. J. Law, 331, 344; *Müllen v. Ramhear*, 45 N. J. Law, 520, 523; *Heintze v. Bentley*, 34 N. J. Eq. 563; *Jaffe v. Harteau*, 56 N. Y. 398; *Tayl. Landl. & Ten.* (7th Ed.) § 382. *Bowe v. Hunking*, 135 Mass. 380, was a suit brought by the plaintiff as administrator of his wife to recover damages for personal injuries occasioned by a defective stairway in a tenement house owned by the defendant, of which she and her husband were tenants. The premises were rented by the husband as tenant at will. There was a defect in the trend of the back stairs, and, the wife coming down this flight of stairs in the evening, the trend gave way, and she was thrown down and received the injuries complained of. The trial judge ruled as matter of law that the action could not be maintained. The court en banc sustained the ruling. *Ffield, J.*, in delivering the opinion of the court, said: "There is no warranty implied in the

letting of an unfurnished house or tenement that it is reasonably fit for use. The tenant takes an estate in the premises hired, and the persons who occupy by his permission or as members of his family cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter the premises." In *Robbins v. Jones*, 15 C. B. (N. S.) 221, the defendant was the owner of certain house and premises, and let them to certain persons, to wit, Smith Allen Jeffs and Augustus Jeffs. On the premises was a certain area adjoining and under a footway leading to the property of the defendant. Whether this footway was a private way to the houses, or a public footway over the premises demised, was a disputed question of fact. Robbins, the plaintiff, on the 10th of February, 1862, was lawfully passing over and along the footway, and, by reason of its dilapidated, dangerous, and unsafe condition, he was thrown into the areaway, and severely hurt and injured, from which injuries he died, and the suit was brought by his administratrix, and resulted in a verdict for the plaintiff. This verdict was set aside, and a nonsuit was entered. The court of common bench, in its opinion, delivered by Earle, C. J., used this language: "It is for the plaintiff to make out that the defendant has been guilty of the breach of some duty which he owed to the deceased, and that thereby the accident was occasioned. Whether he has done so may be considered under the following heads: (1) If the passage over the area be considered as a private way to the houses, then the reversioner is not liable, but the occupier. A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any. In this case there was none,—not that that circumstance makes any difference in our opinion." The other heads under which the case was considered are not relevant to this pleading. In *Mullen v. Rainear*, supra, the plaintiff was tenant for years of the defendant. While he and his wife were carrying a stove on the balcony, which the tenant had a right to use in connection with the leased premises, the balcony broke down, and by the fall the wife of the plaintiff was injured. The supreme court reversed a judgment in favor of the plaintiff below, on the ground that the court erred in refusing to instruct the jury that the landlady was not bound to make repairs to the balcony unless some agreement on her part was shown. Mr. Justice Dixon, in delivering the opinion of the court, said: "There is no implied duty on the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, and no

action will lie against him for an omission to do so, in the absence of express warranty or deceit. An obligation on the part of the landlord will not be implied that he shall make substantial repairs because of the premises being in a dangerous condition."

The exemption of a landlord from liability for injuries sustained by a tenant by reason of the ruinous condition of the demised premises, where there is neither a contract nor fraud, applies as well to members of the family of a tenant as to those who are on the premises by his consent. "The subtenant, servant, employé, or even customer of the lessee, is under the same restriction as the lessee himself; because entering under the tenant's title, and not by any invitation, express or implied, from the owner, they assume a like risk." *Tayl. Landl. & Ten.* (7th Ed.) § 175a.

There being no duty, such as is counted on in this declaration, imposed upon a landlord as the owner of the premises, the declaration must be inspected to ascertain the existence of any contract from which such a duty would arise. The declaration charges that the defendant made a personal examination of the mantelpiece, and assured the said George Clyne and the said plaintiff that the same was safe, but promised and agreed that he would immediately have the same repaired and put in proper order. The promise to the plaintiff in this respect was without consideration, and therefore did not reach the stage of a contract with her. The promise to the tenant Clyne, having been made after the letting, was also without consideration, and would not sustain an action on his part. But if it be assumed that there was a contract with the tenant embodied in the original lease, and for that reason a valid contract as between the landlord and his tenant, such a contract will not sustain this action. The general rule is that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract. *Safe Co. v. Ward*, 46 N. J. Law, 19.

The leading case on this subject in the English courts is *Winterbottom v. Wright*, 10 Mees. & W. 109. In that case A. contracted with the postmaster general to provide a mail coach to convey the mail bags along a certain line, and B. contracted to horse the coach along the same line. B. hired C. to drive the coach. It was held that C. could not maintain an action against A. for an injury sustained by him while driving the coach by its breaking down because of a defect in its construction. The ground of decision was that the defendant's duty with respect to the sufficiency of the coach arose from his contract, and, there being no privity of contract between him and the plaintiff, he was under no obligation to the plaintiff on which the latter could sue. The cases in the same line of decisions and to the same effect are cited in the opinion of the court in *Safe Co. v. Ward*, 46 N. J. Law, 23–25.

The cases cited by the plaintiff's counsel do not touch the cause of action spread upon the

face of the declaration. In *Payne v. Rogers*, 2 H. Bl. 350, the suit was by a third person, and not the tenant, for an injury sustained by stepping through a hole in the pavement, owing to some plates or bars being out of repair. The action was against the landlord, and resulted in a verdict against him. A motion for a new trial was based on the contention that the action ought to have been brought against the actual occupier of the house, and not against the landlord. The rule was refused on the ground that though the tenant was *prima facie* bound to repair, and therefore liable, yet, if he can show that the landlord is to repair, the latter is liable for the neglect to repair; and the defense appears to have been maintained on the ground of avoiding circuitry of action, as the tenant, if recovery was had against him, would have remedy over against the landlord. The case, as will presently be seen, has been criticised in the English courts. In *Russell v. Shenton*, 8 Adol. & E. (N. S.) 449, the declaration stated that the plaintiff, before and at the time, etc., was lawfully possessed of a dwelling house and premises whereon the plaintiff and his family dwelt; that defendant, before and at the time, etc., was the owner and proprietor of divers drains and sewers, situate and being in and upon certain premises belonging to the defendant near to and adjoining the said dwelling house of the plaintiff, into and through which drains and sewers divers quantities of soil, filth, and water from time to time passed and flowed, and by reason thereof the defendant, as such owner, ought from time to time well and sufficiently to have kept cleansed and repaired said drains and sewers, and prevented the soil, filth, etc., from unduly accumulating therein, and from running and proceeding therefrom unto the plaintiff's dwelling house; nevertheless, etc., the defendant, etc., wrongfully suffered the said drains and sewers to become foul and in bad repair, and also wrongfully suffered divers large quantities of soil, etc., to accumulate therein, and wrongfully kept and continued said drains and sewers so foul and in bad repair, etc., that by reason thereof, etc., large quantities of the said soil ran and flowed therefrom into the said dwelling house, etc., and thereby caused divers unwholesome smells, etc., and the walls of the plaintiff's dwelling house became decayed, etc., to the damage, etc., This declaration was demurred to, and judgment thereon was given for the defendant. Lord Denman, C. J., in delivering the opinion of the court, said: "This was an action for a nuisance to the plaintiff's lands by reason of the foul state and bad repair of drains of which the defendant is the owner and proprietor, situated on lands adjoining the plaintiff, and which the defendant, as such owner thereof, ought to repair. The declaration charges no act on the defendant, either of making or continuing the nuisance. It merely states him to be the owner and proprietor of the drains, and seeks to cast upon him as such a legal obligation to make good the damage ensuing to his

neighbor from their foul condition. There is no authority in support of this claim, but several against it." *Payne v. Rogers* was commented on, Lord Denman saying: "The language of the court is not very clear in that case; but, if the marginal note may be taken as a fair representation of the effect of that decision, it will be hard to reconcile with *Cheetnam v. Hampson*, 4 Term R. 318." In *Todd v. Flight*, 9 C. B. (N. S.) 377, the declaration alleged that the defendant was owner and possessed of a certain building and a stack of chimneys, parcel thereof, near to the plaintiff's premises; that the chimneys were then and from thence continually, etc., in a dilapidated state and in danger of falling; that the defendant let the premises in that state to one Batt, and kept and maintained, and continued to keep and maintain, the same in such dangerous condition until they fell and damaged the plaintiff's premises. The suit was brought by the owner of adjoining premises, and the allegation was that the defendant had let his building, etc., to a tenant in a ruinous and dangerous condition, whereby they fell upon and injured the plaintiff's house. The action was sustained on the ground that the defendant let the house when the chimneys were known by him to be ruinous and in danger of falling. Judgment was given for the plaintiff. It will be perceived that the action in this case was by the owner of adjoining premises, and that the liability of the owner for damages arose from the fact that when he leased the premises they were already a nuisance. The foundation of the suit was the duty which the owner of the premises owed to the owner of adjoining premises,—a duty arising independent of contract, from the obligation of which the owner could not discharge himself by showing that the premises at the time when, etc., were let to a tenant,—the chimneys being known by him to be ruinous and in danger of falling at the time of the letting. The cases cited above are all cases in which actions were brought by third persons having no connection with the occupation of the premises demised.

In *Ingwersen v. Rankin*, 47 N. J. Law, 18, the suit was brought by a tenant against his landlord. The plaintiff had leased of the defendant the basement of a building, and the suit was brought for damages for injuries suffered by reason of the improper management of the remainder of the building,—from defects existing in the pipes in the saloon above the basement. The saloon had been leased by the defendant to one M. before the plaintiff's term commenced. The lease to M. expired May 1, 1877, and defendant gave him a new lease for the saloon for a term extending beyond the plaintiff's term. By both of these leases M. had covenanted to keep the premises leased to him in repair. The injury sustained by the plaintiff did not arise from the condition of the premises demised to him, and he had no control over that part of the building in which the defective water pipes were located. This court held that, if the defective water pipes

were part of the premises demised to the plaintiff, the defendant's liability would be measured by his contract with the plaintiff; but, the poles being located without the premises demised to the plaintiff, they constituted a nuisance, for which a liability to the plaintiff arose on the part of him who originally created it and of him who maintained it. The action was sustained on the principle that if one creates a nuisance on his own premises, and thus becomes liable for its erection and also for its maintenance, he cannot escape the latter liability by demising the premises whereon the nuisance is, and that the covenant of M. to repair did not exonerate the landlord from liability. It will be observed that in the case just cited the injury complained of did not result from the condition of the premises demised to the plaintiff and the want of reparation. It arose from a cause extraneous to the premises demised. The decision in that case in no sense trenching upon the doctrine laid down in *Murray v. Albertson*, *Naumberg v. Young*, *Mullen v. Rainear*, and *Heintze v. Bentley*.

But, if the action could have been maintained by the tenant under the facts set out in this declaration, it by no means follows that this plaintiff could maintain this action. There is privity of estate and of contract between the landlord and his tenant arising from the letting, but there is neither privity of estate nor privity of contract between the owner of premises and the persons whom the tenant may choose to make members of his family in any capacity. Such persons dwell in the premises demised neither by license nor by invitation of the owner. Where there is neither privity of estate nor privity of contract, the owner of premises is not liable for injuries sustained by third persons by reason of the condition of the premises, unless by invitation, express or implied, the owner induces them to come upon the premises. *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478. There should be judgment on the demurrer for the defendant.

(70 Vt. 125)

BOYDEN v. FITCHBURG R. CO.

(Supreme Court of Vermont. Windham. Jan. 22, 1898.)

DEATH BY WRONGFUL ACT — ACTION BY NEXT OF KIN — TRAVELING ON SUNDAY — PLEAS.

1. To maintain an action as next of kin for death by wrongful act, one need not have had a legal claim on deceased for services or support, but it is enough that he had a reasonable expectation of deriving some pecuniary advantage from deceased, which was destroyed by his death.

2. A plea cannot be good as a special issue where it alleges matter of evidence merely, and concludes with a verification.

3. A plea, though advancing new matter, is bad, as amounting to the general issue, where such matter is in denial of what plaintiff would be bound to prove on general issue.

4. A railroad is not relieved of duty to one crossing its tracks, though he is traveling on Sunday, in violation of the statute.

Start, J., dissenting.

Exceptions from Windham county court; Start, Judge.

Case upon V. S. §§ 2451, 2452, by George A. Boyden against the Fitchburg Railroad Company, for negligently killing the intestate, to the damage of his father as next of kin. Heard on demurrer to the defendant's second, third, fourth, seventh, and eighth pleas and a motion to dismiss the fifth and sixth pleas, at the September term, 1896, Windham county, Start, J., presiding. Pro forma judgment sustaining the demurrer and motion, adjudging the second, third, fourth, seventh, and eighth pleas insufficient, and dismissing the fifth and sixth pleas. The defendant excepted. Reversed in part.

The fourth plea alleged that the accident occurred upon the Sabbath, when the intestate was in the act of traveling upon the highway, not engaged in any work of necessity or charity, but solely in the pursuit of pleasure. The fifth and sixth pleas alleged that the intestate was of full age, and not under any contract to serve his father; that he was a nonresident of the state, and had not been charged by the judgment of any court with his father's support; and that the father himself was not chargeable as a pauper upon any town in this state. The seventh and eighth pleas sufficiently appear in the opinion.

Waterman, Martin & Hitt, for plaintiff.
Batchelder & Bates, for defendant.

MUNSON, J. The only question made as to the sufficiency of the declaration is based upon the theory that the action cannot be maintained if the injured person survived for the shortest period of time. An examination of *Legg v. Britton*, 64 Vt. 352, 24 Atl. 1016, will show that this view is unfounded. The plaintiff claims that the fifth and sixth pleas are dilatory in their nature, and should have been dismissed because filed out of time; but claims further that, if the pleas are considered, they do not answer the declaration. We think the pleas are to be treated as pleas in bar, and that as such they are insufficient. They are drawn upon the theory that there can be no recovery unless the deceased owed his father some duty at the time of his death. But it is not necessary that the next of kin should have had a legal claim upon the deceased for service or support. It may be shown that there was a reasonable expectation of deriving some pecuniary advantage from the deceased, and the destruction of such expectation will sustain the action. *Rowe v. Moses*, 67 Am. Dec. 568, note; *Railway Co. v. Goodykoontz* (Ind. Sup.) 12 Am. St. Rep. 378, note (s. c. 21 N. E. 472); *Franklin v. Railway Co.*, 3 Hurl. & N. 211, 8 Eng. Ruling Cas. 419, and note.

It is claimed that the seventh and eighth pleas are bad, as amounting to the general issue. The defendant meets this claim by saying that they are special issues. A spe-

cial issue consists of a direct denial of some material and traversable allegation, never advances new matter, and concludes to the country. *Kimball v. Railroad Co.*, 55 Vt. 95. The declaration alleges that the intestate and the driver of the team were in the exercise of due care at the time of the accident. The pleas in question allege various facts and circumstances tending to show that they were not in the exercise of due care; and, as an inference from those facts and circumstances, it is further alleged that neither of them was in the exercise of due care, but that both were guilty of contributory negligence. The pleader probably regarded these pleas as advancing new matter, and not as mere denials of the allegation of due care, for he concludes them with a verification instead of to the country. Treating them as new matter, they are bad, as amounting to the general issue, as such matter is in denial of what the plaintiff would be bound to prove on the general issue in order to support his case. 1 Chit. Pl. 527; Gould, Pl. c. 6, § 78; *Kimball v. Railroad*, above cited; *Burton v. Bostwick*, Brayt. 195; *Martin v. Woods*, 6 Mass. 6; *Thayer v. Brewer*, 15 Pick. 217; *Bank of Auburn v. Weed*, 19 Johns. 800; *Sinclair v. Hervey*, 2 Chit. 642. But, if the pleas are to be treated as not advancing new matter, and therefore not bad as amounting to the general issue, yet they are bad as special issues, for they allege that which is matter of evidence merely, and conclude with a verification. *Kimball v. Railroad Co.*, above cited; *Dowman's Case*, 9 Coke, *9b. It is said in the case last cited that "evidence shall never be pleaded, because it tends to prove matter in fact, and therefore the matter in fact shall be pleaded, and, if that is denied, the evidence is to be given to the jury, and not to the court." These questions regarding the seventh and eighth pleas are disposed of without inquiring as to the proper manner of taking advantage of defects of this character. See *Kimball v. Railroad Co.*, above cited.

The fourth plea is not double. It does not allege negligence on the part of the plaintiff otherwise than as shown by his traveling on Sunday. It thus becomes necessary to inquire whether the defendant is relieved from liability by the fact that the plaintiff was traveling in violation of the statute. The question presented has been decided differently in different states. *Duran v. Insurance Co.*, 63 Vt. 437. It is held in this state that one so traveling cannot recover of the town for injuries sustained through an insufficiency of the highway (*Johnson v. Irasburgh*, 47 Vt. 28), but this is put upon the ground that a town is under no obligation to provide a safe road for such a traveler; and in considering the grounds on which the decisions of other states are based the court expressed its approval of the reasoning adopted by those which held that recovery may be had. It was thought to be difficult to maintain

that the traveler's illegal act contributes to the injury, or that his being engaged in an unlawful act bars his recovery. We have no disposition to ignore the views expressed in the reasoning of that opinion, and, if this plea is sustained, it must be upon the ground that the defendant owed no duty to one traveling upon the highway in violation of the statute. But we think it cannot be said that a railroad company owes no duty whatever to one who is crossing its track on the Sabbath. As a traveler in violation of the statute, he should stand no worse than an ordinary trespasser, and a railroad company owes a trespasser at least the duty not willfully to run over him. There is nothing in the reasoning of the opinion in *Johnson v. Irasburgh* that would have prevented a recovery if the town authorities had been repairing the road on the Sabbath, and had willfully run their road machine upon the plaintiff. It might easily be considered that the defendant company owed the plaintiff no duty as regards the safety of the crossing, and yet be held that it owed him some duty as regards the running of its train. It is not necessary to examine the subject further in disposing of these pleas. They do not necessarily answer the count, and so must be held insufficient.

That part of the judgment dismissing the fifth and sixth pleas is reversed, and those pleas are adjudged bad on demurrer. In all other respects the judgment is affirmed. Cause remanded.

START, J., dissents on the first point.

(1 Pen. 140)

HUGHES v. DIAMOND MATCH CO.

(Superior Court of Delaware. Newcastle. Dec. 11, 1897.)

DECLARATION — AMENDMENT — SUBSTITUTION OF PARTNER.

An amendment to a declaration against defendant as the "Diamond Match Company, under the laws of the state of Connecticut," so as to substitute the word "Illinois" in lieu of "Connecticut," constitutes a new party defendant, and will be denied.

Action by Frances Hughes, a minor, by her guardian, against the Diamond Match Company. Motion to amend the declaration. Denied.

An affidavit made by the plaintiff was filed, alleging, among other things, the following: "That she is the plaintiff in the above-stated action; that she was sixteen years of age on the 27th day of February, A. D. 1897; that she was employed, as stated in the declaration filed in the above-stated cause, by the Diamond Match Company, which company, during all the time of her employment, was engaged in the business of manufacturing matches in the city of Wilmington and state of Delaware; that the said defendant company was, during all the

time of the employment of the said plaintiff, a corporation duly existing under the laws of the state of Illinois; that, in bringing the above-stated action, it was a mistake in description to call the said defendant company a corporation of the state of Connecticut, the said company, in fact, being a corporation of the state of Illinois; that the summons in the above-stated case was served on R. L. Shetter, the manager of the Diamond Match Company, a corporation existing under the laws of the state of Illinois; that the Honorable J. Frank Ball, who entered an appearance in the above-stated suit, was the attorney for the Diamond Match Company, a corporation of the state of Illinois, and as such attorney entered his appearance in the above-stated case."

William S. Hilles, for plaintiff. J. Frank Ball, for defendant.

LORE, C. J. We think this is not a matter of description, but that it is substituting and making an entirely new and distinct party. We therefore refuse the motion to amend.

(1 Pen. 133)

CONNALLY v. McCONNELL et al.

(Superior Court of Delaware. Newcastle. Dec. 8, 1897.)

REPRESENTATIONS OF AGENT—LIABILITY OF PRINCIPAL—RIGHTS OF THIRD PARTIES—INTOXICATING LIQUORS—RECOVERY OF AMOUNT PAID.

1. One purchasing property from an agent, who represents it to be his own, and whose possession is lawful, has the right to presume that he is the owner, in the absence of reasonable ground for believing otherwise; and dealings between them in that capacity will bind the principal.

2. Although Rev. Code 1893, p. 414, § 15, provides that all debts contracted for liquor sold in quantities less than half a gallon are not collectible, the amount paid on such debt cannot be recovered back.

Assumpsit by William P. McConnell and another against John D. Connally to recover the value of goods sold defendant. Verdict for defendant.

The plaintiff prayed the court to instruct the jury that the authority of the agent to act is limited by the instructions received by him from his principal, or which he is held out to the world as receiving, and as to the necessity of one dealing with another in a representative capacity to inquire into his authority to act in such capacity; that an agent has no right to pledge his principal's goods for his own debts; and that, goods having been delivered, the party holding them having had the benefit of them, the law implies a promise to pay.

The defendant prayed the court to charge the jury as follows: "If an agent sell and deliver personal property in payment of debts contracted by himself, in his own name, to a third party, without disclosing his agency, the right of the purchaser cannot be disturbed by the principal or his attaching creditors. Koch v. Will, 63 Ill. 144; Locke v. Lewis, 124 Mass.

7; Bank v. Plimpton, 17 Pick. 159; Miller v. Sullivan, 39 Ohio St. 79-85. Where an agent makes a contract in his own name, the name of the principal not being disclosed, the defendant is entitled to be placed in the same situation in all respects as if the agent had been the real party in interest, or the principal must take therewith all the attendant burdens, and subject to all the attendant burdens, and subject to all the attendant first counterclaims and defense, of the other contracting party. Traub v. Milliken, 57 Me. 63; Stoddard v. Ham, 129 Mass. 383. If A. sells goods to B., who sells them to C., the fact that A. supposed he was selling the goods to C. through B., as his agent, and would not have sold them to B. on his own credit, will not entitle A. to maintain an action against C. for the conversion of the goods. Stoddard v. Ham, 129 Mass. 383. If the purchaser of property does not know that he is dealing with an agent of the owner, and has not good reason to know it, he is justified in treating the agent as the owner, and payment of the purchase price to him will be a defense to an action by the owner for the amount. Wind-Mill Co. v. Thorson, 46 Iowa, 181. If the jury believe that J. Yates Evans was acting for himself, or that from his acts and conduct the defendant had reason to suppose he was so acting, then the jury should return a verdict in favor of the defendant. There was no privity of contract established between the plaintiff and defendant, and, without such privity, the possession and use of the property will not support an implied assumpsit. Ice Co. v. Potter, 123 Mass. 28. A party has the right to select and determine with whom he will contract, and cannot have another person thrust upon him. Id."

John G. Gray, for plaintiffs. J. Frank Ball, for defendant.

SPRUANCE, J. (charging jury). This case comes into this court upon an appeal from a judgment of a justice of the peace, and it is tried here as if the action had originally been brought in this court. The only part of the plaintiffs' declaration applicable to this transaction is a count for goods sold and delivered, which is limited by the bill of particulars to the goods therein mentioned, viz. one bicycle and two other articles, for which \$56.40, with interest, is claimed. There is considerable conflict of testimony, but the determination of questions of fact belongs solely to you. After carefully considering the evidence, you are to give your verdict to that side which has, in your judgment, the preponderance of evidence. In civil causes it is not necessary that the proof be beyond a reasonable doubt, as is required in criminal cases. The determination of the law of the case belongs exclusively to the court.

It is claimed on the part of the plaintiffs, who are bicycle dealers, that this bicycle was intrusted to one J. Yates Evans for the purpose of exhibiting it to the defendant, but

without authority to make a sale, and that Evans was merely their agent, and not the owner of the goods. It is claimed on the part of the defendant that Evans was in fact the owner of the goods, but, if he was not the owner, that he sold the goods to the defendant without disclosing the fact that he was an agent, and that the claim of the owner is subject to all the defenses which could have been made against Evans if he had been the owner of the property. Questions between principal and agent are settled by very different rules of law from those which are applicable to questions between the principal and the vendee of the agent. An agent intrusted with the possession of property, but not authorized to sell it, violates his duty to his principal if he sells it; and an agent authorized to sell is guilty of fraud against his principal if he sells the property of his principal for the payment of his own debt. But, on the other hand, if a person dealing with an agent does not know or have reasonable ground to believe that he is an agent, he is put in the same position as if the agent was the real owner. It is not incumbent upon a person to whom one comes to sell an article, without any information of agency or anything to raise any doubt in his mind as to agency, to make inquiry. He has a right to presume that the person who deals with him, representing the property to be his own, is the owner. The rule, of course, is different where the possession of the vendor is tortious; but in this case there is no claim that the possession of Evans was not a lawful possession. If Evans was the owner of the property, he had a right to sell it to the defendant, on such terms as they might agree upon; but if he was not the owner, and was only the agent of the plaintiffs, and the defendant did not know, and had no reasonable ground to believe, that he was an agent, then this transaction must be treated as if Evans was the owner of the property. The law upon this subject is very well settled. In *Chit. Cont.* 225, it is said: "It would be unjust to permit the principal to interfere and sue the debtor to his prejudice in those instances in which the debtor had innocently, and in ignorance of the claim of the principal, dealt with the agent, he being a factor, upon the supposition that he was the principal,—a character which he was allowed by his employer to assume by having the possession of the goods, or being intrusted with the indicia of property therein." It is not disputed that the plaintiffs intrusted to Evans, not only the possession of the property, but also a paper purporting to guaranty him as to the quality of the bicycle.

In *Story, Ag. § 419*, it is said: "If the agent has sold goods in his own name, no other person being known as principal, and the agent agrees at the time of sale that the vendee might set off against the price a debt due to him by the agent, that set-off will be as good against a suit brought by the principal as it would be if the suit was brought by the agent for the price." In *Koch v. Will, 63 Ill. 144*,

it was decided "that if an agent sell and deliver personal property in payment of debts contracted by himself, in his own name, to a third party, without disclosing his agency, the right of the purchaser cannot be disturbed by the principal or his attaching creditors." In *Wind-Mill Co. v. Thorson, 46 Iowa, 181*, it was held that if a purchaser of goods does not know that he is dealing with an agent, and has not good reason to know it, he is justified in treating the agent as owner, and payment of the purchase price to him will be a defense to an action by the owner. *Traub v. Milliken, 57 Me. 63*, reviews the leading cases on the subject, and holds that if a foreign factor sells merchandise in his own name, without disclosing his principal, and receives in part payment his own check and the balance in money, the principal cannot recover the price of the goods from the vendees if they had no knowledge of the vendor's representative character. In *Locke v. Lewis, 124 Mass. 7*, the court says: "All the authorities agree that when a person intrusted with goods as agent sells them to one who has no knowledge that he is agent, but is led to believe from the manner in which he has been allowed to deal with the goods that they are his, the other party to the transaction may set off against the principal a debt of the agent."

It is contended for the plaintiffs that the alleged agreement between Evans and the defendant, that part of the price of the property should be the discharge of the debt of Evans to the defendant for liquor sold in quantities less than half a gallon, was void, under the following provisions of the Revised Code of 1893 (page 414, § 15): "No debt contracted for liquor sold in quantities less than a half gallon under the provisions of this act shall be collectible either in court or before a justice of the peace." This is not an action to recover a debt for liquor sold, nor an offer to set off such a debt. If there was any agreement on the subject, it was that, as part of the price of the property, the debt of Evans was to be discharged. While a suit for such a debt could not be maintained, if the debt has been paid or otherwise discharged by the agreement of the parties, we do not allow the former debtor to recover back the amount of the debt. We leave the parties where we find them. We are of the opinion that this statute has no application to this case.

Verdict for defendant below.

(1 Pen. 116)

STATE v. TIERNEY.

(Court of General Sessions of Delaware. New-castle. Dec. 4, 1897.)

HUSBAND AND WIFE—NONSUPPORT—EXCUSE.

It is no excuse for husband for nonsupport of a wife that she is unfaithful, as in that case he has his remedy of divorce.

Richard Tierney was prosecuted for nonsupport of his wife and child. Ordered that defendant pay his wife \$8 per month for ben-

elf of herself and child, and give security in sum of \$500 therefor.

The defendant was arraigned at this term on a charge of desertion and nonsupport preferred by his wife. Defendant contended that he was justified in refusing to support or live with his wife, because he had positive proof that she had been guilty of adultery, and that, if he gave her money for the support of the child she would squander it in drink; that he was willing to provide a home for the child with his mother, who had offered to take it; that he had earned between \$5.25 and \$6 a week; that he had been very much interfered with in his work by reason of his wife's having him arrested, and that on that account, in the three years that he had been married, he had only worked about nine months; that his frequent arrests by the wife on the charge of nonsupport had resulted in his being unable to secure work; and that he was at present out of a job for that reason. He offered to prove certain facts to substantiate his charges against his wife. The deputy attorney general objected to such proof as immaterial, contending that while a man need not live with his wife if she was unfaithful, and while unfaithfulness is a legal cause for divorce, yet he must nevertheless support her until he is legally separated from her.

Peter L. Cooper, Jr., Dep. Atty. Gen., for the State.

SPRUANOE, J. If the wife of the defendant is not a fit person to live with, and he has legal grounds for leaving her, he has his remedy. He can apply to the court for relief; but, until he does that, she is his wife, and he is bound to support her. He married her for weal or for woe, and there is only one legal way in which he can be relieved of her support, and that is by obtaining a divorce. The order of the court is that the defendant pay this woman, for the benefit of herself and child, the sum of \$8 per month, the first payment to be made on the 4th day of January, 1898, and to continue thereafter, and that he give security in the sum of \$500.

(1 Pen. 117)

STOECKLE v. GRAY.

(Superior Court of Delaware. Newcastle. Dec. 4, 1897.)

NOTE—AFFIDAVIT OF DEFENSE.

In an action on a note against an indorser, an affidavit of defense setting up that "the said promissory note was never protested according to law," is sufficient.

Action by Johanna Stoeckle against George W. Gray on a note. Judgment refused.

The affidavit of defense filed set out that "the said promissory note was never protested according to law."

Harry Emmons, for plaintiff. J. Harvey Whitman, for defendant.

SPRUANOE, J. The affidavit and copy of the cause of action filed by the plaintiff show that the note was made by Mills to the order of Gray and Stoeckle, and by them indorsed. Therefore the connection of Gray with the note is shown to be that of an indorser. He is not liable unless the note was protested. In his affidavit of defense he states that he has a legal defense, and that the note was not protested according to law. This is sufficient.

LORE, C. J. (concurring). If it was not protested according to law, it could not bind the defendant. The rule is that, where there is any doubt, we never give judgment. We think that this is sufficient to carry it over. Judgment refused.

(1 Pen. 83)

EMMONS v. HOME INS. CO.

(Superior Court of Delaware. Newcastle. Nov. 24, 1897.)

ASSUMPSIT—FIRE INSURANCE POLICY—PLEADING.

When plaintiff, in an action on a fire insurance policy, negatives a clause therein providing that the policy shall be void if the premises remain vacant for 10 days, the plea of non assumpsit by defendant raises the question whether the policy was avoided under such clause, and a special plea alleging the vacancy, and the policy void thereunder, will be stricken out as duplicating the general plea.

Assumpsit by Harry Emmons against the Home Insurance Company on a policy of insurance. Motion to strike out special plea. Motion sustained.

The policy of insurance was for \$700, which was placed upon two buildings in South Wilmington, one a frame dwelling house and the other a stable. There was stamped upon the policy the valuation of \$750, in bulk, with a memorandum attached to the policy, signed by the agent of the company, that the structure destroyed for which suit was brought was valued at \$600, and the other one at \$100. The policy was dated May 26, 1895, and was for one year. The fire by which the dwelling house was destroyed occurred on May 23, 1896, three days before the expiration of the policy. The pleas were as follows: "(1) Non assumpsit. (2) And, for a further plea in this behalf, the said defendant, by Levi C. Bird, its attorney, comes and defends the wrong and injury when," etc.; "and says that the plaintiff ought not to have or maintain his aforesaid action against it, the said defendant, because it says that in and by the policy of insurance or contract between the said plaintiff and the said defendant, mentioned and referred to in the plaintiff's declaration, it is expressly provided that 'this entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void * * * if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days.' And the

defendant avers that the buildings mentioned and referred to in the said policy of insurance between the said plaintiff and the said defendant, though intended for occupancy did, during the period of insurance mentioned in said policy, and prior to the time of the happening of the fire by which the said buildings were burned, become vacant and unoccupied, and so remained for ten days without the knowledge or consent of the said defendant, and without any agreement to permit said buildings to be and remain unoccupied being entered into between the said plaintiff and the said defendant, or indorsed upon or added to said policy of insurance, by reason whereof the said policy of insurance, or contract between the said plaintiff and the said defendant, became absolutely void, and was not in force at the time of the happening of the said fire, and this the said defendant is ready to verify. Wherefore it prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it."—Plaintiff's counsel moved to strike out the second plea on the ground that it amounted to the general issue, which was already pleaded, and therefore could not be pleaded specially.

Anthony Higgins, for plaintiff. Levi O. Bird and Andrew E. Sanborn, for defendant.

LORE, C. J. It was an act of special caution on the part of the defendant to make this special plea, but it will be noted that the plaintiff is bound to aver in his narr. and negative these conditions, and he has so negatived the same. The general issue raises distinctly that specific question, and your special plea only duplicates it. And we are therefore very clear that it ought to go out, and that you can prove this matter under the general issue. There is no doubt about it. We therefore make the order to strike out the second plea.

(1 Pen. 86)

CAVENDER et al. v. CAVENDER.
(Superior Court of Delaware. Newcastle.
Nov. 27, 1897.)

SHERIFF'S SALE—INQUISITION—SUFFICIENCY.

A sheriff's sale will be set aside where the inquisitors were not sworn, and did not have personal knowledge of the value of the land, or learn it from sworn witnesses before making return that the rents and profits would be insufficient to pay the judgment within seven years.

Action by Theodore L. Cavender and others, to the use of Mary E. Vosshell and others, against Thomas Cavender. Plaintiffs obtained a judgment, and had defendant's land sold at sheriff's sale, and a rule was issued to show cause why the sale should not be set aside. Rule made absolute.

The defendant filed several exceptions to the validity of the sheriff's sale, the one relied upon being as follows: "(2) That on September 27, A. D. 1897, the said plaintiffs, through

their attorney, in open court secured a rule of inquisition upon the lands of your petitioner, said rule being returnable with 30 days from the day of issuing the same; that under the said rule the sheriff aforesaid appointed John F. Campbell and Lewis Dickey inquisitors; that neither of said inquisitors was personally acquainted with the land described in said writ, and, without taking any evidence as to the value of the rents and profits of said land, and without taking any evidence as to the amount of judgments against your deponent, signed and made their return that the rents and profits of the said land would not be sufficient to pay the said debt in said writ mentioned within the period of seven years. Your petitioner therefore sheweth that the return of the inquisition is a fraud upon your petitioner, and is wholly void." The two inquisitors above named were called to the witness stand by Mr. Cooper, and testified that they were not personally acquainted with the land described in the writ of inquisition, and, without taking any evidence as to the value of the rents and profits of said land, or as to the amount of judgments against the defendant, and without being sworn, they merely signed the said inquisition as a matter of form, relying simply upon certain statements made by the deputy sheriff.

Peter L. Cooper, Jr., for the rule. Harry Emmons, opposed

LORE, C. J. Let the rule be made absolute. Inquisitors must have personal knowledge, or they must inquire, as to the value of the land, from sworn witnesses, and they must themselves be sworn.

(1 Pen. 138)

O'HARA v. REED.

(Superior Court of Delaware. Newcastle.
Dec. 11, 1897.)

PLEADING—BILL OF PARTICULARS—SUFFICIENCY.

In an action to recover for goods sold, the bill of particulars is insufficient, to give defendant notice of the claim she is required to meet, which describes the property sold at several dates as "Mdse.," meaning merchandise.

Action by John W. Reed against Ella O'Hara. Defendant objects to the bill of particulars as insufficient. Objection sustained.

The plaintiff filed a bill of particulars in which there were set out numerous charges, on sundry dates, for "Mdse.," without specifying the nature, character, or quantity of the merchandise.

Herbert H. Ward, for plaintiff. Walter H. Hayes, for defendant.

SPRUANCE, J. The purpose of a bill of particulars is to give to the defendant reasonable notice of the claim he is required to meet. The bill of particulars in this case

shows the dates and prices of the alleged sales, and describes the property sold as "Mdse.," meaning merchandise. This is not sufficient. The defendant is entitled to know with reasonable certainty what kind of merchandise is claimed to have been sold to him. Under this paper the plaintiff might prove a claim for meat, dry goods, groceries, or any other property answering the general description of merchandise. Let a new bill of particulars be filed.

(1 Pen. 81)

STATE v. RYAN.

(Court of General Sessions of Delaware. New-castle. Nov. 18, 1897.)

BIGAMY — EVIDENCE — COMPETENCY OF WIFE TO TESTIFY.

It is competent for the alleged first wife of defendant, in a prosecution for bigamy, to contradict his testimony, made to justify his second marriage, that she stated she had a former husband living.

Prosecution against Francis H. Ryan for bigamy.

Peter L. Cooper, Jr., Dep. Atty. Gen., for the State.

At this term the defendant was indicted for bigamy. At the trial Mr. Cooper called Sadie Ryan to the witness stand, and stated to the court that he proposed—First, to prove by her that she was the legal wife of the defendant; and, second, certain facts to substantiate the charge of bigamy against the defendant.

LORE, C. J. The law makes a wife competent to testify against the husband in a civil action, but not in a criminal action. It is hornbook law that she cannot testify for or against her husband in a criminal case, and the enabling statute in this state does not cover it.

After proving by Walter Witsell, state detective, certain admissions made to him by the defendant as to his legal marriage with Sadie Ryan, his reasons for leaving her, and the fact that he had subsequently married another woman in Wilmington; and by Deputy Clerk of the Peace Janvier that he had issued a license to one Francis H. Ryan, colored, on the 21st day of August, 1897, permitting his marriage to Annie Bailey,—the prisoner was allowed to take the stand in his own behalf, and proceeded to give a detailed account of his life as the husband of Sadie Ryan, stating, among other things, that she had told him that he was not her husband, that her husband was still living, and would kick him (the defendant) out if she desired it.

Mr. Cooper here asked that the alleged wife, Sadie Ryan, be allowed to take the stand to contradict the statement of the defendant to the effect that she (the wife) had told him that she had a husband then living,

contending this was an exception to the rule of exclusion. 1 Greenl. Ev. §§ 843, 844.

LORE, C. J. A majority of the court think that this testimony ought to go in. But we want to state to what extent. The question as to whether there was a former marriage or not, whether what this man says is true or not, is a material point in this case. It is the material point. The defendant has gone upon the stand under the statute of this state. He has testified that the woman to whom it is alleged he was first married stated to him, practically, that she was not his wife; that she had a former husband living, who would come there and kick him out. In the breasts of those two people alone the knowledge exists. Now, he has so shown, and to contradict him upon that point, to show that she made no such statement to him as to a former marriage, we think, is competent testimony; but it should be confined to a contradiction of the statement that she had a former husband living who still occupied the relation of husband. She cannot prove the fact of her divorce, but she is confined to the contradiction of the statement made by the defendant, as before stated.

LORE, C. J. (charging jury). Francis H. Ryan is charged in the indictment with bigamy; that is, that on the date alleged in the indictment he, then having a wife to whom he was lawfully married, married another woman. If you believe, from the testimony in the case, that he was lawfully married to his alleged first wife, and that he, being so lawfully married, married another woman, then he is guilty of this offense. Where a person sets up as a defense that his first marriage was not lawful because of a former husband, that defense is for him to prove, in such a way as will satisfy you, in your judgment as reasonable men, that the first marriage was not a legal and proper one. The burden of proof is upon him to show it. If you believe, from the testimony on the part of the state, that the first marriage was a legal and proper one, then this second marriage would be unlawful, and he would be guilty of the crime charged in the indictment. You have heard the testimony as to his admissions, etc. The facts are before you, and it is for you to say, from the evidence, whether he is guilty or not guilty.

Verdict, guilty.

(1 Pen. 87)

JOHNSON et al. v. WILMINGTON & N. ELECTRIC RY. CO.

(Superior Court of Delaware. Newcastle. Nov. 27, 1897.)

PROCESS—RETURN—TIME—AMENDMENT.

1. A summons returnable in term cannot be returned in vacation, and such a return will be set aside.

2. A return made in vacation may be amended on motion, at the next term, where the process was regularly issued and served, and jurisdiction obtained of defendant, before judgment, and the rights of third persons had not intervened.

Lore, C. J., dissenting.

Action by Annie R. Johnson and Walter Johnson against the Wilmington & Newcastle Electric Railway Company. A rule was obtained by defendant against plaintiffs and the sheriff to set aside the return of the summons. Return quashed, with leave to plaintiffs to amend.

The defendant, by its president, filed an affidavit alleging, among other things, the following: "That on the 11th day of September, A. D. 1897, Annie R. Johnson and Walter Johnson, the plaintiffs, by and through their counsel, William S. Hilles, Esq., caused a summons to be issued out of the superior court, the same being No. 80 to September term, A. D. 1897, against the defendant, and made returnable to the September term, A. D. 1897. That the said writ was not returned to the September term, as therein directed, but was in fact returned on or about October 18, A. D. 1897, more than two weeks after said September term had adjourned. Your petitioner therefore prays a rule may issue against Annie R. Johnson and Walter Johnson, plaintiffs, and William R. Flinn, sheriff of Newcastle county, for them to appear, and show cause, if any they have, why the said return should not be quashed, and stricken from the record."

Mr. Hilles asked that the sheriff be allowed to amend his return, but the argument on the rule, being a preliminary step, was heard first.

Mr. Cooper, having appeared specially for the purpose, moved that the sheriff's return be vacated, upon the state of facts disclosed by the above affidavit.

William S. Hilles, for plaintiffs. Peter L. Cooper, Jr., for defendant.

SPRUANCE, J. There are two applications in this case, one by the defendant to set aside the sheriff's return, and another by the plaintiff for leave for the sheriff to amend his return. The facts are these: A summons was issued to the September term, 1897, which was regularly served. The sheriff did not make his return, as he ought to have done, at the September term, but waited until some two weeks after the adjournment of the court before doing so. The court are unanimously of the opinion that the sheriff had no right to make the return in vacation, and we order that it be set aside. But, while we make that order, a majority of the court will entertain a motion by the plaintiff to allow the sheriff to make his return now, so as to conform to the facts. This is the first term after that to which the return should have been made; the rights of no third parties have inter-

vened; there has been no judgment; and the plaintiff had his process regularly issued, and the sheriff served it. We therefore do not think that the plaintiff should, under the circumstances of this case, lose the benefit of his process and of its service. By the service of the writ the court obtained jurisdiction of the defendant, and he can suffer no injury by allowing the sheriff to do now what he should have done at the September term.

Mr. Hilles stated that he would later have the sheriff's return in proper form before the court, and would move to make the return in that form.

Mr. Cooper then entered a general appearance.

On December 18th, Mr. Hilles, on behalf of the sheriff, presented a petition asking to be permitted to make the proper return, upon which motion the court made the following order: "And now, to wit, this 18th day of December, A. D. 1897, the foregoing petition being read and considered, it is ordered by the court that the said sheriff be permitted to make the return on the said writ as in the petition mentioned as of the September term, A. D. 1897, of this court."

LORE, C. J., dissented from the latter decision.

(1 Pen. 30)

BALL et al. v. KANE et al.

(Superior Court of Delaware. Newcastle.
Nov. 30, 1897.)

WILLS—TESTAMENTARY CAPACITY—USE OF INTOXICATING LIQUORS—EVIDENCE.

1. In determining the capacity of a testator to make a will, it is proper to show his habit of drinking intoxicating liquors, in connection with their effect on his mind at the time of the execution of the will.

2. When the objection to a will is that long-continued habits of intemperance have impaired the mind and destroyed the memory of the testator, and thereby deprived him of testamentary capacity, it must, in order to prevail, be of such a character as to deprive him of judgment and reason at the time of the execution of the will.

3. Where the capacity to execute a will was contested on the ground of mental incapacity of the testator, subject to undue influence, a declaration by testator, two days after making the will, that "I did not make it; Jimmie and the old woman made it,"—meaning his wife and son,—is competent evidence for the sole purpose of showing the mental condition of testator.

Spruance, J., dissenting.

Issue to determine whether a paper was the last will of Michael Kane.

William T. Lynam, for propounders. J. Frank Ball and Herbert H. Ward, for caveators.

At the trial, counsel for the caveators asked the witness William B. Carswell if he knew Michael Kane's drinking habits.

LORE, C. J. We think this testimony is admissible. It is the effect of the use of alcoholic liquors upon the testator's mind that

the caveators seek to prove. Whether they prove it or not is another matter. But it is to be brought down and connected with the time of the making of the will; otherwise it has little or no effect.

SPRUANCE, J. Barring any nice inquiry as to whether the physician knew in fact the condition of the man's mind at the time the will was made, about which there is some little doubt, yet when he did see him last, which it seems would be not very far from the time when the will was made, his testimony was that then and prior to that time his mind was in a weakened state and impaired, and, in his opinion, it was produced by the use of intoxicants. So that the purpose is not to prove that he was drunk when he made this will, or when he gave the instructions, but that in this man's life there was that which would support the theory or position as to how that state of mind came about, to wit, by the use or abuse of the use of intoxicants. I think the testimony is competent. Of course, I would not let that spread over too much time, but it seems to me you could prove that to be his habit and the degree to which it ran.

The witness Michael Maloney was asked by the counsel for the caveators what conversation, if any, he had with Michael Kane with reference to his will two or three days after the execution of the same, the statement of the testator sought to be introduced being as follows: "I did not make it; Jimmie and the old woman made it."

LORE, C. J. We understand that this is an offer on the part of the parties resisting the will to prove that the testator said, shortly after making the will, "I did not make it; Jimmie and the old woman made it;" that the offer of the testimony is not to prove the fact of undue influence, or anything that would be in the nature of a revocation of the will, but to show the mental condition of the testator at the time of making the will. After a careful examination of the authorities, and considering the rule or the principle underlying the question, a majority of the court think that this testimony ought to be admitted. The line seems to us to be quite clearly drawn that, after a man has formally made his will,—a formal written instrument, signed and executed by him,—he may not in effect, by any subsequent conversation, revoke that will, nor would his evidence in any way be admissible in order to prove any fact which would be in the nature of a revocation. But where a declaration is made within a reasonable time, where one ground of objection to the will is mental incapacity, subject to undue influence, the declaration, made shortly after the making of the will, that "I did not make it; Jimmie and the old woman made it,"—the majority of the court think ought to go to the jury for what it is worth; that the fact that a

man who one day makes a formal instrument, and the next day says to somebody he did not do it, ought to go to the jury, being so nearly connected with the time, in order to throw light upon his mental condition at the time of the making of the will. Jarman has expressly stated that "evidence may be given of the state of the testator's mind and of his bodily health, both before and after the time when the will was made; still, such evidence is not otherwise to be regarded than as shedding light upon the condition of his mind at that time." The majority of the court think that, if a man should make such declarations a little time after the making of the will, it is a fact which would have relation to the mental condition of the testator at the time of making the will; that it throws light upon his mental condition at that time, and it goes to the jury for what it is worth, to show his mental condition at that time. We think that probably the position taken has grown out of the fact that the court has, in some cases, endeavored to relieve against the particular hardship, and has not followed the broad rule that, where the declaration has been made within a reasonable time, it is admissible to throw light upon the mental condition at the time of making the will, and that it ought to go to the jury for what it is worth, to show whether at the time of making the will the man's mind was impaired and susceptible to undue influence.

BOYCE, J. I, too, regret that the court are divided upon a question of such importance as the one now presented for our consideration and determination. If it were now sought to introduce in evidence the simple, bald, and naked declarations of the testator (Independently as it were), made subsequently to the execution of the paper writing purporting to be his last will and testament, and without any evidence previously offered, showing or attempting to show either insanity or imbecility of mind of the testator, and for the purpose of working a revocation of the testator's will, or to attack its validity on the ground of duress or undue influence, then the court agree that such declarations should not be admitted in evidence. We understand that the counsel seeking the admission of this testimony himself admits that any such declarations are not evidence to go to the jury for the purpose of attacking the validity of the will. They are admitted for another purpose, which I will now attempt to show. In cases of this character, where testimony has been offered, as in this case, to show a want of testamentary capacity of the testator, the sufficiency of which is, of course, for the jury to determine, it does seem, from well-considered cases, founded upon sound reasoning and judgment, that subsequent declarations of the testator, made near the time of making his will (the declarations sought to be offered in

this case were made, we are informed, within two or three days thereafter), may be given in evidence to throw light upon the testamentary capacity of the testator, and to aid the jury in determining the mental condition of the testator, and for this purpose only. The admission of this testimony is not sought, as we understand, nor do a majority of the court allow it to go to the jury, as evidence of the fact of a revocation of the will, or of duress, or of undue influence, or of anything else as a fact, attacking the validity of the will. But we admit it as any other evidence which, in the proper discretion of the court, may be admitted when offered affecting the mental condition of the testator, and, as I have said, for the purpose of throwing light upon the real mental condition of the testator. The case in 11 N. Y. 160 (*Waterman v. Whitney*), as well as the case of *Reynolds v. Adams*, 90 Ill. 146, leaves very little room for doubt as to the admissibility of the testimony. They are well-considered cases, and they satisfy my mind that this testimony should be allowed to go to the jury for the purpose already stated. In the last-mentioned case, and on page 148, it is said: "Much of the difficulty, however [meaning in cases of this character], had arisen from the omission to distinguish with sufficient clearness between the different objects for which the declarations of the testator may be offered in evidence in cases involving the validity of their wills." And a distinction is shown between offering the testimony for the purpose of a revocation of the will, or to impeach the validity thereof for duress or undue influence, and offering it to show the mental capacity of the testator. Indeed, after a careful examination of the authorities, the court said: "The rule deducible from the cases on this subject is that while the declarations of a testator are not admissible to show an express revocation of his will, or the fact it was executed under duress or from undue influence, they may nevertheless be proved and used to show his mental condition at the time of the execution of the will, or so near the time the same state of affairs must have existed." In *McTaggart v. Thompson*, 14 Pa. St. 149, "it was distinctly ruled that declarations of a testator, though made after the execution of the will, are admissible in such cases as evidence of imbecility of mind." I think the testimony should be admitted.

SPRUANCE, J. (dissenting). I regret that I am not able to agree with a majority of the court in the admission of this testimony. This is a question of first impression in Delaware. It has been considered in other courts, and the decisions are conflicting. It is admitted that testimony of this character is never admissible for the purpose of proving the fact of undue influence. When testimony of this kind has been admitted, it

has been on the ground that it showed, or tended to show, the mental condition of the testator at the time he made the instrument. Where the alleged character of the mental disorder is of a continuing character, light as to the testator's mind when he made the instrument is often given by testimony as to his mental condition before and after making the instrument. That is the only justification of the introduction of such testimony. The testimony objected to is the following conversation with Kane a few days after the execution of his alleged will: "One night he and I were in the house getting our supper, and he said to me, 'Let's go down as far as Holland's and get a glass of beer.' I said, 'All right;' and we walked down through the yard, and after we got to the front pavement he said to me, 'My will is made.' I said, 'Is that so?' He said, 'Yes;' and he said, 'I didn't make it; Jimmie and the old woman made it.'" "That is all that passed between me and him. That is just what he said,—Jimmie and the old woman made it.'" In other words, it was wholly a declaration by the testator that the will which he had made was made by the influence of his wife and son. There was no failure to recollect what the will contained; no statement of anything from which any inference could be drawn as to his mental condition; but simply a naked and bald statement that the will was really made by them,—meaning by their influence. As before stated, it is agreed that this testimony cannot be admitted to prove the fact of undue influence, but it is insisted that it may be admitted to prove mental incapacity when the will was made. To my mind, it neither proves it, nor approximates towards the proof of it, and that to admit it would be to resort to a mere subterfuge to get before the jury a statement to produce an effect which the law says cannot be produced by such testimony. Upon examination of the cases cited in support of the admission of this testimony, it will be found that a number of them were cases in which the declarations of the testator, that he had made the will under undue influence, were accompanied by other statements which clearly indicated unsoundness of mind. Under such circumstances, it was clearly proper to admit the whole of the conversation. *Waterman v. Whitney*, 11 N. Y. 157, and *In re Clark*, 40 Hun, 237, were cases of this character. In addition to the statements of the testators as to undue influence, there were statements as to what the wills contained which were not there, showing that they were not capable of remembering what was in the wills. In *McTaggart v. Thompson*, 14 Pa. St. 151, the testator told what disposition of his property was made by his will, and said that he had ruined his family and had been imposed upon by certain persons. The court, commenting on this, said, in effect, that a man must be

out of his mind who would say that by making a will he had ruined his family, as any one of sound mind would know that the evil might be remedied by destroying the instrument. If the statement of the testator after the making of the will does not throw light on his mental capacity when the will was made, it ought to be rejected. Among the cases which support this view is that of *Jackson v. Kniffin*, 2 Johns. 30. In that case the testator was an aged man, over 80 years old. The plaintiff called several witnesses to prove that the will was obtained by duress. It appeared that the testator was possessed of considerable real and personal property. He uniformly, and in the most earnest manner, declared the instrument was not his will, and that he had been forced to execute it or he would have been murdered if he had not, and called upon those present to bear witness that said instrument was not his will, that it had been extorted from him through fear of being murdered, and that his desire was to make equal distribution among his children, etc. All of this was rejected by the court. The testimony objected to in this case cannot be admitted for the purpose of proving undue influence, and that is all there is of it; and it does not tend in any degree to prove the mental capacity of the testator either at the time he made the declarations or at the time he made the will. I am therefore very clearly of the opinion that it would be safer for us to adhere to the ancient rule, which excludes such testimony.

Propounders' Prayers.

The propounders prayed the court to charge the jury as follows:

First. What constitutes a sound disposing mind and memory in contemplation of law. If the testator is able to understand that he is disposing of his estate by his will, and to whom he is disposing of it, however weak his intellect may be, he is able and competent to make a valid will. In a word, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed his will? *Jamison v. Jamison*, 3 Houst. 122; *Lodge v. Lodge*, 2 Houst. 423; *Sutton v. Sutton*, 5 Har. 459; *Duffield v. Morris' Ex'r*, 2 Har. 375; *Ethridge v. Bennett's Ex'rs*, 1 Del. Term Rep. 15, 39 Atl. —; *Cordrey v. Cordrey*, 1 Houst. 273.

Second. The presumption of law is in favor of the capacity of the testator to make a will. The burden of showing want of capacity rests on those who oppose the will, and it is incumbent on them to show such incapacity by satisfactory proof. *Cordrey v. Cordrey*, 1 Houst. 269; *Lodge v. Lodge*, 2 Houst. 418.

Third. The jury, in determining the question of capacity, must look to the time when the will was executed, to ascertain the state

and condition of the testator's mind. If he has sufficient capacity at that particular time, his prior or subsequent incapacity amounts to nothing, and the will must stand. *Jamison v. Jamison*, 3 Houst. 123; *Lodge v. Lodge*, 2 Houst. 423.

Fourth. The testimony of the subscribing witnesses, and their opinion as to the soundness or unsoundness of the testator's mind at the time of making the will, is entitled to great weight with the jury. *Ethridge v. Bennett's Ex'rs*, 1 Del. Term Rep. 21, 31 Atl. 813; *Jamison v. Jamison*, 3 Houst. 121.

Fifth. As to the question of undue influence, it must be such influence as amounts to force and coercion, destroying free agency,—such an influence as would permit another to substitute his will for the will of the testator. *Duffield v. Morris' Ex'r*, 2 Har. 384; *Sutton v. Sutton*, 5 Har. 461; *Lodge v. Lodge*, 2 Houst. 424.

Sixth. An influence which is acquired by persuasion, or by affection or attachment, or the desire of gratifying the wishes of another, is not sufficient to vitiate the will. *Duffield v. Morris' Ex'r*, 2 Har. 384; *Sutton v. Sutton*, 5 Har. 461; *Lodge v. Lodge*, 2 Houst. 424.

Seventh. The fact that the widow or son or any other of the beneficiaries named in the will was present at the time of the execution of the will does not throw suspicion on the will. *Ethridge v. Bennett's Ex'rs*, 9 Houst. 304, 81 Atl. 813.

Eighth. To avoid a will on the ground of intoxication, it must be proven that the testator was intoxicated at the very time of the execution of the will. *Pierce v. Pierce*, 38 Mich. 412; *Duffield v. Morris' Ex'r*, 2 Har. 384.

Ninth. The form of insanity produced by long-continued habits of intemperance is either delirium tremens, or such a state of fixed and permanent insanity that would be evident at once to every one with whom the party came in contact. This must exist to such an extent as to exclude thought and judgment at the very time the will was executed. *Duffield v. Morris' Ex'r*, 2 Har. 384.

Tenth. That the testator had a perfect right to dispose of his property as he thought best.

Caveators' Prayers.

Counsel for the opponents of the will submitted the following prayers:

First. Long-continued habits of intemperance may gradually impair the mind and destroy the memory and other faculties, so as to produce insanity. A testator cannot have testamentary capacity whose mind has become so impaired from habitual drunkenness as to be deprived of judgment and reason. *Duffield v. Morris' Ex'r*, 2 Har. 383; 25 Am. & Eng. Enc. Law, 991, 992; *In re Cochran's Will*, 1 T. B. Mon. 263.

Second. Where the mind of the testator is, at the time of the execution of his will, enfeebled from any cause whatever, less evi-

dence will be required to invalidate such will on the ground of undue influence than in the case of a testator possessing an unimpaired intellect; and the feebler the mind of the testator, no matter from what cause, from sickness or otherwise, the less evidence will be required to invalidate his will upon the ground of undue influence. *Reynolds v. Adams*, 90 Ill. 149; *Bates v. Bates*, 27 Iowa, 115, 118; *Clark v. Fisher*, 1 Paige, 176; *Sutton v. Sutton*, 4 Har. 461, 462.

Third. In the case of a weak or weakened mind, the degree of influence necessary to invalidate a will need be only such as is adequate to control the testator's free agency, and to prevent him from doing as he pleases with his property. *Redf. Wills*, p. 516, pars. 18, 19; *Chandler v. Ferris*, 1 Har. 464.

Fourth. In determining the issue presented to the jury in this case, they have the right to consider the circumstances and condition of the testator's family and property, and the claims of particular individuals upon the bounty of the testator, based upon the love and affection of the testator towards them. The jury have also the right to consider the reasonableness or unreasonableness of the provisions of the will in the light of the evidence upon those points. And where the will is unreasonable in its provisions, and inconsistent with the duties of the testator, with reference to his property and family, this, of itself, imposes upon those claiming under the will the necessity of giving some reasonable explanation of the unnatural character of the will, or, at least, of showing that its character is not the offspring of mental defect, obliquity, or perversion. *Patterson v. Patterson*, 6 Serg. & R. 55; *Clark v. Fisher*, 1 Paige, 176; 1 *Redf. Wills*, pp. 515, 516, par. 14; *Duffield v. Morris' Ex'r*, 2 Har. 381, 382; *Sutton v. Sutton*, 5 Har. 462; *Hall v. Dougherty*, 5 Houst. 450.

Fifth. If the jury believe from the evidence that the mind and memory of Michael Kane had, by the long-continued and excessive use of intoxicants, from successive attacks of delirium tremens induced by such use of intoxicants, and by the fall and injury to his head shortly before he made his will, or from any of said causes, become, at the time he executed the will in question, so weakened, impaired, and deranged that he was deprived of the necessary reason, recollection, and judgment to dispose of his property by will, in accordance with his own volition, affections, and desires, then the jury should set aside this will.

Sixth. If the jury believe from the evidence that the mind and memory of Michael Kane had, by the long-continued and excessive use of intoxicants, from the successive attacks of delirium tremens induced by such use of intoxicants, and by the fall and injury to his head shortly before he made his will, or from any of such or other causes, become, at the time he executed the will in question, so weakened, impaired, or deran-

ged, and so devoid of reason, recollection, or judgment, that he was incapable of withstanding suggestions or influences adverse to his real desires, will, and intentions as to the disposition of his property by such testament, and that there were in fact such suggestions or influences which prevented him from so disposing of his property by his will in accordance with his own volition, affections, and desires, then the jury should set aside this will.

LORE, C. J. (charging jury). The question for you to determine is whether the paper writing bearing date February 12, 1892, purporting to be the last will and testament of Michael Kane, deceased, is or is not his last will and testament. The statutes of this state on the 9th of April, 1873, enabled any person of the age of twenty-one years or upwards, of sound and disposing mind and memory, married women excepted, to make a will as well of real as of personal estate. By act of April 9, 1893, it was provided that any married woman of the age of 21 years and upwards may dispose of her property, both real and personal, by will. So that on the 12th day of February, 1892, the date of this will, any person of the age of 21 years or upward, of sound and disposing mind and memory, had a right to make a will. It is conceded in this case that the formal execution of this paper writing was had according to law; but it is claimed by those opposing the will that Michael Kane, the testator, at the time of the execution of this paper, was not of sound and disposing mind and memory; that by reason of the excessive use of intoxicating liquors for many years before that date, and also from a severe injury received by him in a fall down the stairway of his residence, shortly before the date of the will, his mind was so impaired that he was incapable of making a will; and that in addition thereto he was unduly influenced by his wife and his son James H. Kane in the distribution of his property by that will. What constitutes a sound and disposing mind and memory in a testator has been very clearly stated in the decisions of our courts. In *Chandler v. Ferris*, 1 Har. 454, the court say: "When the testator was capable of exercising thought and judgment and reflection, if he knew what he was about, and had memory and judgment," he had testable capacity. In *Duffield v. Morris' Ex'r*, 2 Har. 375, the court say: "A sound mind is one wholly free from delusion, all the intellectual faculties existing in a certain degree of vigor and harmony, the propensities, affections, and passions being under subordination to the will and judgment, the latter being the controlling power, with a just perception of the natural connection or repugnancy of ideas. Weak minds again only differ from strong ones in the extent and power of their faculties; but unless they betray symptoms of a

total loss of understanding, or of idiocy or of delusion, they cannot properly be considered unsound. A perfect capacity is usually tested by this: that the individual talks and discourses rationally and sensibly, and is fully capable of any rational act requiring thought, judgment, and reflection. This is the standard of a perfect capacity. But the question is not how well a man can talk or reason, or with how much judgment he can act, or with how great propriety and sense he can act; it is only, has he mind and reason? Can he talk rationally and sensibly? Or has he thought, judgment, and reflection? Weakness of mind may exist in many different degrees without making a man intestable. Courts will not measure the extent of people's understandings or capacities if a man be legally compos mentis. Be he wise or unwise, he is the disposer of his own property, and his will stands as the reason for his action." In *Sutton v. Sutton*, 5 Har. 459, the court say testable capacity amounts "to nothing more than a knowledge of what he was about when he made the will, and how he was disposing of his property and the purpose so to do it." In the *Lodge Will Case*, 2 Houst. 418, the language of the court is: "If the testator at the time of executing the will was capable of exercising thought, reflection, and judgment, knew what he was doing, and how he was disposing of his property, and had sufficient memory and understanding to comprehend the nature and character of the transaction, he was capable of making a will. Mere weakness of mind or partial imbecility from disease of the body or from age will not render a person incapable of making a will." In the *Jamison Will Case*, 3 Houst. 108, the court say of the testator: "If he is able to understand that he is disposing of his estate by will, and to whom he is disposing of it, however weak his intellect may be, he is able and competent to make a will." Such, gentlemen, is testable capacity as defined in our reports. "Every person is presumed in law to be of sound mind until the contrary is shown, and the burden of showing an unsound mind in the testator rests on the party contesting the validity of the will, and the testimony must relate to the time of its execution." *Lodge's Will*, 2 Houst. 418. If, however, insanity is once clearly established, the burden shifts, and it devolves upon those supporting the will to show that insanity did not exist at the time the will was made. The burden, however, does not shift until insanity is so established to your satisfaction by a preponderance of evidence. In determining the question of capacity, you must direct your minds to the precise time of the execution of the will. In cases like this, courts have been liberal in admitting testimony as to the physical and mental condition of the testator, both before and after the time of the execution of the will; but such testimony is admitted only for the pur-

pose of enlightening your minds, so that you may have the environments of his life, and be able to concentrate your judgment upon that critical moment, and to say in that concentrated light whether, at the precise time of the making of the will, he was of sound and disposing mind and memory. If he was, then it is a matter of indifference what may have been his condition at any other time. In determining his condition at that time, you should give to the testimony of the subscribing witnesses to the will such credit as their peculiar relations to him and opportunity of knowing his condition just then entitle them. The law places them there to speak specially to that point. When it is claimed that the will is void because of undue influence, the objection will not avail "unless such influence amounted to a degree of restraint such as the testator was too weak to resist, such as deprived him of his free agency, and prevented him from doing what he pleased with his property." *Duffield v. Morris' Ex'r*, 2 Har. 375. The degree of influence necessary to control the mind of the testator must depend upon and be proportioned to the mental and physical strength or weakness of the testator. It is obvious that a man mentally and physically weak is more susceptible to undue influence than one who is strong and healthy. The influence "must be such as to take away his free will; such as he is too weak to resist. Mere solicitation will not be sufficient to vitiate a will made by a person having a knowledge of what he is doing, and intending to do it when making it, though his act may be brought about by solicitation or that kind of influence which a disposition to gratify another may produce." *Sutton v. Sutton*, 5 Har. 459. The test is this: Is it the will of the testator or that of a person controlling his will which is expressed in the paper writing? Unless it is the substitution of the will of another for that of the testator, the influence or persuasion, whatever it may be, will not vitiate a will. A testator may listen to the persuasion of a wife and children or others about him, may regard the ties of affection, and the will be valid, unless his mind and judgment were overborne and controlled by them in the making of the will. The mere fact that such persons are about and in the presence of the testator at the time the will was made does not, of itself, vitiate the will. When the objection to the will is that long-continued habits of intemperance have gradually impaired the mind and destroyed the memory of the testator, and thereby deprived him of testamentary capacity, it must be of such a character as to deprive him of judgment and reason, and must exist at the precise time of the execution of the will. The same is true of delirium tremens or any other mental or physical infirmity going to testable capacity.

Taking the law as we have thus laid it down, you are now to say whether this

paper writing is or is not the will of Michael Kane. In reaching a conclusion you should not be governed by any other consideration than whether he at the time of the execution of the will was of sound and disposing mind and memory; that is to say, that he then knew he was disposing of his property, that he intended so to do, and therein was following the behest of his own mind. As was stated by the court during the progress of the trial, declarations made by the testator after the making of the will, to the effect that the will was made by or under the influence of other persons, are not to be received as evidence of undue influence, but only as they may throw light upon the mental capacity of the testator when the will was made. You are not to consider whether it was such a will as you would have made, or such a will as you think he ought to have made, considering all the circumstances of his family and surroundings; for, if he was then of sound and disposing mind and memory, he had a right to dispose of his property by will as he pleased, and you may no more substitute your will, or what you would have done for his will, than you may substitute the will of any one of his family for his will. The law gives a person a right to dispose of his property as he may choose, and he is the judge of how he will dispose of it. In your deliberations you are to be governed exclusively by the testimony in this case, and may listen to no pleas of sympathy, favor, or other considerations. Where testimony is conflicting, as it is here, you should reconcile it if you can; but, if you cannot reconcile it, then you should be governed by the testimony of those witnesses who, under all the circumstances, you consider most entitled to credit, having regard to the opportunities of the witnesses to know that of which they speak, their apparent fairness or bias, their intelligence, manner, and bearing, and every other element that goes to a fair estimate of their truthfulness and accuracy. If, therefore, from the evidence, you believe that on the 12th day of February, 1892, the time of the execution of this paper writing, Michael Kane was of sound and disposing mind and memory, your verdict should be that that paper writing is his last will and testament. If, on the contrary, you believe from the testimony that he was not then of sound and disposing mind and memory, your verdict should be that the paper writing is not his last will and testament.

The jury found the paper writing to be the will of Michael Kane.

(1 Pen. 112)

BUKER v. CARROLL et al.

(Superior Court of Delaware. Newcastle.
Dec. 1, 1897.)

JUDGMENTS—SCIRE FACIAS—PARTIES.

An affidavit of demand in scire facias on a judgment to extend a lien on lands, which states

the name of the terre tenant in the caption, is sufficient, without showing in the body of said affidavit how he became such tenant.

Lore, C. J., dissenting.

Scire facias on a judgment to extend a lien on lands by Fannie M. Buker against James Gibson Carroll and Emma J. Carroll, defendants, and Ananias Ennis, terre tenant.

An affidavit of demand was filed, setting forth the following: "State of Illinois, Cook County—*as*.: Be it remembered, that on this 8th day of November, A. D. 1879, personally appeared before me, Lynam A. White, notary public for the state of Illinois, in Cook county, Fanny M. Buker, the plaintiff in the above-stated cause, who, being by me first duly sworn upon the Holy Evangels of Almighty God, did depose and say that hereto annexed is a duly-certified transcript of the judgment sued upon in this action, and that the sum demanded is eighteen hundred and seven dollars, and interest thereon from the 1st day of October, A. D. 1892; and that she verily believes that the same is justly and truly due."

Martin B. Burris, for plaintiff. John H. Rodney, for terre tenant.

SPRUANCE, J. The objection made to this affidavit is that, except in the caption of the affidavit, it is not stated that Ananias Ennis is the terre tenant, or how he became a terre tenant. We have given this matter careful consideration, and the majority of the court are of the opinion that this affidavit is sufficient. So far as my experience goes, it has never been the practice in ordinary suits on judgments or mortgages, where terre tenants are made parties defendant, to make any allegations respecting them in the body of the affidavit. The names of the plaintiff and defendant and terre tenant are stated in the caption of the affidavit, and, without making any allegations whatever in respect to the terre tenant, the party swears, as in this action, that "hereto annexed is a duly-certified transcript of the judgment [or mortgage] sued upon in this action, and that the sum demanded is justly and truly due." We think this follows the ordinary practice, and that it would be dangerous to require specific allegations as to how the terre tenant became such, etc. This decision can do no harm, as the time has not yet expired in which an affidavit of defense can be filed. We therefore hold that the affidavit is sufficient.

LORE, C. J. (dissenting). The objection is to the sufficiency of an affidavit of demand against Ananias Ennis as a terre tenant in a scire facias for the revival of a general judgment in what has been characterized as a "snap judgment proceeding." The only place where the name of Ennis occurs at all as a party is in the caption. The transcript of the judgment does not show that he has any interest whatever. Neither is any interest whatever shown in the plaintiff's affidavit of demand. He is, therefore, a stranger to the

record, except so far as his name appears in the caption. This is not the case of a scire facias upon a mortgage, which is a proceeding in rem for a judgment of condemnation of the particular piece of land described in the mortgage, which mortgage is a part of the record in the case. No analogy, therefore, can be drawn from such proceeding, whatever may have been the practice of making terre tenants parties thereunder. This is a scire facias for the revival of a judgment against persons, which judgment is a general lien upon any and all property which the original defendant may have held at any time since the original judgment was entered of record, however many pieces of such property there may have been; no piece of which is described in any manner in connection with the record. Ananias Ennis is a stranger to the judgment, as shown by the transcript filed, and is not connected with the judgment in the averments of the affidavit. No judgment should go against him as a party, unless some interest is shown in him to warrant it. Such interest would have to be shown in the case if the case were before a jury, or the court would not permit judgment to be had against him. It is even more necessary that his relation to the judgment should be set out in the affidavit of demand, which affidavit must show a conclusive right on its face, or, under our practice, no judgment will be rendered thereon. No one in reviving a general judgment ever thought of making a terre tenant a party defendant prior to the statute for the extension of a lien of a judgment upon lands. Theretofore the only new parties that could be made were the personal representatives of the deceased plaintiff or defendant, and this was so because they personally represented the parties to the judgment. The relation of this stranger to the record of the judgment which justifies making him a party under the statute should be disclosed in the affidavit. If this is not done, the plaintiff has not made out on the face of his affidavit a sufficient case. There is, therefore, not only a doubt of his right to recover, which is the rule for refusing judgments in such cases, but, to my mind, there is a manifest failure on the face of the paper to show such right. I therefore cannot agree with the judgment of my brethren, and am clearly of opinion that the affidavit is not sufficient, and the judgment should be refused.

(1 Pen. 119)

LEVY v. GILLIS.

(Superior Court of Delaware. Newcastle.
Dec. 6, 1897.)

ASSUMPSIT—PLEADING—SUFFICIENCY—IMPLIED
CONTRACT—VOLUNTARY LABOR—LIMITATIONS—
NEW PROMISE—NOTES—EVIDENCE—ADMISSIONS
—TRIAL.

1. Where defendant pleads limitations, plaintiff may prove a new promise made after the debt was created, without alleging it in a special replication.

2. Under a bill of particulars alleging that cer-

39 A.—50

tain work was done for defendant in January, plaintiff may prove that it was done the preceding November.

3. One cannot recover money advanced to buy intoxicating liquors under a count for goods sold and delivered.

4. Where one loans money at the request of another, the law implies a contract to pay therefor, where there is no express contract.

5. One voluntarily doing work in a political campaign at the request of a friend, not expressly promising to pay therefor, is not entitled to pay.

6. A new promise to pay a debt will remove the bar of limitations.

7. A check or a note is only prima facie evidence of an indebtedness from the maker to the payee.

8. Admissions of a party against his interest are entitled to peculiar weight.

Assumpsit by John Levy against Paul Gillis. Verdict for plaintiff.

Action of assumpsit for work and labor alleged to have been performed, money loaned, and goods sold and delivered by the plaintiff for the benefit of the defendant in the campaigns of 1892 and 1894 for the nomination for sheriff of Newcastle county. The amount claimed was a balance of \$720, with interest on the several items from the time they were due. The pleas were non-assumpsit, payment, set-off, release, and act of limitations, and issue was joined on said pleas.

Peter L. Cooper, Jr., for plaintiff. Philip Q. Churchman, for defendant.

At the trial, Mr. Cooper offered to prove by the wife of the plaintiff certain statements made by the defendant at the home of the plaintiff in 1894, admitting that he owed him \$400 for work done in 1892, and promising to pay that, and also to pay him wages for similar work that he might do in his campaign for the nomination for sheriff in 1894. That part of the conversation relating to a promise to pay the plaintiff for work done in 1892 was objected to by defendant's counsel on the ground that said new promise must be set out in a special replication; that it had not been so pleaded, and was therefore inadmissible.

SPRUANCE, J. It has been settled in this state that in an action of assumpsit, where you plead the statute of limitations, it does not require any special replication; and under the issue thus formed it is competent for the plaintiff to prove—First, the original obligation; and then, if it be more than three years, to prove within the three years some recognition by the defendant of the claim as a subsisting debt and of his obligation to pay it. *Newlin v. Duncan*, 1 Har. (Del.) 207.

The testimony was admitted, and the defendant's counsel excepted.

George Reed was produced on the part of the plaintiff, and was proceeding to state that the defendant had hauled from his stable in November, 1895, a certain quantity of manure belonging to the plaintiff.

Mr. Churchman objected, because the item of manure charged in the plaintiff's bill of particulars was in January, 1896, and he should be strictly confined to his bill of particulars.

LORE, C. J. The defendant has notice that that is the manure. The court have never held to exactness of time, but only a reasonable notice of the subject-matter. In *Stephens v. Greenhill Co.*, 1 *Houst.* 28, this is indirectly passed upon: "J. A. Bayard, for the defendants, objected to the admissibility of it. A bill of particulars of the plaintiff's claim has been furnished us in this case, on due notice served upon his counsel for that purpose, and I submit that it is not competent for him now to ask the question, and prove it in this vague and general manner. The court overruled the objection without hearing a reply. Bills of particulars are somewhat new in our practice, and arise under the Revised Code. But as the object of them is to specify the plaintiff's claim, and to apprise the opposite party of the distinct grounds and several items of the demand, evidence of a new claim, or of a distinct matter not embraced in the bill of particulars, cannot be allowed, on the ground of surprise to the other side. That, however, would not preclude the proof of the aggregate of the bill of particulars and of the whole demand in the mode adopted with the witness."

Mr. Cooper asked the plaintiff if he bought any intoxicating liquors for Mr. Gillis.

Mr. Churchman objected, on the ground that the plaintiff was confined to his bill of particulars, and, unless the plaintiff could prove that the liquors were sold and delivered to the defendant, it was inadmissible; that it could not be proved under money laid out and expended, if it was not bought for and delivered to the defendant.

LORE, C. J. So far as intoxicating liquors are concerned, it can only be proved under goods sold and delivered.

SPRUANCE, J. This bill of particulars is intended to make particular that which was general; to give notice to the other side what they are expected to meet. Most of the counts come in under money advanced, and there are a half dozen counts for money borrowed in different amounts. The next item is for work and labor,—64 days for horse and buggy, at so much per day; but you could not prove under that money paid for his use. That means what it purports; that is, work and labor. The next item is intoxicating liquors. We understand that that means merchandise of that character, to wit, intoxicating liquors, sold to him, just the same as those last two items of hay and manure.

LORE, C. J. (charging the jury). This suit of John Levy against Paul Gillis, ac-

cording to the bill of particulars filed by Levy, is for goods sold and delivered, for money loaned, and for work and labor rendered. He claims \$800, but admits a payment of \$170, making the balance of his claim \$720. When money is loaned by one person to another, even where there is no express promise to pay the same, the law implies such promise, and the party loaning the same can recover it in an action of this kind. Then, again, as to work and labor: Where one person, at the request of another, performs work and labor, and there is no express contract between the parties as to what shall be paid for such work and labor, the law implies a promise to pay whatever such work and labor are reasonably worth, and the jury may determine the value of such work and labor from the evidence in the case. This proposition is true if there be a legal obligation; if the work and labor was so done, and is of such character as to raise a legal liability on the part of the defendant. If the work and labor in this case was the work and labor of a friend rendered voluntarily in a political campaign, without any express promise on the part of the person for whom it was rendered to pay for it, we say to you it raises no legal liability, even though done at the request of the defendant. The principle of law governing this case is very similar to that which governs the work and labor which one person may do for another where they are nearly related by blood. If a daughter works for a father, where there is no express promise to pay, she can recover nothing for her services, because there was no legal liability created thereby. She was presumed to have done it from filial affection. So where work is done as an act of friendship. Any voluntary labor bestowed as an act of friendship does not raise a legal liability. The court stated the principle so clearly in *Mariner's Adm'r v. Collins*, 5 *Har. (Del.)* 290, that I will read a portion from that case: "Wherever a person is under a legal liability to pay money or discharge a duty, the law implies a promise to do it. But no promise can be implied from that which is a mere gratuity." You are to take the three respective elements of this account, and say upon the testimony whether any or what amount is due from the defendant to the plaintiff. You are to determine this by the evidence. In considering that evidence, we may first consider the statute of limitations. If you should believe there was a debt subsisting, and it was more than four years old, yet, if there was a promise within three years which took that out of the statute, the plaintiff still would be entitled to recover. The character of that promise is so clearly expressed in *Newlin v. Duncan*, 1 *Har. (Del.)* 204, a decision of the court of errors and appeals, that I will read a portion from it: "It is not disputed in this case that a pay-

ment of a part of the debt is evidence of a promise to pay the remainder, so as to prevent the operation of the statute as a bar. Indeed, it is now well settled, and has been for more than 100 years past, that an acknowledgment of a subsisting demand, or any recognition of an existing debt, is evidence of a promise to pay." The acknowledgment does not renew the debt, but simply revives the obligation. This is clearly stated in the same case. "From the decision of *Heyling v. Hastings* (1698), down to the present time (1824), it has always been holden that a new promise revives the old debt, but does not create a new one." If you believe that an indebtedness existed from Paul Gillis to John Levy, and his declaration referring to it was of such character as we have stated, it would revive the right to recover that debt and would keep it alive. You are to determine that question from the evidence. Again, in considering this evidence, checks given by Levy to Gillis, and notes signed by Levy and given to Gillis, and drawn to his order, would be prima facie evidence of indebtedness from Levy to Gillis. But they are not conclusive, and their relation to this case, and whether they represent money which Levy owed or which Gillis owed, is to be determined from the evidence in the case. In determining this case upon the evidence, you are to be governed by the preponderance of the testimony. In criminal causes no man can be convicted unless the jury are satisfied beyond a reasonable doubt of his guilt, so tender is the law of the life and personal liberty of every human being. But that is not the rule in civil causes. There the preponderance of evidence controls, and that is the rule which is to govern you in this case. Again, in considering the testimony, the admissions of parties to a suit, where those admissions are adverse to their interest, are entitled to peculiar weight, because of the principle that men are presumed by law not to make admissions against their interest. Therefore they should have in your minds just that weight that this peculiar character gives them. You are to say now from the evidence you have heard whether Paul Gillis owes John Levy any sum of money, and, if so, what. If you find that he owes him any sum of money for a just and subsisting debt under the law as we have stated it, he is entitled to interest on that sum from the time it ought to have been paid.

Verdict for plaintiff for \$116.00.

(1 Pen. 125)

SPAHN v. WILLMAN.

(Superior Court of Delaware. Newcastle.
Dec. 7, 1897.)

MASTER AND SERVANT—WRONGFUL DISCHARGE—
MEASURE OF DAMAGES—SUNDAY CON-
TRACTS—WORK AND LABOR.

1. Where a contract is made for the performance of labor for a specific time, and the

servant is discharged before the end of the time of hiring, he is entitled to recover his wages for the period agreed on in the contract, less such sum as he may have received from defendant and others during the time covered by the contract.

2. An executory contract of hiring made on Sunday is void, and cannot be ratified.

3. If, under a void Sunday contract, defendant received the benefit of the labor of plaintiff, he is bound to pay for it.

Action by Anton Willman against John Spahn. Verdict for plaintiff. New trial denied.

Action of assumpsit, with the common counts and one special count for work and labor and one for special damages. The pleas were non assumpsit and reps. and issues. There was no bill of particulars filed. The special count set forth damages by reason of the nonperformance of a contract on the part of defendant below. Willman alleged that he was hired by Spahn to take charge of his farm in Brandywine hundred, for the period commencing September 14, 1896, and continuing until the following 25th of March, 1897, at the rate of \$10 per month and his board, he to live in the farm house; that he went upon the said farm under the contract, and worked on it, and took care of it for two months, at the end of which time Spahn put one Wiggins in the house to take charge of the place, and the goods of Willman were moved to another part of the house; that he then left the place, considering that that was a sufficient discharge or violation of the contract. His claim was for \$94 for wages, board, and room rent covering the time between his alleged discharge and the expiration of the contract. The appellant alleged that Willman was not the tenant of the farm, but was only hired at \$10 per month and board to work on the farm for an indefinite period; that Wiggins moved into the house after Willman had located there, with the latter's knowledge and consent; and that the contract, if any, was made on Sunday, and was therefore null and void, under the law.

When the plaintiff below had rested, the counsel for the defendant below moved for a nonsuit, on the following grounds: First. Because the servant had sued his master for the act of Wiggins, a third party, and in his testimony proved a tenancy of Wiggins, and could not therefore hold Spahn liable for what Wiggins as tenant did. If the plaintiff proved that Wiggins was Spahn's agent, he was bound to prove that the agent acted within the scope of his authority, in order to bind Spahn; and this he had failed to do. Assuming that the contract was valid, and that Spahn had hired Willman to the 25th day of March, and was bound to pay him, still there was no discharge shown on the part of the appellant, but simply an act of the tenant, Wiggins, who went on the farm under some contract with Spahn. Second. That, by Willman's own testimony, the con-

tract was made on Sunday, and was therefore void.

The court held that there was some evidence on the part of the plaintiff below that he was hired by Spahn, and discharged by Spahn, and that matter, as well as the agency of Wiggins, was a matter for the jury; and, furthermore, that, even though it be admitted that the Sunday contract was void, there were several days' work performed by Willman for which he had not been paid. The nonsuit was refused.

Peter L. Cooper, Jr., for plaintiff. William F. Kurtz, for defendant.

Counsel for the defendant below produced a witness, and offered to prove by him that he had offered Willman work at a certain rate during the time of the continuance of the alleged contract with Spahn, and after he had left the latter's employ. This line of examination was objected to by plaintiff's counsel, who contended that where there is a breach of a contract, as in the present case, the party not responsible for said breach was not obliged to look for work, but could sit down and wait until the end of the period covered by the contract, and then sue for his wages. Defendant's counsel urged that, even where the servant had been wrongfully discharged by the master, the actual damages is the amount which he would have received as wages if he had been permitted to complete his contract, less what he has earned in the meantime, or what he might have earned by due diligence in seeking employment in the same or similar business.

LORE, C. J. You may show what he earned and received during the time for which he claims the defendant should pay him.

SPRUANCE, J. It goes to the measure of damages.

The plaintiff below prayed the court to charge the jury as follows: "First. That if they should believe the special contract was made for the performance of labor as tenant on the farm for the period of time alleged, and the plaintiff was discharged before the end of said period by reason of no default upon his part, he was entitled to recover wages, with any actual damages which he had sustained, and that the true measure of damages was the value of his wages and his board and lodging, which were covered by the special contract, less whatever wages he made working for other people during said period. Second. That if the contract was made on Sunday, and both of the parties thereafter agreed to the terms of the contract, and entered into a part performance thereof, and by their subsequent acts ratified the same, then it was a valid contract. *Williamson v. Brandenberg* (Ind. App.) 32 N. E. 1022; *Russell v. Murdock* (Iowa) 44 N. W. 237; *McKinnis v. Estes* (Iowa) 46 N.

W. 987. Third. That, if the jury should find the contract void, they, nevertheless, could return a verdict in favor of the plaintiff below, under the count for work and labor, for the work actually done."

The defendant below prayed the court as follows: "First. That, if the jury believed the evidence in the case, they must find for the defendant below, as the law arising from the evidence was in his favor. Second. That there was no agency, and no discharge upon the part of the defendant below." The court refused to charge as requested in either of the above prayers, saying that there was evidence on both sides, and it was not for the court to indicate to the jury on which side they thought there was a preponderance of the evidence. "Third. That, if the jury believed that the contract was made on Sunday, no action for a breach of it could be maintained. Fourth. That, if the plaintiff had failed to prove positively his readiness and willingness during the whole time after the alleged wrongful discharge to return to the defendant's employ, he could not recover on the special contract. Fifth. That, if the jury believe from the evidence that the contract was made as an entirety, then the plaintiff could not recover either on the special contract or on the common counts, unless the whole contract was performed; such performance being a condition precedent to his claim to anything. Sixth. That, if the jury believe that there was simply an indefinite hiring, at so much wages per month, then either party could put an end to the contract at any time without notice." The court refused to entertain the above prayer, as it involved the nature of the contract for hiring, which was a matter for the jury to determine. "Seventh. That, if the jury should believe that the plaintiff had a good cause for quitting the service of the defendant, and did not avail himself of it at the time, but continued to work thereafter, he had by his conduct waived his right to recover, and could not afterwards rely upon it."

LORE, C. J. (charging the jury). This is an action of assumpsit brought by Anton Willman against John Spahn, for the recovery of a balance of \$94 for damages, arising from an alleged breach of a contract which he claims was made between John Spahn and himself. Willman claims that on the 13th day of September, 1896, John Spahn made a contract with him to go upon his farm in Brandywine hundred, as he alleges, on the 14th day of September, the next day, and continue until the 25th day of the following March, for the sum of \$10 per month wages and his board and lodging. The plaintiff stands upon two counts in his narr.: First, upon the special count which I have just stated to you; second, upon one of the common counts for work and labor.

Dealing with the special count first: If

you should be satisfied from a preponderance of the evidence in this case that such a contract was made between John Spahn and Anton Willman that Spahn agreed to take and keep him in his employ from the 14th day of September until the 25th day of March, at the rate of \$10 per month in cash and his board and lodging in addition, and that Willman was prevented from the execution of that contract by the wrongful act of John Spahn, the defendant, then, gentlemen, we say to you that, under the law, the plaintiff would be entitled to recover according to the terms of that contract, viz. \$10 per month for his wages and such sum for board and lodging as would be reasonable under the circumstances, less any sum of money that he may have received on account of the contract, and such sum as he may have earned in the time which he would have given to this work if he had continued in the defendant's employ. But, in order to so find, you must be satisfied that such a contract was made, and that the plaintiff was discharged without cause, and that he did not leave himself. Every element that is necessary to constitute that contract, and to constitute a discharge against his will, must be proved to your satisfaction by a preponderance of evidence.

It is claimed, however, that if there was a contract specifically and clearly made, yet that, being made on the Sabbath day, it was not a valid contract, that it cannot be enforced, and that no damages whatever could be recovered for its breach. Upon the question of the contract itself, we have to say to you that any worldly employment in the ordinary transaction of the business of life on the Sabbath day is forbidden by the laws of Delaware. All civilized nations have recognized the propriety and necessity of one day of rest in seven, and the laws of this state have sanctioned that necessity by prohibiting the transaction of ordinary business on that day; and a contract made on the Sabbath day is void if it be executory, as this contract was,—that is, an agreement made to-day to be executed in the future. The law is so well expressed on this subject in 24 Am. & Eng. Enc. Law, 560, that it is impossible for me to express it better: "The doctrine now accepted is that in all contracts entered into on Sunday, as both parties are in *pari delicto*, neither can assert rights under the contract. The policy of the law is that of absolute nonaction. It leaves the parties exactly where they happen to be. The result is that the contract, being executory, is for all practical purposes void. The maxims, 'In *pari delicto potior est conditio defendentis*,' and 'Ex turpi causa non oritur actio,' preclude recovery by either party in an action based upon the contract." Therefore, if you believe this contract was entered into and made on Sunday, it is void, and, furthermore, that it cannot be ratified. On page 570 of this same work, the law upon the sub-

ject of ratification is expressed thus: "By the weight of authority it seems that a contract entered into upon Sunday is incapable of ratification in the strict sense of the term; the authorities supporting this view maintaining that the contract is absolutely void, being declared illegal by statute, and that the parties, by a mere subsequent agreement, cannot legalize what the law has declared illegal. Authorities are not wanting, however, to the effect that, as the contract is only illegal because entered into on Sunday, a ratification upon a secular day purges it of this illegality, and that it then becomes as binding and valid as though entered into, in the first instance, upon a day other than Sunday. There are other cases cited in the support of this latter doctrine,—i. e. that a Sunday contract is capable of ratification,—which upon examination will be found not to support it; the contracts in question being in fact new contracts with regard to the same subject-matter entered into upon a secular day, the same consideration being available."

Therefore, the specific Sunday contract, if you find it to be such, could not be ratified. If there was any valid contract made afterwards, it would be another matter; and it is for you to say whether there was any contract of any kind. If the contract was made on Sunday under our statute, it is void; and, so far as any damages for nonperformance of it are concerned, there could be no action sustained, if you should find that it was made on Sunday. But we have further to say to you that if you should find that the contract was made on Sunday, and was therefore void, yet if John Spahn actually received the benefit of the labor of Anton Willman for a period of time after the 13th day of September, 1896, the law places the duty upon him to pay for it; and, under the count for work and labor, the plaintiff would be entitled to recover whatever money he earned which was not paid while he remained in the employ of the defendant under those circumstances; and, if you should find from the evidence that there was any balance due him for work so done, he would be entitled to recover a verdict at your hands for that amount. We do not think that the doctrine of entirety as applied to contracts is applicable to this case.

In reaching your verdict, you are to be governed by the preponderance of evidence upon all the points to which I have called your attention; and, wherever the preponderance of that evidence is, in that line should your verdict be given. Recapitulating briefly: If there was a specific and valid contract made on any other day than Sunday,—that is, on a secular day,—for a specific period of time, and the plaintiff was prevented from performing that duty during that time by the acts of the defendant, without plaintiff's fault, he is entitled to recover damages for whatever amount he was entitled to under

the contract, less such sum as he may have received from the defendant and others during the time covered. If you should believe that the contract was made on Sunday, it is void, and no action can be had on the contract; and if you should believe that the contract was made on Sunday, and still the plaintiff did work, he is entitled, under the common counts, to recover, for that work that he actually performed, whatever balance is due him.

Verdict for the plaintiff for \$80.

The counsel for the defendant thereupon filed the following reasons for a new trial: (1) That the verdict was against the law; (2) that the verdict was against the evidence; (3) that the verdict was against the weight of the evidence; (4) that the evidence for the plaintiff below (respondent) was sufficient to entitle defendant below (appellant) to a verdict on the special count alleged in the narr., and to bar the claim of plaintiff below (respondent) on said count. A rule was laid upon the plaintiff, returnable Saturday, December 18, 1897, to show cause why the verdict should not be set aside, and the defendant let into a new trial. After hearing argument, the court ordered the rule discharged.

(1 Feb. 1907)

In re DEPUTY.

(Superior Court of Delaware. Newcastle. Nov. 30, 1897.)

MORTGAGES—FORECLOSURE—SALE—DEED—CORRECTION—LACHES.

1. Under Rev. Code 1893, c. 111, § 29, authorizing the court to require the sheriff in office to make a deed to the purchaser at foreclosure sale, where the officer making the sale is out of office, and the purchase money has been paid "without a deed being made pursuant to such sale," the court may order a deed to be executed to remedy a defect in a previous sheriff's deed.

2. A purchaser at a foreclosure sale is entitled to relief under said statute, without regard to the lapse of time since the sale.

Petition of John P. Deputy to have a new deed made by the present sheriff to the party holding under the grantee.

Deputy's petition filed was in part as follows: "The petition of John P. Deputy respectfully represents: That one William Lovell, by virtue of sundry deeds and conveyances, became duly seised in fee simple of and in all that lot or piece of a certain plantation or tract of land situate, lying, and being in the hundred of Christiansa, county and state aforesaid, bounded and described as follows, to wit: [Here follow description of said land and sundry sheriff's sales and conveyances down to Thomas Woodward. The petition then continues as follows:] That the said Thomas Woodward paid, as consideration for the property so sold to him as aforesaid, the sum of twenty-two hundred dollars. That the said sheriff is now dead, and that he did not while alive make a deed pursuant to the aforesaid

sale. That the said Thomas Woodward is now dead, having died about the year A. D. 1864. That the said petitioner, by reason of the defect or omission as aforesaid of the words 'his heirs and assigns' in the said sheriff's deed, believes his title to his part of the above-described land to be defective, and thereupon prays this honorable court for an order authorizing and requiring the present sheriff of Newcastle county, aforesaid, to execute and acknowledge a deed conveying to the petitioner his just proportion of the above-described premises, which proportion is the lot or piece of land hereinafter above described as the property of your petitioner, the said John P. Deputy."

Mr. Churchman made no argument in opposition to granting the petition, inasmuch as the sheriff would be protected by the order of the court.

Mr. Lodge, for the petitioner:

The facts stated in the petition of John P. Deputy show that a mortgage, having been duly executed by the owners of the fee and given to secure a debt, was afterwards duly foreclosed, and the sale confirmed. Every step in the process of foreclosure was duly and legally taken, and every proceeding was regular and ordinary, until we reach the deed by the sheriff to the purchaser. This deed, on its face, conveys but a life estate to the grantee therein.

The first question that presents itself is this: Could the sheriff, on process of foreclosure, sell or convey to the purchaser, under foreclosure proceedings, any estate other or different from the estate for which the property was mortgaged? In my judgment, clearly, he could not. In the foreclosure of a mortgage, under our statutes, the first step is to sue out a writ of scire facias, in order to bring the mortgagor or his legal representatives into court to show cause, if any, why the said mortgaged premises ought not to be taken in execution. Rev. Code 1893, c. 111, § 55. 'After judgment obtained, the plaintiff may then, under a levavit facias, take the mortgaged premises in execution, and sell the same, and convey them by deed to the purchaser. Id. § 58. The purchaser shall hold the said land for such estate or estates as they were sold or delivered for, discharged from all equity of redemption, and all other incumbrances made and suffered by the mortgagor or his legal representatives, and such sale shall not create any further term or estate to the purchaser than the said lands and tenements were mortgaged for. Id. § 59. A fee simple having passed from the grantors in the mortgage to the grantees, the sheriff, being a ministerial officer, can sell only the estate so granted, and he merely is the conduit through which the title passes. He cannot create, increase, or diminish the quantity of the estate that he conveys. The execution of the sheriff's deed is but the exercise of a bare power, disconnected with any estate in the land itself. Murfree, Sheriffs, § 712. The

sheriff, as a ministerial officer, can make no terms except those prescribed by law, and the law is that the sheriff sells, and the purchaser buys, the debtor's title, whatever that may be. *Id.* § 991. Upon confirmation of the sale, the purchaser is entitled to a deed, good and sufficient, for the premises so sold. *Rev. Code 1893, c. 111, § 26.* The grantee in any deed under execution process shall hold the premises therein conveyed, with all their appurtenances, as fully and amply, and for such estate and estates, and under such rents and services, as he or they, for whose debt or duty the same shall be sold, might or could do, at or before the taking thereof in execution. *Id.* § 27.

The point being established that a fee-simple title having been conveyed to secure the debt, and, on foreclosure of the mortgage, only a life estate conveyed by the sheriff, instead of a fee simple, the question that arises is, what remedy, if any, has the purchaser? The remedy is, clearly, that this court may order and direct the present sheriff to make a deed to the petitioner for the land he now holds; for, under the facts as set forth in this petition, the purchaser is entitled to an order of the court directing the present sheriff to make a deed pursuant to the sale originally made. No deed was made by the sheriff who sold the property pursuant to the sale. He made a deed for a life estate when he should have made a deed for a fee simple. Such deed for a life estate was not pursuant to the sale under the foreclosure proceeding. This court may then properly order a deed to be made from the present sheriff to this petitioner. *Id.* § 29. And a sale made by the present sheriff, under order of the court, will convey to the petitioner a fee-simple title. *Id.* § 30.

Edwin R. Cochran, Jr., and George Lodge, for petitioner. Philip Q. Churchman, for the sheriff.

LORE, C. J. In the matter of the petition of John P. Deputy alleging that in 1859 the then sheriff made a deed under a *levari facias*, but that he omitted the words "heirs and assigns," the rule is upon the present sheriff to make a deed in pursuance of the statute. *Rev. Code, p. 837.* The court have fully considered the matter, and we are in entire accord that the prayer of the petitioner ought to be granted. This is a remedial statute, and the application seems to come within the scope of the remedy of the statute. We therefore grant the petition, and the order is made upon the sheriff to make the deed in pursuance of the writ and the sale. Not having made the deed in pursuance thereof, it was, in fact, not in pursuance of the statute and not in pursuance of authority. We think there is ample authority for it, and make the order. This deed gives the party no additional rights. It simply gives him whatever the party was entitled to at the time of the sale.

SPRUANCE, J. We have given to this case very careful consideration; as it presents

several novel features. We know of no case in which such an application has been made after the lapse of so long a time. It is now about 38 years since the defective deed of the sheriff was made. We do not think, however, that this lapse of time warrants the refusal of the order, as there is no statutory limitation of time within which the court may exercise the power given by *Rev. Code, p. 837, § 29.* All of the proceedings under which the land was sold, down to the deed of the sheriff, were regular. The estate mortgaged and the estate sold by the sheriff was a fee simple. The sheriff's deed conveyed a life estate only. This deed was therefore not such as section 26 of the act required him to make, viz. "a good and sufficient deed for the premises so sold." By the provisions of section 27 of the act, the grantee of the sheriff was entitled to hold the premises for such estate as he for whose debt the same were sold held the same, but this deed conveyed a less estate. Section 29 of the act authorizes the court to require the sheriff in office to make a deed where the officer making the sale is out of office and the purchase money is paid. "without a deed being made pursuant to such sale." This case comes within these provisions. A deed was made, but it was not "pursuant to such sale." We make this order the more readily because of the provisions of section 30 of the act, which save all persons interested from any injury in case the order is made improvidently. The sheriff executing the order incurs no risk, as he is merely the instrument of the court. The grantee in the deed made under the order of the court takes only the title which can or ought to be passed, and if he is not the person entitled, or if a greater estate be conveyed than he is entitled to, he is, at most, but the trustee of the person entitled.

(70 Conn. 455)

Appeal of WOODBURY.

(Supreme Court of Errors of Connecticut.
March 24, 1898.)

APPEAL—INSOLVENCY—INTERESTED PARTY.

A trustee in insolvency of an estate cannot appeal from a decree of the probate court, refusing to extend the time for presentation of claims to commissioners of said estate.

Appeal from superior court, Hartford county; Samuel O. Prentice, Judge.

Appeal by Milo K. Woodbury, trustee in insolvency, from an order and decree of the court of probate for the district of Enfield, denying the application for an extension of time within which creditors might present their claims against the insolvent estate. Facts found, and judgment rendered in favor of the testator, and appeal by Margaret Raiche, a creditor of the insolvent estate, for alleged errors in the rulings of the court. Error and cause remanded.

Milo K. Woodbury, the present appellee, as trustee in insolvency of the estate of one Raiche, presented a petition to the court

of probate, in which said estate was then in process of settlement, alleging, in substance, that the time limited by said court for the presentation of claims to the commissioners upon said estate had expired; that, through inadvertence and mistake, a number of creditors, representing over one-third of the total liabilities of said estate, had failed to present their claims within the time limited; that said claims were justly due from said estate; and asking that the time for presentation of claims be extended. The court refused to extend the time, and, from this order and decree of refusal, the trustee took an appeal to the superior court. The motion for said appeal alleged no other interest in Woodbury than as trustee in insolvency of said estate. Margaret Raiche, a creditor of said estate appeared in the superior court, and filed a motion to erase the case from the docket, "upon the grounds that it does not appear upon said appeal that the appellant has any interest in the decree appealed from, and also that the appellant, as trustee of said estate, has no right to appeal from said decree." The court denied the motion, and, upon further hearing, rendered judgment reversing the probate decree appealed from, reopening the hearing before the commissioners, and extending the time for presentation of claims for the period of one month from the date of judgment. From this judgment, Margaret Raiche appealed to this court, and assigns for error the action of the superior court (1) in denying the motion to erase; (2) in overruling two certain specified claims made by her on the trial; (3) in fixing, by its judgment, the limits of the extension of time, instead of leaving this to be done by the probate court.

Charles E. Perkins and John Hamlin, for appellant. George B. Fowler, for appellee.

TORRANCE, J. The first question to be considered is whether the motion to erase should have been granted, and that depends upon the further question whether the trustee, as such, had the right to appeal from the probate decree in question here. It is well settled that, to entitle a party to appeal in a case like this, he must have some pecuniary interest which the decree or order appealed from will in some way injuriously affect. Norton's Appeal, 46 Conn. 527; Dickerson's Appeal, 55 Conn. 223, 10 Atl. 194, and 15 Atl. 99. Furthermore, the record must show that he has such an interest; and if it does not, or shows that he has none, the case will, on a motion to that effect, be erased from the docket. Norton's Appeal, *supra*; Campbell's Appeal, 64 Conn. 277, 29 Atl. 404. The superior court in this case held, correctly enough, that the appellant must have a pecuniary interest in the subject-matter of the appeal. It also held that such interest may be "either in the appellant personally, or in another, with the duty in him, by virtue of his fiduciary relations or repre-

sentative capacity, to protect it." This last, as a general statement of a general rule, is perhaps sufficiently accurate. The trustee in insolvency is unquestionably, for certain purposes and to a limited extent, the representative of both the debtor and the creditors. He takes the property upon a trust—First, to apply so much thereof as may be necessary to the payment of proven debts and attendant expenses; and, secondly, to return whatever surplus may remain to the original owner. He also, like executors, administrators, and receivers, and others who act in a representative capacity, is charged with the performance of certain duties in the interest of all concerned, such as protecting the property against unjust claims and demands, caring for and managing the estate in the interest of all to the extent of their proven rights, and seeing to it that its settlement is not unreasonably delayed nor made unreasonably expensive. Williams v. Wadsworth, 51 Conn. 277; Greene v. Manufacturing Co., 52 Conn. 330; Merwin v. Austin, 58 Conn. 22, 18 Atl. 1029; In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163. Where the law imposes duties of this kind upon one acting in a representative capacity, it clothes him with power to perform them, and must in such cases hold that he has such an interest as entitles him to appeal under our statute relating to probate appeals. Thus, the right of an administrator or an executor to appeal from a probate decree is recognized in Lockwood v. Reynolds, 16 Conn. 303; Davis' Appeal, 39 Conn. 395, and Hewitt's Appeal, 58 Conn. 223, 20 Atl. 453; and it is common practice for executors, administrators, and trustees in insolvency to appeal from the doings of commissioners in allowing claims against the estate.

The superior court in this case held, in effect, that it was the duty of the trustee to see that no creditor, "by accident or mischance, or otherwise, inadvertently or unwittingly," lost his "status" as creditor, and, if this did happen, to do what he could to restore him to that status. If this were so, it would perhaps follow that the trustee in this case would have the right to appeal; but we are of opinion that the trustee is not charged with any such duty. To establish the amount and validity of his claim, and to maintain his right to present it to the commissioners, are plainly duties that belong solely to the creditor. His right to perform them is neither suspended nor in any way abridged by the proceedings in insolvency. In performing them he is acting simply and solely in his own interest, and in a measure adversely to the rest of the creditors. He is simply, in all that he does in this respect, trying to establish his standing as a creditor, and it should be done by him and at his expense, and not by other creditors or the debtor, and at their expense, through their representative, the trustee. If the creditor fails to establish his right to present his claim to the commissioners, or fails to establish the validity of his claim or the amount of his debt as he claims it, he alone is the party aggrieved, and not the debtor, nor

the other creditors, nor the trustee, who for some purposes represents them.

The appellee here argues that if the trustee, under certain circumstances, as shown by some of the cases hereinbefore cited, can appeal from an order extending the time for presenting claims, there is no reason why he should not have the right to appeal from an order refusing to extend the time. The two cases are not analogous. In the former he is acting in the interest of the debtor and of all the creditors whose standing as such is undisputed, in a case where it is his duty to act in favor of a speedy and economical settlement; while in the latter he is charged with no duty to act, and is acting, if he acts at all, in favor of delay, at the expense of the estate, in the interest of one or more parties whose standing as creditors is still in dispute. A trustee may appeal from the allowance of a claim by the commissioners, but it does not follow from this that he can appeal from their action in disallowing a claim. In the one case he may be aggrieved in his representative capacity, because it may be his duty, at the expense of the estate, to oppose the claim; in the other, he is not charged with the duty of establishing the claim at the expense of the estate, and is not aggrieved in his representative capacity by its disallowance. So far as we are aware, the practice in cases of this kind has always been in accordance with the views herein expressed. The creditor himself has ample power to protect his rights, and we see no good reason why he should call upon the trustee to do this for him at the expense of others. For these reasons, we are of opinion that the court below erred in denying the motion to erase. In this view of the case, it is unnecessary to consider or decide the other errors assigned. There is error in the judgment complained of, and it is set aside, and the cause remanded to the superior court, to be proceeded with according to law. The other judges concurred.

(70 Conn. 467)

HEALY et al. v. HEALY et al.

(Supreme Court of Errors of Connecticut,
March 24, 1898.)

WILLS—CONSTRUCTION—PERPETUITIES.

1. A bequest of the use of one-twentieth of the remainder of the estate to A., at his decease to go to his legal heirs, is not obnoxious to the common-law rule against perpetuities.

2. A bequest to testator's brother of the use of one-twentieth of the remainder of his estate, and on his decease to his legal heirs, goes to the brother's legal heirs, on his death before testator.

3. A bequest of the use of one-twentieth of the estate to M., and at his decease to his legal heirs, vests in M. for life, and on his death in his legal heirs then living.

4. A bequest to the heirs of P., deceased, share and share alike, goes to the heirs of P. living at the testator's death.

5. A bequest to the legal heirs of J.'s children goes to the legal heirs of J. living at testator's death.

6. A bequest to the legal heirs of M., share and share alike, goes to the heirs of M. living at testator's death.

7. Where the legal heirs entitled to take under a will consist of children and representatives of deceased children, they take per stirpes.

Case reserved from superior court, Hartford county; Milton A. Shumway, Judge.

Suit by Jane Coe Healy and others, as executors of the will of Samuel L. Healy, against Bertrand N. Healy and others, for the construction of a will. Facts found, and questions reserved to the supreme court for advice.

Samuel L. Healy made his will on October 26, 1890, and died January 1, 1897. The will which has been duly proved is as follows: "(1) I give and bequeath to the children of Nephew Bertrand (daughters), Edna and Sada, five hundred dollars each. (2) I give and bequeath to the daughters of my deceased sister Betsey Allen (name forgotten), or her legal heirs, one thousand dollars. (3) I give and bequeath to my beloved wife, Jane Coe Healy, ten-twentieths of the remainder of my estate, real and personal. (4) I give and bequeath to my brother John Healy the use of one-twentieth of remainder of my estate, real and personal, at his decease to go to his legal heirs. (5) I give and bequeath to my brother Wm. C. Healy the use of one-twentieth of remainder of my estate, real and personal, at his decease to go to my brother John Healy's children, share and share alike. (6) I give and bequeath to my brother M. L. Healy the use of one-twentieth of remainder of my estate, real and personal, at his decease to go to his legal heirs. (7) I give and bequeath to my sister Julia Warner one-twentieth of the remainder of my estate, real and personal, at her decease to go to her legal heirs. (8) I give and bequeath to the legal heirs of my brother Paul Healy (deceased) two-twentieths of remainder of my estate, real and personal, share and share alike. * * * (10) I give and bequeath to the legal heirs of my brother M. L. Healy two-twentieths of remainder of my estate, real and personal, share and share alike. (11) I ordain and appoint my wife, Jane Coe Healy, executrix, and my nephew Anson W. Healy, executor, of this, my last will and testament, without bonds." Upon settlement of the estate, there remain to be distributed some \$50,000, personal estate, with \$—, real estate. The complaint asks the superior court to construe the will in the following particulars: "First, whether, under section 4, the children of John Healy are entitled to one-twentieth of remainder after his decease, or whether said remainder is intestate estate; second, whether, under section 6, M. L. Healy's children are entitled to receive, or said estate subject to said life use is intestate; third, whether, under section 7, Julia Warner takes absolutely, or her children take subject to her life estate, or if these will remain intestate estate; fourth, whether, under section 8, Paul Healy's children, or their representatives, take, or said

remainder is intestate estate; fifth, whether, under section 9, the children or grand children of John take, or the estate given in the ninth clause is intestate; sixth, whether, under the tenth clause, the children of M. L. Healy take, or the two-twentieths purporting to be given by said clause is intestate estate." The court finds that the testator was 80 years old at the date of the will, which was written by one Rollin Humphrey, who was at the time about 70 years old; and neither the testator nor Humphrey was a lawyer; that defendant Bertrand N. Healy is one of the heirs at law of the testator, being the only son of Nathaniel Healy, deceased, brother of the testator; that Thomas G. Healy, a brother of the testator, not named as legatee, was a man of large wealth, and has died since the commencement of this action, leaving children surviving him; that the defendants Charles J. and Mabel Healy, Lucretia Barnes, and Mary and Clara Beckwith are the children, and all the children, of the testator's brother John Healy, who died after the execution of the will, and before the testator; that Herbert S. Beckwith is a son of Mary Beckwith, and Raymond and Louis Beckwith are sons of said Clara Beckwith (being all minors), and are all the grandchildren of John Healy, deceased; that said John Healy lived a near neighbor to the intestate, who was intimate with John and his family, and knew well his children and his grandchildren; that the defendants Emma, Edith, Wallace, and Willis Healy, Effa Curtis, Ellen Welton, Hattie Hyde, Winifred Hayes, Egbert N. Elmer, and Henry Healy were the children, and all the children, of the testator's brother M. L. Healy, and they were all well known to the testator at the time he executed said will; that the testator's brothers William C. and M. L. Healy and his sister Julia Warner still survive; that Paul Healy died before the testator, and three of his children and three representatives of children survive.

Charles H. Briscoe, for executors, Julia Warner, and heirs of Paul Healy. Donald T. Warner and Howard F. Landon, for Emma Healy and others. Hungerford, Hyde, Joslyn & Gilman, for Bertrand N. Healy. Samuel A. Herman, for William C. & Marcus L. Healy. Sperry, McLean & Brainard, for Charles J. Healy and others. John H. White and Sylvester Barbour, for Mary Beckwith and others.

HAMERSLEY, J. Some of the respondents, in their answer, allege certain facts as tending to show the circumstances under which the will was made; and the executors demurred to these allegations. Apparently, this demurrer, although sustained by the court, is waived by the reservation; but, if not, we deem it unnecessary to pass upon the action of the court in sustaining the demurrer, as the facts averred, in view of the

plain meaning of the will, could only serve to support a construction sufficiently clear without them.

The clauses we are asked to construe are valid. A bequest of "the use of one-twentieth of the remainder of my estate to A. B., at his decease to go to his legal heirs," is certainly not obnoxious to the common-law rule against perpetuities. It is immaterial whether it would be valid under our late statute of perpetuities. This will was executed since the repeal of that statute. The gift in the fourth clause vests in the legal heirs of John Healy at the death of the testator. The prior death of the life tenant does not invalidate the gift over. The seventh clause, which gives "to my sister Julia Warner one-twentieth of the remainder of my estate, real and personal, at her decease to go to her legal heirs," gives to Julia a life estate only. The language used, in connection with that of other parts of the will and its whole scheme, clearly expresses this intent. The ninth clause gives the legacy named to the legal heirs of John. When a clause can be read so as to be consistent with a testator's evident intent, and avoid uncertainty, it should be so read. By supplying the omission of a comma, any doubt as to the meaning of this clause disappears. It then reads: "I give and bequeath to the legal heirs of my brother, John's children, two-twentieths," etc. In the tenth clause the legacy is given "to the legal heirs of my brother M. L. Healy." It appears from the will itself that the testator knew that his brother was living, for he gives him a legacy in the sixth clause. It is therefore certain that he here uses the words "legal heirs" in the popular sense, as indicating the persons entitled to inherit if his brother were dead. Where the legal heirs include children and the representatives of children, as appears to be the case with those names in the eighth clause, of course they take per stirpes. *Jackson v. Alsop*, 67 Conn. 249, 254, 34 Atl. 1106.

The superior court is advised: (1) The legal heirs of John Healy living at the death of the testator are entitled to the bequest under the fourth section. (2) The bequest under section 6 is to M. L. Healy for life, and upon his death to those who in that event are his legal heirs then living. (3) The bequest under section 7 goes to Julia Warner for life, and upon her death to her legal heirs then living. (4) The bequest under section 8 goes to the legal heirs of Paul Healy living at the testator's death. (5) The bequest under section 9 goes to the legal heirs of John Healy living at testator's death. (6) The bequest under section 10 goes to those persons living at the testator's death who would be the legal heirs of M. L. Healy if he were dead. (7) All the above gifts are valid, and, where the legal heirs consist of children and representatives of deceased children, they take per stirpes. The other judges concurred.

(70 Conn. 450)

HILLS et al. v. TOWN OF FARMINGTON.

(Supreme Court of Errors of Connecticut.

March 24, 1898.)

ACTION ON CONTRACT—EVIDENCE.

1. In an action on a builder's contract, testimony as to the employment by the defendant of architects to prepare the plans, incorporated into the written contract made by him with plaintiff, is immaterial.

2. A builder's contract, in writing, provided that the builder should erect a building for a certain sum, according to certain specifications and architects' plans. *Held*, that it could not be shown by parol evidence that the sum agreed to be paid included an extra price, for which he made a certain verbal warranty that the architects' plans would be satisfactory, which was not a part of the written contract.

Appeal from superior court, Hartford county; Samuel O. Prentice, Judge.

Action by John R. Hills and others, executors, against the town of Farmington, to recover for work and labor and materials furnished, brought to the superior court in Hartford county, and tried to the court (Prentice, J.); facts found, and judgment rendered for the plaintiffs; and appeal by the defendant for alleged errors in the rulings of the court. No error.

This action was brought to recover the balance due for the construction of a town hall for the defendant. The hall was partially built by John C. Mead, and was completed by his representatives, the present plaintiffs. It was built in pursuance of a written contract between Mead and the defendant, containing the usual provisions of a building contract. The contract price was \$10,500. The complaint contained two counts, —one for balance due on the contract price and some extra work, and one for balance due on account stated. Judgment was rendered on the former count. The answer alleges that Mead had not fulfilled his written contract, and that the building was not finished to the satisfaction of Sturgis & Keister, the architects, as required by the contract, and contains a counterclaim alleging that Mead had agreed with the defendant's building committee that, if they would award him the contract to build in accordance with the plans and specifications of said architects at the contract price of \$10,500, he would warrant to said committee a properly constructed building, and that the committee had agreed to pay this extra price, being \$2,000 more than the cost of construction, in consideration of the warranty. The plaintiffs replied to this counterclaim by a general denial. The court found that the building was constructed in strict conformity with the plans and specifications; that by reason of defects in its roof construction it is an improper and unfit building; that said defects were due to the faulty structural requirements contained in said plans and specifications, and to the construction of said building in accordance with said plans and specifications, and to no

other cause. Upon the trial the defendant offered evidence to prove the agreement alleged in its counterclaim, which was rejected. The rulings are stated in paragraphs 43 and 44 of the findings as follows: "(43) Upon the trial the defendant asked Gay, a witness in its behalf, whether the committee had authorized said architects to prepare any other plan for said building than said original plan with stone lower story. To this question the plaintiffs objected, upon the ground that it was immaterial whether such authority had been given by the committee, after such other plan had been made by the architects and embodied in the contract as the plan to be built upon. The objection was sustained, and the question excluded. (44) Counsel for the defendant next asked said witness if the committee had ever employed said architects at all in the matter of the erection of said building. Plaintiffs' counsel objected. Defendant's counsel then said: 'I offer to show that these plans were prepared by Sturgis & Keister upon the request of a private individual, and handed over to this committee, and that this committee never employed these architects, and never paid them, and that this committee took these plans to Mr. Mead, and submitted them to him, and that Mr. Mead, in order to induce this contract, after examining the plans, made such recommendation as he saw fit with regard to changes, one of which was this change from stone to wood,—perhaps the only one,—and that then, in order to induce this contract for the building, and to induce the committee to pay him \$10,500 therefor, which was \$2,000 more than others would build the building for, Mr. Mead warranted to them that the building put up upon the plans would be all right and satisfactory, and that these plans were all right with that change. I offer to show that agreement as the inducement for this contract,—not as disputing this contract, but as a separate and distinct agreement, entirely apart from this contract, and as the contract which induced this one.' After a somewhat extended discussion between counsel and the court as to the relevancy of these matters, during which it was conceded by counsel that all these matters took place before the execution of the contract, and rested wholly in parol, said question and testimony were upon objection excluded." The appeal assigns error in excluding this testimony, and that the facts found do not support the judgment.

Noble E. Pierce, for appellant. Henry O. Robinson and John T. Robinson, for appellees.

HAMERSLEY, J. Testimony as to the employment by the defendant of the architects to prepare the plans, which were adopted by the defendant and incorporated into the written contract made by it with the plaintiffs' intestate, was properly excluded as immaterial.

al, unless it might come in as a part of the testimony supporting the verbal agreement alleged in the counterclaim. We think all this testimony was inadmissible. The parties had deliberately reduced their agreement to writing. There is no question of any fraud or mistake. The defendant simply claims to add to the written contract a verbal warranty. It is well settled that a parol warranty cannot be superadded to a written contract of sale. *Dean v. Mason*, 4 Conn. 428, 431; *Galpin v. Atwater*, 29 Conn. 93, 100. In this respect the contract before us is not distinguishable from a contract of sale. The verbal agreement sought to be proved is an integral element of the negotiations which the parties, upon reaching a final conclusion, put into writing, and is not a separate agreement on a matter consistent with the terms of the written agreement. On the contrary, it contradicts that agreement. The verbal agreement, as alleged in the counterclaim and outlined in the offer of testimony, is that Mead agreed to build with a warranty for \$10,500, being \$2,000 more than the sum for which other contractors were ready to construct the building, and that the defendant "agreed to pay said extra price therefor, because of his [Mead's] said representations, and in consideration of his said warranty and guaranty." The written agreement details at length the obligations assumed by Mead for the consideration of \$10,500, including the promise to finish said building agreeably to the drawings and specifications made by the architects (and annexed to the contract) to the satisfaction and under the direction of the architects, to be testified by a writing under their hands, the guaranty of skillful work and the use of proper materials, but not the warranty of the architects' plans. It also details the covenants on the part of the defendant to pay to Mead, at the time and in manner specified, the sum of \$10,500, "in consideration of the covenants and agreements being strictly performed and kept by the party of the second part [Mead] as specified." This contract appears to contain the obligations assumed by Mead, in consideration of the receipt of \$10,500, and the rights acquired by the defendant, in consideration of the payment of that sum. It is presumed to contain the whole of that contract, and cannot be contradicted by parol testimony. *Averill v. Sawyer*, 62 Conn. 560, 568, 23 Atl. 73; *Caulfield v. Hermann*, 64 Conn. 325, 327, 30 Atl. 52. The probability of a town building committee paying \$2,000 to a contractor to warrant the architects' plans for an \$8,500 building is a matter pertinent to the weight of the evidence but not to its admissibility.

The plaintiffs, by their denial of the counterclaim, put in issue the facts therein alleged; and there may be a question whether they were not estopped from objecting to testimony in support of that issue. This question would not control the ultimate rights of the parties; it was not raised in the court

below, and is not specifically assigned in the appeal; and therefore we do not consider it.

Counsel for the defendant claimed in argument that the special facts found by the court support a conclusion that Mead had, by his conduct before and after the execution of the contract, made himself liable for the incapacity of the architects. There is no occasion to detail these facts; indeed, the counsel urges them mainly in connection with the excluded evidence. It is quite clear that the committee had much too great confidence in Mr. Mead, but it is equally clear that he did not assume the liability claimed. The judgment of the court is the legal conclusion from the facts found. There is no error in the judgment of the superior court. The other judges concurred.

(70 Conn. 435)

TOWN OF NEW MILFORD v. LITCHFIELD COUNTY.

(Supreme Court of Errors of Connecticut.
March 24, 1893.)

COUNTIES—HIGHWAYS—LIABILITIES—FAILURE TO LEVY TAX.

Under Laws 1895, p. 655, §§ 6, 7, requiring a county to pay a town for one-third the cost of constructing a road in the town and county out of any money in the treasury not otherwise appropriated, the town is entitled to a judgment against the county, though it neglected to make a levy therefor, and had no money not otherwise appropriated.

Case reserved from court of common pleas, Litchfield county; Gideon H. Welch, Judge.

Action by the town of New Milford against Litchfield county to recover one-third of the sum expended by the plaintiff town for the permanent improvement of one of its highways, brought to the court of common pleas in Litchfield county, and reserved by that court upon a finding of facts for the consideration and advice of this court. Judgment advised for plaintiff.

Frederic M. Williams and Donald T. Warner, for plaintiff. Albert P. Bradstreet and Samuel A. Herman, for defendant.

ANDREWS, C. J. The legislature at its session in 1895 (Laws 1895, p. 655) passed "An act to provide for the improvement of public roads." It provided that any town in the state might, in each year, by pursuing the steps therein named, improve a portion of its public roads, and in section 6 said: "When any road shall be constructed under this act one third of the cost of said construction shall be paid for out of the state treasury, * * * one third of the cost shall be paid for out of the treasury of the county within which such road is constructed, and one third of the cost shall be paid for out of the treasury of the town within which such road is constructed." Section 7 of the said act provides that the selectmen of the town within which any such road has been constructed shall file a certificate of the cost

thereof with the highway commissioners of the state, and that the said highway commissioners shall file a certificate with the county commissioners of each county between December 15th and 31st of each year, and that "said certificate shall state the amount of money due the various towns by the county for the construction and permanent improvement of roads under this act, and the county commissioners shall cause to be paid to the town said money as set forth in said certificate out of any money in the treasury not otherwise appropriated." The complaint in this action, in its first count, alleges that the town of New Milford, in the year 1895, did permanently improve a portion of its public roads, pursuant to the provisions of said act, and expended in such improvement the sum of \$2,940, and that all the steps were taken and things done which entitled it to receive, and made it the duty of the county of Litchfield to pay to it, one-third of the said amount, to wit, the sum of \$980. In the second count the complaint alleges a like liability upon the county to pay plaintiff for money expended in the year 1896 the sum of \$950. It is also alleged that there was in the county treasury money not otherwise appropriated sufficient to pay the said sum, and that a demand had been made on the county commissioners for the payment thereof, and that the same had never been paid. Damages are demanded for the amount of both said sums. The answer avers that at the time the said demand was made on the county commissioners there was not, nor was there at any time prior to the bringing of this suit, in the treasury of the county or due to the county the said sums of money, nor any part thereof, not otherwise appropriated. The trial court found all the allegations of the complaint to be true, except the allegation that there was sufficient money in the treasury, and upon this part of the case found the averment of the answer to be true, and thereupon reserved the cause for the advice of this court.

The reservation is in these words: "That if, as matter of law, the defendant county is liable in the premises to the plaintiff town, then the plaintiff shall recover of the defendant the said sum of \$980 under the first count, and the further sum of \$950 under the second count, and costs." The statute above referred to, in its sixth section, imposes in terms on the defendant county, under the state of facts found by the trial court to be true, an absolute liability to pay to the plaintiff town the sums of money demanded; and in its seventh section it empowers the county commissioners to discharge that liability. It is admitted—at least, it is not denied—that the conditions are found by the court to exist which create the liability. The sole reason suggested in the record, or urged by the eminent counsel for the defendant in their brief, why this liability to pay the amounts does not attach, and why judgment

should not be rendered for the plaintiff against the county, is that there is no money in the county treasury. And they argue that, because there is no money in the treasury, there is, therefore, no liability to pay. The want of money in the treasury can only be owing to the omission of the proper authorities to levy and collect the necessary tax. So the argument comes to this: Because the county authorities have neglected to provide money sufficient to meet its liabilities, there is no liability; in other words, that the defendant may gain an advantage by its own omission of duty. An argument of that kind is so obviously untenable that, when it is stated, it is already refuted. The neglect or omission to provide money can never absolve a public corporation from the duty to discharge a statutory liability. *Whitney v. City of New Haven*, 58 Conn. 450, 461, 20 Atl. 886; *State v. Staub*, 61 Conn. 553, 562, 23 Atl. 924; *Williams v. City of New Haven*, 68 Conn. 263, 272, 36 Atl. 61. The court of common pleas for Litchfield county is advised to render judgment for the plaintiff town. The other judges concurred.

(70 Conn. 444)

LOOMIS v. PERKINS et al.

(Supreme Court of Errors of Connecticut.
March 24, 1898.)

NEW TRIAL—APPEAL—PRESUMPTIONS—VERDICT.

1. A trial court has the power to set aside verdicts and grant new trials.

2. Where the trial court sets aside a verdict and grants a new trial, all reasonable presumptions will be indulged in favor of the correctness of its action.

3. A joint verdict against two defendants on a contract for services is erroneous if the evidence is insufficient to support the verdict as to one.

Appeal from court of common pleas, Hartford county; William S. Case, Judge.

Action by Hiram G. Loomis against Charles E. Perkins and Arthur Perkins to recover for services as a surveyor and civil engineer. The jury returned a verdict for plaintiff, which the court, on motion of defendants, set aside, from which action of the court plaintiff appealed. No error.

Roger Welles, for appellant. Joseph L. Barbour, for appellees.

ANDREWS, C. J. The plaintiff brought his action against the defendants in the court of common pleas in the county of Hartford. In his complaint and in his bill of particulars he alleged that they were jointly indebted to him in the amount therein stated, and claimed a joint judgment therefor. The defendants denied their liability. The case was tried to a jury, and the plaintiff had a verdict. The judge refused to accept the verdict, and returned the jury to a second and a third consideration, and then accepted it as it is recorded. The court then, upon motion, set aside the

verdict, and ordered a new trial. From that order, this appeal is taken. The appeal says: "Said court erred in granting said motion of the defendants to set aside the verdict as against the evidence in said cause, because (1) said court had no power or authority to set aside said verdict on said motion; (2) the record in said cause fails to disclose anything from which improper conduct on the part of the jury in fairly weighing the conflicting testimony, and honestly and reasonably reaching their conclusion, can be legally inferred; (3) said verdict is not against the evidence in said cause; (4) said verdict is warranted by the evidence in said cause; (5) the said verdict is warranted by the evidence, by the terms of the charge of the said court to the jury in said cause; (6) said verdict having been rendered three times by the jury after they had been returned to a second and a third consideration thereof by the court, the power of the court to set aside said verdict no longer existed."

The duty and the power of a trial judge in respect to any verdict which may be rendered by a jury in his court has been recently gone over quite fully by this court in *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226. We have no occasion to change what was then said. Since that decision trial judges have repeatedly set aside verdicts for causes which have seemed to them to require such action, and, as far as we are aware, the exercise of that power has been generally acquiesced in. Ordinarily, the power to set aside a verdict is called into action only by the motion of the party against whom the verdict was rendered; and there was, as the law formerly stood, an apparent inequality between the parties on the result of the motion. If the motion was denied, the party making it could at once take the case by a motion in the nature of an appeal to the court of errors; but, if the motion was granted, the party in whose favor the verdict was rendered, and against whom the motion was granted, could not appeal. This inequality was corrected by the legislature by the provisions of section 29, c. 194, Acts 1897. That section enacts that, "whenever any court shall set aside a verdict of a jury in a civil cause upon the ground that it is against the evidence in said cause, the party in whose favor said verdict was rendered may appeal from the decision setting aside said verdict to the supreme court of errors in the manner herein provided for appeals, and the court shall report all the evidence in said cause to the supreme court of errors and make it a part of the record, and if said supreme court of errors shall be of opinion that such decision setting aside the verdict was erroneous it shall reverse such decision and order judgment to be entered upon said verdict in the lower court in favor of the party for whom said verdict was rendered." Motions to this court have been made many times asking that a verdict of a

jury be set aside on the ground that it is against the evidence. The rule which this court follows in such cases is pretty thoroughly established by repeated decisions. It is to the effect that the verdict will not be disturbed if there is any reasonable ground appearing in the evidence on which the jury might have acted. In the present case the rule to be followed is somewhat different from the one just cited. The statute which governs this case says that in a case where a verdict is set aside by a trial judge, and an appeal is taken, the judge shall report all the evidence to the supreme court of errors, "and, if said supreme court of errors shall be of opinion that such decision setting aside the verdict was erroneous," it shall re-establish the verdict, etc. In such appeal, this court is dealing, not directly with the verdict of the jury, but with the action of the judge. The question, strictly, is not, was the verdict against the evidence? but, did the judge err? It is possibly true that, in determining the latter question, we may be required to pass upon the former one. In doing so, however, we must give all reasonable presumptions in favor of the correctness of the judge's action. In *Chatfield v. Bunnell*, 69 Conn. 511, 37 Atl. 1074, the plaintiff had recovered a verdict in the superior court, which the defendant moved that court to set aside, on the ground that it was against the evidence. The superior court denied this motion. The defendant then filed a similar motion to obtain the same relief in the supreme court of errors. This court was of opinion that the verdict should not be set aside for the reason stated, and, in passing on that matter, said: "Great weight is due to the action of the trial court in denying the original motion filed immediately upon the conclusion of the trial when the whole case was fresh in its recollection." The action of a trial judge is no less entitled to weight when he sets aside a verdict than when he refuses to set it aside; and for the same reasons. He has seen the witnesses, heard their testimony, observed their demeanor on the witness stand, their manner and bearing, their intelligence, character, and means of knowledge; and if, while all this is fresh in his mind, he sets aside a verdict, great weight would naturally be given to his action. In the case just above cited, when the trial judge had refused to set aside the verdict of a jury, we said: "It is only in a clear case that in such circumstances we should feel justified in coming to a different result." So, in this case, when the trial judge has set aside the verdict of a jury, we think great weight is due to his action, and that we should not be justified in coming to a different result except there were reasonably strong grounds requiring us to do so. "When a new trial is granted, this court [i. e. the court of errors] will interfere only when the trial court misapplies or mistakes some principle of

law, or manifestly abuses a discretion." *McCreary v. Hart*, 39 Kan. 218, 17 Pac. 839; *Hicks v. Stone*, 13 Minn. 437 (Gil. 898). "The rule adopted by this court [the court of errors], that the verdict of a jury will not be disturbed on the ground of insufficiency of evidence unless it appears without substantial conflict that there is no evidence to sustain the verdict, has no application to the court below. The judge of that court has the same opportunity to see the witnesses, to judge of their credibility, and of the degree of weight which ought to be given to their evidence, as the jury has, and is often better qualified to determine these questions than the jury itself. It has therefore been held by this court in a long line of decisions that, where the evidence is conflicting, this court will not interfere with the exercise of the discretion of the court below in granting a new trial unless there has been abuse. *White v. Merrill*, 82 Cal. 17, 22 Pac. 1129; *Smith v. Bank*, 99 Mass. 605; *Reeve v. Dennett*, 137 Mass. 818; *Buller*, N. P. 327; *Bright v. Eynon*, 1 Burrows, 397. *Bartholomew v. Clark*, 1 Conn. 472, was a case which had been tried to a jury in the superior court of Litchfield county, with a verdict for the plaintiff. The court returned the jury to a second and a third consideration, and, as they adhered to their first verdict, then accepted it. The defendant filed a motion in arrest of judgment, which was overruled. The defendant then moved for a new trial, because the verdict was against the evidence. This motion, with the questions of law arising thereon, the superior court reserved for the consideration and advice of the supreme court of errors. The question was argued in the supreme court with great ability,—Nathaniel Smith and Roger Minot Sherman for the defendant, and David Daggett and Asa Bacon for the plaintiff. The supreme court advised that the verdict be set aside, and a new trial granted. Chief Justice Swift gave the opinion of the court, and in the course of it said: "I think a discreet and prudent exercise of this power [i. e. that of setting aside verdicts by a trial court] can be attended with no inconvenience or danger; that it is necessary to adopt it to complete the fabric of jurisprudence, and to give to courts all the powers essential to a due execution of the law. It should be exercised only in clear cases, which will rarely occur. It will leave to juries an important and valuable power in the trial of civil causes; and, when it is understood that an erroneous verdict can be corrected, the public confidence in the trial by jury will be increased, instead of impaired." *Bacon v. Parker*, 12 Conn. 217.

The plaintiff did certain work in surveying and making a map of premises situate at Tarriffville, in the town of Simsbury. This suit was brought to recover for the service thus rendered. The plaintiff had a verdict

against both the defendants, which the trial judge set aside. The plaintiff now appeals, on the ground that this action of the trial judge was erroneous. If the evidence in the case was such that it did not support the verdict against both defendants,—that is to say, if it was such that it was insufficient to support the verdict as against either one of the defendants,—then it was rightly set aside, and there is no error. The evidence showed that the premises surveyed, and of which the map was made, by the plaintiff, did not belong to the defendants or either of them, and that the plaintiff knew this. He knew also that the surveying and map-making were done, not for the benefit of the defendants or either of them, but for the benefit of some party for whom the defendants or one of them was counsel. The verdict, therefore, was not supported, unless there was evidence showing a joint contract by the defendants to pay the plaintiff for his services. The plaintiff says the defendants requested him to do this work, and although he supposed they were acting as the agents for some one else, as they did not tell him the name of their principal, he had the right to regard them as his debtors. He says that one who contracts as an agent, if he does not disclose his principal, is himself liable, and cites *Story*, Ag. 267. We have no occasion to question this authority. He says also that, by usage, an attorney is liable for the fees of sheriffs, clerks of courts, etc., in cases in which the attorneys are engaged, and that, by parity of reasoning, this rule extends to the fees of surveyors and civil engineers employed by attorneys. As a general proposition, we think this latter claim could not be supported. But, even if it were correct, there would be no error in this case, unless the evidence showed that the defendants had both of them, as such agents or attorneys, contracted with the plaintiff to render the services for which he has sued. We do not find such evidence. The defendants were not partners. True, they were father and son; they were both lawyers; and they occupied the same office. These are circumstances which might give color or weight to evidence, but, standing by themselves, they prove nothing. All the evidence in the case is to the effect that they were not partners. A construction of the evidence as favorable to the claim of the plaintiff as any that seems possible might show that one part of the work done by him was done on the request of Mr. Charles E. Perkins, and all the rest on the request of Mr. Arthur Perkins. But the part ordered by Mr. Charles Perkins had been paid for before the suit was begun; so that as to him there was not even a scintilla of evidence to sustain the verdict. The joint verdict was therefore wrong, and properly set aside. There is no error. The other judges concurred.

(70 Conn. 473)

In re PREMIER CYCLE MFG. CO.

Appeal of CASSIDY.

(Supreme Court of Errors of Connecticut.
March 24, 1898.)RECEIVERS — REMOVAL IN VACATION — NOTICE —
FINDINGS — APPEAL — QUESTIONS REVIEW-
ABLE — TRIAL — WAIVER OF OBJECTIONS.

1. Where the exigencies of the case require the removal of a receiver of a manufacturing corporation in vacation, under Pub. Acts 1895, p. 496, c. 108, a notice of a petition for such removal, giving him five days to prepare his defense, is sufficient.

2. Where a receiver alone appeals from the order removing him, he cannot complain that plaintiff and defendant in the action were not notified, where they had actual notice, and made no objection for want of formal notice.

3. On application for removal of receiver, notice to all the creditors who had proved their claims was unnecessary.

4. Where a petition seeks the removal of a receiver because of his disobedience of an order, and his answer explains his management, and alleges that he had done nothing to prejudice the interests involved, which the petitioner denies, the judge can remove him for unfitness.

5. Where a receiver is removed, he cannot, either as receiver or individually, appeal on the claim that the grounds for his removal were insufficient.

6. Findings of fact, made on the hearing for the removal of a receiver, in which it is stated that the court considered that the receiver was personally liable for certain debts contracted, are not within the issues nor an adjudication as to his personal liability.

7. Where, on a hearing for the removal of a receiver, the court, at his request, makes findings which it was not required to make, the receiver cannot complain, on appeal, that the court erroneously found that he mismanaged the property, and by such findings damaged his business reputation.

8. An order refusing to allow a receiver to sell certain property of the estate at auction to pay debts contracted by him in the management of the business will not be reviewed.

9. On an application for the removal of a receiver, it is proper to consider the fact, not known to the court when the receiver was appointed, that while an officer of the insolvent corporation he had joined with others in the execution of a mortgage on the property, thereby giving a preference to a creditor holding notes upon which the receiver was liable as indorser.

10. An objection by a receiver, on the hearing of an application for his removal, that the attorney who appears against him had been counsel for him personally, and brought, as such, the action in which a receivership was sought, comes too late, when not interposed until the second term, and after the attorney had been heard at length on a preliminary motion.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Application for the removal of John C. Cassidy, the receiver of the Premier Cycle Manufacturing Company, made in vacation. Facts found, and judgment rendered in favor of the applicant; and appeal by the receiver for alleged errors in the rulings of the court. No error.

The order was as follows: "Ordered, that John C. Cassidy be forthwith removed from the position of receiver of the Premier Cycle Manufacturing Company, and that he forthwith turn over to his successor in office ev-

everything which has come into his possession and hands as such receiver, including therein all books and papers and correspondence appertaining to such receivership. Ordered, that John C. Cassidy, heretofore receiver of the Premier Cycle Manufacturing Company, forthwith prepare and file with the clerk of this court a full and complete account of all his doings as receiver of said company, and that John C. Cassidy shall not be discharged of all or any of the liabilities resulting from or obligations incurred by said receivership until said account shall be accepted and approved by the superior court or a judge thereof, and until the further order of said court or a judge thereof. George W. Wheeler, A Judge of the Superior Court."

The appointment of the appellant had been made in 1896, upon a petition by himself and others, being more than one-third of the stockholders of the company, alleging that it was financially embarrassed, but had assets more than sufficient, if properly administered, to pay all creditors, and asking that a receiver might be appointed to take charge of, manage, and dispose of the same, and wind up its affairs, for the benefit of all parties interested. The order of appointment, made September 18, 1896, authorized him to continue the manufacturing business of the company, subject to the orders of the court, employing necessary help and purchasing necessary materials. On July 6, 1897, a further order was passed that the business be closed up by September 23, 1897, and "that the receiver pay forthwith all bills for rent and labor now due, and all bills of such character to become due, immediately upon their becoming due." On July 24th, the rent for the preceding month of the factory formerly occupied by the company, and since his appointment by the receiver, being unpaid, the landlord and sundry workmen employed by the receiver, whose wages were unpaid, brought a petition for his removal for violation of the order of July 6th and for negligence in the performance of his duties as receiver. The sums due these petitioners were due and payable prior to July 6th. The receiver made answer that he had not, as such, on July 6th or ever since, any funds wherewith to execute the order, and had conducted the business throughout, from the time of his appointment, without negligence and with all due care and skill. The order of removal was passed after a full hearing as to all these matters. A memorandum of the grounds of the decision was filed on August 3d, stating that the receiver's conduct, including, among other things, his failure to pay the rent and wages due on July 6th, and his continuing the business since that date at a loss, had made him personally responsible for the loss to the estate. At his request a special finding of the facts upon which the order was passed was subsequently filed. This stated, among other things, that he had no money in his hands, as receiver, on July

6, 1897, and had received none since, and that he had continued the business since that date at a steady and increasing loss, in reliance on the success of a scheme of financial reorganization, which he had been working upon ever since his appointment, but which had, before July 6th, taken such shape as to be practically hopeless. At the hearing he claimed that the only question to be considered was whether he had been chargeable with negligence or disobedience to the order of July 6th in not paying the demands of those petitioning for his removal, which claim was overruled. He also claimed that the want of a longer time for the preparation of the case, and the want of notice to stockholders and creditors, prevented the receiver from adequately trying it, and in particular prevented him from presenting, as he believed he could, the formal protest of all the stockholders and of nearly all the creditors against his removal. The only notice ordered and formally given of the petition for removal was notice to him as receiver, but the finding stated that all the parties of record in the action were either present at the hearing or had actual notice thereof, except three creditors; that these three, the judge believed, had actual notice; and that none had objected for want of notice. The order of notice was made July 24th and served on July 25th; the hearing being set for July 30th. The receiver also claimed at the hearing, among other things, that no ruling could be made in this proceeding that he was personally liable for any obligations incurred by him as receiver; that want of funds was a sufficient reason for not paying the petitioners' demands; that one who contracts with a receiver officially cannot hold him personally liable; and that, though acting as the representative of the court, if his removal and discharge is sought, he is nevertheless entitled to reasonable notice of such application; and, if it is sought on the ground of his misconduct, he should not only have reasonable notice, but the grounds upon which his removal is sought should be specified and served upon him with such notice, in order that he may have an opportunity to be heard.

The finding contained this statement: "I considered, and so stated in the memorandum filed, that the facts proven established that the receiver ought to make good to the estate the loss incurred by his misconduct; but the only ruling made or order passed was that of removal. Thereafter I passed orders designed to protect the estate. Except as above stated, I did not overrule the claims made by the receiver's counsel, but regarded them in the main as inapplicable to the case before me."

John S. Seymour, for appellant. George P. Carroll, for appellees.

BALDWIN, J. A receiver, under our statutes, is subject to removal at any time, at the

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pleasure of the court. Gen. St. § 1319. When it is not actually in session, any judge of the superior court, should the exigencies of the case require it, may also remove him, after due notice given. Pub. Acts 1895, p. 499, c. 108. Due notice was given to the appellant of a petition for his removal. Five days was ample time for the preparation of his defense.

It is assigned for error that the order did not direct notice to be given to the parties to the action. This should have been directed, as to both the plaintiffs and the defendant; but as they in fact received actual notice before the hearing, interposed no objection for want of formal service, and have taken no appeal, the defect constitutes no ground of reversal upon this proceeding. Notice to every one of the creditors who had proved their claims was not necessary.

The order of notice was for a hearing upon a certain petition, a copy of which was to be served on the receiver. That petition contained no specific averments of negligence or misconduct other than those as to his failure to pay the bills which he had been directed to pay by the order of July 6th. Without asking for any more particular specification of what it was intended to put in evidence, the receiver answered at length, denying the charge of negligence, setting forth the whole history of his management from the beginning, and affirming that he had "never intentionally done any act or omitted any act, the doing or omission of which was prejudicial to the interests committed to his charge; and that, in particular, he has never disregarded any of the orders of the court; that he has done no important act without seeking the authority of the court in advance." To this answer the reply was a general denial. Upon this state of the pleadings, the trial judge was not confined to the question whether the order of July 6th had been disobeyed. The answer had opened the door to the investigation of all the doings of the receiver, from his original appointment to the time of the hearing, and of whatever might bear on his fitness to discharge the duties of his position. The appellant, therefore, had due notice of the petition for his removal, and of the grounds upon which an order of removal might be based. Jurisdiction to make the order having been thus acquired, the receiver could not, either as such or individually, appeal from it, on the claim that these grounds were insufficient. He had no vested right of office. If any interests were prejudiced by his removal, they were those of the parties to the action or intervening creditors, none of whom have taken any exception to it. In re Colvin, 3 Md. Ch. 302. In many matters, a receiver may be treated as representing those entitled to the fruits of the action in which he is appointed, even for purposes of appeal from final orders in interlocutory proceedings. Guarantee Trust & Safe-Deposit Co. v. Philadelphia, R. & N. E. R. Co., 69 Conn. 709, 38 Atl. 792. But it would be an inadmissible extension of this doctrine to allow him to except, in his representative ca-

capacity and at the expense of the estate, to his removal from office. *Conner v. Belden*, 8 Daly, 257.

The judgment appealed from does not set forth any finding of facts for its support. None was required. The superior court, of which the appellant was an officer, could remove him at pleasure. The authority of a judge of that court, acting when it is not in session, is the judicial authority of that court exercised at chambers. *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576, 602, 37 Atl. 1080, and 38 Atl. 708. On this proceeding, the judge was bound to give due notice before taking action to the parties interested; but when this was done, and they were fairly heard, he had the same power of removal at pleasure, in view of whatever this hearing might bring out, as if he had been holding court at a regular term. A special finding of facts was afterwards made at the appellant's request, on which to predicate his appeal. In this paper, and in a memorandum of decision to which it refers, there are expressions which he claims may be construed to import that he is personally liable for the bills referred to in the order of July 6th, and for any loss to the estate in consequence of his continuing the business of the company beyond the time when, in the opinion of the trial judge, it should have been closed up. No adjudication on these points was made by the order of removal, and none of a final nature could be made in the finding of facts. A receiver may appeal in his individual capacity from an order which determines that after his discharge from office he will be personally liable for obligations which he contracted officially. *Hinckley v. Railroad Co.*, 94 U. S. 467; *Payne v. Dejean*, 32 La. Ann. 880. But, even if the finding could be held to bear the meaning apprehended, the appellant could not be aggrieved by it. The evidential facts and conclusions which it set forth spent their force when the ultimate conclusion was reached by the trier that there ought to be a change of receivers; and they could not be used against him upon any subsequent accounting, or in any other suit. *Kashman v. Parsons*, 70 Conn. —, 39 Atl. 179.

These considerations are also decisive against the right of appeal claimed on the ground that the finding of facts states that he mismanaged the property in various particulars, and in this way may be damaging to his business reputation. He sought the finding, and, if he has caused to be spread upon the record conclusions of the trier which would not otherwise have been disclosed, cannot make it a reason for reversing a judgment of which they formed no part, which they were not needed to support, and upon which no estoppel in respect to them could ever be predicated.

During the hearing on the petition for his removal, the receiver applied to the trial judge for an order authorizing him to sell certain property of the estate at auction, and from

the proceeds to pay the debts which he had contracted in the management of the business. This was denied, and the denial is made a ground of appeal. It was a matter resting in the sound discretion of the trial judge, and nothing is shown to indicate that that discretion was abused.

There are numerous exceptions to the finding, and to the refusal to incorporate in it certain matters which the appellant claims to have been established by incontrovertible evidence, upon which we have no occasion to pass. For reasons already stated, the finding, even were it corrected as he desires, could not support the appeal. One of these exceptions may merit a word further. It is that taken to the statement that, shortly before his appointment, and when the company was hopelessly insolvent, the appellant, being the vice president and manager, combined with his associates in office, they being with him liable as indorsers on company notes held by a bank, to give a preferential mortgage to secure the bank, and thus themselves, and that this transaction was not stated to the judge from whom his appointment proceeded. This, it is claimed, was irrelevant to the question whether the appellant had properly administered the affairs of the receivership. It was plainly irrelevant to the question whether he was a fit person to hold a position from which, if at all, that mortgage could be or could have been attacked in the interest of the general creditors, and therefore came within the proper field of inquiry. It is only under exceptional circumstances that the principal manager of an insolvent company can with propriety be made its receiver, and such an appointment should never be made where his personal interests may conflict with those of creditors. It may be added that, were there ground for any exception, it should have been taken, not to the statement of these facts in the finding, but (as by other reasons of appeal it virtually was) to the admission of the evidence in respect to them at the hearing, or to their use as a basis for the judgment of removal.

During the argument before this court, objection was made on behalf of the appellant to the appearance against him here of counsel for his successor in the receivership who had been his own counsel while he was receiver. Had the objection come earlier, it would have been sustained; but it was not interposed until the second term, and after the same counsel had been heard at length upon a preliminary motion. The relation of counsel and client is one of so great confidence that, though the client may occupy such an official position as to represent the court, his successor in office, without his free consent, ought not to be permitted, even with the sanction of the court (which, we are informed, was here given), to avail himself of the services of the same counsel in any inquiry as to whether the previous ad-

ministration was properly conducted. Particularly is this true where, as in this case, the counsel for the first receiver had before been counsel for him personally, and brought, as such, the action in which a receivership was sought.

There is no error. The other judges concurred.

(70 Conn. 439)

NICHOLS v. PECK.

SAME v. HUTCHINSON (two cases).
(Supreme Court of Errors of Connecticut.
March 24, 1898.)

EASEMENTS—RIGHT OF WAY—REPAIRS—VARIATION OF COURSE—EXTINGUISHMENT—ESTOPPEL—LICENSE—REVOCATION—EVIDENCE—FINDINGS—REVIEW—ACTIONS.

1. The owner of land which is subject to a right of way is not bound to keep it in repair in the absence of an agreement.

2. Chaining up and locking the gate is sufficient to revoke any license implied from previous conduct to use a way over a farm.

3. The course of a right of way acquired by prescription is no more subject to variation by parol agreement or by acts and conduct than it created by deed.

4. A way joining a highway through a gate cannot be regarded as substantially identical with a way joining it with another gate 70 feet away.

5. A conclusion as to an ultimate fact, drawn from specified evidential facts which are legally incompetent to support it, is a proper subject of review on error.

6. A prescriptive right of way is not extinguished by nonuser by reason of the owner using another way under a mere implied license.

7. No estoppel from asserting a right of way can be formed on defendant's negative reply to plaintiff's question, before he purchased the land, as to whether defendant had "a regular right of way" over the land, where plaintiff did not rely on the answer, and defendant was not informed of the purpose of the inquiry, and had no intention to mislead.

8. In trespass for using a way across plaintiff's land without license, all parties claiming from the same source, against whom plaintiff seeks to establish his title, should be joined.

Appeal from court of common pleas, Hartford county; David S. Calhoun, Judge.

Action by Harry Nichols against Cornelius Peck in the nature of trespass *quare clausum fregit*, brought originally before a justice of the peace, and thence by the plaintiff's appeal to the court of common pleas. The case was tried to the court, and facts were found and judgment was rendered for defendant, and plaintiff appeals. Error, and new trial granted.

Two other cases by the same plaintiff against Frank Hutchinson and Levi Hutchinson, respectively, identical in their facts, were tried and argued with the foregoing case.

In each of the cases a justification was pleaded, under a right of way by prescription from the highway to a lot owned by the defendant Peck, known as the "Jones Lot." The reply denied any such right, but admitted that the defendant owned the Jones lot, and that there was no mode of access to it except over the plaintiff's land. It also set

up, as an estoppel in pais, that the plaintiff bought his land in 1892 on Peck's assurance that he did not claim any right of way over it to the Jones lot.

Cornelius J. Danaher, for appellant. Charles H. Sawyer, for appellees.

BALDWIN, J. In 1885 the defendant Peck had acquired, by an adverse user of 40 years, a prescriptive right to a way about 43 rods in length, over a farm now owned by the plaintiff, between a certain lot called the "Jones Lot," which was wholly inclosed by that farm, and the highway. The way was not defined by any worn track, but had always been traveled in substantially the same course, running for half its length through a narrow swale, and connecting with the highway through a certain barway. In that year the grade of the highway was so lowered by the town authorities as to make the barway useless, whereupon the then owner of the farm closed it, and opened a new entrance from the highway, by a barway set over 70 feet south of that formerly existing. For seven years thereafter the defendant used the new barway as belonging to his way, adversely, under a claim of right. Then the plaintiff bought the farm, and for four years more Peck continued to use the new barway, with his express approval. At the end of that period the plaintiff chained up and padlocked the gate of the barway, and now sues Peck for breaking the chain in order to get access to his lot.

The owner of land which is subject to a right of way is not bound, unless by virtue of some agreement, to keep the way in repair, or to be at any expense to maintain it in a passable condition. The owner of the right of way may repair it, and do whatever is reasonably necessary to make it suitable and convenient for his use. When the old barway became useless, it was therefore the right of Peck to lower it, and alter the level of his way to correspond with the new grade of the highway. *Smith v. City of Rome*, 19 Ga. 89. He preferred to make use of another barway set up by the owner of the farm, over 70 feet distant from the prescriptive bounds of his way, and to this no objection was made for 11 years. When the plaintiff chained up the gate, however, and locked it, he sufficiently manifested his intention that this use should be continued no longer, and effectually revoked any license implied from his previous conduct. "*Res ipsa loquitur*." *Foot v. Northampton Co.*, 23 Conn. 214, 223. A way by prescription, which runs in a defined course to a fixed point, is no more subject to variation by parol agreements, or by acts and conduct, than if it had been created and so described by deed. The finding of the trial court that the way used from 1885 to 1896 was substantially the same as that used from 1845 to 1885 is an inference from facts which do not warrant it. The law can-

not regard a way joining a highway through a certain gate as substantially identical with a way joining it through another gate 70 feet distant. A conclusion as to an ultimate fact, drawn from certain specified evidential facts which are legally incompetent to support it, is a proper subject of review on proceedings in error. *Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 563, 575, 38 Atl. 310; *Nolan v. Railroad Co.*, 70 Conn. 159, 39 Atl. 115. The right of way which existed in 1885 exists still. The disuse of part of the way which followed the change of the grade of the highway arose from circumstances which exclude any inference of an intent to abandon that part, unless by exchanging it for another way, the right to which should be equally secure. Such an abandonment might have been presumed, if Watrous, who owned the farm in 1885, had then given Peck a deed of the right to use the new barway, or had Peck's user been continued adversely, and under a claim of right, for 15 years. But so long as it had no other justification than an implied license, or acquiescence for a shorter term, it could not avail to extinguish his original prescriptive right. Different rules might apply where one location of a highway is abandoned for another substituted for it, by acts of dedication, since a dedication once accepted is irrevocable. *Jones, Easem.* § 429. The defendant's remedy, when he found the gate chained against him, was to have recourse to the way he owned, and cut it down, at the point where the old barway was, to the grade of the highway. *Reignolds v. Edwards, Willes*, 282. The entrance from the old barway became impassable by the lawful act of the public authorities. The owner of the farm only closed it after it had thus become useless. Had he, without such cause, wrongfully closed it, in order to prevent its lawful use by Peck, and then allowed him for 11 years to pass through the new barway, it may be that in such case the latter could not have been excluded from that mode of access to his way, unless reasonable notice of the intended revocation of license had been previously given. *Hamilton v. White*, 5 N. Y. 9. But, as things stood, the defendants were guilty of a technical trespass in forcing their way through.

With respect to the claim of estoppel, it is found by the trial court that, before the plaintiff bought from Watrous, he asked Peck if he had "a regular right of way" over the farm, to which he replied in the negative; but that he was not informed of the purpose of the inquiry, and answered it with no intention of misleading, nor did it appear that the plaintiff relied upon the statement in completing his purchase. The question, being, not whether he had a right of way, but whether he had a regular one, was calculated to direct his attention only to the particular description of his right, and he might well have thought that a way acquired

by adverse user was not entitled to the name of "regular." No estoppel can be founded on his reply. *Danforth v. Adams*, 29 Conn. 107. We perceive no reason for bringing separate suits against the Hutchinsons. If the plaintiff desired to establish his title against them also, he should have joined them as co-defendants with Peck. The three suits will be treated as consolidated in this court, and costs taxed in favor of the appellant in one only. There is error in the judgment appealed from. The other judges concurred.

(87 Md. 321)

GRAHAM, Comptroller, et al. v. COMMISSIONERS OF HARFORD COUNTY.

(Court of Appeals of Maryland. March 3, 1898.)

CIRCUIT COURTS—JURISDICTION—INJUNCTION—TAXATION—APPEAL—REVIEW.

1. Under Code, art. 16, § 71, providing that a circuit judge may grant injunctions to take effect in any part of his circuit, a circuit court whose jurisdiction is confined to one county has no power to enjoin state officers not within its jurisdiction from reviewing the determination of another state officer, made beyond the court's jurisdiction, respecting the division of an assessment of a railroad's rolling stock not situated within its jurisdiction.

2. Acts 1896, c. 140, § 199, permitting an appeal from the decision of the state tax commissioner on the apportionment of the total valuation of the rolling stock of a railroad "as in other cases in this article," authorizes an appeal to the comptroller and the treasurer, as provided by Code Pub. Gen. Laws, art. 81, §§ 132, 144, and such officers will not be enjoined from entertaining it.

3. Where the sufficiency of a bill of complaint is brought before an appellate court, they take notice of a public statute, and, if there is a conflict between averments of the bill and the statutes, it is the court's duty to interpret the former so as to make them read as if set out in connection with the provisions of the statute.

Appeal from circuit court, Harford county.

Bill for injunction by the county commissioners of Harford county against Robert P. Graham, comptroller of the treasury of Maryland, and another. From an order granting the injunction, defendants appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

Atty. Gen. Clabaugh, for appellants. Geo. Y. Maynadler, for appellees.

McSHERRY, C. J. By section 178, c. 120, and by section 199, c. 140, of the Acts of Assembly of 1896, provision is made for the valuation and assessment of the rolling stock of railway companies for purposes of county and municipal taxation. In substance, these sections enact that the situs of such rolling stock shall be taken and considered to be in the assessment district in which the company's principal place of business is located, that the total valuation shall be made there, and that, for the purposes of county and municipal taxation, this total valuation shall be divided among the counties and the city

of Baltimore in proportion to the mileage of roadbed located in the counties and in the city, respectively. The several boards of control and review are required to make reports to the state tax commissioner as to the total valuations of such rolling stock so made up in the assessment district of its situs, and it is thereupon declared to be the duty of the state tax commissioner to apportion and divide the total valuation among the counties and the city of Baltimore according to the mileage of roadbed therein, respectively. Section 199 then goes on to declare: "And after having made such apportionment or division thereof, he [the state tax commissioner] shall certify to the respective boards of county commissioners of the several counties and to the appeal tax court of Baltimore city the amount of the proportion of the valuation of such rolling stock to which each such county or the said city is so entitled; and such proportions respectively shall thereafter be valued and assessed for purposes of taxation in such respective counties or said city, subject to the right of appeal as in other cases in this article." Under these and other provisions of the general assessment act of 1896 the rolling stock owned by the Philadelphia, Wilmington & Baltimore Railroad Company was valued and assessed in assessment district No. 3 of Baltimore city. The total valuation thereof was returned by the board of control and review to the state tax commissioner, who at once made an apportionment and division of the whole between the city and the several counties of this state through which the railroad is located, and ascertained, upon the mileage basis, that the amount chargeable to the company for county taxation in Harford county was \$550,202.81, which amount he forthwith certified to the county commissioners of that county. From this apportionment the railroad company took an appeal to the comptroller of the state treasury and to the treasurer of Maryland. Pending that appeal, which, from aught that appears to the contrary, is still undisposed of, the county commissioners of Harford county filed, in the circuit court for Harford county, the bill of complaint to be found in the record now before us. This bill, after making allusion to the assessment, apportionment, and appeal just adverted to, alleges that the comptroller and treasurer are proceeding to hear and determine questions relative to the amount so apportioned to Harford county, and that they are about to interfere with said apportionment, and to largely reduce the amount thereof, under pretense of reviewing the same as a board of appeal, which action, it is charged, is without any legal authority or warrant of law. The bill then prays for an injunction to restrain the comptroller and the treasurer from interfering in any manner with, and from disturbing by any action whatever on their part, the apportionment of \$550,202.81

so made by the state tax commissioner. Upon this bill an ex parte order was passed, directing the injunction to issue as prayed, and accordingly three writs went out,—one to Baltimore city, one to Anne Arundel county, and one to Wicomico county. The writ issued to Baltimore city was served on both the comptroller and the treasurer, that to Wicomico was served on the comptroller, and that to Anne Arundel was returned indorsed "Non sunt." The defendants appeared solely for the purpose of contesting the jurisdiction of the court, and filed a demurrer to the bill. They then immediately appealed to this court from the order granting the injunction.

It is nowhere averred in the bill that either of the defendants is a resident of Harford county, and, apart from all other questions in the case, it is insisted that, in the absence of an appropriate allegation showing that the defendants were, or that one of them was, within the court's jurisdiction, or that the subject-matter of the proceeding was, the court below possessed no power to order the injunction to be issued. Not only does the bill fail to aver that the defendants were within the limits of the court's jurisdiction, but the docket entries affirmatively show that they were not; for no writ was directed to them in Harford county, but three were sent to other circuits in the state. It cannot be pretended that the circuit court for Harford county has authority to restrain by injunction the fiscal officers of the state, who do not reside or are not found within that county, from doing some act, beyond the limits of the county, respecting property not actually situated in the county, without conceding to every other circuit court in the state a like and an equal power. And if each circuit court possesses, under these conditions, the power to issue an injunction to operate beyond the territory over which its jurisdiction extends, and against persons not amenable to its ordinary process, and to inhibit the doing of an act not attempted or intended to be done within the county over which the court's jurisdiction does reach, and when the act prohibited has no relation to property actually or constructively within the county, then that power is not to be found either in the constitution or the statutes of the state. In the very nature of things, no such jurisdiction can be maintained. To uphold it in this instance would, as just suggested, be to admit its existence in every other court of equity in Maryland; and the result certainly might be that the state's officers would be proceeded against, not where they reside, or even where they transact the public business, but wherever a plaintiff who sought to subject their official functions to the control of a court of equity might happen to live. This would lead to endless confusion, if it did not practically cripple the efficiency of the officers themselves; and, besides, it would ma-

terially amplify the authority conferred by statute upon the courts. "Each of the circuit judges may grant injunctions, or pass orders or decrees in equity, * * * to take effect in any part of his circuit," is the language of section 71, article 16, of the Code. The thing which the injunction restrains the defendants from doing is a review by them of an apportionment made by the state tax commissioner. That apportionment was an apportionment of the assessed value of rolling stock having no actual or constructive situs in Harford county; its situs being fixed by the statute at the place where the company owning it has its principal office in Maryland, and that, as the bill, read in the light of the enactment, shows, was in Baltimore city.

The circuit court for Harford county undertook by an injunction to restrain state officers not within its jurisdiction from reviewing the determination of another state officer, made beyond the court's jurisdiction, respecting the division of an assessment of rolling stock not situated within its jurisdiction; and the power to do this was rested, in the argument, upon the assumption that the comptroller and the treasurer are state's officers, whose official acts are co-extensive with the boundaries of the state. The jurisdiction of the court is thus made to depend, not upon the residence of the defendants, nor upon the location of the subject-matter of the controversy, but solely upon an independent, accidental circumstance that the parties who are proceeded against in a special capacity have, when acting in a different capacity, as state officers, authority that is effective throughout the state. But the question before us is not as to whether the comptroller's or the treasurer's acts, done as comptroller or as treasurer, are co-extensive with the limits of the state. The question is as to how far the jurisdiction of the circuit court reaches, and that jurisdiction in no manner depends upon the amplitude of some state official's ordinary authority. The executive authority of the governor stretches over the whole state, but it will hardly be seriously contended that every circuit court in the commonwealth—even those in the counties most remote from the seat of government—has, as a consequence, jurisdiction to issue a mandamus or an injunction against him in his official capacity. The fallacy of the contention lies in the assumption that the territory within which the circuit court may exercise jurisdiction is defined by and coincident with the territory within which the official acts of the comptroller and the treasurer, as comptroller and treasurer, are effective; whereas, the court's jurisdiction is a subject wholly and essentially independent of considerations of that character. The two things—the scope of the comptroller's and the treasurer's authority, and the extent of the court's jurisdiction—are intrinsically dissimilar. Neither is de-

pendent on or related to the other, nor does one furnish a measure of power to which the other can, in any respect, be compared.

But there is another, and a broader, reason why the injunction ought not to have been issued. It will be remembered that that portion of section 199 which in the beginning of this opinion was transcribed expressly provides that the action of the state tax commissioner in making the apportionments of the total valuations of rolling stock shall be "subject to the right of appeal as in other cases in this article." The phrase, "this article," means article 81 of the Code of Public General Laws; and article 81 relates to revenue and taxes. There is an appeal provided from the state tax commissioner to the comptroller and treasurer, under sections 132 and 144 of article 81. It is true section 144 relates to the assessment of shares of stock in banks and other corporations, but it distinctly and in terms gives an appeal, as just stated to the tribunal, just named. There is no appeal allowed from the state tax commissioner, in any instance, to any tribunal other than to the comptroller and treasurer. Consequently, when section 199, c. 140, of the Acts of 1896, permitted an appeal from the state tax commissioner on the apportionment of the total valuation of rolling stock, and permitted that appeal to be taken "as in other cases in this article," it authorized an appeal to the same tribunal to which other appeals were given from him by antecedent sections of article 81; and that tribunal is the one composed of the comptroller and the treasurer, as there is no other to which an appeal from the state tax commissioner will lie. As, then, an appeal is explicitly given by the act of 1896 from the state tax commissioner's apportionment, and as, by necessary and irresistible implication, it is to be heard by the comptroller and treasurer, not in virtue of their general powers, but solely because they have been specially selected to hear it, the appeal taken by the railroad company was a lawful act; and as the only purpose to be subserved by such an appeal would be to procure a review of the determination reached by the state tax commissioner, it is obvious that the tribunal to which the appeal is authorized to be carried has jurisdiction to entertain it, and, if to entertain it, then to revise, and either to affirm or to readjust the apportionment from which the appeal was taken. The right to appeal would be utterly idle and meaningless if the tribunal to which the appeal is transmitted were without authority to review the apportionment complained of; and it is, therefore, perfectly manifest that the comptroller and treasurer have, under the statute, jurisdiction to rejudge the adjustment made by the tax commissioner. We are not called on, and it would not be proper, to express a definite opinion as to the extent of the power of the comptroller and treasurer on such an appeal. It is only nec-

essary to determine that an appeal is provided for. Being provided for, it was lawful to enter it; and, it being lawful to enter and prosecute the appeal, the court below had no power to restrain the comptroller and treasurer from entertaining it.

In dealing with the bill of complaint, whose sufficiency is brought before us by the appeal, we are not precluded by its averments from looking to the public statute law of the state; and, if that law advises us, as it does, that some of the allegations or averments are not simply as they are therein stated, it is our duty to interpret them so as to make them read as if set out in connection with the provisions of the statute. *State v. Jarrett*, 17 Md. 325. And, this being so, we are at once apprised that the acts of the comptroller and treasurer in undertaking to review the apportionment are not without warrant of law or legal authority. It results, from the views we have expressed, that the injunction should not have been granted, and that the order directing it to issue must be reversed, and the bill must be dismissed. Order reversed, with costs above and below, and bill dismissed.

(87 Md. 173)

CONSTABLE et al. v. CAMP et al.

(Court of Appeals of Maryland. Feb. 10, 1898.)

ADMINISTRATOR — ACCOUNTING — LIMITATIONS — LACHES—PARTIES.

1. So long as money belonging to decedent's estate, and collected by his administratrix, remains in her hands undistributed, the statute does not run against proceedings against her therefor by his heirs.

2. Laches will bar suit to enforce a claim against testatrix, the claimants, though knowing all the facts, having waited years till after her death and that of her attorney, who knew the facts, and till after distribution of her personalty to legatees, though having had notice to present any claim they had.

3. Testator's personalty being the primary fund for payment of his debts, and being sufficient, suit to enforce claims brought after distribution should be against the legatees, instead of the devisees.

Appeal from circuit court, Kent county.

Bill by Emory Camp and others against Alice A. Constable and others. Decree for complainants. Defendants appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, and BOYD, JJ.

Rich. D. Rynson and Albert Constable, for appellants. Hope H. Barroll and Jas. A. Pearce, for appellees.

McSHERRY, C. J. In May, 1896, the appellees filed in the circuit court for Kent county a bill of complaint against the appellants. The appellees are the next of kin of one James Hurtt, who died, intestate, in the year 1876; and the appellants are devisees of the real estate, and also some of the legatees of part of the personal estate of Amanda M. Hurtt, who was the widow of James Hurtt, and who herself died in 1894. The bulk of the personal estate

which Amanda M. Hurtt possessed at the time of her death was bequeathed in the form of pecuniary legacies to other persons than the parties to this suit. The bequest to Mrs. Constable consisted of personal property appraised at \$2,067; while the bequests to her daughters Blanch and Harriet were specific,—a diamond ring and breastpin and a piano respectively. The testatrix's real estate was devised to Mrs. Constable for life, and then in remainder to her children; and she and her children are the appellants against whom the decree appealed from was passed. Upon the death of James Hurtt, administration of his personal estate was duly committed by the orphans' court of Kent county to his widow, Amanda M. Hurtt. She gave bond, and in August, 1878, stated and settled a first and final account, making a distribution of the small balance remaining in her hands as administratrix, after the payment of debts and expenses. After the death of Amanda M. Hurtt, in 1894, her will was admitted to probate, and letters testamentary were granted to the executors therein named; and in September, 1895, these executors stated and settled their final account, showing an overpayment to the estate. This overpayment was refunded to them by one of the devisees. The pecuniary and specific legacies bequeathed by her aggregated \$7,528.70. The overpayment was \$2,178.29, and there remained \$5,350.41 actually received by the legatees, of which sum \$5,061.70 were paid to legatees who are not parties to this proceeding. It is alleged in the bill that after the final settlement and distribution had been made of James Hurtt's estate by Amanda M. Hurtt, administratrix, large sums of money were received by her, which rightfully belonged to the estate of her deceased husband, and which ought to have been distributed by her to his next of kin; and it is insisted that her estate in the hands of the appellants is accountable to the appellees (her husband's next of kin) for these sums thus collected by her. And so, in effect, the prayer of the bill is that the devisees and some of the legatees of Amanda M. Hurtt may account to the next of kin of James Hurtt for all the money which she as his administratrix collected and failed to make distribution of, and that a distribution thereof may now be directed under the authority of the circuit court for Kent county, sitting as a court of equity. The defendants, who are the appellants, answered the bill, denying the material averments, and relying, in addition, on laches and limitations as further defenses against the demand made upon them. Evidence was adduced on both sides, and the court below, after a hearing, signed a decree, in July, 1897, holding the appellants, as devisees and legatees of Amanda M. Hurtt, liable to account to the appellees, as next of kin of James Hurtt, for the sums of money specified in the decree. From that decree this appeal was taken.

The sums of money for which the appellants are held accountable are two: First, the sum of \$1,800 alleged to have been collected by

Amanda M. Hurtt, as administratrix of her husband's estate, on September 24, 1879, from James W. Hurtt; and, secondly, the sum of \$3,000 alleged to have been collected by her in the same capacity, on September 2, 1880, from the same James W. Hurtt. It is claimed that both of these sums were due to the estate of James Hurtt by James W. Hurtt, on judgments originally recovered,—the one in April, 1874, in the name of the state of Maryland, to the use of Charles Woodland, against James W. Hurtt, William Welch, and James Willis, for \$1,618.09, and subsequently entered to the use of James Hurtt; and the other in October, 1875, in the name of the state, to the use of A. E. Woodland, against James W. Hurtt and James Willis, for \$1,945.33, and subsequently entered to the use of James Hurtt, for \$1,885.12. That James W. Hurtt paid to Amanda M. Hurtt, on September 24, 1879, the sum of \$1,800, and on September 2, 1880, the further sum of \$3,000, is clearly and conclusively established by the evidence; but whether these payments were made in settlement of the two judgments just alluded to, and whether those judgments both belonged to the estate of James Hurtt, are matters by no means free from dispute. The testimony of the debtor himself is to the effect that these judgments were satisfied and discharged by those payments, but there are other circumstances in the record which raise considerable doubt as to the accuracy of his statement. That James W. Hurtt was heavily indebted to Amanda M. Hurtt—that he owed her individually about \$10,000 on judgments—is specifically admitted by him in his testimony. Now, the aggregate of the two payments exceeds by several hundred dollars the gross amount due on the two judgments at the time the payments were made, and yet the receipts taken by James W. Hurtt both recite that the money was merely a part payment on the judgments of Mrs. A. M. Hurtt. Both receipts describe the judgments upon which these payments were to be partial satisfaction to be judgments of Mrs. Hurtt, though both of these judgments stood on the records entered to the use of James Hurtt. Besides all this, there is evidence in the record tending to show, and, in our opinion, actually showing, that the judgment of October, 1875, was improvidently entered to the use of James Hurtt, and that it should have been entered to the use of Amanda M. Hurtt, as her money, and not his, was paid to A. E. Woodland, the owner of the judgment, as a consideration for its assignment.

However the truth may be as to the applicability of these payments to the satisfaction of these particular judgments, we do not intend to rest the decision of this case upon that mere issue of fact, or, indeed, to discuss that feature of the contest at all. We have adverted to an outline of these conflicting circumstances merely because they will become important, or at least incidentally relevant, in considering the questions of law that are the controlling questions in the

case. We regard it, however, as sufficiently established that the judgment of October 18, 1875, in reality belonged to Amanda M. Hurtt, though improvidently entered to the use of her husband. If the money collected by Amanda M. Hurtt from James W. Hurtt was collected upon the two Woodland judgments, and if, when collected, it belonged, not to her, but constituted assets of her deceased husband's estate, would the appellants be liable in this proceeding to account therefor to the next of kin of James Hurtt, the intestate? If a liability ever did exist on the part of Mrs. Amanda M. Hurtt during her life, it was a liability that, under the circumstances, obviously is not barred by the statute of limitations. Assuming that the money received by her belonged to her husband's estate, and that she collected it in her representative capacity after the settlement of her account as administratrix, then, so long as it remained in her hands undistributed, it remains impressed with a trust in favor of the next of kin of her husband. Her holding of it under these conditions was a holding in trust for them, for ultimate distribution among them; and, while the trust continued, the statute of limitations did not begin to run. If the money belonged to her husband's estate, and if she collected it as his administratrix, the act of collecting it was not a devastavit; it was a rightful act, done in the strict performance of her duty. Her possession of the fund thus rightfully received was the possession of the next of kin; and, as observed by Lord Redesdale in *Hovenden v. Lord Annesley*, 2 Schoales & L. 633 (relied on in *Raborg v. Donaldson*, 26 Md. 312), "if the only circumstance is that he [the trustee] does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title." The admitted or clearly proved possession and nondistribution of such funds creates a continuing trust, in which event the possession of the trustee does not operate as a bar, because such possession is all the while according to his title. *Donaldson v. Raborg*, 28 Md. 57. It is manifest, then, that, so long as this fund remained in the hands of Mrs. Hurtt undistributed, her possession of it, if it belonged to her deceased husband's estate, was according to her title, and therefore could not have been adverse thereto, and, this being so, the statute of limitations never began to run in her favor, and could not have been invoked by her as a bar to proceedings instituted by her husband's next of kin against her in her representative capacity.

But, although the statute of limitations be inapplicable, the defense of laches is undoubtedly available. Whenever there is neglect or omission to assert a right, in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, the defense of laches becomes a bar. The length of the delay and the nature of the acts done during the interval are

the two circumstances that constitute the bar. Where, as said by Lord Romilly, M. R., in *Wollaston v. Tribe*, L. R. 9 Eq. 50, there has been any dealing "which had altered the state of matters," or where the acts done during the interval injuriously affect either party and cause as respects the remedy invoked an injustice in pursuing one course rather than the opposite, courts of equity will refuse to lend their aid to the enforcement of a demand resulting in injurious consequences directly referable to such changed conditions and such delay. Very often in the administration of justice the hourglass must supply the ravages of the scythe, as in many instances the lapse of time, though not of great duration, carries with it the life and the memory of witnesses, the muniments of evidence, and the other means of judicial proof, and brings about, by intervening changes, material alterations in the relative situation of the interested parties. The money claimed to have been paid in 1879 and 1880 in settlement of the Woodland judgments was paid to Mr. Charles A. Baker, the attorney of Mrs. Amanda M. Hurtt; and he died some years ago. Mrs. Hurtt, who received the money, is also dead. No demand was made upon her during her life, and her estate was finally settled in the orphans' court of Kent county, on September 17, 1895. Long before the final distribution of her personal estate, these appellees were fully apprised of all the facts upon which they now rely in this proceeding. Indeed, there is sufficient in the record to indicate that there had been some prior litigation over the same claim in a court of law, though the precise nature of that litigation does not appear. But on July 5, 1895, Mr. Barroll, who seems to have been administrator de bonis non of James Hurtt, as well as the counsel for the appellees, was notified in writing, by the executors of Amanda M. Hurtt, that they would proceed to settle her estate after the expiration of the then pending term of the circuit court for Kent county; and in the letter written by them to him on that date they stated: "The executors have given you ample time to bring any suit your clients [heirs of James Hurtt] may have desired." No claims of the next of kin of James Hurtt or of his administrator de bonis non against the estate of Amanda M. Hurtt for the sums of money now sought to be recovered were presented or preferred; and, in something over two months after the delivery of the notification just alluded to, the executors finally closed Mrs. Hurtt's estate, and paid out to legatees who are not parties to this proceeding over \$5,000 in money. If the decree appealed from stands, the devisees of the real estate will be required to pay to the next of kin of James Hurtt a sum of money which, if payable by the estate of Mrs. Hurtt at all, was properly payable out of her personal estate, and was only not so paid therefrom because of the neglect of those who claim it

to present their demand before the debtor's personal estate was settled and distributed, though they were fully apprised of all the facts at that time that they now rely on. The situation of the parties called on for payment has been materially changed from that which they would have occupied had the claim been proved against the personal estate of Mrs. Hurtt. The personal estate that was the primary fund for the payment of debts has been distributed to other legatees who have received their legacies because of the failure of the appellees to file their claim in due time, and after being notified to do so; and an attempt is now made to hold the real estate liable, though had the appellees exerted a proper diligence in asserting their claim that real estate would have been wholly exonerated from liability. If the decree should be enforced, the result will be that the devisees will pay the debts due by the testatrix, though she had ample personal estate out of which complete satisfaction could have been had; and the burden will be thrown on the real estate, not because it was primarily liable, but simply because the creditor failed, though fully informed of all his rights, to file his claim before distribution and payment of the legacies were actually made. When the results of the delay by the appellees are so unjust to the devisees, and when, as a consequence of that delay, such material changes have been brought about in the situation of the parties, and especially when the two witnesses (Mr. Baker and Mrs. Hurtt) who could have testified as to whether the sums now sought to be recovered were really paid on the Woodland judgments are both dead, a court of equity ought to rigidly apply the defense of laches. It was aptly observed in *Zollickoffer v. Seth*, 44 Md. 375: "If, however, a party has a provable claim against an estate, and, without sufficient cause, neglects to prove and exhibit it to the executor in due time, it may be that, in any subsequent attempt to pursue the assets in the hands of legatees or distributees, he will be successfully met with the defense of laches." And, if this be true as respects legatees, it is at least equally so in regard to devisees. *Van Bibber v. Reese*, 71 Md. 614, 18 Atl. 892.

But there is another ground upon which the decree below must be reversed. It is an elementary doctrine that the personal estate of a deceased debtor is the primary fund for the payment of debts. Unless the personalty is insufficient, a court of equity has no jurisdiction to decree a sale of a decedent's real estate for the payment of his debts; and even then the amount payable out of the realty is only the sum that the personalty falls short of satisfying. It is equally true that the debts must be first fully discharged before the legacies can be paid. If there be a deficiency of assets, a specific legacy will not abate with the general legacies. The latter must be first entirely exhausted before

the former can be made liable for the decedent's debts. Now, the bill in this case was filed against the devisees of the real estate. Of these devisees, Mrs. Constable was bequeathed, in addition to the devise to her, a general legacy, and her two daughters were given the specific legacies we have already mentioned. Mrs. Constable's general legacy was entirely absorbed in making good to the executors an overpayment to which we have adverted. She consequently took nothing as legatee. The result is that the property affected by the decree is the real estate and the specific legacies. This is precisely the reverse of what ought to have been done if there was any liability existing at all. The total amount of the two Woodland judgments, with accrued interest, was something more than the value of Mrs. Hurtt's personal estate. But the evidence shows, as we have already observed, that one of the Woodland judgments belonged to Mrs. Hurtt, and not to her husband. The amount due on the other, together with all interest and costs, was considerably less than the \$5,000 paid out in pecuniary legacies; and, if any liability existed against Mrs. Hurtt's estate to pay the amount of that judgment to her husband's next of kin, her personal estate was amply sufficient to have discharged it; and the legatees ought to have been proceeded against, as the legacies in their hands were liable before the devisees or the specific legatees could be called on. This has not been done. The decree subverts the legal principles just stated, and holds the devisees and the specific legatees liable to the exoneration of the pecuniary legatees altogether. It follows from the views we have expressed that the decree appealed against must be reversed, and, as the defense of laches is a complete bar to the right of the appellees to recover, the record will not be remanded. Decree reversed, with costs above and below, and bill dismissed.

(87 Md. 240)

BENJAMIN v. BRUCE et al.

(Court of Appeals of Maryland. March 3, 1898.)

CONTRACT—VALIDITY—WANT OF MUTUALITY—ASSIGNMENT FOR BENEFIT OF CREDITORS—UNLIQUIDATED DEMANDS.

1. A practically exclusive privilege to sell the goods of a manufacturer, but without any corresponding obligation on the other party to the contract, is invalid for the want of mutuality except in so far as it has been actually performed by the last-named party.

2. A claim against the assignee for benefit of creditors of E., a manufacturer, for commissions on sales made by E. to firms other than those designated in a contract with plaintiff, providing that E. should not sell any goods which he manufactured except to certain firms and to plaintiff, but with no penalty provided for a breach thereof, cannot be allowed; since the measure of damages is the actual loss falling on plaintiff by reason of such breach, which, being unliquidated, must be evidenced by a

judgment before the claim becomes a "debt" provable against the estate.

3. A contract with plaintiff provided that E. should not sell goods which he manufactured to certain firms for a less sum than the price at which they were to be furnished to plaintiff, but no specific penalty was agreed on for its breach. Thereafter the plaintiff filed accounts with the assignee for benefit of the creditors of E., for sums alleged to have been paid by him in excess of the prices charged by E. to one of the designated firms. Held, that the breach created a liability only as to the losses actually sustained thereby by plaintiff, which were unliquidated damages, and were not in that shape a provable "debt" against the estate.

Appeal from circuit court of Baltimore city.

Claims were presented for allowance by George P. Benjamin against Bruce, Cook, and others, as assignees for benefit of the creditors of the insolvent estate of Henry Evans, Jr. Other creditors filed objections to their allowance, and, at a hearing, the claims were rejected, and claimant appeals from the order. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

Steele, Semmes, Carey & Bond, for appellant. M. R. Walter, J. Hemsley Johnson, and H. N. Abercrombie, for appellees.

McSHERRY, C. J. The questions presented on the record now before us arise out of the following facts: Henry Evans, Jr., was a manufacturer of tinware in Baltimore, and George P. Benjamin, of New York, was a general agent for the sale of various kinds of merchandise. In December, 1885, these two parties entered into an agreement, which is embodied in a letter from Benjamin to Evans, and which, in substance, provided (1) that all goods manufactured by Evans were to be sold through Benjamin, except such as Evans might himself sell in Baltimore city, or might deliver to a designated customer in New Orleans; (2) that all goods were to be shipped upon Benjamin's orders, and were to be billed to him at bottom prices, on 60 days' time, such bills to be subject to a commission of 5 per cent., and to certain additional discounts for cash; (3) that all orders and inquiries as to prices from parties outside of Baltimore were to be referred to Benjamin; and that all acknowledgments of orders, replies, and quotations were to be made by him. It was further provided that the agreement could be terminated at any time by either party on giving 'three months' notice. This arrangement continued in force until September, 1894, when it was modified. By the modified agreement, Evans stipulated to allow Benjamin, on all of Benjamin's orders for Evans' goods, a commission of 5 per cent. "below the lowest price and terms at which I will sell any other parties, excepting C. A. Conklin Manufacturing Company, of Atlanta, Georgia, and Butler Brothers, of New York and Chicago." And Evans further agreed that the prices and terms to these two

parties (Conklin and Butler) should not in any case net lower than the prices to Benjamin with the commissions off. This arrangement was to continue for one year, and to be terminable thereafter upon three months' notice. Under the original and the modified agreements, which remained in force until April 26, 1896, a large number of transactions and dealings occurred that have all been adjusted and closed. In the latter part of May, 1896, Evans, becoming embarrassed financially, executed a deed of trust for the benefit of his creditors, appropriating all his assets to the payment of all the "debts" due and owing by him. Benjamin claims to be a creditor of Evans, and the accounts which he has filed are designated "merchandise account" and "commission account." In the merchandise account he demands, under the agreement of September, 1894, on purchases made by him in 1895 and in 1896, the several sums paid by him in excess of the prices charged by Evans, during the same period, to C. A. Conklin, for similar merchandise. The account is made up by deducting from the aggregate of the prices as invoiced to Benjamin, and as diminished by the allowance of commissions, discounts, and freight charges, the amount which would have been chargeable had the same discounts and deductions been allowed to Benjamin that were given to Conklin during the same period, and the difference, after being lessened by a credit, is the sum of \$3,500.51; and this is claimed as due on the merchandise account. The commission account consists of a demand for \$9,260.96 for commissions on sales made by Evans himself within the territory in which Benjamin insists that he alone had a right, under the original and modified agreements, to make sale of Evans' goods. Other creditors of Evans filed objections to the allowance of these two claims preferred by Benjamin; and after testimony had been taken, and the objections had been heard and considered by circuit court No. 2, both claims were disallowed and rejected. Thereupon Benjamin brought the record by appeal into this court for a review of that decision.

The objections interposed by the contesting creditors are 10 in number, but it is not deemed necessary to set them forth with particularity. They assail the validity of the agreements of 1885 and 1894, as unilateral and without mutuality, and as in general restraint of trade; and they insist that there is no ascertained definite sum due thereunder which constitutes a debt in the sense that the term is used in the deed of trust; and they maintain that whatever may be claimed, if anything, must be in the form of unliquidated damages for a breach of the agreements, and that there has been no ascertainment of these damages, and no evidence adduced to establish the amount or extent thereof.

It must be borne in mind throughout this

discussion that the appellant's claims are not for compensation for labor or services actually performed. They do not represent the fruits of an executed contract, where nothing remains to be done but to pay money as a consideration for what has been performed by the other party, but the charges in the commissions on sales Benjamin did not make; and they are claimed, not because they are appropriate or stipulated compensation for work really performed by him, but because Evans violated an agreement not to make sales of his own manufactured articles, except through the appellant, in the territory where these sales were effected. A mere glance at the contract of 1885 (the substance of which we have already stated) at once reveals the fact that the obligations which it creates, and the duties which it imposes, are to be performed wholly by one of the parties to it. There is no reciprocal obligation or duty whatever on the other party. Benjamin did not purchase the entire or any portion of the output of Evans' factory, nor did he bind himself to sell or even to attempt to sell the wares and merchandise made by Evans. He literally undertook to do nothing on his part at all as respects the purchase or sale of Evans' commodities. Had he made no sales or sent no orders to Evans, there would have been no breach of the contract by him, because he had made no stipulation to do either; and, had he been sued for a failure to send in orders or to make sales, a defense that he was under no obligation to do the one or the other would have been perfect, unanswerable, and complete. Obviously, if this be so, the contract, except in so far as it has been executed and performed by Benjamin, is not binding on Evans, because it lacks the element of mutuality, which is a constituent essential to the validity of an agreement respecting such a subject as the parties purported to deal with. It is essential to the validity of every contract of this character that there should be a mutuality of obligation. A contract is not binding on one of the parties, unless it is binding on the other. *Baltimore & O. R. Co. v. Potomac Coal Co.*, 51 Md. 343; 1 Chit. Cont. (11th Am. Ed.) 20, 21. Precisely the same want of mutuality affects in the same way the modification made of the original contract in September, 1894.

If the claim here made were for work actually done by Benjamin, Evans could not escape making payment by setting up the defense that the contract was not enforceable. As said by this court in *Association v. Fisher*, 71 Md. 430, 18 Atl. 808: "If one should say to a laborer, 'If you will work in my fields for a month, I will pay you twenty dollars,' and the laborer should accordingly work that length of time, it would be impossible to say that he had not earned the money. And it could make no possible difference whether the offer of employment

were in writing or by word of mouth. It would not be a contract until accepted and agreed to by the laborer; but doing the work in pursuance of the proposal is as unequivocal an assent to it as could be imagined." In the case just cited, the performance of the work was an acceptance of the proposal, and, while the mere proposal alone created no obligation to pay the money, the doing of the work constituted a clear acceptance of the proposal, and fixed the liability of the party offering the proposal to make the payment when the work was actually performed. But in the case at bar the claim is for commissions on sales not made, for work not done, and not even contracted to be made or done, and which the appellant was under neither an express nor an implied obligation to make or to do. It differs widely from the case of *Breweries Co. v. Callahan*, 82 Md. 106, 33 Atl. 460, in this: that there a definite employment of the appellee as a salesman, at a fixed salary for a specified term, existed; and, though there were no formal words imposing the obligation to discharge the duties of a salesman, the necessary implication to that effect arose, and this furnished a valid consideration for the correlative promise to pay the salary. But in the case at bar there was no employment of Benjamin as a salesman. He was simply given a privilege, in return for which he assumed neither expressly nor by implication any corresponding obligation himself. The payment of a salary imports an obligation to perform the duties for the due discharge of which the salary is stipulated to be paid; and, though there be no express agreement to render the services, their performance as a consideration for the payment of the salary is necessarily involved and implied.

But even if there were or could be any doubt that the contract of 1895 and the modification of 1894 were invalid for the want of mutuality, except in so far as they have been executed, it is perfectly clear that, as respects the claim for commissions, it is a claim, not for a subsisting debt that is due, but for unliquidated and unascertained damages for the breach of a contract on Evans' part not to sell within a certain defined territory. Evans bound himself not to sell his own goods in a designated territory. He further agreed that all goods sold in that territory should be shipped upon the order of Benjamin, and should be billed to him at bottom prices, "such bills to be subject to a commission of five per cent." Now, the commissions claimed under the original agreement are not commissions upon any order given or upon any sale made by Benjamin, but are commissions on sales made by Evans himself in violation of his agreement not to sell at all within that territory. Under the modification of the original agreement, Evans stipulated to allow Benjamin "on your orders for my goods a commission

of five per cent. below the lowest price and terms at which I will sell any other parties excepting Conklin," etc. Here, again, the commissions are not upon orders given by Benjamin, but upon sales alleged to have been made by Evans in contravention of his agreement not to sell within the prescribed territory. Neither the agreement nor the modification stipulated to give Benjamin 5 per cent. commissions on all sales made in the territory assigned to Benjamin, but only on sales made therein by Benjamin himself; and, though there is a prohibition against Evans selling at all in that territory, there is no term of the contract that allows to Benjamin a 5 per cent. commission upon sales that Evans might make in violation of the contract. There is, consequently, under the agreement of the parties, no definite, fixed, and ascertained sum prescribed to be paid by Evans to Benjamin, either as commissions upon or as compensation for sales wrongfully made by Evans; and, as a result, if Benjamin has been injured by such wrong, and if the contract is a valid one, he would have redress by an action for a breach of the contract. The damages recoverable in such an action would not necessarily be the 5 per cent. now claimed, but they would be such only as Benjamin might be able to show he sustained. Whether he sustained any or not, the record does not disclose. If the sales made by Evans were sales that Benjamin could not or would not have made, then he may not have been damaged by Evans' having made them. But, as the facts are now presented, to assume that he has been injuriously affected would be simply to substitute conjecture for proof. Commissions, as such, are not recoverable, because they are not stipulated in the contract to be paid on sales not made by Benjamin. If any sum be recoverable at all, it would be such an amount as Benjamin has been injured by Evans' breach of contract in selling where he had agreed not to sell; and there is no evidence whatever showing that he has sustained substantial damages, and far less is there any tending to indicate the amount that he might recover. The whole claim for commissions under the contract is a claim for which the contract makes no provision. Without considering the other objections to the commission account, those which we have just been discussing are quite sufficient to exclude that account from participation in the distribution of Evans' assets.

But little need be said in regard to the merchandise account. That account is founded on the modified agreement of September, 1894. There is nothing in the letter of September 25th (and it is that letter which contains the terms of the modification) to justify the inference that Benjamin was to have, as a discount or as a commission, 5 per cent. off of the price of the goods sold by Evans to Conklin; nor does Evans agree to pay to Benjamin the difference between the prices at which he might sell to Conklin and those

which he might charge Benjamin. He merely contracted with Benjamin that the prices and terms to Conklin and ^{to} Butler should not in any case net lower than the prices to Benjamin with the commission off. In other words, he stipulated not to sell to Conklin or to Butler at less than he would sell to Benjamin. He violated that agreement, so the appellant alleges. Assuming that he did, does that fact give Benjamin a right to be refunded the sums that the sales to Conklin did net lower than the prices to Benjamin? Or does it give Benjamin a cause of action wherein he may recover the damages he may have sustained by Evans' breach of the contract? Evans' agreement was simply that he would not sell to other parties at a less or lower price than he charged Benjamin. This was not an agreement to sell the goods to Benjamin for the same price at which Evans would sell similar merchandise to any one else. Such a contract, if in other respects valid, would have entitled Benjamin to purchase from Evans at the same prices that Evans charged others, and an overcharge would have given Benjamin the right to claim a rebate to the extent of the excess wrongfully exacted from him. *Holtz v. Schmidt*, 59 N. Y. 255. The contract itself would then have furnished precisely the measure of the sum that Benjamin could have claimed to be repaid by Evans. But the contract actually made had no relation, in the provision now being considered, to the prices to be charged Benjamin for the goods purchased by him; but it simply placed a restriction on Evans by which he was prohibited from selling to others at a less rate than he might quote to Benjamin. This was a stipulation affecting in no way the price chargeable to Benjamin for goods bought by him; but it was designed to protect him against the consequences of an underselling by Evans to other customers. A breach of that stipulation could not possibly, under the contract, change or lessen the prices which Benjamin agreed to pay; but it would, if the contract itself were binding, undoubtedly subject Evans to a liability for any injury occasioned to Benjamin by its nonobservance. The breach, however, would not create a definite, ascertained debt. If the violation of the contract caused Benjamin no loss, there is nothing in the agreement that obliges Evans to refund to Benjamin the sum he charged the latter in excess of the prices he charged Conklin, because there is no term of the contract that binds Evans to sell to Benjamin at the same prices he might sell similar goods to Conklin, but only a restriction on Evans not to sell to Conklin at less than he might charge Benjamin. There is no evidence tending to show that Benjamin sustained any loss by Evans' alleged breach of agreement.

Both claims are for unliquidated damages that have not been reduced to a certain ascertained amount, and neither of them, in

their present form, evidences a debt provable against the assets of Evans in the hands of his trustees. As we agree to the result reached by the court below, we shall, for the reasons we have assigned, affirm the order appealed from. Order affirmed, with costs above and below.

(185 Pa. St. 176)

GALLERY et ux. v. EASTON TRANSIT CO.
(Supreme Court of Pennsylvania. March 21, 1898.)

STREET RAILWAYS—ACCIDENT TO CHILD—WITNESS.

1. No recovery can be had for death of child, caused by his sudden darting on the track immediately in front of car, so that it was not possible to stop it in time to prevent accident.

2. The motorman of the car killing plaintiffs' child cannot be called as if on cross-examination by plaintiffs in action against the railroad therefor; he being neither a party nor person having legal interest in the action.

Appeal from court of common pleas, Northampton county.

Action by Patrick Gallery and wife against the Easton Transit Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

Edward J. Fox and James W. Fox, for appellants. F. W. Edgar, R. C. Stewart, H. J. Steele, and J. D. Brodhead, for appellee.

PER CURIAM. This case was properly disposed of by the learned court below. The undisputed testimony on the part of the plaintiffs established beyond all question that the death of the child was caused by his suddenly darting upon the track immediately in front of the approaching car, and that it was not possible to stop the car in time to prevent the collision. In such circumstances, as we have frequently held, there is no right of recovery, because there is no breach of legal duty to the child.

There is no merit in the second assignment. The motorman, Barnet, was neither a party nor a person having legal interest in the pending suit, and hence the plaintiffs had no right to call him as if on cross-examination. The remaining assignments are of no importance, and cannot be sustained. Judgment affirmed.

(185 Pa. St. 194)

In re BRUCH'S ESTATE.

Appeal of KNECHT.

(Supreme Court of Pennsylvania. March 21, 1898.)

WILL—CONSTRUCTION—RESTRAINT OF MARRIAGE—RIGHT OF REMAINDER-MAN.

1. A bequest of income of a certain sum to a person so long as she remains single, and bears her then name, is not in restraint of marriage, but merely on a limitation as to time.

2. Under a will bequeathing the income of \$5,000 to H. so long as she remains single, and providing that on her death the \$5,000 go to S., the right of S. to the principal and interest accrues on marriage of H.

Appeal from orphans' court, Northampton county.

Distribution of balance in hands of executor of W. J. H. Bruch, deceased. From decree overruling exceptions to auditor's decision, Elizabeth Knecht, née Elizabeth Hamlin, appeals. Affirmed.

F. H. Lehr and H. J. Steele, for appellant. O. H. Meyers, for appellee.

PER CURIAM. It is perfectly clear, and is established by numerous authorities, that the bequest in favor of Elizabeth Hamlin was not upon a condition in restraint of marriage. She was to enjoy the income of \$5,000 so long as she remained single and bore the name of Elizabeth Hamlin. When she ceased to be single, and to bear the name of Elizabeth Hamlin, her right to the income was simply ended. The words of the bequest were merely a limitation of the time of enjoyment. Hotz's Estate, 38 Pa. St. 422, is precisely in point, and rules this question. Many other cases cited in the appellee's argument are in the same line. The other question, as to the vesting of the principal, is equally free from doubt. The "cemetery fund" was well defined in the will, and there was no uncertainty as to its import. By the express terms of the codicil that fund was to be increased by the principal fund of \$5,000 after the death of Elizabeth Hamlin. There was no other use to which this sum was to be put in any event. The use of the income of this identical fund having terminated by the marriage of Elizabeth Hamlin, and the only limitation over being to the cemetery fund, there is no other right either to the income or the principal than the right of the cemetery fund. It is clear the appellant cannot have the income, but the income is a certain incident of the principal, and necessarily goes with it. There is no possible reason for delaying the vesting of the principal in possession at the moment the right of the donee of the income ceases. It is somewhat like the line of cases in which, where there is a gift of the income to one, and no gift over of the principal, we hold that the legatee of the income takes also the principal. A bequest of the interest of a fund without limitation is a bequest of the fund itself. Garret v. Rex, 6 Watts, 14; Campbell v. Gilbert, 6 Whart. 72; Van Rensselaer v. Dunkin's Ex'rs, 24 Pa. St. 252; Pennsylvania Ins. Co.'s Appeal, 83 Pa. St. 312; Millard's Appeal, 87 Pa. St. 457. Here there is a limitation over the principal of the fund; there is no person to take the income after the marriage of the legatee of the income; the succeeding income is a necessary incident to the principal, and hence passes with the principal; and, there being no object to subserve by postponing the reception of the principal, it becomes due at once. Where a trust is unnecessary to protect any interest in remainder, the estate is executed by the statute in the remainder-man. Bradley's Appeal, 36 Leg. Int. 38; McAleer's Appeal, 99 Pa. St. 139. The latter case, in its facts, is quite analogous to the present. Judgment affirmed.

(185 Pa. St. 198)

COMMONWEALTH ex rel. KOSTENBADER et al., Directors of the Poor, v. COYLE et al., County Com'rs.

(Supreme Court of Pennsylvania. March 21, 1898.)

PAUPERS—DIRECTORS OF THE POOR—POWERS.

Act March 11, 1837 (P. L. 45), establishing the directors of the poor of Northampton county, made them "one body politic corporate," relative to the poor of said county. Section 5 makes it their duty in each year to furnish the county commissioners with an estimate of the probable expense for one year, and said commissioners' duty to assess and collect the amount of said estimate to be paid the directors by the county treasurer on warrants in their favor by said commissioners, "as the same may be found necessary." *Held*, that said commissioners are bound to pay orders by said directors for amounts within their estimates.

Appeal from court of common pleas, Northampton county.

Proceeding by the commonwealth of Pennsylvania, on the relation of James Kostenbader and others, directors of the poor and of the home of employment for the county of Northampton, against William Coyle and others, commissioners of Northampton county, for a writ of peremptory mandamus to compel defendants to issue warrants for the amount of certain orders drawn by relators. Heard on case stated. From a judgment awarding the writ, defendants appeal. Affirmed.

The case stated is as follows:

"And now, December 4, 1897, it is hereby agreed by and between the parties to the above suit that the following case be stated for the opinion of the court in the nature of a special verdict with the same force and effect as if a petition for a writ of mandamus had been duly presented by said plaintiffs against said defendants, and a writ of alternative mandamus regularly granted, issued, and returned served. The said relators are the directors of the poor and of the house of employment for said county, duly elected and qualified and acting as such at this time and since January, 1897, under the provisions of an act of assembly of said commonwealth entitled 'An act to provide for the erection of a house for the employment of and support of the poor in the county of Northampton and for other purposes,' approved March 11, 1837 (P. L. 1836-37, p. 45), which act with the several supplements thereto are to be considered as part of this case stated. Section 5 of this act provides as follows, viz.: 'It shall be the duty of said directors on or before the first day of November in each and every year, to furnish the commissioners of said county with an estimate of the probable expense of the poor and the poor house for one year, and it shall be the duty of said commissioners to assess and cause to be collected the amount of said estimate, which shall be paid to said directors, by the county treasurer, on warrants drawn in their favor

by the county commissioners, as the same may be found necessary, and the said directors shall, at least once in every year, render an account of all moneys by them received and expended to the auditors appointed to audit and settle the county accounts, subject to the same penalties, rules and regulations as are by law directed respecting the accounts of the county commissioners, and shall at least once in every year, lay before the court of quarter sessions and grand jury of said county, a list of the number, ages and sex of the persons maintained and employed in said house of employment, or supported or assisted by them elsewhere, and of the children by them bound out to apprenticeship as aforesaid, with the names of their masters or mistresses, and their trade, occupation or calling, and shall, at all times when thereunto required, submit to the inspection and free examination of such visitors as shall, from time to time, be appointed by the court of quarter sessions of the said county, all their books and accounts, together with the rents, interests and moneys payable and receivable by the said corporation, and also an account of all sales, purchases, donations, devises and bequests as shall have been made by or to them.' In pursuance of the provisions of said act, the said directors of the poor before the 1st day of November, A. D. 1806, furnished the commissioners of said county with an estimate of the probable expense of the poor and the poor house for one year, and the said commissioners assessed and caused to be collected the amount of said estimate. The said defendants are the county commissioners of said county, and in the months of June and October, 1897, the said directors of the poor in due and proper form and manner drew and presented to said commissioners two orders in their favor, each for the payment of fifteen hundred dollars, which amounts were within their said estimate, and were necessary, in their opinion, to meet the due and proper expenses of the poor and poor house of said county. But the said commissioners refused, and still refuse, to pay said orders, or draw their warrants in favor of said directors upon the county treasurer for the said amounts, or to pay the amount of said money to said directors of the poor, and the same now remains unpaid. If the court be of the opinion on this statement of facts that the said commissioners are compelled to draw their warrants upon the county treasurer for the amounts so demanded by said directors of the poor, then judgment to be entered in favor of the plaintiffs, and a peremptory writ of mandamus then to issue as directed by law. But if the court should be of the opinion that the said commissioners are not so compellable to draw their warrants as aforesaid, then judgment to be entered in favor of the defendants. Either party to be entitled to appeal from such judgment."

Edward J. Fox, for appellants. H. J. Steele, for appellees.

GREEN, J. The learned court below was clearly right in awarding the writ of peremptory mandamus in this case. The act of March 11, 1837 (P. L. 45), which established the directors of the poor of the county of Northampton, erected them into "one body politic corporate in law to all intents and purposes, relative to the poor of the county of Northampton." They were clothed with the right of perpetual succession, to sue and be sued, plead and be impleaded, to take and hold lands and tenements, and to erect suitable buildings for the reception, use, and accommodation of the poor of the county, and "to provide all things necessary for the lodging, maintenance, and employment of said poor," and to appoint a treasurer, steward, matron, and physician and all other necessary attendants that may be necessary "for the said poor respectively." Other powers and duties were conferred and imposed upon them, essential to the proper discharge of their official functions. By the fifth section of the act it was provided as follows: "It shall be the duty of the said directors on or before the first day of November in each and every year to furnish the commissioners of said county with an estimate of the probable expense of the poor and poor house for one year, and it shall be the duty of said commissioners to assess and cause to be collected the amount of said estimate which shall be paid to said directors by the county treasurer on warrants drawn in their favor by the county commissioners as the same may be found necessary." It is very apparent that the entire business of caring and providing for the poor of the county was devolved by the act upon the directors of the poor, and it follows, hence, that they, and they alone, were required by the positive terms of the law, as well as by the plain necessities of the case, to fix and determine the annual amount that would be required for the support and maintenance of the poor. It would be impossible for the commissioners of the county to discharge this duty, for the simple reason that they do not possess any powers or qualifications necessary for that purpose, and the argument that they should be the judges of the necessity for the issuing of the warrants for the payment of the moneys required by the directors of the poor is entirely untenable. It has no foundation upon which to rest. Moreover, the plain meaning of the act is that the directors must determine the amount of the annual requirement and furnish it to the commissioners. It is equally clear that the act thereupon requires the commissioners to assess and collect the amount and pay it to the directors by means of warrants drawn on the county treasurer for that purpose. No discretion whatever is conferred upon the commissioners to review the action of the directors. Their duty is simply ministerial, and in no sense judicial. They must collect the money by assessment and taxation as part of the county levy, and, when collected, they have no right in it or control over it.

The argument that the directors might arbitrarily demand excessive sums, and therefore abuse their powers, is without merit. They have no right, under the law, to exact any sums more than are necessary for the purpose indicated, and would be at once responsible for an abuse of their powers if they attempted to do so. Extended argument is unnecessary, as the question at issue is very plain. In construing a similar act for the county of Berks in the case of *Cumru Tp. v. Directors of the Poor of Berks Co.*, 112 Pa. St. 264, 3 Atl. 578, we said (Gordon, J.): "It certainly does not matter that the money used for the purchase of the land and the erection of the buildings was raised by assessment made by the county commissioners, for the money thus raised was intended for the use of the poor district, and the municipality known as Berks county has no interest in or control over it. That the taxes were to be assessed and collected by the county officers did not make the money thus raised any more the property of the county than does the assessment and collection of state taxes by the same instrumentality invest the county with the right thereto. In the one case these officers are trustees for the poor district, and in the other for the state." We see no error in the ruling of the learned court below, and therefore sustain the decree. Judgment affirmed, and appeal dismissed, at the cost of the appellants.

(186 Pa. St. 208)

In re **McGOVERN'S ESTATE.**

Appeal of **MURDOCH.**

(Supreme Court of Pennsylvania. March 21, 1898.)

TESTAMENTARY CAPACITY—DELUSION.

That testatrix was under a delusion as regards a relative whom she excluded from participation in her estate is not shown by evidence that, shortly before making the will, her feelings towards such relative underwent a marked change, so that she came to fear and dislike her.

Appeal from orphans' court, Franklin county.

In the matter of the estate of Annie E. McGovern, deceased. From a decree of orphans' court refusing an issue devisavit vel non, and dismissing her appeal from the decree of the register admitting to probate the will of said McGovern, Louisa M. Murdoch appeals. Affirmed.

The opinion of the court below is as follows (Stewart, J.):

"This is an appeal from the decision of the register admitting to probate a paper purporting to be the last will of Annie E. McGovern. The testamentary capacity of the testatrix is denied, and we are asked to award an issue to determine this question. The facts are few. The testatrix was a single woman, and at the date of the will was considerably advanced beyond the period of

middle life. Her nearest kindred were cousins in the first degree, and of these there were seven, none of whom resided with or near her. Her personal acquaintance with several of them must have been very slight, and it is not shown to have been very intimate with any of them. Some resided in Wheeling, one in Washington, one in Baltimore, and another in California. The estate is estimated to be worth about \$70,000. By her will the testatrix devoted a sum not to exceed \$5,000 to the erection of a monument in her burial lot. She specifically bequeaths to George D. McDowell, Esq., a neighbor, who had rendered her kind offices, certain railroad stock, and to the two daughters of one of her cousins—Philip Moore—certain stock in the Belmont Nail Company. The entire balance of her estate she directs shall be distributed under the intestate laws of the state, excluding, however, from all participation therein, Mrs. Kate Johnson and Mrs. Louisa M. Murdoch, two of her first cousins, the latter being the present contestant. By a codicil to the will she excludes another cousin, Mrs. Mary Lehr, and revokes the legacy to the daughters of Philip Moore. The testimony submitted in connection with the appeal raises no question as to the general sanity of the testatrix. On the contrary, it shows her to have been a person of at least average intelligence, of fair business capacity, abundantly able to take care of herself and her estate, and entirely rational in all her dealings and intercourse with others, notwithstanding certain peculiarities of temperament, tact, and habit. It leaves no doubt whatever that when she executed the will she had a free and intelligent knowledge of the act she was engaged in; that she was at the time possessed of a free knowledge of her property, and had an intelligent perception and understanding of the disposition she desired to make of it, and of the persons and objects she desired to be the recipients of her bounty. This much, as we understood, was conceded upon the argument; but it was then contended that, notwithstanding the testatrix possessed the qualifications, which, ordinarily, is all that the law requires, she was, at the time she made this will, and so continued thereafter until her death, under the influence of a delusion with respect to certain of her kindred,—those denied participation in her estate,—especially Mrs. Louisa M. Murdoch, the contestant, which dominated and controlled her; that it not only found expression in her will, but actually determined its provision; and that, in consequence, she did not have a sound and disposing mind and memory, as to them at least. An assault on this ground may be just as effective as where general insanity or imbecility is urged, depending wholly upon the force and effect of the evidence offered. The existence of a delusion in the mind of a testator, influencing the testamentary act, whenever alleged, is always a material con-

sideration, and the question which thereupon arises is whether the fact alleged is actually a controversy. The mere allegation does not put it in controversy. Evidence is required to do this, and that of sufficient strength to support a verdict based upon it. The effort here is to show by evidence that a delusion existed in the mind of the testatrix with reference to the appellant, including also such others of the kindred of same degree as are excluded by the will, which put her in a hostile attitude towards her and them, and influenced her will as to them.

"It may be conceded that the testimony shows clearly enough for present purposes that the feelings of the testatrix towards Mrs. Murdoch, the appellant, underwent a marked change shortly prior to the making of the will; that, whereas she had entertained for her feelings which, if not shown to be affectionate, were at least trustful and kind, she came to fear and dislike her; that so radical and decided was the change that testatrix attributed at least every attention she received from appellant to mercenary motives, and believed not only that she was scheming through such acts to get a portion of her estate, but experienced the fear that she might take her life, the sooner to enjoy it, and for this reason she was unwilling to have her in the house. It may be further conceded that appellant was discriminated against in the will solely because of the change of feeling, and that there is nothing in the evidence that explains or accounts for it. But all this falls short of establishing a controversy as to whether this fear and dislike on the part of the testatrix was the result of a delusion. It is but a step in that direction. Such change of feeling as is here shown does not necessarily, nor even ordinarily, imply a delusion. Whence did it originate, and upon what, if anything, did it rest? In itself it is, or may be, consistent with testamentary capacity; or, for that matter, with the highest degree of mental soundness. Standing by itself, it is not a circumstance that calls for explanation. Alienation and estrangement, attended by most radical change of feeling,—not, perhaps, with the extreme distrust and fear here shown,—are quite too common and frequent to be referred to as either unnatural or as indicating disturbed mental condition. The distrust and fear may be exceptions in their degree, but no different inference results. When the appellant, therefore, showed this condition of mind and feeling on the part of the testatrix towards herself, she did not then throw upon the other side the burden of showing reason and justification for it. The burden still rested upon her, as part of her case, to show, at least by evidence sufficient to support a verdict, that the change resulted from a delusion; that is to say, that it was without any cause whatever in reason or in fact, but rested wholly on things imagined. For a delusion is a creation of

the imagination. It is said to be something that springs up spontaneously in the mind, and which rests on no intrinsic evidence of any kind. This part of the burden appellant has wholly failed to meet. Not a single fact or circumstance that we now recall indicated that testatrix, however unreasonable in her prejudices and foolish in her fears she may have been, was under hallucination with respect to the existence of any fact that could have contributed to any change of feeling on her part towards any of her kindred. So far as appears from the evidence, she imagined nothing. It is not shown that ever in conversation—and she conversed frequently, and with many—she attributed to any of them conduct which rested only in her imagination. She expressed her opinion in regard to them, her preference, her likes and dislikes, and even her fears. But, as we have said, these cannot be delusions. They may result from delusions, but are not identical with them. Her extreme distrust of appellant results from an opinion with respect to her which may have been, and doubtless was, wholly unreasonable and unworthy of her, but it can have no weight in this inquiry, except it be shown that the opinion rests upon a state of facts not real, but imagined. It is never a question of soundness of view in such investigations, but the proper inquiry always is whether the party imagined or conceived something to exist which did not in fact exist, and which no rational person, in the absence of evidence, would have believed to exist. In such case, as said by Cockburn, C. J., in an English case quoted in *Taylor v. Trich*, 185 Pa. St. 592, 30 Atl. 1053, it is manifest that the only way in which said unnatural belief can be accounted for is that it is the product of mental disorder. Two methods were open to appellant to establish her right to an issue: First, by offering evidence to show that the change of feeling on the part of the testatrix towards herself was based upon the supposed existence of facts which never existed, and which no rational person, in the absence of evidence, would have believed to exist; second, by showing a condition of things surrounding the whole case which would not only be consistent with the theory of delusion, but from which the existence of the delusion might reasonably be inferred. Upon a careful consideration of the testimony submitted, we are of opinion that it fails in both. A verdict against this will on the testimony before us could not be sustained. And now, November 4, 1897, the appeal from the register is dismissed, and an issue refused."

Charles W. Russell and Sharpe & Sharpe, for appellant. Gehr & Gehr and O. C. Bowers, for appellees.

PER CURIAM. After a careful examination of the testimony in this case, we fail to

discover any evidence which, in our opinion, would have justified a verdict against the will of the testatrix. The testimony in support of the mental capacity of the testatrix is simply overwhelming. The alleged delusions which are thought to sustain the charge of testamentary incapacity as to the testatrix were not delusions as to facts which affected, or might affect, her feelings towards the appellant. We think the opinion of the learned court below is an ample vindication of the conclusion reached that an issue should be refused, and we sustain the decree of the court for the reasons stated therein. Decree affirmed, and appeal dismissed, at the cost of the appellant.

(185 Pa. St. 174)

In re ANDERSON'S ESTATE.

Appeal of MOSTELLER.

(Supreme Court of Pennsylvania. March 21, 1898.)

WILLS—ELECTION OF WIDOW—RIGHT OF HEIRS.

On death of widow without election not to take under husband's will, election cannot be made by her heirs or personal representatives.

Appeal from orphans' court, Chester county.

In the matter of the estate of Eber Anderson, deceased. From decree quashing petition of F. W. Mosteller, administrator of Margaret Anderson, deceased, widow of said Eber Anderson, asking for decree "that it be presumed the said Margaret Anderson, in her lifetime, elected to take against her husband's will," said Mosteller appeals. Affirmed.

W. W. Smithers and W. S. Harris, for appellant. Chas. H. Pennypacker, for appellee.

PER CURIAM. There is no merit in this appeal. In Crozier's Appeal, 90 Pa. St. 384, this court held that "the right given by statute to a widow to elect not to take under her husband's will is purely personal, and, in the event of her death without having exercised said right, her heirs or personal representatives cannot make the election." That principle rules this case. Decree affirmed, and appeal dismissed, at appellant's costs.

(185 Pa. St. 41)

FLANAGAN v. NASH.

(Supreme Court of Pennsylvania. March 21, 1898.)

GIFT—WITNESS—TRANSACTION WITH DECEDENT.

1. There is no gift where one deposits her money in a savings bank in the joint names of herself and another, and there is written on the bank books, "Either party to draw, and, in case of death of either of them, the survivor shall have full power to withdraw the deposit as if the same had been duly transferred to such survivor."

2. Defendant in an action by an administrator for a fund which defendant claimed through a gift from intestate is incompetent, as the sur-

living party to a contract in actions between him and his deceased (Act May 23, 1887; P. L. p. 158, §.5, cl. "e"), to testify as to what took place between them relative thereto.

Appeal from court of common pleas, Philadelphia county.

Action by Edwin G. Flanagan, administrator of Bridget Gallagher, deceased, against James Nash. Judgment for plaintiff. Defendant appeals. Affirmed.

Joseph P. McCullen, for appellant. Henry C. Loughlin and James S. Williams, for appellee.

GREEN, J. The money in dispute was the property of Bridget Gallagher exclusively. The defendant had no ownership or interest of any kind in it. She kept the money on deposit in the Philadelphia Savings Fund in her own name, and as her own property. Subsequently, on April 14, 1892, she drew the money out of the savings fund, and deposited it in the Beneficial Savings Fund Society of Philadelphia. When she made that deposit the defendant was with her, and the money was deposited in the joint names of herself and the defendant. On the margin opposite the signatures, the words "Either to draw" were entered by the treasurer of the association. A book was also handed her, which had these words stamped upon it: "Either party to draw, and, in case of death of either of them, the survivor shall have full power to withdraw the deposit as if the same had been duly transferred to such survivor." There was no evidence to show that the entry appearing on the book was made in pursuance of any directions given by Bridget Gallagher. On the 12th of April, 1893, she drew out \$52.80, and she died on November 11, 1893. On the trial the defendant was offered as a witness to show anything that took place between him and the deceased in regard to the subject-matter in controversy, but, upon objection made to his competency, he was rejected. It is only necessary to determine the precise relation of the parties to the action in order to decide this question. The plaintiff is the administrator of Bridget Gallagher, and the defendant is the claimant to the fund in question. The title of the decedent to the money has passed to her administrator by an act of the law, and he represents her interests in the subject in controversy. He, as her representative, claims the money in controversy as belonging to her estate, and the defendant claims the same money as his own property. As a matter of course, these claims are antagonistic and adverse. The contest is in no sense a controversy between parties "respectively claiming such property by devolution on the death of such owner." It is not a contest between two adversary claimants to the property of the former owner, but a contest between the legal representative of that owner and one claiming adversely to the title of the owner. Of course, such a claimant is not competent to testify in his own behalf in such a case. The express

words of the act of May 23, 1887 (P. L. p. 158, § 5, cl. "e"), exclude him. The words of the act are: "Nor where any party to a thing or contract in action is dead, * * * and his right thereto or therein has passed either by his own act or the act of the law, to a party on the record, who represents his interests in the subject in controversy shall any surviving or remaining party to such thing or contract * * * be a competent witness to any matter occurring before the death of said party * * * unless the issue or inquiry be devisavit vel non or be any other issue or inquiry respecting the property of a deceased owner, and a controversy between parties respectively claiming such property by devolution on the death of such owner, in which case all parties shall be fully competent witnesses." It is only necessary to say that this proceeding is neither an issue of devisavit vel non nor an issue or inquiry respecting the property of a deceased owner between parties claiming an interest in such property by devolution on the death of the owner. It is, on the contrary, a claim to the property of the owner by a title adverse to the owner, in an action brought by the legal representative of the owner, the defendant being the surviving party to a contract in an action between himself and the other deceased party to such contract. The case is an exact instance in which the excluding words of the act of 1887 are distinctly applicable, and the question needs no further argument.

The only remaining question is whether the defendant has any title to the money by way of gift. The difficulty in the way of the defendant's contention in this regard is that the decedent never parted with her title in her lifetime, and hence there was no delivery of the subject of the alleged gift. She had the right to draw out the whole of the money up to the moment of her death, and for that reason she still held her title to the money. It never passed away from her while she lived, and therefore there was no delivery. There is no difference in this respect between gifts *inter vivos* and gifts *causa mortis*. Actual delivery of the subject of the gift is just as necessary in the one case as in the other. The only material difference between the two is that there is a right of reclamation in the latter which does not exist in the former. This whole subject has been so fully illustrated by our Brother Williams in the case of *Walsh's Appeal*, 122 Pa. St. 177, 15 Atl. 470, that any further reference to authorities is unnecessary. He there said: "A gift is more than a purpose to give, however clear and well settled the purpose may be. It is a purpose executed. It may be defined as the voluntary transfer of a chattel, completed by the delivery of possession. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and irrevocable contract. All gifts are necessarily *inter vivos*, for a living donor and donee are indispensable to a valid donation; but when the gift is prompted by the belief of the donor that his death is impending, and is made as a

provision for the donee, if death ensues, it is distinguished from the ordinary gift *inter vivos*, and called '*donatio mortis causa*.' But, by whatever names called, the elements necessary to a complete gift are not changed. There must be a purpose to give. This purpose must be expressed in words or signs; and it must be executed by the actual delivery of the thing given to the donee, or some one for his use. In every valid gift a present title must vest in the donee, irrevocable in the ordinary case of a gift *inter vivos*, revocable only upon the recovery of the donor in gifts *mortis causa*." These words, and many more to a similar effect, contained in the opinion, are absolutely destructive of any claim of title by way of gift on the part of the defendant. Moreover, the statement in the bank books that either might draw, or the survivor might draw, does not at all establish a title as owner in the defendant. It is a mere right to draw the money that is conferred. There is nothing to show that, if the defendant drew the money, he could keep it as his own; and without such words no title by way of gift could pass. We are very clearly of opinion that the case was correctly decided by the learned court below. The assignments of error are all dismissed. Judgment affirmed.

(125 Pa. St. 83)

GRAUEL v. WOLFE.

(Supreme Court of Pennsylvania. March 21, 1898.)

FRAUD—RELATION OF TRUST—SUFFICIENCY OF EVIDENCE—FINDINGS OF MASTER AND REFERENCE—WHEN DISTURBED.

1. The findings of fact by a master on conflicting evidence should not be set aside except for manifest error; but where the facts found are mere deductions from undisputed testimony, or from other facts found from the testimony, they are given no greater weight than his findings of law.

2. In an action for fraudulent representations in a sale by defendant to plaintiff of a coffee-roasting establishment, it appeared that plaintiff had been in the same business for 40 years; that he made his own investigation during the negotiation, which extended over six months; that he conversed with defendant's employees repeatedly; that he examined the books, and made extracts therefrom, without defendant's knowledge, and became entirely familiar with the business before he bought it, and acted on his own knowledge. *Held*, that a finding that a relation of trust existed between plaintiff and defendant was erroneous, though plaintiff, when asked to examine the books, declined, and said that he would rely on defendant's statement as to the amount of sales and profits.

3. One of two expert accountants who had examined the books found that the whole amount of roasting done for both customers and for sale equaled the amount represented. The other found that the amount appearing from the books was short of the amount represented, but he had not, because of the imperfect manner in which the books were kept, brought the account up to within four months of the sale. The profits on coffee sold exceeded the profits on roasting done for others. *Held*, that the facts did not show fraud because of misrepresentation as to the amount of coffee roasted for customers only.

Appeal from court of common pleas, Philadelphia county.

Action by Andrew J. Grauel, to use of Susanna Granel and George P. Reibstein, against Jacob S. Wolfe, for false and fraudulent representations made in the sale of the stock, fixtures, and good will of a coffee-roasting establishment. From a judgment reversing the findings of law and judgment of a referee in favor of plaintiff, he appeals. Affirmed.

Charles H. Sayre and Joseph H. Shoemaker, for appellant. Wm. Grew and Mr. Hanson, for appellee.

FELL, J. The findings of fact by a master or referee, based upon his belief as to the credibility of witnesses and the effect to be given to their testimony, are entitled to the same consideration as the verdict of a jury, and should not be set aside except for manifest error; but when the facts found are mere deductions from undisputed testimony, or from other facts found from the testimony, they are given no greater weight than his findings of law. The rule is well stated by our Brother McCollum in the opinion in *McConomy v. Reed*, 152 Pa. St. 42, 25 Atl. 176: "It may be stated as a general principle that where the evidence is conflicting, and the credibility of witnesses is involved, a master's finding upon a question of fact is entitled to the same consideration as the verdict of a jury, and will not be set aside unless it is clearly and palpably against the weight of the testimony. If, however, his finding is a deduction from undisputed facts, or from uncontradicted and credible evidence, the controlling reason for the application of this principle is not present, because in such a case he has no greater facilities for reaching a correct conclusion than the court has in passing upon the exceptions to his report."

The primary error of the learned referee is in his conclusion that a relation of confidence existed between the vendor and the vendee, and this conclusion is an inference from admitted facts or practically uncontradicted testimony. The transaction was an ordinary one of bargain and sale. The vendee had been in the same kind of business for 40 years. He was thoroughly familiar with the business in all its details, and was as capable of determining the value of what he bought as was the vendor. He made his own investigation, in his own way, during the negotiation, which extended over a period of six months. It is true that, when asked to examine the books, he declined, saying that he would rely on the vendor's statement as to the amount of sales and profits; but it is evident that he did not rely on these statements. He instituted and carried on an investigation of his own, and kept it up for weeks. He saw and conversed with the vendor's employes repeatedly. He examined the slips on which sales were

entered, and the order books, and made extracts therefrom, without the vendor's knowledge; and he appears by this means to have become entirely familiar with the character and extent of the business before he bought it. His knowledge thus acquired, if not as full as that which might have been obtained from an examination of the books, appears to have been more satisfactory to him; and we cannot but conclude from the testimony that it was upon his knowledge that he acted. If he undertook to judge for himself, or if he acted upon the knowledge gained in his investigations, to verify the representations made, there was no relation of trust between him and the vendor.

Nor do we find that there was in fact any fraudulent representation made by the vendor. It was conceded that the sales of coffee made by the vendor were substantially as represented by him, and the referee does not find that there was any misrepresentation as to the amount of the profits of the business. The uncontradicted evidence from the books produced is that the profits were in excess of the representation made. The only remaining allegation of fraud was that the representation as to the amount of coffee roasted for customers was untrue. Whether the representation made related to the whole amount of coffee roasted, or only to that roasted for customers, was disputed by the testimony. But taking the view most favorable to the plaintiff, and assuming that the representation related to the roasting of coffee for customers, the testimony would not sustain a finding of fraud. Two expert accountants who had examined the books testified. One found that the whole amount of roasting done for both customers and for sale equaled the amount represented, and as the profits on coffee sold exceeded the profits on roasting done for others, if there was a discrepancy between the facts and the representation, the plaintiff profited by it. The other witness found that the amount appearing from the books was short of the amount represented; but he had not, because of the imperfect manner in which the books were kept, brought the account up to within four months of the time of the sale of the business. When recourse was had to the books, the defendant was entitled to have the whole account considered; and we can see no reason for setting aside the conclusion reached from a full examination, and adopting that reached by a partial one. The decree of the court is affirmed, at the cost of the appellant.

(185 Pa. St. 46)

SCHIMPF v. HARRIS et al.

(Supreme Court of Pennsylvania. March 21, 1898.)

CARRIERS—INJURY TO PASSENGER.

When a tram arrived at a depot, it appeared that the conductor had not been able to col-

lect all the tickets, and a brakeman, not on duty, attempted to collect the tickets as the passengers were alighting. He pushed by one of the passengers, throwing her from the platform, whereby she was injured. There was evidence that it was a brakeman's duty, under the circumstances of the case, to notify some one in authority that the tickets had not been collected. Held, that there was evidence on which to charge that if in the performance of his duty the brakeman left the car, and negligently pushed plaintiff off, defendant was responsible.

Appeal from court of common pleas, Philadelphia county.

Action by Josephine Schimpf against Joseph S. Harris and others, receivers of the Philadelphia & Reading Railroad Company, for personal injuries caused by defendants' negligence. From a judgment for plaintiff, defendants appeal. Affirmed.

Gavin W. Hart, for appellants. George P. Rich and Henry C. Boyer, for appellee.

FELL, J. The plaintiff took a train at the Philadelphia & Reading terminal station to go to Girard avenue station. Because of a strike of the employes of the city passenger railway companies, the travel on the defendants' road had been greatly increased, and the conductor and brakeman in charge of the train had not been able to collect all the tickets when it reached Girard avenue. As the train stopped at the station, some one of the party with whom the plaintiff was riding called out: "Our tickets have not been taken up." This remark was repeated by others of the party, and was heard by a number of employes of the road, conductors and brakemen, who were in the car going home, and not on duty. One of these employes, a conductor, said to a brakeman: "You had better get out there, and see to them, and see that their tickets are gathered." The brakeman arose from his seat, and, either at that time or as he crossed the platform of the car, said: "I will take your tickets." He walked hurriedly out of the car, across the platform, to the front platform of the next car, and down its steps to the floor of the station, and received the tickets from the passengers. It was alleged by the plaintiff that the brakeman, in passing her, pushed her off the platform and steps, and that the fall caused her serious injury.

The question whether the plaintiff was pushed or fell accidentally; whether, if pushed, it was by an employe of the company or a passenger; whether, if by an employe, he was one of the crew of the train or an employe off duty; and whether, if not on duty in the running of the train, he still was, in the emergency which arose, acting for the company within the scope of his employment,—were submitted to the jury, with such clear and accurate instructions that it is conceded that there is no ground for objection to the general charge or to the answers to the points presented. After the charge, at the request of the plaintiff's counsel, additional instructions were given to the effect

that if it was not the duty of the brakeman to collect the tickets, but it was his duty to notify some one of the train crew to collect them, and in the performance of the latter duty he left the car and went out on the platform and negligently pushed the plaintiff off, the company was responsible for his act. The objection urged to this instruction is that it widened the issue of fact by the introduction of a question not raised by the testimony, as the brakeman did in fact collect the tickets in pursuance of his announcement that he would do so, and there was no testimony that he went out of the car for any other purpose. The inquiry was clearly within the limits of the case presented. There was distinct and positive testimony by a number of employes that it was the duty of a conductor or brakeman, not one of the crew of the train on which he was riding, who saw passengers leaving a car without having given up their tickets, to notify some one of the crew, and to collect the tickets himself, if directed to do so by the conductor; and that in this particular case it was the brakeman's duty to go out of the car, and give notice to some one in authority. The distinction drawn by these witnesses between doing the thing and notifying some one to do it was not based on a written rule of the company, but on a general understanding that there should be no unauthorized interferences with those charged with the management of the train. It was certainly within the limits of their duty, as they understood it, to collect the tickets, if they could not give notice to the proper person to do so. The duty was concisely expressed by the answer of one of the defendant's witnesses: "We are not employed by the company to let people get away with their tickets." The brakeman who took the tickets, and whose negligence is alleged to have caused the injury to the plaintiff, left the car, at the suggestion of a conductor, to see that the tickets were collected. Presumably he went to do what the emergency required. According to his own testimony, he passed the plaintiff before he announced that he would take the tickets himself. If the act complained of was done while he was on his way to give notice, it was done while he was clearly in the line of duty. If it was done after he had decided to collect the tickets, and while on his way to do so, it was still for the jury, under all the testimony, to say whether he was then acting in the line of duty. The judgment is affirmed.

(125 Pa. St. 57)

IN RE BUCK'S ESTATE.

(Supreme Court of Pennsylvania. March 21, 1898.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—CHARGES.

On adjudication of an administrator's account, it appeared that deceased was engaged in

the retail liquor business, and had a license; that the unexpired lease and the good will of the business, with the opportunity of procuring a transfer of the license, were worth from \$2,000 to \$2,500; and that accountant, without making an effort to procure a purchaser, appropriated them to himself. *Held*, that accountant was properly surcharged with \$2,500.

Appeal from orphans' court, Philadelphia county.

Adjudication of the account of Lewis J. L. Buck, administrator of the account of Sylvester B. Buck, deceased. From a judgment dismissing exceptions to and affirming the adjudication of the auditing judge surcharging the accountant with the sum of \$2,500, accountant appeals. Affirmed.

Samuel Peltz, for appellant. Thomas Leaming, for appellee.

FELL, J. The finding of the learned auditing judge that the unexpired term of the lease of the saloon and the good will of the business, with the opportunity of procuring a transfer of the license, were worth from \$2,000 to \$2,500, and that the accountant, without making an effort to procure a purchaser, appropriated them to himself, fully sustains the surcharge made. In *Re Grimm's Estate*, 181 Pa. St. 233, 37 Atl. 403, relied on by the appellant, the executor sold the stock and fixtures to the widow of the decedent, and she secured a new lease, and on her petition the license was transferred to her. There was no evidence of collusion, nor any that a better price could have been obtained. The executor was surcharged with the amount for which the widow, after conducting the business for some months, sold the stock then in hand, the fixtures, good will, and lease, to a purchaser, who, with her consent, had procured a transfer of the license to himself. It did not appear that the lease had any time to run, or that the executor had not obtained the full value of what he sold. It was said in the opinion that, if the executor by the exercise of diligence could have procured a higher price for the stock and fixtures from one willing to take the chance of securing a renewal of the lease and a transfer of the license, there would have been reason for surcharging him. A license to sell liquor is a personal privilege. It is not assignable by the holder, and at his death it does not go to his representatives. It is not an asset of his estate. *Blumenthal's Petition*, 125 Pa. St. 412, 18 Atl. 395. An executor or administrator could not, under the law, carry on the business for the benefit of the estate, if he so desired. In *re Grimm's Estate*, supra. But the fact that a license had been granted to sell liquor at a particular place may increase the value of that which the executor or administrator may have to sell. On the hearing of an application for a retail license, the court considers the public necessity of the place as well as the personal fitness of the applicant, and the granting of a license is a finding that the

place, in its location and appointments, is a suitable place for the sale of liquor. The opportunity to secure a transfer of the license, and a renewal at the end of the year, may materially affect the value of the fixtures, good will, and unexpired term of the lease. When this is shown to be the case, and the accountant has failed in the performance of a plain duty, there is ground for surcharge. The order of the orphans' court is affirmed, at the cost of the appellant.

(185 Pa. St. 105)

**CHAMBERS v. CHAMBERS & McKEE
GLASS CO. et al.**

(Supreme Court of Pennsylvania. March 21, 1898.)

**AWARD—VALIDITY—CORPORATIONS—RIGHTS OF
STOCKHOLDERS.**

1. The plant of a firm manufacturing glassware, and that of a corporation manufacturing window glass, were supplied with natural gas from the company's wells, under an agreement that the expense should be shared in proportion to the amount used at each plant. A dispute as to the amount used was submitted to two experts, who reported that the firm should pay 17.72 per cent. and the company the balance. Before a settlement on that basis was made, one of the arbitrators informed the company's board of directors that his assent to the award had been given under an important mistake of fact, and the award was not assented to by him. *Held*, that such award was not enforceable.

2. A settlement by the directors of a corporation of a claim against the company is binding on a stockholder unless he affirmatively shows that the action of such board was fraudulent, and in bad faith towards the corporation.

Appeal from court of common pleas, Allegheny county.

Bill by Martha J. Chambers against the Chambers & McKee Glass Company and others for an account, etc. There was a decree dismissing the bill without prejudice, and plaintiff appeals. Modified and affirmed.

J. S. & E. G. Ferguson, for appellant. Knox & Reed, for appellees.

WILLIAMS, J. McKee & Bros. is a partnership engaged in the manufacture of glass tableware. The Chambers & McKee Glass Company is a corporation organized under the act of 1874 and its supplements, for the manufacture of window glass. The manufacturing plants of the partnership and the corporation are in close proximity, and are supplied with natural gas as a fuel from wells owned and operated by the corporation, under an agreement that the expense of furnishing the natural gas shall be shared, as near as may be, in proportion to the amount used at each plant. Mrs. Chambers, the plaintiff, is a large stockholder in the Chambers & McKee Glass Company, but has no interest in the partnership of McKee & Bros. Operations were begun in both factories some time in 1889. A difference of opinion arose as to the relative proportions of the expense of the natural gas used and to

be paid for by each. This difference was submitted to two competent experts for decision, who were to determine what sum should be paid by McKee & Bros. from the commencement of operations to the 21st day of December, 1891. If unable to agree, they were empowered to select an umpire, and decide by a majority. They entered upon an examination of the subject, and submitted a report, without selecting an umpire, in which they fixed the amount to be paid by McKee & Bros. at 17.72 per cent. of the entire cost of the natural gas for both plants, and that to be paid by the Chambers & McKee Glass Company at 82.28. On the 29th day of December, 1891, the report was presented to the board of directors, and on the same day one of the arbitrators communicated to them the fact that his assent to the award had been given under the influence of an important mistake of fact, and that the award was not assented to by him. The reference to the arbitrators does not seem to have been made under a rule of court, or to have been drawn under any statute relating to arbitration, but to have been made by the parties with a view to securing the judgment of competent persons upon the quantity of gas used by each, and to relieve Mr. H. Sellers McKee from the very embarrassing position in which he found himself. He was the president and a large stockholder in the corporation. He was also the largest contributor to the capital of the partnership of McKee & Bros. He was thus the head of the creditor corporation, and he was personally, as a member of his firm, the debtor. Without further meeting of the arbitrators, or other effort to investigate the alleged mistake asserted by one of them, the board of directors of the corporation (H. Sellers McKee being one of them) decided, in March, 1892, to settle with McKee & Bros. on the basis of the discredited award, and this was accordingly done. Four years afterwards Mrs. Chambers served the notice attached to her bill requiring the directors of the corporation to take steps to compel McKee & Bros. to pay to the corporation the money it owed for natural gas, both before and after such settlement, within two weeks after such notice; and stating her intention, if this was not done, to proceed on her own behalf as a stockholder to compel such settlement. This bill was filed pursuant to the notice given by her. It is against the corporation of which she is a stockholder and the partnership which she alleges to be its debtor, and the relief asked includes the taking of an account of the gas used by McKee & Bros. from the wells and pipe lines of the Chambers & McKee Glass Company, and the payment therefor in the proportion which the amount so used bears to the whole amount consumed by both plants. Is she entitled to have an account taken of the gas consumed by McKee & Bros.? We do not think the award is in her way. We fully

agree with the learned judge of the court below that the mistake brought to the attention of the parties by George H. Browne, one of the arbitrators, soon after the award was made, and before any action was taken upon it by either party, was of such a character as to prevent its enforcement at law or in equity. As the learned judge well said: "It was not a mere error in judgment, based upon established facts, but an error in reference to the facts themselves upon which his judgment was based, and which he hastened to correct as soon as he became aware of his mistake by notifying defendant company to that effect." After this mistake was brought to the attention of the directors, and the fact was made known to them that the relative proportion of gas consumed by McKee & Bros. was, so far, at least, as Mr. Browne was concerned, fixed under the influence of this mistake at much less than it should have been, it was no longer binding upon them. But corporations are governed and their business is directed by persons chosen by the stockholders for that purpose. Their action legally taken is the action of the corporation, and as between it and the persons with whom it deals it is binding. The board of directors of the Chambers & McKee Glass Company, with full notice of the mistake of Browne, and against the protest of one or more of its members, resolved to settle the claim of the corporation they represented on the basis of the award. The amount so fixed was paid by McKee & Bros. and received by the corporation in full settlement of the demand which had been considered by the arbitrators. If this was done in good faith by the board of directors of the corporation, every stockholder was bound by it, even though it was an error in judgment, and resulted in a serious loss to the corporation. If it was not so done, but was collusive and fraudulent, it is not conclusive, but may be investigated, and, upon a proper showing, held to be a nullity, and an account taken for the purpose of determining the true amount of gas consumed by McKee & Bros., and the actual amount of their indebtedness to the corporation therefor. The real question, therefore, on which the plaintiff's right as a stockholder to an account depends, is the validity of the action of her agents, the board of directors. They have settled this claim. That action binds the stockholder, unless it was fraudulently taken. Fraud is not presumed. The natural presumption is in favor of innocence and good faith. The plaintiff has this presumption to overcome both in her bill and by her proofs, and until she presents such a case as will justify a finding that the conduct of the board of directors in making the settlement with McKee & Bros. was fraudulent and in bad faith towards the corporation represented by them, she has no title to the relief she seeks. It would seem, from the evidence

before us, that the settlement complained of was not an advantageous one to the corporation or its stockholders. It is possible that personal considerations may have influenced the result, but stockholders take the risk of the business qualifications and business judgment of those whom they may select as directors, and, as a general rule, they cannot be heard to complain if the action of their agents is not the most discreet and the most careful that could have been taken. But when a director betrays his trust, and defrauds those whom he ought to serve with fidelity, every stockholder has a right to complain; and it is the duty of the courts to assist in relieving against the consequences of such frauds whenever it is practicable. The learned judge who heard the testimony in this case reached this conclusion from it: "It is true, the plaintiff alleges that this was done [the settlement of this claim] in violation and fraud of her rights, but I can find nothing which will justify me in coming to the conclusion that the directors acted in bad faith, or knowingly or intentionally disregarded the interests of the stockholders of the company." In the absence of the finding of bad faith on the part of the directors, or an intentional disregard of the interests of the corporation confided to their care, the only ground on which the relief sought could be extended was absent, and there was nothing left for the learned judge to do but dismiss the plaintiff's bill without prejudice to her right to proceed in any proper way to relieve herself from the consequences of any fraudulent acts of her agents, the directors of the Chambers & McKee Glass Company, in connection with the settlement of which she complains. We are not disposed to allow the costs in this case to follow the result of this appeal, but will modify the decree appealed from by imposing one-third of the costs in this case upon the plaintiff, one-third upon the directors of the Chambers & McKee Glass Company as individuals, and one-third upon McKee & Bros. As so modified, the decree is affirmed.

(185 Pa. St. 115)

COOPER et al. v. ROSE VALLEY MILLS et al.

Appeal of POTTS.

(Supreme Court of Pennsylvania. March 21, 1898.)

ASSIGNMENT—PAROL EVIDENCE—RATIFICATION.

1. Parol evidence is admissible as against assignee in insolvency of R. to show that prior assignment by R. to C. of "all money due or to become due by M. for goods consigned" by R. to M., or from any other sources, was intended to cover the goods and money of R. in the hands of M., its commission merchant.

2. An assignment signed for a company by its secretary will be held ratified by it, it having from the time of signing known thereof, and failed to repudiate it, though putting a wrong construction on it.

Appeal from court of common pleas, Delaware county.

Action by H. L. Cooper and another against the Rose Valley Mills and another. From a decree dismissing exceptions to report of auditor, defendant Potts appeals. Affirmed.

Following are the report of the auditor and the opinion of the court below:

Report of auditor:

"Before the assignment of Rose Valley Mills for the benefit of creditors, it owed Edward H. Coates & Co. about \$88,037.17, with some interest, which was partly made up of accounts which Coates & Potts had against Rose Valley Mills, and which were on June 9, 1890, assigned to Edward H. Coates & Co. for a debt which Coates & Potts owed them. On February 29, 1892, while this money was owing, Mr. Benjamin C. Potts, treasurer of Rose Valley Mills, met William M. Coates and Edward H. Coates at the office of William M. Coates, in Philadelphia; and, while there is a dispute as to just what was said, still, in consequence of it, the parties went to the office of Richard C. Dale, Esq., and had a paper drawn by him, of which the following is a copy: 'Media, Pa., February 29, 1892. The Rose Valley Mills hereby assign to Edward H. Coates & Company all money due or to become due by O. J. Martin & Company for goods consigned by Rose Valley Mills to O. J. Martin & Company, or from any other source. Rose Valley Mills. Benjamin C. Potts, Treasurer.' Notice of this assignment was given to O. J. Martin & Co. on February 29, 1892, by the treasurer of Rose Valley Mills, and receipt of the notice was acknowledged on March 1, 1892, by O. J. Martin & Co. to the treasurer of Rose Valley Mills. Almost immediately after the assignment of Rose Valley Mills for the benefit of creditors, on March 7, 1892, a dispute arose as to the ownership of the money in the hands of O. J. Martin & Co. The assignee claimed and included it in an inventory of the assets, and Edward H. Coates & Co. claimed it under the assignment, and insisted that it was improperly included in the inventory. This dispute was carried on until an agreement was entered into, dated May 9, 1892, wherein it was agreed by Edward H. Coates & Co. and Horace P. Green, assignee of Rose Valley Mills, that the goods be sold, if not then sold, and that the fund be paid to the United Security, Life Insurance & Trust Company of Philadelphia, and that suit be brought against the said company by the assignee to recover said money, and that a legal determination of the suit shall be binding and conclusive as to the fund. The trust company accepted the position as stakeholder, and, by agreement, are to receive three per centum of the proceeds for their trouble, as well as reimbursements for all outlays. The goods were sold for \$3,014.73. The trust company retain \$90.42 for their trouble, and retain \$2,924.31, awaiting the action of the court.

When Edward H. Coates & Co., in September, 1892, signed the composition paper, they stated in a letter to Benjamin C. Potts, treasurer, that it was signed with the distinct understanding that the O. J. Martin & Co. account was not included in the settlement, and that it must be first credited on account as a payment, to which the treasurer replied that he could not agree to such a disposition of the account, and that the assignment of the account was not in payment of the claim, but for a very different purpose, and that, unless the condition under which the signature was given was withdrawn, he must regard the composition as not signed by Edward H. Coates & Co. This misunderstanding was finally settled by an agreement that the composition paper was given and accepted without prejudice to either party in determining the ownership of the property or money in the hands of O. J. Martin & Co., as agreed to before. All the parties in interest appeared before your auditor, and agreed that the question to be determined in Philadelphia by an issue, as to the rights of the several parties to the fund now in possession of the said United Security, Life Insurance & Trust Company of Pennsylvania, received from O. J. Martin & Co., shall be passed upon and determined by your auditor in this proceeding with the same effect as if no issue had been agreed upon in Philadelphia.

"The question to be disposed of is: To whom does the fund in the hands of the United Security, Life Insurance & Trust Company belong? Edward H. Coates & Co. claim it, and offered the assignment of it by Benjamin C. Potts, treasurer, to them, and proved that Benjamin C. Potts has been a lawyer for ten years, was the treasurer of Rose Valley Mills, also the chief executive officer, had the general supervision of all business, signed notes, drafts, and checks, paid bills, bought goods, sold their product, arranged with commission houses to sell on consignment, negotiated and settled with creditors, and was the general manager and overseer of all the business of the Rose Valley Mills, and exercised, with the knowledge and without the disapproval of the company, all these and other powers necessary to carry on the business; that the by-laws gave him custody of the funds, the power to manage and conduct the operations of the mill, and the business generally in accordance with the directions of the board. To prove that the assignment was not intended to transfer the money to Edward H. Coates & Co. absolutely, but only to protect the goods from attachment, counsel for other creditors called Benjamin C. Potts, who admitted signing the paper, but said, under objection, that he met Edward H. Coates, William M. Coates, and Joseph H. Coates, in Philadelphia, and stated to them on February 29, 1892, that relief must be had for Rose Valley Mills, or that it

would have to make an assignment or ask for a receiver; that William M. Coates asked of him whether there were any foreign creditors who would be likely to attach any goods or accounts in commission house, and, being informed that there was a claim in New York and one in Boston which might annoy, suggested that the goods and accounts in the commission house be transferred temporarily to prevent attachments until an assignment could be made or a receiver appointed; that a paper was drawn and signed by Mr. Potts, as treasurer, assigning the money in the hands of O. J. Martin & Co. to Edward H. Coates & Co.; the validity of this paper was then questioned, and the parties, to settle that question, went to the office of Richard C. Dale, Esq., for the purpose of getting him to draw up such a paper which would stand; that Mr. Potts stated to the Messrs. Coates that it would be impossible for him to prefer Edward H. Coates & Co., inasmuch as he had told the creditors that there would be no preference; that the advisability of making an assignment or having a receiver appointed was discussed in Mr. Dale's hearing; that the assignment of the claim against O. J. Martin & Co. to Edward H. Coates & Co. was drawn up by Mr. Dale, read aloud, and, just before the treasurer signed it, Mr. Edward H. Coates said to Mr. Dale that it is not intended as a preference, but to prevent creditors from attaching goods in New York until such time as an assignment could be made or a receiver appointed; that it was then suggested by Mr. William M. Coates that the assignment should be a preference for at least so much as would cover the interest to the date that interest is paid to other creditors, whereupon Mr. Edward H. Coates stated that he had told Mr. Dale what the understanding was; that the treasurer would not have signed the paper if it had been intended as a preference; that, a short time after this, he saw Mr. William M. Coates, and ascertained that the paper was claimed as preference, and that he then told him that it was intended for no such thing, but to prevent attachments; that Edward H. Coates gave him an order on O. J. Martin & Co. for all over twenty-five hundred dollars in their hands, which Martin & Co. declined to accept, because they were unable to tell the value of the goods they had on hand which had not been converted into money. Horace P. Green was also called, and says that he, as assignee, included the account due by O. J. Martin & Co. in the inventory subject to the claim of Edward H. Coates & Co.; that he showed the inventory to Edward H. Coates & Co., and told them that he had understood from Mr. Potts that the assignment was given to prevent attachments of property in New York, and for the purpose of protecting all the creditors, so that none might be preferred; that Mr. Coates replied that primarily that was so,

but that there was considerable interest due to Edward H. Coates & Co., and that this assignment should be given as a preference to the amount of the interest, and that then they would be on an equality with the other creditors.

"To further sustain the assignment, counsel for Edward H. Coates & Co. called Mr. William M. Coates, who said that on February 29, 1892, Mr. Benjamin C. Potts and Mr. Edward H. Coates were at his office, and that Mr. Potts said that the Rose Valley Mills would have to stop unless he could get assistance, and that he feared some six thousand dollars in New York would be attached; that he wanted us to help him; and that, if we would not, he hoped to get outside assistance; it was then suggested to Mr. Potts that the claim of Edward H. Coates & Co. should be preferred in full, and that these goods be assigned to them as part payment; that Mr. Potts did not say that the assignment was not intended as a preference; that they accordingly went to the office of Richard C. Dale, Esq., and told him that they wanted to assign the money in the hands of O. J. Martin & Co., as a preference, and he, in consequence, drew up the assignment; that Mr. Edward H. Coates said to Mr. Dale that one purpose of the assignment was to prevent attachments by other creditors, on which Mr. William M. Coates said that the understanding was to be a straight preference, and to this Mr. Potts assented. Mr. Edward H. Coates says that on February 29, 1892, Mr. Potts came to the office of William M. Coates, and stated that the Rose Valley Mills were financially embarrassed unless relief came; an assignment for creditors would have to be made or a receiver be appointed; that it was asked of Mr. Potts if there were any goods which might be attached by foreign creditors, and, being informed that there was money in New York subject to attachment, Mr. William M. Coates suggested that as the claim of Edward H. Coates & Co. was such as should be preferred, that this money in New York, in the hands of O. J. Martin & Co., be assigned to Edward H. Coates & Co. as a preference; that Mr. Potts consented to assign the money in accordance with the suggestion of Mr. William M. Coates, and signed the transfer in Mr. Dale's office; that Mr. Green did not state to him that the assignment was not to give a preference, and he did not reply to Mr. Green that primarily that was so; that he did not say to Mr. Dale that one of the first objects to be accomplished by the assignment of the O. J. Martin & Co. claim was to prevent any attachments, but that Mr. William M. Coates said it was made upon no such conditions, and that Mr. Potts assented to this; that, shortly after the claim was assigned, Mr. Potts stated that, after he had given the assignment, he had shipped to O. J. Martin & Co. goods from which he expected to obtain advances sufficient to pay

wages coming due on the following Saturday, and asked the assignee of the claim to give him an order for an amount sufficient to pay the wages; that there was nothing said about the shipment of other goods when the assignment was made; and that an order was given for seventeen hundred dollars, provided the amount in the hands of O. J. Martin & Co. was not reduced below two thousand and five hundred dollars, and provided the order would not invalidate the assignment of the fund; that William M. Coates was consulted about this, because George M. Coates, whom William M. Coates represented, had guaranteed part of the claim against Rose Valley Mills. Richard C. Dale, Esq., testifies that William M. Coates, Edward H. Coates, and Benjamin C. Potts called at his office, and explained that Rose Valley Mills were in financial difficulty, owed Edward H. Coates & Co., and wanted to secure a portion of the claim by assignment of some money in the hands of a New York commission house; that they wanted the assignment drawn immediately, for fear creditors might get ahead of them by foreign attachment; that with this understanding the assignment was drawn; that Mr. Edward H. Coates did not say that the assignment was not intended as a preference, nor that it was only to prevent attachments of the money by foreign creditors, but that the parties expressed, in the hearing of all three, their desire to have a paper drawn which would give the claim of Edward H. Coates & Co. a preference as far as possible.

"Considerable correspondence is also offered, amongst which is a letter of March 8, 1892, concerning the order of O. J. Martin & Co., for the purpose of obtaining money to pay wages of the hands of the Rose Valley Mills, in which it is stated by Edward H. Coates & Co. that further necessities can be provided hereafter from the shipment of goods going forward. Mr. Edward H. Coates, in a letter of March 25, 1892, to the assignee, claims that the O. J. Martin & Co. account is improperly included in the inventory, and the assignee, by letter of the same date, states that he does not see how the claim could have been left out or included in any other way than that in which it appears. On September 16, 1892, Mr. Edward H. Coates wrote the Rose Valley Mills that the signature to the composition paper was given with the understanding that the O. J. Martin & Co. account be first credited on his account as a payment, and that the account was not included in the settlement. To this the treasurer replied, under date of September 22, 1892, that the O. J. Martin & Co. account was not assigned in payment of the claim, but for a very different purpose, and, unless the condition in letter of 16th is withdrawn, the agreement to compromise will have to be treated as not signed. This dispute was finally settled by a letter of Benjamin C. Potts, treasurer, to Edward H. Coates & Co., in

which it is stated that it was understood that the composition agreement is to be regarded as without prejudice to the rights of either party in the O. J. Martin & Co. account. The testimony given orally seems to practically agree with the letters offered; so your auditor is unable to reconcile the statements of the different parties.

"An attempt is being made to reform the assignment by parol evidence to establish a contemporaneous oral agreement which induced the execution of the assignment, though it may vary the instrument, or to show a contemporaneous promise to use the instrument for a particular purpose, which has been violated. It has been decided many times that, in order to contradict or vary a written instrument by parol testimony, there must be proof of fraud, accident, or mistake in the creation of the instrument itself, or an attempt to make a fraudulent use of it, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed; and the evidence must be clear, precise, and indubitable, and established by the testimony of two witnesses, or of one witness corroborated by circumstances equivalent to another. *Phillips v. Melly*, 106 Pa. St. 536; *Sylvius v. Kosek*, 117 Pa. St. 67, 11 Atl. 392. The instrument in this case is asked to be reformed on the positive testimony of Mr. Potts, and on the testimony of Mr. Green, which is made up of a talk with Mr. Coates. It is clear that, without the testimony of Mr. Green, the contention of the creditors must fail. Does his testimony vary or contradict the instrument, or show a fraudulent use of it, which was not contemplated at the time it was signed? It is not disputed but that Mr. Potts' primary object in having the goods assigned was to prevent their being attached, as that was the reason which prompted the assignment; so that statement can be reconciled with the assignment, and even though Mr. Green did say to Mr. Coates that its object was for the purpose of protecting all the creditors, so that none might be preferred, and that Mr. Coates told Mr. Green that was primarily so, but that there was considerable interest due on the claim, and that this assignment should give them a preference to at least the extent of the interest, still this does not show that it was not afterwards given as a preference on account of the claim or of interest, neither does it show that Mr. Coates said it was not intended as a preference. It does show that Mr. Coates contended then that it should be preferred to an amount equal to the interest, and that it was not given for the exclusive purpose of preventing attachments. It is far from clear that this evidence supports the testimony of Mr. Potts. We are of the opinion that the evidence offered is insufficient and not clear enough to vary the terms of the assignment. Should the court be of the opinion, however,

that the evidence against the instrument, standing alone, is enough to vary it, we are still confronted with the testimony of Edward H. Coates, William M. Coates, and Richard C. Dale, Esq. While they state that the assignment was prompted by a fear of foreign attachments, still they all insist that it was an absolute assignment, intended as a preference to Edward H. Coates & Co., owing to the character of their claim against Rose Valley Mills, and that Mr. Potts did not state that it was not intended as a preference. The instrument was read aloud to the treasurer before he signed it. He was fully aware of its terms, and, as a lawyer, knew its importance, and that it could not be easily varied if it did not contain all the transaction. Those who assert that the paper is not what it purports to be, and does not contain the entire transaction, must take the laboring oar, and prove it by evidence clear, precise, and indubitable. *Thomas v. Loose*, 114 Pa. St. 35, 6 Atl. 326.

"It is contended by Mr. Johnson that an agreement to give an order on O. J. Martin & Co. to pay wages is persuasive evidence that the assignment was not given to prefer Edward H. Coates & Co., else he would not have relinquished that much of the fund; but this position is explained to the satisfaction of your auditor by the fact that other goods had been shipped by Rose Valley Mills to O. J. Martin & Co., after the assignment, which was not in contemplation at the time the assignment was made, and for that reason Edward H. Coates & Co. relinquished some of the fund, upon the expressed condition that the remainder of the fund be not reduced below twenty-five hundred dollars. Your auditor is of the opinion, and finds from the weight of the evidence, that the paper assigning the goods in the hands of O. J. Martin & Co. to Edward H. Coates & Co. was signed with the intention of creating a preference for the amount realized from the sale of those goods.

"It is contended, however, that, even though it was so intended, the treasurer had no authority to make such an assignment. The by-laws of the corporation gave the treasurer custody of the funds of the corporation, gave him power to manage and conduct the operations of the mill and the business generally in accordance with the direction of the board. In pursuance of this very general power, the treasurer, who was also chief executive officer and general manager, had, with the knowledge of the company, general supervision of all business, paid all bills, bought and sold good, arranged with commission houses to sell on consignment, signed notes, drafts, and checks, employed and discharged the hands and workmen, and exercised, without disapproval of the directors, all powers necessary to carry on the business. The directors seemed to meet every three months, but the minutes disclose the transaction of very little, if any,

business, and do not show any action of the directors, in conducting any particular business, or that the acts of the treasurer were approved or disapproved. If the proceeds of the sale of the goods in the hands of O. J. Martin & Co. had been in the bank account of Rose Valley Mills, there can be no question but that the treasurer had authority to draw a check for the amount to Edward H. Coates & Co. for a payment on account of their claim; and, as the money was in the hands of O. J. Martin & Co., your auditor is unable to see why he did not have the authority to do practically the same thing in giving an assignment of the claim for the same purpose; and the fact that the assignment of this claim was made on the eve of the insolvency of the corporation makes no difference. *Williams v. Rolling-Mills Co.*, 174 Pa. St. 299, 34 Atl. 442. Your auditor is therefore of the opinion that the treasurer did not exceed his authority under the by-laws, and that the assignment is valid, and recommends that the amount of money in the hands of the United Security, Life Insurance & Trust Company, less their commissions, be awarded to Edward H. Coates & Co., on account of their claim.

"The report of your auditor was referred back to him for the purpose of taking more testimony on the claim for the goods in the hands of O. J. Martin & Co. By this testimony it appears that O. J. Martin & Co. would not pay the amount of money or give the warehouse receipt for the goods to E. H. Coates & Co., because the assignee of Rose Valley Mills, for the benefit of its creditors, claimed them, and would not give them to the assignee, because E. H. Coates & Co. claimed them, and, to get the matter adjusted, an agreement was entered into between the assignee and E. H. Coates & Co., on May 9, 1892, wherein it was agreed that the goods be sold, if not then sold, and that their proceeds be paid to the United Security, etc., Co., and that a suit for the proceeds be brought to determine who had the right to the money. It was afterwards agreed by the parties that the dispute be referred to your auditor. After the agreement was entered into, Mr. Potts went to see O. J. Martin & Co., and obtained from them a draft, which represented the goods sold, indorsed to the order of the United Security, etc., Co., and the warehouse receipt, which was indorsed to him as treasurer, and which represented the goods which had not been sold. The draft and warehouse receipt were turned over to the United Security Company, in pursuance of the agreement, and they had never been in the hands of E. H. Coates & Co. The draft and warehouse receipt were transferred by O. J. Martin & Co., for the purpose of getting them into the hands of the stakeholders. Upon this state of facts, it is urged:

"(1) That the assignment to E. H. Coates & Co. did not pass the goods unsold, in the

hands of O. J. Martin & Co. I think it cannot be doubted but that it was the intention of all parties in interest to transfer everything in the hands of O. J. Martin & Co., belonging to Rose Valley Mills. 'All money now due and to become due for goods assigned' is the language of the assignment. The goods were placed in the hands of O. J. Martin & Co. for sale, and the proceeds of those sold at the time of the assignment to E. H. Coates & Co. undoubtedly passed to them, and those unsold had been in the hands of Martin & Co. for some time, and were put there for sale; and the clause in the assignment 'all money to become due' certainly contemplated a transfer of that realized by a sale of those not then sold, and would certainly put the goods themselves out of all reach and control of the Rose Valley Mills. Your auditor is of the opinion that it would be drawing too fine a distinction to hold that the goods in the hands of Martin & Co., for sale, did not pass by the assignment.

"(2) That E. H. Coates & Co. cannot claim them as against the assignee, because they did not have them in possession. Your auditor does not understand the law to be that an assignee of goods must take actual possession of them when they are not left in the hands of the assignor. The general rule is that possession must be given to the vendee when the property sold is in vendor's possession; and, in determining the kind of possession necessary in the vendee, regard must be had to the character of the property, the location of it, the nature of the transaction, the position of the parties, and the intended use of the property. In this case, when the property was assigned, it was out of the actual possession of the assignor, and the assignee of it had quite as much possession after the assignment as the assignor had before. It had been placed in the hands of a commission merchant for sale, and was at the time of the assignment in his hands for that purpose, subject to his charges; and, of course, E. H. Coates & Co. would only take possession of the goods and money subject to the charges of the commission house, and only wanted the proceeds of the sale of the goods, after being converted into cash. Your auditor is therefore of the opinion that the assignment to E. H. Coates & Co. passed the money, together with the goods in the hands of Martin & Co. for sale, and that the possession of E. H. Coates & Co. was sufficient under the circumstances, and sees no reason to change his report."

Opinion of court dismissing exceptions:

"Both sides seem dissatisfied with the auditor's report. Mr. Potts, the principal creditor, excepts to the auditor's construction of the paper executed by him for the company, purporting to assign to E. H. Coates & Co. the commission account of the company in the hands of O. J. Martin & Co., of New York, dated February 29, 1892. Coates & Co. except to the allowance made by the auditor to Mr. Potts for his salary. Both parties object to certain fees and expenses being charged to

the fund, instead of to the share of the funds awarded to the litigants. The testimony is quite voluminous, and the argument was most exhaustive. The points in dispute may be reduced to five: (1) What is the proper construction of the paper of February 29, 1892, unaffected by the parol testimony? (2) Is the parol testimony sufficient to either explain or vary the writing. (3) If the paper is to be construed as an assignment of the money and goods in the hands of O. J. Martin to E. H. Coates & Co., had Mr. Potts authority to make such a contract, to be binding upon both the company and its creditors? (4) Has the auditor allowed Mr. Potts too much for his services as general manager of the concern? (5) Has the auditor properly distributed the fees and expenses in charging them to the fund, instead of charging the dividends awarded to the several litigants?

"The paper, standing alone, would undoubtedly be an equitable assignment if it was for a good and sufficient consideration, and was authorized by the company. On its face, it states no consideration. This, however, can always be proved by parol. The uncontradicted evidence on both sides is that the Rose Valley Mills owed E. H. Coates & Co. an honest business debt, more in amount than the highest value of the goods and money assigned. It was also competent to hear parol testimony as to any latent ambiguity in the paper. It speaks of 'money due and to become due,' etc. The uncontradicted parol testimony is that it was intended to cover all the property in the hands of O. J. Martin & Co. that could be attached, and that the subject of the alleged assignment was the goods and money of the Rose Valley Mills in the hands of their commission merchant, O. J. Martin & Co., of New York. Thus far, therefore, the auditor has heard proper testimony to enable him to construe the paper. If the evidence of a contemporaneous parol agreement, giving to the paper a meaning different from its apparent meaning, has not been sufficient in law to have that effect, then the construction put upon this paper by the auditor is correct, and the chief exception must be dismissed.

"This brings us to the second question: Is the parol testimony sufficient of a contemporaneous parol agreement that this paper should only be used for the benefit of all the creditors, and that its object was to assign the money and goods to Edward H. Coates & Co., as a trustee for all the creditors, so as to place the property beyond attaching foreign creditors? The auditor has found against this proposition, and we are not convinced that this is erroneous. He had the witnesses before him, and was better able to weigh the testimony than the court can by a mere reading of it.

"This brings us to the third question: Had Mr. Potts authority to make such a contract? It may be conceded that he had not such authority, either as secretary or general manager. And, unless there is sufficient evidence of a ratification of his contract by the company,

we are of the opinion that this point was well taken. We find, however, that the company, from the time the paper was signed, knew of its existence, and have not from then till now repudiated it. The assignment that was made by the company a few days after the date of the paper virtually recognizes it, as the assignee, in his inventory of the assets, names the commission account of O. J. Martin & Co., and notes it as subject to the claim of Edward H. Coates & Co. 'Potts was the active business executive of the company under its by-laws.' (I quote from Mr. Johnson's paper book.) There was a meeting of the directors after the date of the paper, and after an alleged compromise with all the creditors, including Coates & Co., and after the Rose Valley Mills Co. had full knowledge of the existence of the paper. In addition to this, the company and assignee claimed under the assignment. The tripartite agreement to select a stakeholder until the effect of the paper should be construed was a clear ratification of Potts' power to make it. Not only was no action taken to repudiate it, but, on the contrary, it was regarded by the company as a valid transfer of the claim in New York, at least so far as to protect the property from attaching creditors. True, Mr. Potts says the company supposed his construction of the paper was all the effect it was to have, but a mistake in law will not relieve them. We are therefore of opinion that the learned auditor has given the proper construction to the paper, and that its legal effect was to vest in E. H. Coates & Co. the title to said goods and money, not only as to the company, but as against its creditors. By the uncontradicted testimony, the intention of the parties was that this paper was to have the effect of defeating any foreign attachment, which it could not have unless it was a full and absolute assignment, bona fide, made before the levying of the attachment.

"The fourth question is: Has the auditor allowed Mr. Potts more than he was entitled to under his agreement and the resolution of the company, as measured by the services he rendered? It must be remembered that Mr. Potts was the factotum of the concern; that the company had agreed to the compensation claim; that the company, although it had reorganized, and held a meeting afterwards, did not change it. It must also be remembered that the success of business was doubtful, and the result has shown that all he could receive was his dividend. Under all the circumstances, we do not feel like disturbing the finding of the auditor on this point. His findings upon the fifth and last point are entirely satisfactory, and, in our judgment, correct. The exceptions are therefore dismissed, and the report of the auditor is confirmed."

Isaac Johnson, for appellant. V. Gilpin Robinson and William C. Hannis, for appellees.

PER CURIAM. We think the findings of fact contained in the auditor's report are fully sustained by the testimony, and upon those

findings, and for the reasons stated in the report of the auditor and in the opinion of the learned court below, we affirm the decree. Decree affirmed, and appeal dismissed, at the cost of the appellant.

(185 Pa. St. 98)

In re NEFF'S ESTATE.

(Supreme Court of Pennsylvania. March 21, 1898.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RENTS OF LAND ASSIGNED—RIGHTS OF CREDITORS—BOND—CONSTRUCTION—CONTRACTS—SUFFICIENCY OF EVIDENCE—ESTOPPEL.

1. Rents of land assigned for the benefit of creditors, subject to incumbrances, must be applied by the assignee to the liens.

2. The condition in a bond given to a bank was that N. should pay to the bank, when so required by it, all notes and other indebtedness on which he "is liable" in any way to said bank. *Held*, that such bond secured only debts existing at the date of the bond, and not notes which were not renewals, afterwards executed.

3. Where the question was whether it was subsequently agreed that a bond given a bank should be security for notes of N. executed after its date, there was evidence that he said to a committee which called that the judgment on the bond "secures all these notes," or "that this judgment that we had was to cover all these notes." *Held*, that the evidence merely showed the expression of an opinion by N. as to what the bond covered, and not an agreement that it should cover such notes.

Appeal from court of common pleas, Lehigh county.

Distribution of the assigned estate of Joel Neff. From a judgment dismissing its exceptions to and confirming the auditor's report, the National Bank of Slatington appeals. Affirmed.

Joel Neff made an assignment for the benefit of creditors to Frank Jacobs on the 8th day of April, 1896. At the time of the assignment the assignor was the owner of considerable valuable real estate situate in the county of Lehigh. This real estate was sold by the assignee under an order of the court of common pleas for the payment of debts, and, on return being made to the order of sale, the sale was confirmed by the court. This sale discharged all liens on the property except first mortgages. At the time of the execution of the assignment the judgments against said Joel Neff entered of record were as follows, and in the following order, to wit: (1) Frank Jacobs, No. 393, January term, 1896, note dated April 4, 1896, for \$925. (2) National Bank of Slatington, No. 405, January term, 1896, bond dated July 19, 1893, entered April 6, 1896, for \$30,000. (3) Thomas Kern, No. 411, January term, 1896. Note dated April 6, 1896, entered same day for \$10,950. There were judgments entered on a subsequent day to these, but they were not reached, and do not come in question here. The auditor in his first report reported that the net balance for distribution arising out of the proceeds of sale of the real estate, after deducting all proper costs and expenses,

was \$6,498.79. This amount he distributes as follows:

To Frank Jacobs, on his judgment No. 393, January term, 1896.....	\$ 955 55
To Thomas Kern, on his judgment No. 411, January term, 1896 (the balance)	5,543 24
Total	\$6,498 79

The auditor refused to make any distribution to the judgment of the National Bank of Slatington, though entered on the same day with that of Thomas Kern, and prior in date and in time of entry. On exceptions being filed to this report, the same was referred back to the auditor for the taking of further testimony. In his supplemental report the auditor makes no change in the distribution, except that he deducts the expenses of the reference back from the amount allowed in his former report to Thomas Kern, thus making his distributive share \$5,489.54. The bond on which the judgment of the National Bank of Slatington was entered is dated July 19, 1893, is for \$30,000, and contains the following conditions: "The condition of this obligation is such that if the above-bounden Joel Neff, his executors, administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above-named National Bank of Slatington, when so required by them, all notes and other indebtedness in which he is liable in any way to said National Bank of Slatington, and said bank to have the right at any time to enter judgment and issue execution to recover said indebtedness, whether notes of said Joel Neff are due or not." None of the notes held by the bank at the time of the execution of this judgment bond remained unpaid at the time of the assignment. But subsequently a large amount of other notes were discounted by the bank for Mr. Neff, on which he was liable either as maker or indorser, aggregating, in the fall of 1895, about September or October, to upwards of \$20,000. On some of these notes Thomas Kern was indorser. About September or October, 1895, the bank appointed a committee consisting of W. H. Gish, the cashier of the bank, and D. D. Roper, and the said Thomas Kern, two of the directors of the bank, to see Mr. Neff in relation to his standing and the notes he had in bank. This committee had an interview with Mr. Neff in the bank, all the members of the committee, including Mr. Kern, being present. The object of this interview was to get Mr. Neff to take up his notes in the bank, and to reduce his liability to the bank, and to get him to give security or collateral to the bank for his liability. What occurred between this committee and Mr. Neff is stated in the opinion of the court of common pleas. Subsequent to this interview with Mr. Neff, and on the strength and in pursuance of what was then said by Mr. Neff, the bank renewed some of the notes for Mr. Neff and discounted other notes for

him; and all the notes held by the bank at the time of the assignment on which Mr. Neff was liable were either renewals of notes or new notes discounted by the bank for Mr. Neff subsequent to this interview of the committee with him. At the time of the audit the amount due on the notes held by the bank on which Mr. Neff was liable, either as maker or indorser, was \$5,306.46. The contention on the part of the bank was that there should be a pro rata distribution of the balance after the payment of the judgment of Frank Jacobs on the judgment of the bank and that of Thomas Kern. This was denied by the auditor and the court below, and the whole balance was distributed to Thomas Kern on his judgment. Hence this appeal.

The opinion of the court of common pleas is as follows (Albright, J.):

"As to rent charged in this account (this account concerns the realty only; there seems to be a personal fund not yet accounted for): The authorities cited by the learned auditor show that rents are to be applied to the payment of liens. See, especially, Wolf's Appeal, 106 Pa. St. 545, and cases cited in opinion in that case. The auditor's decision in this respect is correct. As to taxes paid by assignee: Upon reading the reports and the evidence, the court is unable to find any findings of fact about the taxes nor any evidence from which the facts about them can be found. There is no proof upon which error of the auditor in refusing to impose them on this real-estate fund can be inferred. If accountant desires to press the matter of taxes, probably upon proper application made at an early day, there will be a reference back for the auditor's action as to the facts and the law. Is the Slatington National Bank entitled to have its judgment share in the distribution with that of Thomas Kern? Both were entered on the same day, April 6, 1896. The bond, with warrant of the bank, is dated July 19, 1893. The condition is that if Neff shall pay, or cause to be paid, to the bank, 'when so required by them, all notes and other indebtedness in which he is liable in any way to said National Bank of Slatington, and said bank to have the right at any time to enter judgment and issue execution to secure said indebtedness, whether notes of the said Joel Neff are due or not.' The meaning of the words 'is liable' is not affected by any other words in said condition. It is beyond argument that it provided only for indebtedness existing at the date of the bond. It would no doubt cover the case of renewals of evidences of such then existing debts. Appeal of Bank of Commerce, 44 Pa. St. 423. But it is conceded by the bank that none of the indebtedness when the judgment was entered existed at the date of the bond. It is claimed by the bank that it is shown by testimony that the bond covered indebtedness created subsequent to its date; that Neff so agreed. As to the said matter, Mr. Roper testifies that he was a director of the bank; that the financial standing of Mr. Neff was discussed; that in Sep-

tember or October, 1893, Mr. Gish, the cashier, Thomas Kern, aforesaid, and the witness were appointed a committee to see Neff in relation to his standing and notes in the bank; said committee met Neff at the bank; said bond (it is for \$30,000) was talked about; Gish said to Neff that they wished to see him about his notes in the bank; the bank examiner was finding fault; certain notes were mentioned; 'that we did not regard these notes as safe, and look upon them as single-name papers; and that he ought to take them out of the bank, or provide us with satisfactory security; and that we wanted him to make some effort to take up these notes, and that we wanted to feel safe in the matter. Mr. Neff said, 'I will do what I can in the matter, to take out notes as fast as I can reduce.' He said, 'I don't see why you don't feel safe; I gave you a judgment that secures all these notes.' I said, 'Mr. Neff, that judgment is not on record.' 'Well,' he says, 'you might put it on record any time you want, if you find it necessary to protect yourself;' 'but,' he says, 'I would not like to have the judgment on record, as it would injure my credit and standing. If you feel any danger, you may put it on record, but I would not like it. I think I can take these notes up, and I think I am good for all my debts.' That was principally what was said between us.' Mr. Kern was present, and heard what was said. At that time the bank held Neff's paper for about \$20,000. Mr. Gish testifies concerning said meeting and conversation: 'I stated the object to Mr. Neff of the meeting about the amount of his notes, saying that we wanted security, some collateral, or to get him to take up some of these notes. He said he didn't know why we were uneasy, because he had given judgment for all these notes. He always met me with the argument that he had given judgment for the notes.

* * * He said, 'You fellows are safe, because I gave you judgment for all these notes.'

* * * That afterwards, when Neff was spoken to by the witness about his indebtedness, he said he would take care of them; that we should renew them; 'that this judgment that we had was to cover all of these notes;' and that consequently the notes were renewed for his accommodation. This is the testimony relied on by the bank. It was given upon the hearing on the reference back, which was made to afford an opportunity to make the testimony more explicit after the witnesses had refreshed their recollections. Kern was the indorser of Neff on notes held by the bank when said judgment was given, and when said conference took place, for about \$6,200. After Neff's failure Kern lifted those notes. (Testimony of Mr. Gish and of Mr. Roper.) That liability or debt was part of the consideration of Kern's judgment, which was confessed on April 6, 1896, for \$10,950. The fund in controversy is \$5,489.84. The parties to a written contract may subsequently abandon, modify, or change it, or substitute a new contract, and this may be shown by parol. Holloway

v. Frick, 149 Pa. St. 178, 24 Atl. 201. In *Mitchell v. Coombs*, 96 Pa. St. 430, the latter had given a mortgage to a bank intended to secure, not future advancements, but a bond of \$1,000, which he at the time owed the bank and afterwards paid. The bank, instead of satisfying the mortgage, retained it as security for future discounts. The supreme court said that Coombs' acquiescence in that arrangement would not avail to continue its lien; and quoted from *Irwin v. Tabb*, 17 Serg. & R. 423, that 'it must perhaps be conceded that a mortgage to secure further advances which does not contain notice of the agreement is void against creditors generally.' While Coombs was still indebted to the bank, the latter assigned the mortgage to a third party, Coombs representing that it was a first lien and no defense against it. Concerning that the court said: 'Suppose that this assignment, made, as it was, with Coombs' consent, not only estopped him, but as to creditors amounted to a novation of the mortgage; yet as to them it could be nothing more than a novation, and, in order to give it effect, they must have notice.' A judgment for future advances is a lien for such advances, as against intervening incumbrances, only from the date of such future advances, and not from the date of the judgment. *Kerr's Appeal*, 92 Pa. St. 236. Evidence of the intention of the parties at the time of the discounts to consider the new notes as renewals of former notes is not admissible. The question is one of fact whether or not they are renewals, and not what the parties intended or considered. *Appeal of Bank of Commerce*, supra. The court remarked that the rejected questions on the trial and the points were attempts to substitute the opinions and intentions of the parties for the actual facts, and that the court below were right in overruling the questions and in declining so to charge the jury. The most obvious of the reasons why the bank's contention cannot prevail is the one that, taking said testimony at its strongest, it does not establish that the condition of the obligation was changed, nor that it was intended or desired to change it; nothing was added to it. The parties to the conference did not have the bond then, and it is probable that no one of them had a distinct idea as to what the bond actually covered. What Neff said on that occasion amounted to no more than an opinion that the bond covered the notes then held by the bank, or an argument the purpose of which was to persuade the bank's representatives to be content with his obligation then held by the bank. He said, 'I gave you a judgment that secures all these notes;' and, according to another version, 'that this judgment that we had was to cover all these notes.' It is urged that Kern is estopped from resisting the bank's claim because he was present and was a party to said conference. But he did

not say, or refrain from saying, anything that induced action or inaction by the bank to its prejudice. And the cashier and the other director present knew as well as Kern that the latter was on Neff's paper then held by the bank. It seems Kern, like his colleagues, was satisfied with Neff's assurance that the bond was for all the notes on which he was liable to the bank. When that bond was entered and became a judgment it secured none of Neff's obligations at that time. October 25, 1897, the exceptions are dismissed, and the report confirmed."

John Rupp and D. D. Roper, for appellant.
Edward Harvey, for appellee.

PER CURIAM. In his opinion dismissing the exceptions and confirming the auditor's reports, the learned president of the common pleas has so carefully considered and satisfactorily disposed of the questions presented by the assignments of error that nothing can be profitably added to what he has so well said. A careful examination of the record has disclosed nothing that would justify us in disturbing the decree; and we accordingly affirm the same, and dismiss the appeal, for reasons given in the opinion referred to. Decree affirmed, and appeal dismissed, at appellant's costs.

(125 Pa. St. 121)

MEDIA TITLE & TRUST CO. v. KELLY et al.
(Supreme Court of Pennsylvania. March 21, 1898.)

SHERIFF'S SALE—SETTING ASIDE—EVIDENCE—PRESUMPTIONS.

1. It was error to set aside a sheriff's sale after it was confirmed, the deed was acknowledged in open court, and the purchase money had been paid, on the grounds that part of the land had been subdivided, and the other part contained a valuable stone quarry; that neither the subdivision into lots nor the quarry was mentioned in the advertisement of sale; that the sale was not advertised as required by law; and that the price was inadequate.

2. In the absence of evidence to the contrary, it will be presumed that the court made a special order fixing a certain day for the acknowledgment of sheriff's deeds, where a deed acknowledged on such day is attacked.

Appeal from court of common pleas, Delaware county.

Action by the Media Title & Trust Company against Mary Kelly and others, in which there was a judgment for plaintiff. Certain land was sold by the sheriff under execution issued on said judgment, the sale was confirmed, and the deed was acknowledged in open court, and delivered to the purchaser. Defendants filed a petition to set the sale aside, etc. From an order setting aside the sale, plaintiff appeals. Reversed.

Horace P. Green and V. Gilpin Robinson, for appellant. John E. McDonough, for appellees.

GREEN, J. This is an appeal from an order of the court below setting aside a sher-

iff's sale of lands of the defendants. The sale was made on July 3, 1897. On the 6th of July, 1897, the sheriff's deed was duly acknowledged in open court, and was delivered to the purchaser. The whole of the purchase money was paid by the purchaser prior to the acknowledgment of the deed, partly in cash and partly by the proper receipt of the purchaser as first lien creditor on the sheriff's docket. On the 13th of July, 1897, the defendants in the execution presented a petition to the court below to have the sale set aside, and November 3d following the rule to set aside the sale was made absolute. On November 8th the plaintiff presented a petition to have the order setting aside the sale revoked, and on January 7th the court filed a modified order vacating the record of the acknowledgment and delivery of the deed, and directing the deed to be delivered up for cancellation, the refunding of the hand money paid by the plaintiff as purchaser, and discharging the rule for the revocation of the decree made November 3, 1897. The exceptions to the sheriff's sale were that a large portion of the land in question—a tract of 71 acres—had been subdivided into streets and building lots, and that the part not subdivided contained a valuable stone quarry, and that neither the subdivision into lots nor the stone quarry was mentioned in the advertisement of the sale. It was also objected that the sale was not advertised as required by law, and that the price realized at the sale was grossly inadequate; but no offer of any higher price was made. The court below, without filing any opinion, made absolute the rule to set aside the sale, and the question is whether there was error in this ruling. The appellant contends that it was too late to set aside the sale for irregularities or inadequacy of price after the acknowledgment and delivery of the sheriff's deed. The rule upon this subject seems to be very well settled. Thus, in *Cooper v. Wilson*, 96 Pa. St. 409, which we regarded as an extremely hard case, and would have relieved if it were possible to do so, we said: "It is a familiar principle that a sheriff's sale will not be set aside for mere inadequacy of price. *Weitzell v. Fry*, 4 Dall. 218; *Carson's Sale*, 6 Watts, 140; *Swires v. Brotherline*, 41 Pa. St. 135. It is true, in a clear case of inadequacy of price the court will seize hold of a slight irregularity to set aside the sale. But mere irregularities are cured by the acknowledgment of the sheriff's deed. *Crowell v. Meconkey*, 5 Pa. St. 168; *Spragg v. Shriver*, 25 Pa. St. 282; *Shields v. Miltenberger*, 14 Pa. St. 76. We have no doubt that relief might have been granted for the misdescription, had an application been made in proper time. But it was too late, after acknowledgment and delivery of the deed and payment of the purchase money. There must be a point of time when such irregularities are cured. The law fixes the acknowledgment of the sheriff's deed as that time. Were we to relax this rule, we might imperil titles." In *Evans v. Maury*, 112 Pa. St. 300, 3 Atl. 850, which was a case of alleged fraud upon the

defendant in the execution, we held that, after a sheriff's sale has been confirmed, the purchase money paid, the deed acknowledged, recorded, and delivered to the purchaser, and possession of the premises taken by him, the court has no power, upon a rule to show cause, to set aside the sale, and compel the purchaser to deliver up the deed to be canceled. The delivery of the deed by the sheriff, after it has been properly acknowledged, the sale confirmed, and the purchase money paid, vests the title in the purchaser. It is a good title until it is proved that he procured it by fraud upon the defendant in the execution. This must be done either in an action of ejectment or by bill in equity. In both the foregoing cases the sale was set aside by the court below, but the orders were reversed by this court.

It is contended by the appellees that the record does not disclose any special order of the court fixing the 6th day of July, 1897, as a day for the acknowledgment of deeds, and hence the acknowledgment in this case was void. It is not claimed that there was no such order, but only that the record does not disclose it. It is only necessary to say that this contention entirely ignores the rule, "*Omnia præsuntur esse rite acta*," and hence is entitled to no consideration. Certainly it must be presumed, in the absence of evidence to the contrary, that in so important a matter as the acknowledgment of sheriff's deeds, to be done formally in open court, and upon which the titles to all lands sold by the sheriff depend, the court acted rightly, and strictly in accordance with its own rules. This point does not appear to have been made in the court below, and hence the necessity of being prepared with proof on this subject was not apparent to the appellant. But, as no proof was required to show that the court obeyed its own rules, the proposition that it did not do so would require much more proof than the mere assertion of counsel that the record did not disclose it affirmatively. However, the counsel for the appellant has furnished us with the official certificate of the prothonotary of the court below, by which it appears that on June 21, 1897, the court did make a formal order for the holding of a court on the 6th day of July following, for the acknowledgment of sheriff's deeds, the confirmation of accounts, and the transaction of miscellaneous business. The certificate further shows that on the 6th day of July named in the order the sheriff appeared in open court, and acknowledged 15 deeds for as many different properties, among which was the deed in question in this case. It would be useless, therefore, to entertain the suggestion made by counsel for the appellees that the record does not disclose the fact, when in truth it does make that disclosure. We cannot discover any sufficient reason for setting aside the sale in this case, and therefore sustain the assignments of error. The order of November 3, 1897, making absolute the rule to set aside the sheriff's sale, and the order of January 7, 1898, vacating the record of the acknowledgment and delivery of the sheriff's deed, and directing that

the same should be surrendered for cancellation, are reversed and set aside, at the cost of the appellees.

(185 Pa. St. 95)

BACHMAN v. PHILADELPHIA & R. R. CO.
et al.

(Supreme Court of Pennsylvania. March 21, 1898.)

DEATH BY WRONGFUL ACT—LIMITATIONS.

Act 1851 (P. L. 674) and Act 1855 (P. L. 309), giving a right of action to widow or personal representative of one whose death is unlawfully caused, being general laws, and not affecting corporations only, are not repealed by Const. art. 3, § 21, providing that "no act shall prescribe any limitation" for suits "against corporations" different from those fixed by general laws, and avoiding any such existing acts.

Appeal from court of common pleas, Lehigh county.

Action by Mary Bachman against the Philadelphia & Reading Railroad Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Opinion of the court below:

"In the statement it is averred that Henry Bachman, the husband of plaintiff, was instantly killed by the alleged negligence of defendant on August 31, 1894, for which damages are claimed by the plaintiff. This action was brought on March 9, 1896. The statement is demurred to on the ground that the action was not brought within one year after said death. For reasons set forth in an opinion filed by this court in *Grath v. Iowa Barb-Wire Co.*, No. 26, September term, 1894, the demurrer is sustained."

Opinion in *Grath* against the Iowa Barb-Wire Company, referred to in the court's opinion in this case:

"The cause of action averred is that defendant, by negligence, caused the death of plaintiff's minor unmarried son. The action was brought more than one year after the son's death. Defendant demurred to the statement of cause of action. The ground of the demurrer is that the action does not lie, because not brought within one year after the death, as required by the second section of the act of 1855 (P. L. 309). As to this, plaintiff's counsel insists that said one-year limitation is abrogated, and actions of this nature are left under the act of 1713, limiting actions, by virtue of article 3, § 21, of the constitution of this state, which provides that 'no act shall prescribe any limitation of time within which suits may be brought against corporations for injuries to persons or property or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided.' The argument in this reference is that said act of 1855, and that of 1851 (P. L. 674), which gives a right of action to the widow or personal representative of one whose death was

unlawfully caused, are not general laws, that said act of 1855 picks out a particular class from a general class. The court is of the opinion that this action cannot be sustained. At common law an action for malfeasance or misfeasance died with the person. A personal right of action dies with the person, was the maxim. *Broom, Leg. Max. 702*. Therefore, the act of 1851, conferring a right of action, and that of 1855, designating the beneficiaries and the time within which suit should be instituted, relate to a class. A class was created by said legislation. Said one-year limitation is as general a law as can be conceived, unless it were conceded that, to be a general law, the law must embrace all human beings, all kinds of property, or all legal remedies, which, of course, would be impracticable.

"The foregoing is a reply to plaintiff's counsel's chief argument; but that argument does not bear on the real question. Said provision of the constitution avoids all acts of assembly that prescribe any limitation of time for suits against corporations different from those fixed by general laws regulating actions against natural persons. No difference as to rights exist between corporations and natural persons by reason of said acts of 1851 and 1855. Said act of 1851 (section 18) saves from abatement by the death of the plaintiff all actions for injuries to the person by negligence or default, and declares (section 19) that whenever death shall be occasioned by unlawful violence or negligence, and no suit be brought by the injured party in his lifetime, the widow or personal representatives may recover damages. The first section of the act of 1855 designates what relatives of the deceased may recover for any injury causing death; and the second section prescribes what the declaration shall set forth, and declares that such action shall be brought within one year after the death, and not thereafter. It cannot be said that said legislation affects only corporations; for natural persons as well as corporations are made defendants in actions for damages for injuries causing death. This court is but treading the path beaten by the common pleas judges who decided *Kashner v. Railroad Co.*, 42 Leg. Int. 346; *Black v. Nockamixon Tp.*, 2 Pa. Co. Ct. R. 116; *Wasson v. Railroad Co.*, 25 Pittsb. Leg. J. 184, and *Jacobs v. Railroad Co.*, 6 Pa. Co. Ct. R. 60."

James L. Marsteller, for appellant. R. E. Wright, for appellees.

PER CURIAM. For reasons given by the learned president of the court below, he was clearly right in entering judgment for the defendant on the demurrer to plaintiff's statement. All that is necessary to be said on the question involved will be found in the opinion to which he refers in disposing of the demurrer. Judgment affirmed.

(185 Pa. St. 19)

COMMONWEALTH v. MYLIN et al.

(Supreme Court of Pennsylvania. March 14, 1898.)

CAPITOL COMMISSION—INJUNCTION.

The commissioners appointed to erect a state capitol cannot be enjoined from proceeding because it might be made more nearly fireproof, the direction that it be as nearly fireproof as possible being relative to the absolute limitation as to cost, and to the necessity for size.

Appeal from court of common pleas, Dauphin county.

Suit by the commonwealth of Pennsylvania against Amos H. Mylin and others for injunction. From decree denying preliminary injunction, plaintiff appeals. Affirmed.

The opinion of the court below is as follows: "As we have come to the conclusion that a preliminary injunction ought not to be granted, and as the act of assembly which gives the right of appeal where a motion for a preliminary injunction is denied provides that 'all such appeals shall be heard by the supreme court in any district in which it may be in session, as provided in cases of equity originating in the supreme court, * * * and all cases shall be heard and determined as though said court had original jurisdiction in the premises and the application for injunction had been made to said court,' we do not think it would serve any useful purpose to discuss this case at length. We shall therefore content ourselves with indicating briefly the reasons for our conclusions. One of the allegations in the bill on which the motion for an injunction is based is that the specifications upon which the advertisement for bids for the construction of the capitol building was founded call for an unfinished and incomplete structure, and that, if it were built according to these specifications, it would be incomplete, and not habitable. This averment in the bill is sustained by the testimony of several witnesses, but the conclusion sought to be drawn from it is based on evident misapprehension. The defendants admit, in their answer, that the building would be incomplete if the construction were confined to these specifications, and the contract to be based upon them; but they aver, and Mr. Cobb, their architect, testifies, that additional specifications are to be prepared, and other contracts made, for the remaining parts of the construction, all of which are to be in progress together, and to be finished at the same time. Another averment in the bill is that the intent and meaning of the act of assembly was that a completed building should be erected for the use of the general assembly, its officers, committees, and employes, and that in future, from time to time, as the financial condition of the state will admit, other buildings are to be added, necessary for executive and departmental purposes; but that the plans and specifications prepared for the commission by their

architect provide for the incomplete construction of a large structure for the use, not only of the general assembly, but for executive and departmental purposes as well. The defendants, in their sworn answer, aver that the act of assembly requires them not only to procure the construction of a new capitol building on or near the site of the old capitol building, in the city of Harrisburg, of such size and form as may, in their judgment, be adapted to the present and future use of the general assembly, its officers, committees, and employes, but that it makes it the duty of the defendants to advise with and employ an architect, and adopt plans for the construction of said building and such other buildings to be erected in the future as may be necessary for executive and departmental purposes. And they aver that they have adopted plans prepared by the architect for such buildings, and also a plan for the construction of the particular building which said act requires to be now constructed for legislative use, and that the plans and specifications which they have procured do not relate to or require the erection and construction of any other building except one which will be of such size and form as will, in their judgment, under the conditions and requirement of said act of assembly 'be adapted to the present and future use of the general assembly, its officers, committees, and employes.' The testimony shows that the only difference between the plan adopted by the commissioners and that originally adopted in what has been known as the 'programme' is that the buildings to be erected in the future are to be physically connected with the building now to be erected for the use of the legislature, instead of being detached, as was contemplated in the original programme, and we find nothing in the act which in any degree controls this matter. Another allegation in the bill is that the commissioners intend to contract for the expenditure of a large amount of money in excess of the sum of \$550,000, in violation of the provision of the act of assembly which forbids them to contract for the expenditure of any larger sum. To this defendants answer, and the testimony shows that it is not their intention or purpose, and never has been, to enter into any contract or contracts for the erection and construction of said building, or any parts or portions thereof, in excess of the amount of money available under said act of assembly, and that it is not their purpose or intention to leave said building, when completed, in accordance with the plans and specifications approved and to be approved by them, in such condition as to require the expenditure of any additional money thereon in order to fit it for the convenient use and occupancy of the general assembly, its officers, committees, and employes; and the testimony warrants us in believing that such is the fact, even were we not required to accept the

sworn answer of the defendants to this effect. Another of the allegations in the bill is that the defendants have invited and have received bids upon the plans and specifications prepared by their architect, and that in advertising for said bids they also called for and have received modified bids from a number of contractors, and that they propose and intend to let a contract to some one of the aforesaid bidders according to plans and specifications made by such bidder as modifications of the plans and specifications upon which bids were invited, and that to let such a contract would be in violation of the provision of the act of assembly requiring two weeks' public notice by advertisement previous to awarding the contract for the construction of said building, and would be the acceptance of a bid without competition. Defendants, in their sworn answer, admit that they have asked for and received such bids; that they are now in the hands of their architect, who is instructed to make a careful examination thereof, and report to the commission the character of the modifications so suggested, and such other information as will enable the commission to determine whether or not these modifications are upon such lines as will suggest a proper competition, and that, if it be found that they are not, no contract will be awarded upon either of said bids, but that modified specifications will be prepared, and proper advertisements made, and new bids received; and that they do not propose or intend to let any contract to any of the bidders, or to accept any bids or modifications with such competition as is required by the act of assembly. Another allegation in the bill is that, notwithstanding the act of assembly requires that the capitol building shall be made as nearly fireproof as possible, the plans and specifications upon which bids have been invited call for a building not fireproof, but readily combustible; and a number of respects are specified in the bill on which it is alleged the building is not fireproof,—among others, the roof and flooring and staircases. In respect to this the commissioners say in their sworn answer that they believe that, under the restrictions and limitations imposed by the act of assembly in the matter of cost, size, and accommodations required, the specifications provide for a building which, when completed, will be as nearly fireproof as possible within the meaning of the act. The architect of the commissioners testifies that on account of the restriction as to cost the only kinds of roof which could be selected would be either tar and gravel or tin, and that a tar and gravel roof, properly constructed, is not a dangerous roof on a building standing detached from other buildings, and that all portions of the building that are constructed of timber are to be coated with fireproof paint, which will prevent their burning; and that, in his opinion, the building will be as

nearly fireproof as the limitation of cost and the required size and accommodations to be furnished in the building will allow. There can be no doubt that a building could be constructed which would be much more nearly fireproof than the building called for under these specifications, if the builder were not limited in the matter of expense; but we are unable to see how a building which would meet the requirements of the one in question, with the cost limit attached, could be made more nearly fireproof than this, and we do not think the requirement that it shall be as nearly fireproof as possible is to be understood in an absolute sense, and not relatively to the other conditions, including that of cost. On the specifications upon which the advertisements were issued and the bids received, the word 'temporary' occurs in a number of places, and it is alleged in the bill that this indicates that the work is to be of a temporary nature, and to be replaced hereafter by other work, which will require future appropriations. The architect, however, explains that 'this contract is the initial contract, and there are future contracts necessary to complete the building, and that the work marked "temporary" is in many cases superseded by work that is to be put in by other contractors, and that specifications are to be prepared and advertisements to be made and bids received for the stone carving, the fireproof painting, sewers, and plumbing, gas piping, water supply, electric wire, elevators and elevator screens, vault doors, heating, ventilating, bells and tubes,' and that the contracts for all these are to be executed during the same time that the contract for the general construction is under way, and all will be required to be completed at the same time; and that, when all the specifications are drawn, and all the contracts to be advertised for are completed, which must be within the time limited by the act of assembly, the building will be complete, and ready to be used for the purposes prescribed in the act. After a careful consideration of the bill and the sworn answer of the commissioners, and an attentive hearing of the testimony produced at the hearing, we have been unable to find any evidence that the commissioners have done or intend to do any act which will endanger the rights or prejudice the interests of the commonwealth, such as would warrant the granting of a preliminary injunction, and thus delaying them in the prosecution of the work intrusted to and imposed upon them by the act. The motion for a preliminary injunction is therefore refused."

Wilbur F. Reeder, Dep. Atty. Gen., and Henry C. McCormick, Atty. Gen., for the Commonwealth. Lyman D. Gilbert, John H. Weiss, and Robert Snodgrass, for appellees.

PER CURIAM. In *Cope v. Hastings*, 183 Pa. St. 300, 38 Atl. 717, referring to the pow-

ers and duties of the state capitol commission, it was said that "the location upon or near the site of the old capitol building, the colonial style of architecture, and the cost, not to exceed \$550,000," were fixed by the act, and were mandatory upon the commissioners, and every one dealing with them. So, to a lesser extent, was the fireproof character of the building, but everything else was left to the discretion of the commissioners under the general direction that the building should, "in their judgment, be adapted to the present and future use of the general assembly, its officers, committees, and employes." The extent of the commissioners' authority, the nature of their duties, etc., having been definitively settled by our Brother Mitchell, who wrote for the court in that case, they are no longer open questions; and until it is shown that the commissioners have exceeded the authority vested in them by the act of assembly, as thus construed by this court, they should be permitted to proceed in the proper discharge of their duties without further delay. A careful consideration of the record before us has led us all to the conclusion that, in the absence of sufficient proof to overcome the legitimate effect of the defendants' responsive answers to the material averments of fact contained in the bill, as amended, there is nothing to justify the granting of a preliminary injunction. The controlling questions in the case have been so satisfactorily disposed of by the learned president of the common pleas that further discussion of any of them is unnecessary. On his opinion, the decree denying the motion for a preliminary injunction is affirmed, and the appeal is dismissed, at appellant's costs.

(185 Pa. St. 147)

PLETCHER v. SCRANTON TRACTION CO.
(Supreme Court of Pennsylvania. March 21, 1898.)

STREET RAILWAY—ACCIDENT ON TRACK.

Negligence of motorman is not proximate cause of the killing of child who runs suddenly from the sidewalk to the track, and, after halting on it an instant, is struck by approaching car.

Appeal from court of common pleas, Lackawanna county.

Action by Jacob Pletcher against the Scranton Traction Company for death of plaintiff's son. Judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed.

The opinion of the court below is as follows (Archbald, P. J.):

"That the car by which the plaintiff's son was killed was running at a high and possibly negligent rate of speed may for the present be conceded. The distance which it ran before it could be stopped would go to prove this, if there were nothing else. Dunseath v. Traction Co., 161 Pa. St. 124, 28 Atl. 1021. But, unless this was the proximate cause of the accident, or was a material factor in it, the defendant, not-

withstanding it, is not liable. Goshorn v. Smith, 92 Pa. St. 435. The testimony of Frank Jackson establishes clearly how the accident occurred. Four or five boys, of whom the deceased was one, were chasing each other along the street on the way home from school. About at the point where the accident occurred, they turned off from the sidewalk, across the street and car track, at an angle. Two of the boys, who were considerably in advance of the others, had reached the opposite side, when the Pletcher boy, closely followed by young Jackson, started across also. They apparently took no account of the coming car, and did not, in fact, observe it. It was so close upon them, however, that, when young Pletcher ran onto the track, it must have been but a few feet away. Young Jackson says he just saw it himself in time to turn aside as it shot by, and that Pletcher was but five or six feet ahead of him. He called to him to look out for the car, and, as he did so, Pletcher stopped, but looked in the opposite direction from that in which the car was coming. Another instant, and in all probability he would have been across, and out of danger; but, stopping as he did, the car struck him, and he was killed. There is no dispute over these facts, and it is evident from them that the boy darted in front of the car when it was so close upon him that, stopping as he did, it was inevitable that he should be struck. The excessive speed of the car had nothing to do with the matter. For all that we can see, it would have occurred had the car been running at an entirely safe and proper rate. The case is not to be distinguished from Funk v. Traction Co., 175 Pa. St. 559, 34 Atl. 861. There is no difference, in principle, between running into a moving street car and running directly in front of it. The case is not like that of Woeckner v. Motor Co., 176 Pa. St. 451, 35 Atl. 182. The child there was of tender years, playing between the side of the street and the car track; but the boys here were of such size and age as to warrant the belief that they would not heedlessly run into danger. The suggestion that they formed a procession across the street, of which the motorman was bound to take notice, is highly imaginative. The rule to take off the nonsuit is discharged."

I. H. Burns and Frank T. Okell, for appellant. W. H. Jessup and W. H. Jessup, Jr., for appellee.

PER CURIAM. Without assenting to all that was said by the learned president of the court below in his opinion refusing to take off the judgment of nonsuit, we are satisfied as to the substantial correctness of his conclusion. It was, of course, incumbent on the plaintiff to prove that the proximate cause of the sad accident in which his son lost his life was negligence of the defendant company's motorman. We are not satisfied that the testimony on which he relied for that purpose was sufficient to have justified the learned trial judge in sub-

mitting the question of the motorman's negligence to the jury. Failing to find any error in the record, the judgment is affirmed.

(135 Pa. St. 126)

BITTENBENDER et al. v. BITTENBENDER et al.

(Supreme Court of Pennsylvania. March 21, 1898.)

EQUITY PRACTICE—DISMISSAL.

Where a partner unsuccessfully attempts to annul a contract for dissolution of the firm, the court will not retain the bill to work out the equities of the parties under the contract, but will dismiss it.

Appeal from court of common pleas, Lackawanna county.

Bill by Emily Bittenbender and Israel Bittenbender against Abraham Bittenbender and another to set aside an agreement for dissolution of partnership between Israel Bittenbender and defendants. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

The following are the assignments of error, viz.:

"First. The court erred in rejecting the evidence under the following order: 'Abraham Bittenbender, one of the defendants, witness on stand. By Mr. Price: Q. When Israel ran the business himself, you and John were employed by him, were you not? A. Yes, sir. Q. You had prior to that time failed, and he had taken the business and all the property,—real estate and personal? A. Yes, sir. Q. What did you pay him for your interest in the Franklin avenue property after that, if anything? A. What did I pay him for what? Q. For a third interest in that Franklin avenue property? (Counsel for defendants object to the question, as immaterial and irrelevant.) By Mr. Price: We propose to show (he said he helped this man out several times),—I propose to show by the witness that he was given a one-third interest in the Franklin avenue property, and never paid anything for it. (Objection is sustained, and bill sealed for plaintiffs.)'

"Second. The court erred in refusing to find as requested, and to answer the requests for findings of facts presented by plaintiffs' counsel.

"Third. The court erred in its fifth finding of fact, which finding is as follows: '(5) A large portion of the testimony is directed to the question of Israel Bittenbender's mental condition at or about the time the contract of sale was signed. It is contended on the part of the plaintiffs that, on account of his financial troubles, Israel was not in a fit condition of mind to transact business in December, 1895. This is denied and controverted by testimony on the part of the defendants. After due consideration of the evidence, I have come to the conclusion that plaintiffs' contention on this point is unfounded. Not only was Israel in sound men-

tal condition, and able to transact business, but he was fully aware of the nature of the transactions connected with the dissolution of the co-partnership, and of the terms on which the partnership accounts were settled.'

"Fourth. The court erred in not finding as requested in the third request for finding of fact by plaintiffs' counsel, which request is as follows: 'Third. Late in the fall of 1895, Israel Bittenbender, one of the partners, having become improvident by reason of irregular habits, and largely indebted, to about twenty-six or thirty thousand dollars, asked his partners, Abraham Bittenbender and John M. Kemmerer, to assist him. The Bittenbenders were brothers, and John M. Kemmerer was a brother-in-law, having married the Bittenbenders' sister. When Abraham Bittenbender and John M. Kemmerer learned the amount of Israel's indebtedness, they refused to aid him unless he would sell his interest in all the property of the firm.' The facts set out in this request are supported by the testimony of plaintiffs and defendants, and are uncontradicted.

"Fifth. The court erred in the sixth finding of fact, which finding is as follows: '(6) Were the terms of the settlement of the partnership affairs fair and equitable to the retiring partner? Did the other two partners conceal any facts from him, or did they take advantage of him in any way? In answer to these questions, I find from the evidence that the settlement between the partners was just and honorable; that nothing was concealed by one from the other; and that no undue advantage was taken of Israel Bittenbender by his co-partners in the adjustment of their partnership interests. The books of the firm were always open to Israel's inspection. His long experience in the business enabled him to form a judgment as to the value of the stock, and he had the same knowledge as to the value of the real estate owned by the firm as the other partners had. During the negotiations for the sale of Israel's interest, and for several months after the sale was made, the conduct and feelings of the three men towards each other were of the friendliest character. As there is considerable testimony concerning the value of the firm's real estate, the estimates of the witnesses differing on this question, it is necessary to find the value of this real estate. From the testimony, I fix the values as follows: Franklin avenue property, \$25,000; Washington avenue property, \$10,000; Mifflin avenue property, \$7,500; Williams property, not disputed, \$1,000.'

"Sixth. The court erred in not finding the facts as set forth in the fourth request for finding of fact of plaintiffs' counsel, which request is as follows:

"Fourth. The property of the firm consisted of a stock of wagonmakers' and blacksmiths' supplies, iron, steel, and general

hardware, and the value of the stock was at this time:

December 1st, 1895.....	\$ 83,466 13
Book accounts which were good...	44,342 13
Store building on Franklin avenue.	40,000 00
Mifflin avenue property.....	10,000 00
Washington avenue lots.....	20,000 00
Notes and judgments.....	8,512 26
¹ / ₅ interest in Williams property..	1,000 00

Total \$207,320 52

"And there were stocks as follows:

(Not Included.)

Lace Company	\$8,000 00
Lackawanna & Montrose R. R.....	500 00
Scranton Iron Fence Co.....	1,250 00
Scranton Axle Co.....	500 00

"The negotiations and conversations relating to Israel Bittenbender's financial standing began about December 1st, and continued until December 9, 1895. During that time, and for a long time prior thereto, Israel Bittenbender, on account of his improvident investments and other losses, was troubled and disappointed by the refusal of his brother and brother-in-law to aid him in his financial distress, was in despair, and desperate, and not fully competent to transact business. He placed himself in the hands of his partners, and allowed them to control his action with reference to the contracts for his interest in the partnership; and they, after refusing to lend him aid, drew up Exhibits B and C, assigning his interest in all the property for much less than its value, with eight (8) years in which to pay the same, by monthly installments of three hundred and fifty dollars per month, without interest and without security. One-third of the property purchased was $\frac{1}{3}$ of \$207,320.52, or \$69,106.84. The purchase price which Kemmerer and Abraham Bittenbender agreed to pay Israel Bittenbender for this undivided one-third interest was \$50,634.54, without interest. They paid on that agreement thirteen or fourteen thousand dollars. The valuation as above fixed is substantially that as agreed upon by the co-partners from time to time, and entered in the inventories, except the Washington avenue property, which the evidence fully proves is worth twenty thousand dollars. The defendants refused to sell their interest for a like amount as that at which they forced Israel Bittenbender to sell."

"Seventh. The court erred in not finding the facts as set forth in plaintiffs' fifth request for finding of fact, which request is as follows: 'Fifth. The books of Bittenbender & Company were not balanced or closed, and it is impossible to ascertain from them whether a profit was made in 1895 or not. The inventory of the merchandise stock increased. It was more than \$87,000, the increase being \$4,000. This is shown by the inventory of 1896. The inventory of 1896 is not completed as in prior years except as to the item of stock.'

"Eighth. The court erred in not finding the

facts as set forth in plaintiffs' sixth request for finding of fact, which request is as follows: 'Sixth. The manner of keeping the accounts between the partners was such that it is impossible to tell from the books, without an account being taken by an accountant, what were the relative balances of the individual partners. There is evidence of an unsettled indebtedness of Kemmerer to Israel Bittenbender of \$2,500 to \$2,600 never placed on the ledger, and including the checks of \$175 and \$80, which are in evidence, but not on the books, and not settled.'

"Ninth. The court erred in not finding material facts of the case which were supported and fully proved by the evidence offered in the case.

"Tenth. The court erred in answer to plaintiffs' sixth request for finding of law. The request and answer are as follows: 'Sixth. In every fiduciary relation there is implied a condition of superiority held by one of the parties over the other. In every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and thereby overcoming the presumption. The contracts attached to the bill are hard and unconscionable in terms, and the defendant must account to the plaintiff for the full value of the property obtained under the assignment or otherwise, or the agreement should be canceled and decree entered against the plaintiff to repay to the defendant the amount of money already received upon the contracts, with interest from the time of payment.' Answer: 'The sixth and seventh propositions are denied.'

"Eleventh. The court erred in refusing to find as requested in plaintiffs' seventh request for finding of law, which request is as follows: 'Seventh. The plaintiff is entitled to an account of all the partnership dealings and transactions between the parties.' Answer: 'The seventh proposition is denied.'

"Twelfth. The court erred in finding as a conclusion of law that the plaintiffs' prayer for an account should be denied.

"Thirteenth. The court erred in finding as a conclusion of law that the plaintiffs' bill of complaint should be dismissed, with costs.

"Fourteenth. The court erred in finding as follows: 'The stock of goods in the inventory which was the basis of settlement amounted to \$83,466.13. This was to be taken with 10% off, but the evidence establishes to my satisfaction that 20% would have been a fair and reasonable deduction. The book accounts, notes, and judgments amounted to \$52,854.39. From this amount 20% was deducted, but the evidence convinces me that 30% would have been a fair discount. It is also shown on the part of the defendants that the current liability of the firm for mer-

chandise, amounting to \$5,770.13, by an oversight, was omitted from the terms of the settlement. These different items to a great extent offset the grounds of plaintiffs' complaint as to the valuation of the real estate and the item of interest."

Samuel B. Price, Roswell H. Patterson, and William A. Wilcox, for appellants. W. G. Ward and George S. Horn, for appellees.

PER CURIAM. As set forth in the bill praying that the agreement of dissolution be declared void, etc., the grounds on which equitable relief was invoked are that the plaintiff Israel Bittenbender "was suffering from reverses and remorse, and not being in a fit condition to transact business, and relying on the friendship and good judgment of his brother and partners, he executed the agreement, having full confidence in their statement that the estimates of the value of the property were correct," etc. Fraud and inadequacy of price were also averred. The learned court's findings of fact, in favor of the defendants, were that "not only was Israel in sound mental condition, and able to transact business," but "he was fully aware of the nature of the transactions connected with the dissolution of the partnership, and of the terms on which the co-partnership accounts were settled." The sixth finding of fact is in part as follows: "That the settlement between the partners was just and honorable; that nothing was concealed by one from the other; and that no undue advantage was taken of Israel Bittenbender by his co-partners in the adjustment of their partnership interests. The books of the firm were always open to Israel's inspection. His long experience in the business enabled him to form a judgment of the value of the stock and he had the same knowledge of the real estate owned by the firm as the other partners had. During the negotiations for the sale of Israel's interest, and for several months after the sale was made, the conduct and feelings of the three men towards each other were of the friendliest character." There was sufficient evidence to warrant these and other findings of fact on which the decree dismissing the bill is based. While there is some testimony tending to prove a different state of facts, it is not of such a character as would justify us in holding that there is any substantial error in the learned court's findings of fact. The conclusions of law drawn from the facts thus established are correct; and it necessarily follows that there was no error in dismissing the bill.

The suggestion that the court should retain the bill in order to work out the equities between the parties is without merit. If the plaintiffs were here asking to have the contract construed or enforced, there might be something in the suggestion. But where, as here, the plaintiffs have unsuccessfully attempted to annul the contract of dissolution,

etc., the only proper disposition of the case is dismissal of the bill. Decree affirmed, and appeal dismissed, at appellants' costs.

(185 Pa. St. 167)

In re HOOPES' ESTATE.

(Supreme Court of Pennsylvania. March 21, 1898.)

OPENING DECREE—FAILURE TO SUGGEST DEATH OF PARTY.

Where a party to a proceeding in the orphans' court dies before decree, and his attorney does not suggest his death, on motion of his representative the decree will not be opened because of the failure to suggest death and have substitution made.

Appeal from orphans' court, Chester county.

Petition to the register of wills by Samuel H. Hoopes, administrator of the estate of Sarah Hoopes, deceased, to open a decree of the orphans' court admitting to probate the will of Joshua Hoopes, deceased. The register certified certain questions to the orphans' court for determination, and such court remitted the record to the register with instructions to dismiss the petition for want of jurisdiction. Petitioner appeals. Affirmed.

W. S. Harris, for appellant. J. Frank E. Hause, Thomas W. Peirce, and Alfred P. Reid, for appellees.

PER CURIAM. The proceeding which led up to this appeal was inaugurated by petition of Samuel Hoopes, administrator of Sarah Hoopes, deceased, to the register of wills, praying him, for reasons therein set forth, to open the decree theretofore made by the orphans' court, under which the will of Joshua Hoopes was admitted to probate. Without assuming to take further action in the matter, the register certified certain questions to the orphans' court for its determination, one of which was: "(4) Was the administrator of Sarah Hoopes, deceased, concluded by said decree of the orphans' court filed January 6, 1896?" The decree thus referred to was entered in a proceeding to which Sarah Hoopes, the petitioner's intestate, appears to have been a party, represented by same counsel that appears here for the petitioner. The record shows that W. T. Barber, Esq., entered his appearance for the Marshall Walters legatees, and W. S. Harris "for all the legatees under the will except the Marshall Walters legatees." It is alleged that Sarah Hoopes died before decree, and that her death was not suggested, etc. That no suggestion of her death and substitution of her personal representative was made was not the fault of the court. It was rather the duty of counsel who undertook to represent her to see that it was done. The court, unadvised as to her death, proceeded to final decree as though all the legatees were living and represented by counsel, as

they were pending the earlier stage of the proceeding. In such circumstances, no advantage can be taken of the failure to suggest death and have substitution made. Aside from this, however, it is quite clear that the register of wills had no jurisdiction to open the decree referred to in appellant's petition, and hence there was no error in remitting the record to him with instructions to dismiss the petition for want of jurisdiction. There is nothing in the record that requires further notice. Decree affirmed, and appeal dismissed, at appellant's costs.

(185 Pa. St. 51)

In re MARTIN'S ESTATE.

(Supreme Court of Pennsylvania. March 21, 1896.)

WILLS—ACCUMULATION OF INTEREST.

Income of residuary estate prior to death of testator's wife passes as though he had died intestate, the residue being given the executors to invest and collect income till death of said wife, the income then accrued to be divided among his "brothers and sisters then living, the survivor or survivors of them," and the principal among nephews and nieces; and it being provided by the act prohibiting accumulations that the liberated income shall go to "such * * * persons as would have been entitled thereto if such accumulation had not been directed."

Appeal from orphans' court, Philadelphia county.

Accounting by David B. Martin and others, executors of Joseph J. Martin, deceased. From decree of orphans' court dismissing exceptions to adjudication of auditing judge as to disposition of accumulation of interest by executors as directed by testator, the executors appeal. Affirmed.

The opinion of the court below is as follows (Penrose, J.):

"The act of assembly prohibiting accumulation, except during an existing minority and for the benefit of the minor, provides that the liberated income shall go, not under the intestate laws, but to 'such person or persons as would have been entitled thereto if such accumulation had not been directed.' The inquiry, therefore, must, in the first instance, always be who, under the provisions of the will, as fairly interpreted, such persons are. It frequently happens, however, that there are none,—as where the principal of the estate from which the income in the meantime is to be accumulated is not given until a future event, or where the persons who are to take cannot now be known with certainty, as in Rhodes' Estate, 147 Pa. 227, 23 Atl. 553, and Mellon's Estate, 16 Phila. 323; or where the accumulation is to create a fund from which legacies are payable, and there is no present residuary gift, as in Grim's Appeal, 109 Pa. St. 391, 1 Atl. 212. In these and similar cases the liberated income necessarily passes under the intestate laws, though where there is a gift, taking effect at once, of the principal from which the accumulations are to arise, or a general residuary gift,

carrying with it not only 'everything not disposed of, but everything that, in the event, turns out not to be disposed of' (Cambridge v. Rous, 8 Ves. 25; Act June 4, 1879, § 2; P. L. 88), those to whom it is given will be the persons 'who would have been entitled' if the accumulation had not been directed (Howell's Estate, 180 Pa. St. 515, 37 Atl. 181).

"In the present case there is a separation of income from the principal estate, and there is no capitalization for benefit of principal. The principal, without augmentation, is to go at the death of the testator's widow to nephews and nieces then living and the issue of such as may be then dead; while the income, retained until that time, is given to a class, viz. the brothers and sisters 'then living, the survivors and survivor of them.' It is argued, therefore, that as there can be no increase of the class to which the income is given, and no possible introduction into it of a person not known, the beneficiaries are ascertained; that the primary or general intention of the testator is that the income accruing during the period of accumulation shall go exclusively to them, while the direction that it shall go in a gross sum as the result of the accumulation is subsidiary, merely regulating the method or manner of enjoyment; and that the failure of the secondary intent in consequence of the prohibition of the statute will not defeat the general purpose, under the principle which (as in the rule in Shelley's Case) sacrifices the particular intent in order to accomplish the primary purpose. The question has not come before our supreme court, but the English decisions are opposed to the position thus taken, holding, as they do, that rights, even when clearly vested, are not accelerated by the elimination of the direction to accumulate. Shaw v. Rhodes, 1 Mylne & C. 135; s. c., on appeal, sub nom. Evans v. Hellier, 5 Clark & F. 114. See, also, Talbot v. Jevors, L. R. 20 Eq. 255; Weatherall v. Thornburgh, 8 Ch. Div. 261; Mitcheson's Estate, 11 Wkly. Notes Cas. 547. It is proper to say, however, that, in Shaw v. Rhodes and Evans v. Hellier, Lord Brougham, while he did not dissent, expressed great doubt as to the propriety of the decision.

"But, however it may be where the future right is vested, the case seems clear where, as here, the gift is contingent: To the brothers and sisters 'living at the death of the wife. A devise or bequest to such persons as shall be living at a particular time, without any distinct gift to the whole class preceding such restrictive description, is necessarily contingent, since the uncertain event forms part of the description of the person or persons who are to take.' Smith, Ex. Int. § 281; McBride v. Smyth, 54 Pa. St. 245; Fairfax's Appeal, 103 Pa. St. 166. It is true the limitation is to brothers and sisters living at the death of the wife, 'the survivor or survivors of them'; and it is argued that under the rule which requires the avoiding of an intestacy if, by construction, it is possible to prevent it, these words must be understood as providing for the

contingency of the death of all the brothers and sisters in the lifetime of the wife, the accumulations in that event being given to the one who died last. But the gift is to the 'survivors,' as well as to the 'survivor'; and this, if the argument is sound, would include all of the class except the one who died first. It is difficult to believe that this was intended. The words 'survivors or survivor,' in a limitation following a prior gift, are understood in Pennsylvania as referring to the death of the testator (*Johnson v. Morton*, 10 Pa. St. 245), unless the intent to refer them to some other period is plain and manifest (*Woelpper's Appeal*, 126 Pa. St. 562, 17 Atl. 870), which cannot be said of the will of this testator, especially as there was an obvious reason for using them in this sense, viz. to exclude claim, under the act of assembly relating to lapsed legacies, by children of a brother or sister dying in his lifetime.

"That the general residuary clause carries with it no right to the income accruing before the time at which it is to vest is manifest; and it is no less clear that none is given by the supplemental provision as to further sums 'thereafter' becoming part of the residuary estate. The general residue is to vest at the death of the wife in the nephews and nieces, and issue of deceased nephews or nieces, then living; and when 'thereafter' [that is, after the death of the wife and the vesting of the original residue] further sums' become part of it, under other provisions of the will (e. g. under items 11, 13, etc.), they also are disposed of in the same manner. We are not at liberty to read the word 'thereafter' in the sense of 'therefore.' The exceptions are dismissed, and the adjudication confirmed absolutely."

John G. Johnson, for appellants. Theodore F. Jenkins, for appellee.

PER CURIAM. We find no error in this record that requires reversal or modification of the decree. The questions involved have been so satisfactorily disposed of by the learned judge of the court below in his opinion, dismissing appellants' exceptions, and confirming the adjudication, that further discussion of either of them is unnecessary. On his opinion, the decree is affirmed, and appeal dismissed, at appellants' costs.

(185 Pa. St. 164)

FAWCETT v. HARRIS et al.

(Supreme Court of Pennsylvania. March 21, 1898.)

MORTGAGE—FORECLOSURE.

On scire facias on mortgage it is no defense for terre-tenants that the mortgagor had title to only part of the land described in the mortgage, as such interest as he had, though none acquired by the terre-tenants elsewhere, will pass by the sheriff's sale.

Appeal from court of common pleas, Chester county.

Scire facias on a mortgage by Nathan Y. Fawcett against John K. Harris, defendant,

and William S. Harris and another, terre-tenants. From judgment notwithstanding affidavit and supplemental affidavit of defense, the terre-tenants appeal. Affirmed.

W. S. Harris, for appellants. J. Frank E. Hause, for appellee.

PER CURIAM. The court below was so clearly right in entering the judgment from which this appeal was taken that it is unnecessary to consume time in considering the questions intended to be raised by the specifications of error. There is nothing in either of them that requires discussion. It is conceded in the first affidavit that the defendant, J. K. Harris, executed and delivered to the plaintiff the mortgage on which the scire facias was issued; but it is averred, by way of defense, that "he did not have title to more than one-seventh of the land described in the mortgage." It cannot be doubted that whatever interest he had when the mortgage was executed,—whether it remained in him or passed to the terre-tenants by conveyance,—the same is bound by the mortgage, and to that extent, at least, the title will pass to the purchaser at sheriff's sale. *St. John's Church v. Steinmetz*, 18 Pa. St. 273. If the terre-tenants acquired title from other and independent sources, it cannot be affected by such sale. Judgment affirmed.

(185 Pa. St. 32)

BECK v. HOOD et al.

(Supreme Court of Pennsylvania. March 21, 1898.)

NEGLIGENCE—DANGEROUS PREMISES—INSTRUCTIONS—QUESTIONS FOR JURY—WITNESSES—IMPEACHMENT.

1. On cross-examination of a party to an action, his credibility may be impeached by showing that he had, during a former trial of the case, improperly sought to affect the verdict by ex parte statements made to an individual juror out of court.

2. Near the close of the day, a contractor put a stone near the middle of the outer half of the graded, but unfinished, footwalk in front of a house in course of erection, and plaintiff, while walking along at night, ran against the stone, and was injured. In an action against the contractor and the owner of the premises, plaintiff contended that it was the duty of the owner to fence off the sidewalk at both ends, and to display lights, and that it was the contractor's duty, when the stone was delivered, to remove it to some less exposed position, or, if this was not practicable, to use lights or erect barriers about the stone. *Held*, that whether the contractor was either a participant in the owner's negligence, if any, or otherwise guilty of negligence, was a question for the jury.

3. The ground of liability in actions for negligence is not danger, but negligence, and the test is the ordinary usage of business.

4. A traveler injured in attempting to pass over an unfinished sidewalk at night may be entitled to recover from the owner of the premises and the sidewalk contractor, although the walk had been fenced off by them on the evening before the accident, and the fence had been taken down without their knowledge by persons over whom they had no control, unless they used sufficient care to see that the fence was kept in place.

Appeal from court of common pleas, Philadelphia county.

Action by Samuel L. Beck against James Hood and Thomas Keegan. From a judgment for plaintiff, defendants appeal. Reversed.

William F. Harry and James M. Beck, for appellant Michael Keegan. Howard B. Lewis and Thomas A. Fahy, for appellee.

WILLIAMS, J. This is an action of trespass, brought to recover damages for a personal injury suffered by the plaintiff, which he alleges resulted from the negligence of the defendants. His right to recover depends upon his ability to show the negligence of which he complains, and that it was the proximate cause of his injury. The circumstances surrounding the accident, as disclosed by the testimony, were substantially these: The plaintiff had been during the early evening of the 31st of August, 1890, at the house of an acquaintance, near the corner of Sixth street and Montgomery avenue, in the city of Philadelphia. He started to return home at about half past 9 o'clock. His route was down Sixth street, in a southerly direction, one square to Columbia avenue, west on Columbia avenue, one square, to Seventh street, and southerly again, down Seventh street, to some point below Oxford street. He turned down Seventh street on the east side, and for about 100 feet the houses were all occupied, and the footwalks in front of them in good condition. At the end of this distance, a narrow alley crossed the walk, and from this alley down to Oxford street a row of 22 new houses was in process of construction. The sidewalk in front of this row was in an unfinished condition. It had been graded ready for the surface of brick or asphaltum, but no part of it was completed, and at least one-half of its breadth was incumbered with building materials. Near the middle of the outer half of the graded footwalk, or two or three feet from the curb, in front of the second house from the alley, a block of stone was lying. Beck, on reaching the alley, crossed it, and entered upon the unfinished walk in front of the row of new houses, walking rapidly. He ran against the block of stone, and injured one of his legs quite seriously, and for this injury he now seeks to recover in this case. Hood was the owner of these new houses, and was building them by contracting with mechanics and material men for different portions of the work. Keegan was one of these contractors, and his undertaking was to furnish the stones used about the steps and foundations, and put them in place. The block against which Beck ran was intended for use in the front steps of the second house from the alley, in front of which it lay, and had been delivered by Keegan's employes before the close of the day of the 31st of August. The contention of the

plaintiff was that it was the duty of Hood, as owner and builder, to protect the public from the danger of injury on account of the unfinished and incumbered condition of the sidewalk, by barricading or fencing it off at both ends, and by the display of lights, so as fully to warn the public of the situation. He also contended that it was the duty of Keegan, when the block of stone was delivered to him upon the unfinished walk, to remove it to some less exposed position, or, if for any reason this was not practicable, to protect passers-by by the use of lights or by the erection of barriers about it. The defendants set up the exercise of due care on their part, by the display of red lanterns near the curb, and just below the alley, and the erection of barriers at each end of the building operation. They also alleged that the street was well lighted; that the fact that a building operation was in progress was perfectly obvious to every traveler on the street; and that the stone with which Beck collided was plainly visible, and should have been avoided by one exercising common care.

On the trial, the plaintiff took the witness stand in his own behalf, and testified at length in regard to all the contested questions of fact involved. He denied the existence of barriers across the walk, of red lights at the proper places, and of the sufficiency of the street lights to enable him to see that a building operation was in progress, or that the walk was incumbered with materials. He alleged, on the other hand, that the walk was hard and smooth, and that there was nothing in its condition to warn him that it was unfinished, or to put him upon notice. While his cross-examination was in progress, counsel for defendants proposed to show by him, "for the purpose of attacking his credibility, and with a full understanding that I am bound by his answer, that on a previous trial of this cause, and during its progress, he (the plaintiff) met the foreman of the jury which was then trying the case, out of court, took him to a tavern on Sixth street, bought him liquor, and then induced him to go his (plaintiff's) house and place of business, at No. 313 Marshall street, and there talked to said juror in regard to the probability of the verdict to be rendered by the said juror and his fellows, and attempted to demonstrate to said juror his (plaintiff's) physical inability to perform his work as a printer." This offer was objected to, as inadmissible for the purpose proposed. The objection was sustained, and the offer excluded by the court. This ruling is the subject of the first assignment of error. The rule limiting the right to cross-examine with a view to affect the credibility of the witness is stated in the case of *Elliott v. Boyles*, 31 Pa. St. 65. If the examination is directed to collateral matters, the court may limit, and under some circumstances exclude, it; but, if directed to the situation of the witness, his relations with the party

calling him, his zeal or bias, as shown by his conduct or by improper efforts to influence witnesses or jurors in the case trying, it is, within proper limits, a matter of right. *Cameron v. Montgomery*, 13 Serg. & R. 128. When the party becomes a witness for himself, he stands in no better position than any other witness not a party. His credibility may be attacked by the same methods, and his conduct when he attempts to corrupt the administration of justice is subject to investigation in the same manner. The facts set out in the rejected offer were such as, if proved before the jury, would have been an impeachment of the character of the plaintiff, and a moral conviction of a misdemeanor. They were not only sufficient to affect his credibility, but their force could not have been readily avoided. It is not necessary to go at length into a discussion of the modern doctrine in regard to cross-examination, or the introduction of evidence for the purpose of discrediting a witness, for the cross-examination proposed is not on debatable ground. It was clearly admissible. Counsel for appellee seems to rely upon *Buck v. Com.*, 107 Pa. St. 486, as holding an opposite doctrine, but it is really in harmony with the rule we have stated. In that case it was sought to show that the witness had been indicted and convicted of an offense at some previous time in order to affect his credibility, and it was said that the record of the conviction was the proper evidence of the fact. There was no such question here. The offer was to show that the witness, who was also the party, had on a former trial of this case sought to reach the jury that had been sworn for its trial, by ex parte statements and by other methods equally reprehensible which were intended to affect their verdict. There was no record by which the facts stated in the offer could be shown. If they were admissible (about which we have no doubt), the offer to show them by a cross-examination of the witness against whom they were alleged was a proper method of proof. The first assignment is sustained.

The fourth assignment of error is to an instruction in the general charge in relation to the liability of Keegan. The learned judge said to the jury: "As to Mr. Keegan, he put the stone there, and had control of it while it was there; and, if there be any liability for negligence, it is obvious that in the act of negligence he was a participant." This was, in effect, a binding direction that, if Hood was guilty of negligence, then Keegan was, as a "participant" in the act of negligence, also guilty. This does not necessarily follow. The negligence, if any was found to exist, may have been chargeable to Hood or to Keegan, or both might have been found equally careless of the safety of the public. The question was one of fact for the determination of the jury, not of law for the decision of the court. The negligence of Keegan, like that of Hood, depended upon his own

acts or omissions, and not on those of another. Each had a duty to perform, and each must stand or fall upon the manner of his performance. If Keegan put or caused the stone to be put upon the sidewalk, he had no right to rely upon a temporary barrier erected by Hood, without giving attention to its maintenance or otherwise warning or protecting the public. It may be that, under all the circumstances of this case, the direction now considered did the defendant no harm; but, as the case must be reversed upon the first assignment, the true rule on this subject should be pointed out.

The sixth assignment is directed at the answer by the learned judge to the defendants' fifth point. The instruction asked was that the true ground of liability in actions for negligence was "not danger, but negligence, and the test of negligence is the ordinary usage of business." This is undoubtedly the general rule (*Ford v. Anderson*, 139 Pa. St. 263, 21 Atl. 18), and should have been affirmed by the court, and the possible exceptions pointed out. The answer was: "I refuse that point in the form in which it is stated. The test of danger is the ordinary usage of business if the ordinary usage of the business was the exercise of ordinary care under the circumstances." This was really an affirmation by the learned judge of the rule stated in the point in the very words of the point, with a qualification denying its effect in cases where an ordinary usage of business was below what ordinary care would require. This was right in effect, although the formal refusal of the point might possibly mislead the jury to some extent as to the general effect of the answer.

One other subject, brought to our attention by the fifth assignment of error, requires notice. The defendants' third point asked the court to instruct the jury that if the sidewalk had been poled or fenced off by the defendants on that evening before the happening of the accident, and the pole had been taken down without the defendants' knowledge by parties over whom they had no control, they were not liable for the accident. This instruction was properly refused. It would not be enough for a builder to fence off a part of the walk because it was in a dangerous condition, and then give it no more attention. He knows the probabilities of the removal of the barrier by mischievous or disorderly persons, and he should exercise reasonable care to see that it is in place. It might not be necessary to maintain a watchman at the spot during the night, but the builder should give some attention to this subject during the evening, and while the walks are actively occupied, in order to be sure that the lights and barriers he has provided to protect the public are in place, and are doing their work. How well this had been done in this case was for the jury. The pole was certainly down, according to the plaintiff's testimony, when he

came upon this part of the walk, although it had been found in place but a few moments before. There was an electric street light at Columbia avenue a little more than 100 feet away. There was another at Oxford street, or near the other end of the row of houses, and there was a gas burner about midway between them, upon the other side of the street. There were red lights also displayed within a few feet of the block of stone at the curb. Whether there was light sufficient to enable one exercising ordinary care to see where he was going, or warnings sufficient in the red lights at the curb to attract his attention, are questions that upon a new trial should be distinctly brought to the attention of the jury. For the reasons given in this opinion, the judgment is reversed, and a writ of *venire facias de novo* awarded.

(185 Pa. St. 111)

AUGE v. DARLINGTON.

(Supreme Court of Pennsylvania. March 21, 1898.)

PRINCIPAL AND AGENT—RATIFICATION—CONVERSION.

The unauthorized act of an agent in selling certain bonds, and investing the proceeds in other bonds for his principal, was ratified by the principal, where she made no objection until four years after she had received the new bonds and had been advised of the transaction, though both parties lived in the same town, and she had ample means of knowing the exact situation.

Appeal from court of common pleas, Chester county.

Action by Sarah D. Auge against Smedley Darlington for the conversion of two certain bonds of \$1,000 each. From a judgment entered upon a compulsory nonsuit, plaintiff appeals. Affirmed.

Chas. H. Pennypacker, for appellant. R. T. Cornwell, John J. Gheen, and Gibbons Gray Cornwell, for appellee.

WILLIAMS, J. This appeal is from a judgment entered upon a compulsory nonsuit. The plaintiff was the only witness sworn at the trial, and the validity of this judgment must depend upon the fair legal effect of her testimony. Upon her direct examination, she testified that, in 1891, the Chester County Guaranty Trust Company held in its possession bonds and securities belonging to her, for the safe-keeping of which she was paying to it \$1 on each \$1,000 of the par value of the securities. Among these were two bonds for \$1,000 each, issued by townships in Kansas in aid of some railroad enterprise, bearing interest at the rate of 7 per cent. In July, 1891, she was requested by the trust company to take her securities away, and went to its office for that purpose. She there met the defendant, who took from an unsealed envelope and put upon the table before her the securities which he alleged were hers. She stated that she

missed from among them the two 7 per cent. township bonds, and inquired where they were, and that the defendant replied that he feared trouble with them when they should mature, and had sold them. This action to recover their value was brought in September, 1895. Now, these statements, without explanation and wholly separated from the circumstances surrounding them, amounted to a charge that the defendant had taken from the plaintiff, without her knowledge or consent, and sold for his own benefit, these two bonds. So far as a legitimate cross-examination would explain the relations between these parties, and put the transaction complained of in its own proper light before the jury, the defendant had a right to cross-examine. We think this right was pushed very far, and that the several certificates issued by the trust company to the plaintiff, showing what securities were held by it for her, are not in this case in any proper sense. They were produced by defendant's counsel, identified and marked by the stenographer, but they were not in evidence, and we do not see how they could have been made evidence without having been offered on behalf of the defendant as part of his case. Leaving these out of consideration, and limiting the cross-examination to its proper province, was the effect of the examination in chief so far affected as to justify the judgment of nonsuit? It appeared that the defendant had been the trusted confidential agent and adviser of the plaintiff for many years, and of her father before her; that he received the moneys paid upon her bonds as they matured, and was trusted to reinvest such money upon his own judgment; that he had sold the two bonds for which this suit is brought, and had invested their proceeds in other bonds or securities of equal par value, and had up to July, 1891, collected the interest thereon and paid it regularly to the plaintiff. What was left of the charge of abstraction, or improper use of the plaintiff's bonds for his own benefit, after these explanatory facts appeared? When the mere skeleton of fact presented by the direct examination had been rounded out into the proper proportions which belonged to the transaction, by adding to it the circumstances and explanations developed by the cross-examination, the first impression created by the story had disappeared. There was now nothing left to support the theory of an unauthorized abstraction and conversion of the plaintiff's bonds, on which the action was based. There was no breach of trust; no making use of his position for his own profit; and, so far as the evidence goes, no proof that the bonds purchased with the proceeds of the Kansas bonds were not worth their face. If the exchange was not a wise one, and the new bonds are really worth less than the old ones, Mrs. Auge's agent may possibly be answerable to her for her real loss; but there was no proof upon this sub-

ject. She was in the possession of the new securities bought with the proceeds of the old, and yet asking to recover the value of the old from her confidential agent, who had made the exchange on her behalf. But what is quite as much to the point is that she was advised of these transactions and put in possession of the new securities in July, 1891. She should within a reasonable time thereafter have determined whether to ratify or disaffirm the act of her financial agent. If within such reasonable time she does not disaffirm, she will be presumed to have ratified. These parties lived in the same town. Opportunities for conference were within easy reach. For more than four years she retained possession of the new securities without, so far as appears, a word of inquiry or a word of complaint. From her testimony, we infer that she still holds possession of them. Now, after these years, without notice or demand, she attempts to disaffirm the action of her agent. We incline to the opinion expressed by the learned judge of the court below that this attempted disaffirmance comes too late. This question must be considered under all the circumstances that surround this case, such as the relations that existed between these parties, their residence in the same town, the ease with which inquiries about the character of her securities could be made by the plaintiff, and the abundance of the sources of such information that were within her reach. If, with all these advantages for knowing the exact situation, she delays action for more than four years, the conclusion that her delay is unreasonable is a conclusion of law. The presumption would seem to be a fair one that action taken at such a time has been taken in view of circumstances that did not exist at the time of the exchange, or at the time when the securities came into her own hands, but have arisen recently. Upon a careful examination of the testimony of Mrs. Auge, and after excluding as much of the cross-examination as seems to us to have transcended the proper limit, we are of opinion that the plaintiff showed no right to recover in this case. The judgment of nonsuit was therefore properly entered, and is now affirmed.

(185 Pa. St. 149)

SHEARER v. MILLER.

(Supreme Court of Pennsylvania. March 21, 1898.)

WILL—CONSTRUCTION—NATURE OF ESTATE.

S., surviving testator and J., takes a fee simple under will devising to S. certain lands, "all of which he shall have in possession on April 1st ensuing the decease of * * * J. [reserving to the latter the rents, issues, and profits during life]. * * * provided, however, should said devisee die without issue, * * * said real estate shall fall back and vest to my estate, and * * * said executor then shall, * * * after the decease of * * * J., sell * * * the same."

Appeal from court of common pleas, Berks county.

Action by Weaver Shearer against Levi Miller. Judgment for plaintiff. Defendant appeals. Affirmed.

The case stated and opinion of the court below are as follows:

Case Stated.

"The following facts have been agreed upon, and are admitted by both plaintiff and defendant in this issue; and it is further agreed that these facts shall be submitted to the court in the nature of a case stated for its determination and judgment: "

"Peter Weaver, late of Amity township, Berks county, died on the 27th day of October, A. D. 1879, testate. His will was duly proven in the register's office of Berks county on November 12, 1879, and is recorded in Will Book No. 14, page 38. The following is a copy of the will of said testator:

"In the name of God, amen. I, Peter Weaver, of Amity township, Berks county, and state of Pennsylvania, widower, being of good health of body and of sound mind, memory, and understanding, but considering the uncertainty of this transitory life, do make and publish this, my last will and testament, in manner and form as follows: (1) I nominate, constitute, and appoint my esteemed friend Jeremiah Van Reed the executor of this, my last will and testament, and of my estate, reposing in him full confidence in his integrity to perform the trust thus hereinafter unto him committed, and hereby revoking all other wills, legacies, and bequests by me heretofore made, and declaring this, and no other, to be my last will and testament. (2) I order and direct my said executor to have a fair valuation and appraisement made according to law at the time of my decease of all my estate, real and personal, by three disinterested men, and have the same regularly filed in the register's office at Reading. (3) I order and direct my said executor to dispose of all my personal property, effects, etc., not otherwise bequeathed, as soon after my decease as conveniently can be done, collect and settle up my estate, and thereout pay my just debts and funeral expenses, etc. (4) I give and bequeath unto Mahlon E. Weldner and wife ten (10) shares of one hundred dollars (\$100) each of my preferred stock of the Northern Pacific Railroad Company, and unto their heirs and assigns. (5) I give and bequeath unto Levi Miller and wife ten (10) shares of one hundred dollars (\$100) each of my preferred stock of the Northern Pacific Railroad Company, and unto their heirs and assigns. (6) I give and bequeath unto Clara Yocum (daughter of Moses Yocum) ten (10) shares of one hundred dollars (\$100) each of my preferred stock of the Northern Pacific Railroad Company, and unto her heirs and assigns. (7) I give and bequeath unto Weaver Shearer (a son of Henry Shearer) twenty

(20) shares of one hundred dollars (\$100) each of my preferred stock of the Northern Pacific Railroad Company. Provided the said Weaver Shearer, at the time of my decease, should not be in his minority, then said stocks so to him bequeathed shall be transferred unto Levi Miller aforesaid, in trust for said legatee until of age, by my said executor, whom I hereby fully empower and authorize so to do; also the same with the three before bequests of stocks, if necessary so to do, according to the mode and usages of said company. (8) I give and bequeath or donate unto the trustees of the Amityville Cemetery, and unto their successors, for the use of said cemetery, the sum of five hundred (\$500) dollars, to be applied to the repair, enlargement, etc., of said cemetery, in lieu of which said trustees or successors shall forever keep my burial lot and fence in the said cemetery clean, and in repair; and, in default of said trustees accepting said bequest on said condition, then the said bequest to be void, and of no effect. (9) I order and direct my said executor to pay unto Ann Matthias, out of my estate, such sum or sums of money as may be due and owing her, with interest, by my son Jeremiah, after final settlement and distribution of his present assignees, in case the same is not done so in some shape or other in my lifetime. (10) I give and bequeath unto the aforesaid Weaver Shearer my gold watch and chain, to be taken care of by Mrs. Levi Miller until she thinks fit for him to have it. (11) I give and bequeath unto the said Levi Miller my iron safe, horse, carriage, harness, and desk. (12) I give and bequeath unto my son Jeremiah Weaver my bed and bedstead, all the bedding thereto belonging. (13) I give and devise unto the said Weaver Shearer all that certain messuage, tenement, plantation, and tract of land whereon I now reside, situate in Amity township, Berks county, and state of Pennsylvania, bounded by lands of J. Van Reed, Peter K. Ludwig, Levi Miller, Abraham Boyer, Ezekiel Rhoads, and others, containing one hundred and eighty (180) acres, more or less, or so much thereof as I may hold at the time of my decease, and not otherwise devised; together with four tracts of woodland situate in Earl township, county and state aforesaid, three of which are adjoining ones, bounded by lands of Levi Miller, David Bucher, John Wise, Jacob Geiger, and others, containing together thirty-five acres, more or less; and the other is called the "Sands Tract," bounded by lands of Daniel K. Rhoads, late Solomon Rhoads and others, containing four acres, more or less,—all of which he shall have in possession on the first day of April ensuing the decease of my son Jeremiah, reserving in the meantime all the rents, issues, and profits thereof; that is to say, to lease and re-lease said farm, and cut off the wood from time to time for repairs, firewood, posts, rails,

etc., and of the woodland also for posts, rails, firewood, and also to sell when fit to be cut: provided, however, should said devisee die without issue or descendants of such, then, and in such case, said real estate and railroad stocks hereinbefore unto him bequeathed shall fall back and vest to my estate, and then to be distributed as herein-after directed. (14) I hereby order and direct my said executor to lease or let the hereinbefore devised farm or plantation to some good and trustworthy tenant or tenants, to the best advantage and interest to the farm, during the lifetime of my said son Jeremiah, and pay over unto him at times such of the net rents, issues, and profits thereof as he may want or my executor may deem expedient to pay over unto him, keeping in hand at all times sufficient sums or amounts of such rents to meet ordinary and even extraordinary expenses and repairs. None of such rents, etc., however, shall in any wise be liable to be attached for any debts my said son may be owing at my decease. (15) I further order and direct, should the real estate hereinbefore devised fall back and be vested to my estate by virtue of this, my will, that he, the said executor, then shall, as soon as conveniently can be done after the decease of my son Jeremiah, sell and dispose of the same to such person or persons and for such price or prices as may reasonably be gotten for the same, and the same, with any other real estate which I may hold at the time of my decease, and for that and similar purposes, I do hereby authorize and empower my said executor to sign, seal, execute and acknowledge, all such deed or deeds of conveyance as may be necessary and requisite for the granting and assuring of the same to the purchasers thereof in fee simple. (16) I do hereby authorize my executor at any time to dispose of my remaining shares of the Northern Pacific Railroad stocks if necessary, or deem advisable, and transfer and let over unto the purchaser or purchasers thereof according to the mode and usages and requirements of said company, and invest the proceeds thereof, together with any other moneys on hand (if not needed otherwise to carry out the intents and purposes of this, my will), in landed or other good security at interest, to be wholly at the risk of my estate. (17) And I further direct and authorize my executor to pay from time to time such sum or sums of money out of my estate for the maintenance, support, and education of the aforesaid Weaver Shearer. (18) And as touching the rest and residue of my estate that may be or remain at the time of the decease of my said son Jeremiah or at any time thereafter, I hereby order and direct to be paid unto the present creditors of my said son Jeremiah, respectively, in proportion to their respective remainders of claims, definitely presented, and the same

with any others bequeathed or devised estate that may fall back and revert to my estate by virtue of this my will: provided, however, in case any or either of such creditors or claimants as aforesaid should in any way or manner molest, harass, interfere or go to law in and about the construction or distribution of said residue contained in this 18th section of this, my will, with my said executor (or his successor), then such creditor or creditors so molesting, harassing, interfering, disputing, controversing, or going to law shall be forever barred from the benefit of this particular bequest, and his, her, or their portion, dividend, or share that would fall to him, her, or them shall then fall and be added to the dividends of such creditor or creditors not molesting, etc., my said executor or his successor in pro rata to their respective claims. (19) I hereby further order and direct, and it is my express will and devise, that in case my said executor should die or resign of the trust, and so forth, thus hereinbefore unto him committed before the decease of my said son Jeremiah (or after if required), then and in such case I do hereby give and intrust the same unto Levi Miller, aforesaid, by him to be performed and carried out to all intents and purposes with the same power and authority as enjoined upon him, my said executor, more fully set forth in this my will.

"In witness whereof, the said testator has hereunto set his hand and seal this twenty-fourth day of March, A. D. 1879.

^{his}
"Peter X Weaver. [Seal.]
mark.

"Signed, sealed, and delivered by the said testator as his last will and testament in presence of us:

"J. W. Van Reed.

"Rebecca V. R. Hill."

"I, Peter Weaver, the within-named testator, do hereby make and publish this codicil, to be added to my last will and testament, in manner following, to wit: (1) I give and bequeath unto Levi Miller two thousand dollars (\$2,000). (2) I give and bequeath unto Mary Miller, wife of the aforesaid Levi Miller, two thousand dollars (\$2,000.00). (3) I give and bequeath unto Clara Yocum (daughter of Moses Yocum) four hundred dollars (\$400), to be paid her out of the first available funds coming into the hands of my executor. (4) I order and direct, and it is my will, that the amount of money due at my decease by my son Jeremiah and his wife, Catharine, by a certain bond and mortgage, shall be held by them without interest during the lifetime of my said son, if not sooner paid by them, and, as a matter of course, the above bequest and direction will materially affect the surplus or rest and residue spoken of in the 18th section of my foregoing will; and, lastly, it is

my will and desire that this, my present codicil, be annexed to and be made a part of my will and testament.

"In witness whereof, the testator has hereunto set his hand and seal this twenty-ninth day of April, A. D. 1879.

^{his}
"Peter X Weaver. [Seal.]
mark

"Signed, sealed and declared by the said Peter Weaver as and for a codicil to his last will and testament in presence of

"J. W. Van Reed.

"Rebecca V. R. Hill."

"When Peter Weaver died he was the owner in fee simple of all the real estate mentioned in the thirteenth item of his will, which is as follows: 'All that certain messuage, tenement, plantation, and tract of land whereon I now reside, situate in Amity township, Berks county, and state of Pennsylvania, bounded by lands of J. Van Reed, Peter K. Ludwig, Levi Miller, Abraham Boyer, Ezekiel Rhoads, and others, containing one hundred and eighty (180) acres, more or less, or so much thereof as I may hold at the time of my decease, and not otherwise devised; together with four tracts of woodland situate in Earl township, county and state aforesaid, three of which are adjoining ones, bounded by lands of Levi Miller, David Bucher, John Wise, Jacob Gelger, and others, containing together thirty-five acres, more or less, and the other is called the "Sands Tract," bounded by lands of Daniel K. Rhoads, late Solomon Rhoads and others, containing four acres, more or less.' And he was also the owner and possessor of the railroad stocks mentioned in the seventh paragraph of his will as well as of the articles given to Weaver Shearer in the tenth paragraph of the will. The estate of the testator was entirely solvent, and all debts were paid without affecting or lessening any of his devises or bequests; and Weaver Shearer has not aliened any property willed to him, nor incumbered the same in any way. Jeremiah Weaver, the son of the testator mentioned in the thirteenth clause of the will as taking a life estate in the property, died on the 2d day of November, A. D. 1885, and Weaver Shearer took possession of the estate on the 1st day of April following his death. On the 8th day of June, A. D. 1897, Weaver Shearer entered into articles of agreement with Levi Miller, both of Berks county, for the sale of the said real estate mentioned and described in the thirteenth clause of said will, to wit, the farm containing 180 acres, more or less, and the four tracts of woodland, bounded and described as in said will set forth, for the sum of fifteen thousand dollars (\$15,000), payable on the 1st day of November, A. D. 1897, on the delivery of a good and sufficient deed. On the said 1st day of November, A. D. 1897, the said Weaver Shearer tendered to the

said Levi Miller a deed acknowledged to be correct in form for all the premises hereinbefore mentioned, and demanded the payment of the purchase money according to the terms of the agreement, to wit, fifteen thousand dollars (\$15,000). Levi Miller, the purchaser, refused payment, admitting that the deed was correct in form, but declared that under the will of Peter Weaver the estate coming to him, the said Weaver Shearer, was but a life estate, and not a fee simple, and that a legal conveyance in fee simple could not be made to him by the said grantor. Now, therefore, if the court be of the opinion that the said Weaver Shearer is seized of an estate in fee simple of the real estate so devised to him by the will of Peter Weaver, deceased, then judgment to be entered in favor of the plaintiff for the sum of fifteen thousand dollars (\$15,000), with interest from November 1, 1897; if not, then judgment to be entered in favor of the defendant. Each party reserving to himself the right of appeal, writ of error, and certiorari to the supreme court."

Opinion of the Court.

"Peter Weaver died October 27, 1879, leaving a will, dated March 24, 1879, in which he provided as follows: '(1) I nominate, constitute, and appoint * * * Jeremiah Van Reed the executor of this, my last will and testament. * * * (7) I give and bequeath unto Weaver Shearer, * * * 20 shares * * * of my preferred stock of the Northern Pacific Railroad Company. Provided the said Weaver Shearer at the time of my decease should yet be in his minority, then said stocks so to him bequeathed shall be transferred unto Levi Miller * * * in trust for said legatee until of age. * * * (13) I give and devise unto the said Weaver Shearer all that certain * * * plantation * * * whereon I now reside, * * * together with four tracts of woodland, * * * all of which he shall have in possession on the first day of April ensuing the decease of my son Jeremiah * * * [reserving to the latter the rents, issues, and profits during life]: * * * provided, however, should said devisee die without issue or descendants of such, then and in such case said real estate and railroad stocks hereinbefore unto him bequeathed shall fall back and vest to my estate, and then to be distributed as hereinafter directed. (15) I further order and direct, should the real estate hereinbefore devised fall back and be vested to my estate by virtue of this, my will, that he, the said executor, then shall, as soon as conveniently can be done after the decease of my son Jeremiah, sell and dispose of the same. * * * (18) And as touching the rest and residue of my estate that may be or remain at the time of the decease of my said son Jeremiah, or at any time thereafter, I hereby order and direct to be paid unto the present creditors of my said son Jeremiah,

respectively, in proportion to their respective remainders of claims, * * * and the same with any others bequeathed or devised estate that may fall back and revert to my estate by virtue of this, my will. * * * Testator's son Jeremiah died in 1885, and in the following April Weaver Shearer went into possession of the realty above referred to. The single question to be determined upon this case stated is whether plaintiff's interest in said realty is a fee simple or not. The answer to that question must depend upon the proper construction of the proviso to paragraph 13, read in the light of the other portions of the will above quoted. So read, it cannot be successfully maintained that the language of this proviso imports a limitation over upon an indefinite failure of Weaver Shearer's issue. The direction that upon the falling back of the property to the estate it be sold by 'the said executor' is inconsistent with the idea that the time of the reversion is designed to be postponed to an indefinite period. *Middlewarth's Adm'r v. Blackmore*, 74 Pa. St. 414, 420. So is the direction that the proceeds of the sale of the reverted property go towards the satisfaction of Jeremiah's 'present creditors.' *Taylor v. Taylor*, 63 Pa. St. 481, 485. Besides, that sale is to be made about the time of Jeremiah's death. And again, the phrase 'issue or descendants of such' is significant. If the word 'issue' were used to denote an unbroken and indefinite succession, there would be no sense in adding 'or descendants of such,' for all would be covered by 'issue.' The addition of these words, which may mean 'heirs' (*Huston v. Read*, 32 N. J. Eq. 591, 599) and may mean 'children' (*Schmaunz v. Goss*, 132 Mass. 141, 144), would seem to indicate that Weaver Shearer's 'issue' means simply his children, and that they were regarded as taking, if or when they should take, as a new stock, by way of substitution and as purchasers. But neither does the testator appear to contemplate a failure of issue at the death of Weaver Shearer; certainly not a 'death without issue' before the testator, within the rule in *Mickley's Appeal*, 92 Pa. St. 514; *Morrison v. Truby*, 145 Pa. St. 540, 22 Atl. 972; *Mitchell v. Railway Co.*, 165 Pa. St. 645, 31 Atl. 67; *Keating v. McAdoo*, 180 Pa. St. 5, 36 Atl. 218, and similar cases; for in paragraph 7 he appoints a trustee for Weaver Shearer in case of his being under age at testator's decease, thus showing that he is providing for one whom he expects to survive his (testator's) death, and that, when he speaks of Weaver Shearer's death, he has reference to a period subsequent to his own. This inference is greatly strengthened by the fact, stated by counsel on both sides at the argument, that at the time of making his will testator was about 80 years old, whilst Weaver Shearer was a child. It would seem nonsensical to suppose that in these circumstances the testator was contemplating a possibility that Weaver

Shearer might have children and grandchildren, and that all of these persons might live and die before the will should be probated. Yet, though evidently thinking of Weaver Shearer's death as something subsequent to his own, there is that in this will which forbids the conclusion that the testator is speaking of a failure of Weaver Shearer's issue upon the latter's death at any time thereafter. The realty in question is subject to a life estate in Jeremiah. It is upon Jeremiah's death that Weaver Shearer, if living, or his children, if he be dead, are to go into possession. It is upon Jeremiah's death, if at all, that the property is to be sold by the executor. In order to enable them to do so, it must have reverted before Jeremiah's death, i. e. Weaver Shearer must have died, and his issue, etc., failed, before Jeremiah died. If this be too literal a construction, still, clearly, Jeremiah's death is the important epoch in the testator's entire scheme,—the point of time to which he refers the ultimate disposition of his estate,—and it seems most reasonable to assume that that is the period which was in his mind when he provided for the event of Weaver Shearer's death without issue, etc. The words, 'or at any time thereafter,' in paragraph 18, directing distribution among Jeremiah's creditors, refer to what may be found remaining of the testator's estate after Jeremiah's death, including, not the reverting realty itself (the time for the sale of which is fixed by paragraph 15), but only its proceeds, and have, therefore, no bearing upon the question as to when the period for its reversion is to be ascertained. Accordingly, the intention of the testator was that, subject to Jeremiah's life estate, the realty should, upon testator's death, vest in Weaver Shearer; that, in the event of the latter's surviving Jeremiah, it should continue his absolutely; that, in the event of his death before, and leaving children, grandchildren, etc., surviving, Jeremiah, it was to be theirs; and that, in the event of his dying before Jeremiah, without leaving children, grandchildren, etc., surviving the latter, it should go to the executor as part of the estate. Words of inheritance not being essential in a devise, in order to create a fee (Act April 8, 1833; P. L. p. 249, § 9), the effect of the language in which this intention is sought to be expressed would seem to be to give Weaver Shearer a fee, with an alternative executory limitation, in case of his death before Jeremiah, to his children, grandchildren, etc., if there be any surviving Jeremiah, or, if not, to the testator's executor for the purposes specified in the will. Weaver Shearer's surviving Jeremiah rendered impossible the contingency upon which the executory limitation was to take effect, and his interest then became an indefeasible one in fee simple. *Wentz's Appeal*, 106 Pa. St. 301; *Drum v. Millar*, 18 Pa. Co. Ct. R. 318; *Brightman v. Brightman*, 100 Mass. 238. And now, De-

cember 27, 1897, judgment upon the case stated in favor of plaintiff for \$15,140."

H. P. Keiser, for appellant. J. H. Jacobs, for appellee.

PER CURIAM. On the facts set forth in the case stated, the learned judge of the court below was clearly right in entering judgment in favor of the plaintiff for \$15,140. On his opinion the judgment is affirmed.

(70 Conn. 459)

ROPER v. CITY OF NEW BRITAIN.
(Supreme Court of Errors of Connecticut.
March 24, 1898.)

**MUNICIPAL CORPORATIONS—CONSTRUCTION OF
STREETS—DAMAGES—ESTOPPEL.**

1. The right to recover the amount of damages appraised by the street commissioners and adopted by the common council, on account of the construction of a street through plaintiff's premises by a city in accordance with the provisions of its charter, was not suspended during the pendency of an appeal by other owners, not including plaintiff, from the estimate of their respective damages and benefits.

2. The sum which a city had been found liable to pay plaintiff as damages for taking his land for a street is in no wise dependent on the amount which may be finally fixed, after proceedings on appeal, as allowed by the charter, as the just portion of the expense of the road to be paid by plaintiff, since, under the charter, adequate means are furnished the city to collect such assessments.

3. The action of the common council in accepting and auditing the report of the street commissioners of a city in regard to the respective damages and benefits from the construction of a street is not affected by a subsequent appeal of some of said landowners from the appraisal of their respective damages and benefits.

4. A city, by constructing a street over plaintiff's property after an appraisal of the damages to him by its officers, affirms such appraisal as final.

5. Where a city, under its charter, could not take property for a street without first paying to plaintiff, an owner, or providing for the payment to him, of the damages assessed by its officers, the construction of such street estops the city from averring that the damages appraised to plaintiff are not due and payable.

6. In an action against a city to recover the amount of damages assessed by its officers for the construction of a street through plaintiff's land, the city, in order to rely on benefits of the road duly assessed against plaintiff, must plead such fact as a counterclaim.

Appeal from superior court, Hartford county; Milton A. Shumway, Judge.

Action by Stephen Roper against the city of New Britain to recover the amount of damages appraised to the plaintiff on account of the laying out of a highway in the city of New Britain and the taking of the plaintiff's land therefor. The court sustained plaintiff's demurrer to the answer, and upon final hearing judgment was rendered by the court in favor of the plaintiff. Appeal by defendant for alleged errors of the court in sustaining plaintiff's demurrer, and in the amount of the final judgment. No error.

The original complaint was as follows:
"(1) On and before May 1, 1895, the plaintiff

was the owner, in possession, of a certain parcel of land situated in said town, within the limits of said city of New Britain [describing same]. (2) On and before said 1st day of May, 1895, the defendant laid out a highway or public street across said land, and appropriated for public use a portion of said land [describing portion appropriated]. (3) On and before the 1st day of May, 1895, the defendant took and had such proceedings, pursuant to its charter and the laws of this state, that it ascertained the amount of damages to the plaintiff on account of laying out said street and taking said land to be one thousand and seventy-five dollars, and the benefits therefrom to be seventy-five dollars, and the just compensation to the plaintiff to be one thousand dollars. (4) On or about the 1st day of May, 1895, the defendant entered on said land against the remonstrance of the plaintiff, tore down the fences, cut down his fruit trees, destroyed his well, dug up the soil, and constructed said street, and thereafter opened the same to public travel, and ever since has continued to use the same as a public street. (5) The defendant, though often requested and demanded, has never paid the plaintiff any part of said damages so as aforesaid ascertained by said defendant, and has not made just compensation, or any compensation, to the plaintiff, on account of the taking and damaging of his property for the purpose of said street, and neglects and refuses to make any appropriation or lay any tax for the purpose of providing for the payment of his damages or just compensation."

The complaint was afterwards amended by striking out paragraph 3, and inserting the following in place thereof: "(3) The board of street commissioners of said city, after due notice and hearing, as prescribed by its charter, proceeded to assess all betterments and benefits, and to appraise all damages, for the laying out of said street or highway, and taking said land and other lands covered by said layout, for public use; and prior to the 20th day of March, 1895, said board appraised the damages to the plaintiff on account of said layout and taking at one thousand and seventy-five dollars, and assessed benefits against him on account of said layout and taking, at seventy-five dollars, and no more. (3a) Prior to the 20th day of March, 1895, said board of street commissioners made their report of their doings to the common council of said city. (3b) On the 20th day of March, 1895, said common council accepted and adopted said report. (3c) The clerk of said common council recorded said report in the records of the common council, and said common council caused a notice signed by its clerk, containing the names of the persons thus assessed, with the amounts of their respective assessments, to be published twice in a newspaper published in said city of New Britain, to wit, on the 21st and 22d days of March, 1895."

One of the answers of the defendant, entitled "Second Defense," which admitted the truth of paragraphs 1, 2, 3, 3a, 3b, and 3c of the complaint, proceeded (after amendment) as follows: "(4) Within ten days after the notice of the appraisal of damages and assessment of benefits had been given, as stated in paragraph 3c of the amendment to the complaint, Thomas C. Smith and others, not including the plaintiff, being the owners of land taken for the highway referred to in paragraph 2 of the original complaint, and claiming to be aggrieved by the estimate of the board of street commissioners of their damages caused by the layout of said highway, and by the assessment of benefits consequent thereon, applied by petition to David S. Calhoun, a judge of the court of common pleas for Hartford county, for a reassessment of their damages and a reassessment of their benefits, in accordance with the provisions of the charter of the city of New Britain relating to appeals in such cases. (5) Said appeals by Thomas C. Smith and others were taken from the appraisal of damages and assessment of benefits to them on account of the layout and construction of said highway, in accordance with the provisions of the charter of said city. (6) Said appellants in said appeal prayed that said judge of the court of common pleas should reduce the assessment of special benefits, and should increase the appraisal of damages made to them, the said appellants. (7) [Stricken out by amendment.] (8) Said appeals are now pending. (9) By the provisions of said charter, if, upon the hearing of said appeals, said judge, or a committee appointed by him, shall find cause to alter the appraisal of damages or the assessment of benefits, or both, from which appraisal or assessment, or both, an appeal may have been taken, it will be the duty of said judge or committee to reassess the whole amount of the damages or costs of construction of said highway, or both, upon the persons or land specially benefited, of whom the plaintiff is one. (10) By reason of said appeals, the amount to be paid by said city to this plaintiff by reason of the layout and construction of said street and the taking of the plaintiff's land is liable to be changed and altered, and the amount to be finally paid to him upon the determination of said appeals is now uncertain. (11) By reason of said appeals, the amount of compensation—i. e. the excess of damages over benefits to be paid the defendant, if any—has not been ascertained, and the action taken by the city, as set out in paragraphs 2, 3, 3a, 3b, and 3c of the complaint, was only a preliminary step towards such ascertainment, so that there is nothing yet due to the plaintiff by virtue of said proceedings."

To said "Second Defense" the plaintiff demurred, upon the ground set forth in such demurrer, as follows: "In lack of any allegation of an appeal on the part of the plaintiff, of the nature of those alleged in said

answer to have been taken by Thomas C. Smith and others, or of any allegation of an appeal from the appraisal of damages to this plaintiff, there are no matters of fact alleged in said defenses which, under the charter of the city of New Britain or otherwise by law, operate to vary or suspend the right of the plaintiff to maintain this action, especially since the city, after said appeals were taken, has entered on said land, constructed a street thereon, and opened the same as a public highway, and maintains the same as such." The court sustained said demurrer.

Upon the final hearing before the court the plaintiff claimed that, upon the pleadings, judgment should be rendered in his favor for the full amount of damages appraised to him, to wit, \$1,075, with interest from May 3, 1895. The defendant claimed that, if the plaintiff was entitled to judgment for damages, it should be for only \$1,000, with interest from said date, namely for the amount of damages, \$1,075, appraised to the plaintiff, less the benefits \$75 assessed upon the plaintiff. The court sustained the plaintiff's claim and rendered judgment for \$1,075 and interest.

Frank L. Hungerford and William O. Hungerford, for appellant. John Coats, for appellee.

HALL, J. The city of New Britain, in accordance with the provisions of its charter, laid out a highway over the plaintiff's land. Damages and benefits were duly assessed by the board of street commissioners, and the notice containing the names of the persons assessed and the amount of their respective assessments was published, as required by section 50 of the charter, on the 21st and 22d of March, 1895. Within 10 days after said last date, Thomas C. Smith and others, as alleged in paragraph 4 of the defendant's second defense, appealed from the assessment of benefits and the appraisal of damages so made to them, which appeal is still pending. The plaintiff's damages were appraised at \$1,075, and he was assessed \$75 as benefits. He has taken no appeal. In May, 1895, and while said appeal of Smith and others was pending, the defendant, without having paid to the plaintiff his damages, entered upon his land, constructed said highway, and opened the same as a public street, and it has ever since been so used. The present suit is not an action of trespass, and has not been so regarded by counsel for either plaintiff or defendant. The plaintiff claims that it is an action to recover the entire sum of \$1,075 awarded him as damages; the defendant, that from the allegations of the complaint it should be held to be a suit to recover only the excess of the damages over the benefits. There are but two contested questions presented: (1) Is the plaintiff barred from recovering judgment in this action by the pendency of the appeal of Smith and others? (2) If the plaintiff may recover, should the judgment be for the full sum awarded him as

damages, with interest, or for said sum less the amount assessed as benefits, with interest.

The defendant maintains that the plaintiff cannot recover judgment until the amount due him from the city has been finally fixed, in the manner provided by the charter, and that, so long as said appeal is pending, that amount is uncertain, because by that appeal the sum awarded the plaintiff as damages may be either directly reduced or diminished indirectly by an increase of the amount assessed to the plaintiff as benefits. The sum of \$75, assessed as benefits to the plaintiff, is not intended, under the defendant's charter, to measure the actual benefit derived by the plaintiff from the opening of the highway. It represents that part of the whole expense of the public work which he, as one specially benefited, is required to bear. The manner of making the assessment of such so-called benefits is described in section 50 of the charter (10 Sp. Laws Conn. pp. 133, 134). The board of street commissioners, having heard all parties interested, adds to the estimated cost of constructing and completing the highway the amount of damage which will result to all persons whose land must be taken, and apportions the payment of the whole or a part of that sum among those who will be specially benefited by such public work. It follows, therefore, that if it should be found, upon the appeal of Smith and others, either that the benefits assessed by the board of street commissioners to either of the appellants are disproportionately large, or that the damages appraised to either of them are too small, it may become necessary to reapportion the entire expense of the highway among those specially benefited, or, in the words of section 51 of the charter, "to reassess the whole amount of the damages or cost of construction or both upon the persons or land specially benefited." Such reassessment may increase the amount to be paid by the plaintiff to the city as benefits, and so may diminish the balance due the plaintiff from the city, if the benefits are to be deducted from the damages as appraised. It does not occur to us that the interests of the plaintiff, or the relative obligations of the plaintiff and defendant to each other, can in any other respect be affected. Clearly the question of the amount of the plaintiff's damages cannot be considered in the appeal of Smith and others. The plaintiff is not a party to that appeal, nor does the charter provide that he may become a party. Not until the appellate tribunal has found cause to alter the assessment or appraisal of some of the appellants, as made by the board of street commissioners, so that a reapportionment of the expense among those specially benefited is required, can the plaintiff and other persons interested be made parties to the proceeding under section 53 of the charter. They are then made parties that they may be heard upon such reapportionment of the expense, and for no other purpose.

The plaintiff's right to recover compensation for the land taken from him by the city is not suspended during the pendency of this ap-

peal because a possible result of such appeal is an increase of the amount of benefits assessed to the plaintiff. The sum which the city must pay to the plaintiff, as damages for having taken his land, is in nowise dependent upon the amount which may be finally fixed as the just portion of the expense of the public improvement to be paid by the plaintiff. Adequate means are furnished the city to secure and collect such assessments of benefits by sections 53 and 54 of the charter. They are liens upon the land upon which they are made, taking precedence of all other liens or incumbrances, excepting taxes due the state, and may be foreclosed as mortgages. The assessments may also be collected by warrant in the same manner as town taxes. The amount of the appraisal of damages to the plaintiff was due and payable, notwithstanding the pendency of the appeal in question. No appeal having been taken by the plaintiff, and no appeal having been taken by any person the result of which could change the appraisal of damages to the plaintiff, the common council, after having accepted and adopted the report of the board of street commissioners, and given the required public notice, should have ordered to be paid to the plaintiff the amount of his damage as assessed and determined, and upon his refusal or neglect to receive the same the amount so due him should have been deposited in the city treasury, to be paid to him when he should apply for it. The action of the common council in accepting and adopting the report of the street commissioners was not affected by the subsequent appeal of Smith and others. *Messer v. Wildman*, 53 Conn. 494, 2 Atl. 705. Under the circumstances of this case, the city had no right to enter upon the plaintiff's land, and appropriate it to the public use, against the will of the plaintiff, until his damages were either paid or deposited in the city treasury. If facts might exist which would justify the city in delaying the payment of such assessments of damages after having adopted the report of the board of street commissioners, they are not found in the present case. The plaintiff's land was entered upon and taken by the defendant for a public street, after the appeal of Smith and others was taken; and while that appeal was pending the defendant constructed the street over the plaintiff's land, and it has ever since been used as a public street. By so taking the plaintiff's property the city has accepted and affirmed the assessment of damages made to the plaintiff by the street commissioners as final. As the city, under the provisions of its charter, could not take the plaintiff's land against his will, and open the same as a public street, without having first paid to him, or provided for the payment to him, of the damages so assessed, it is estopped, after having so taken it, and after having constructed and opened the public street, from averring that the damages as appraised to the plaintiff are not due and payable.

The plaintiff was entitled to recover the full

amount of his damages as appraised, with interest, as allowed. The \$75 assessed as the sum to be paid by the plaintiff as benefits is subject to change by the reassessment which may be rendered necessary by the appeal of Smith and others. But, were this not so, the claim of the plaintiff for damages and that of the city for the assessment of benefits are so far independent of each other that the defendant, to have the benefit of its claim in this action, should have pleaded it, either as a set-off or as a counterclaim, unless such pleading was rendered unnecessary by the allegations of the complaint. Under the complaint as originally framed, such pleading would not have been required, as in paragraph 3 it was distinctly alleged that the just compensation to the plaintiff for the taking of his land had been ascertained to be \$1,000. This averment was afterwards stricken out by amendment. The complaint in its present form is for the recovery of the full amount of the damages appraised. To have availed itself, in this action, of its claim against the plaintiff, the defendant should have pleaded it. There is no error. The other judges concurred.

(70 Conn. 429)

McKEON v. BYINGTON.

(Supreme Court of Errors of Connecticut.
March 24, 1898.)

ACTION ON ACCOUNT—PLEADING AND JUDGMENT—
INTEREST—LIMITATIONS—PART PAYMENT—
PARENT AND CHILD—SUPPORT.

1. In an action for clothes "furnished to the defendant and his sons," plaintiff may recover for clothes furnished another besides his sons on his written order.

2. A father is liable for clothing furnished his minor sons on his order, whether or not it is intended to be for their support.

3. The fact that a father's minor sons leave his home does not revoke an order he had made to furnish them with clothing.

4. Rent, by agreement applied by a lessee on an open, running account against the lessor, operates as payments to prevent the statute of limitations from running on the account until the last of the rent is due.

5. An open account, the last payment on which was made by the application, by agreement, of rent due from creditor to debtor, is deemed to be closed from the time the application should be made, and the creditor is entitled to interest from that date on the balance due him.

Hamersley, J., dissenting.

Appeal from superior court, Fairfield county; Milton A. Shumway, Judge.

Action by Francis J. McKeon against Aaron H. Byington to recover the amount of a tailor's bill. The case was tried to the court. Defendant's remonstrance to the report of a committee in favor of plaintiff was overruled, and afterwards judgment was rendered for plaintiff, and both parties appealed. Error on plaintiff's appeal.

The complaint in this case was in the nature of an action of assumpsit. The plaintiff was a merchant tailor. The bill of particulars was for goods sold, and for work and labor,

such as an artisan of that kind would ordinarily furnish to his customers. The answer was: (1) A general denial; (2) that the cause of action did not arise within six years next before the suit was brought. The reply denied the matters set up in the second defense, and also alleged that within six years before the commencement of this suit the defendant had undertaken and promised to pay to the plaintiff the amount of his bill. The rejoinder denied this last matter. There was also a counterclaim pleaded by the defendant, the bill of particulars under which set out the use and occupation of rooms at a certain rent; also work and labor in advertising in a newspaper. The plaintiff denied all the matters alleged in the counterclaim. The cause was referred to a committee, who reported as follows: "(1) The plaintiff, from September 13, 1867, to April 1, 1882, was a merchant tailor, doing business in Norwalk, Conn., in a store which he rented from the defendant. (2) The rental price agreed upon was \$200 per year, payable quarterly. The plaintiff paid his rent in cash to April 1, 1868. After that time he paid nothing. (3) On October 17, 1867, the defendant had four minor sons. (4) Upon said last-mentioned date he opened an account with the plaintiff, directing him to make clothing as it should be ordered for himself and his sons, and to charge the same to him. He never revoked this direction. (5) The defendant, in June, 1868, ordered the plaintiff to supply Edward Owens with a suit of clothes, and charge the same to the defendant. The plaintiff complied with said order. The clothing so furnished was of the price and value of \$31, and has never been paid for. (6) Between October 17, 1867, and November 6, 1878, the plaintiff made and delivered to the defendant and his sons clothing of the price and value of \$4,213.50. (7) An account for repairing, in addition to the amount above allowed, was presented to me, but, while I am satisfied that the repairing was done, no reliable evidence of the amount or value of the same was furnished, and I am unable to fix upon any amount due therefor. (8) The plaintiff also presented an account for the care of a lamp which was left lighted in the hall of the building in which his store was located. I find that said lamp was placed there by the plaintiff himself, and that the defendant never agreed to pay anything for its care. (9) The defendant has paid in cash or its equivalent \$365 upon the plaintiff's account. No part of said account was paid within six years prior to the bringing of this action. (10) At all times since April 1, 1868, the account of the plaintiff for clothing has exceeded the account of rent due. (11) While the plaintiff was in occupancy of said store, the parties agreed verbally, in the year 1874 or year 1875,—not later than the year 1875,—that the rent should be applied as it became due as payment on the account. (12) The last rent became due on April 1, 1882. (13) On April 1, 1882, there was due to the plaintiff \$1,079.50 (exclusive

of interest and inclusive of the suit for Owens), after deducting said \$365 and \$2,800 for rent. (14) No part of said sum has ever been paid to the plaintiff. (15) The plaintiff did not present annual statements of his accounts to the defendant, but at various times he sent bills to him. Said bills were not correct in amount, and the parties had never agreed as to the balance due. (16) On some day subsequent to April 1, 1882, while the parties were attempting to arbitrate their differences, the defendant requested the plaintiff to give him his account. The plaintiff accordingly called at the defendant's house, and presented to him his account (as he claimed it). The defendant denied that he owed the plaintiff anything, but he then stated to the plaintiff that, if he owed him anything, he would pay him every cent he owed. (17) I find that the defendant's claim for advertising set forth in his counterclaim is not proven." When this report was filed in court, the defendant remonstrated against its acceptance. The plaintiff denied all the allegations contained in the remonstrance. The court, after a full hearing, overruled the remonstrance, accepted the report, found the facts therein stated to be true, and rendered judgment for the plaintiff to recover of the defendant the said sum of \$1,079.50 damages, and his costs. From this judgment both parties have appealed.

Joseph A. Gray, for plaintiff. Edward M. Lockwood and Hurlbutt & Gregory, for defendant.

ANDREWS, C. J. (after stating the facts). Where a case is referred to a committee for a hearing and finding thereon, the committee may report in detail all the proceedings which occur at the hearing,—all the objections taken and all the interlocutory questions made,—with the rulings thereon, as well as the findings upon the issues in the case. If this is done, a party who is aggrieved by any of these rulings has them spread on the record, so that, when the report comes up for acceptance, he can ask the court to pass upon them. But sometimes the committee reports only the ultimate facts found. If this is done, a party who has been aggrieved by any rulings at the hearing sets forth in a remonstrance all those rulings and questions of which he complains, and in that way spreads them upon the record, and thus enables the court to determine upon their correctness. In the present case the latter course was taken.

It is certainly within the jurisdiction of the superior court to decide upon a report which its own committee has made to it. So that there is nothing erroneous in the first reason of appeal. And as, on his remonstrance, the defendant had the benefit of all the questions he desired to raise, there was no need of sending the report back to the committee. There is, therefore, no error in the fifth and sixth reasons. The rule in respect to the assignment of errors requires that the precise matter

of error or defect in the proceedings in the court below, relied on as ground of reversal, must be set forth. No others will be considered by this court. Rule 16. Several of the reasons do not conform to this rule. They present no questions which this court can consider. Of this kind are the second, third, fourth, seventh, eighth, twentieth, and twenty-fifth reasons.

The ninth, tenth, and eleventh reasons have reference to a suit of clothes furnished by the plaintiff on the written order of the defendant, and delivered to one Owens; the price of which was \$31. The defendant now argues that this sum ought not to be charged against him in this suit, because the clothes were to be worn by one Owens, while the complaint asks to recover only for clothes furnished to the defendant and his sons. We think the committee properly disregarded a technicality so thin and so devoid of merit as that.

The twelfth, thirteenth, and sixteenth reasons assign as error that it is not found that the clothing furnished to the sons of the defendant were for their support. It is stated in the report that the defendant had four minor sons, for whom clothing was furnished. Ordinarily, clothing furnished to a minor child on the order of the father would be assumed to be for its support. It does not appear that any of these sons became of full age while this account was being incurred; and, as all the clothing was furnished on the order of the father, the question of support is not material. There is no error in these reasons.

It seems probable that the fourteenth reason does not clearly express the thought of counsel. Whether or not the plaintiff made and delivered clothing to the defendant's sons was expressly in issue by the terms of the complaint and the bill of particulars. The same probability seems to attach to the fifteenth reason. It assumes that the defendant was not liable for the clothing furnished to his sons, a conclusion exactly contrary to the facts found. And also the seventeenth, because it assumes, contrary to the fact, that the verbal order given by the defendant to the plaintiff in 1867 was an agreement to answer for the debt of another. There is no error in any of these reasons. Nor is there in the eighteenth. The fact that two of the defendant's sons went away from his home did not revoke his order to the plaintiff to furnish them with clothes. Besides, there is no evidence that the plaintiff had any knowledge that they were absent. The nineteenth reason is evidently an inadvertence. The court ruled in accordance with the defendant's claim. The twenty-first, twenty-second, twenty-third, and twenty-fourth reasons each refer to the new promise which the plaintiff alleges the defendant had made.

The defendant set up in his second defense that the cause of action stated by the plaintiff did not accrue within six years next before the commencement of this action. The plaintiff denied this defense. An examination of the

record shows that this defense was not sustained. The committee's report says in paragraph 11 that the parties agreed that the rent of the store should be applied, as it should become due, as payment on the account. It appears by the bill of particulars that the rent had been in fact so applied; and in paragraph 12 that the last rent became due on the 1st day of April, 1882. By the agreement this was a payment by the defendant of the amount of the yearly rent, and one which should be credited on that date. "In a matter of account every proper item of credit on one side is presumed to be intended, and will therefore operate as a payment upon existing debts on the other. The account is an entirety. The items of debit and credit are the elements of which that entirety is composed. Credits on one side are applied to the extinguishment of debts on the other as payments intentionally made thereon, and not as set-offs of one independent debt against another." *Sanford v. Clark*, 29 Conn. 462. This was a payment which prevented the statute of limitations from running until that day. The action was brought on the 27th day of March, 1888, and within six years after that payment. It is very possible that the facts found were sufficient to establish a new promise, but we have no occasion to pass upon these because the statute of limitations had not run against the account. There is no error on the defendant's appeal. There is, however, error on the plaintiff's appeal. The plaintiff is entitled to have interest on the sum of \$1,079.50 from the 1st day of April, 1882. The mutual accounts closed on that day, and he is entitled to have damages from that date to the date of payment. The case must be remanded to have interest computed for that time, and then judgment should be rendered for the plaintiff to recover the amount. Error on plaintiff's appeal, and case remanded. The other judges concurred, except HAMERSLEY, J., who dissented as to the allowance of interest.

(87 Md. 302)

**BLAKISTONE v. GERMAN BANK OF
BALTIMORE CITY.**

(Court of Appeals of Maryland. March 3, 1898.)

**CONTRACTS—INDEFINITENESS—SALES—BILLS OF
EXCHANGE—ACCEPTANCE.**

1. When contracting for certain car fenders to be made and delivered, the maker asked the buyer if, when he asked him from time to time to give him something on account to help out his pay roll, he would do it, and the buyer said he would help him. *Held*, that the agreement to help was too vague to be enforced.

2. A. contracted with B. to furnish him a certain number of car fenders, for which B. advanced on his contract certain sums from time to time. A. then made an order on B. for the entire contract price, and B. accepted it, deducting the amount already advanced. Before accepting the order, B. made objections to doing so, saying that if A. secured no more advancements he was not likely to complete his contract, upon which the payee remarked: "Well, I suppose somebody will have to take care of him."

I suppose we will have to do it." *Held* too vague to show an independent agreement on the payee's part to make advancements to A. in consideration of the acceptance.

3. A buyer who has accepted an order for a balance which may become due on a contract with a seller to complete certain work to be delivered at a fixed price cannot set off against his acceptance sums subsequently advanced the seller, on his becoming insolvent, to enable him to complete his contract.

Appeal from Baltimore city court.

Action by the German Bank of Baltimore City against George Blakistone. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Defendant's fourth prayer, referred to in the opinion, is as follows, viz.: "The defendant prays the court to instruct the jury that, even though they shall find that the whole of the contract between the defendant and C. L. Gwinn & Co. was contained in the letter and its acceptance as set out in the declaration, yet, if they shall further find that after the assignment of the contract to the plaintiff, and the acceptance thereof by the defendant, the said Gwinn & Co. became insolvent, and utterly unable to fulfill their contract with the defendant, and so notified both the plaintiff and the defendant, and shall further find that the defendant thereupon went to the plaintiff, and urged it to make the advances required by Gwinn & Co. to complete the contract, and that the plaintiff refused so to do, then the defendant was at liberty to make the advances so required by Gwinn & Co. to carry out their contract, and, if the jury shall further find that the advances were made as set out in the evidence, then their verdict must be for the defendant. (Refused.)"

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Lemmon & Clotworthy and W. S. Bryan, Jr., for appellant. Edwin G. Baet, Jr., for appellee.

PAGE, J. This suit was brought by the appellee to recover on an alleged acceptance of the appellant of an order on the latter from Gwinn & Co. for the payment of whatever should become due on a contract between that firm and the appellant for the manufacture of certain car fenders. The contract referred to was created by two letters,—one dated the 12th day of February, from Gwinn & Co. to the appellant, in the words following: "We will be pleased to furnish you with one hundred, more or less, complete fenders, equipments for the Washington and Georgetown Railway Company, for twenty-five dollars net per car. This will include two wheel-guards and one automatic projecting fender for each car; also equipping cars with the same." The other, dated the next day, from Blakistone: "Your proposition for the manufacture of 100 fenders for the Washington and Georgetown

Railway Company, dated Febry. 12th, 1895, is hereby accepted." On the 29th March, 1895, Gwinn & Co. gave to the appellee an order on the appellant, "for all moneys which may become due under the above contract, after deducting five hundred dollars, already paid on account thereof." This order was not presented to the appellant for acceptance until the 22d day of May following, when Blakistone accepted in writing, in the terms following: "The within order is hereby accepted, less amount already advanced at this date,—about nine hundred and twenty-five dollars." The appellant now claims the right to a credit for other sums paid by him to Gwinn & Co. after the date of the acceptance, but admits a liability of \$450.24, which he has paid into court. This right, it is contended, arises from the fact that by reason of a verbal agreement between the appellant and Gwinn & Co. he was bound to make advances of money to Gwinn & Co. to enable them to complete the work on the fenders; that at the time of his making the acceptance the appellee was informed of this agreement, and verbally promised that, if the appellant would accept the order, in consideration thereof it would make such advances to Gwinn & Co. as were required of the appellant; and that, the appellee having failed to perform its part of the agreement, the appellant was at liberty to make the advances, and deduct the amount of them from whatever might become due on account of the acceptance. All evidence was admitted subject to exceptions, and at its conclusion the appellee moved the court to strike out and exclude from the jury—First, all testimony offered to prove that such verbal agreement was made between the parties hereto; and, secondly, all testimony offered to prove the verbal agreement between the appellant and Gwinn & Co. Both of these motions were granted by the court, and the propriety of so doing presents the first question to be now considered.

Was the evidence offered to establish the alleged verbal agreement between the appellant and Gwinn & Co. proper to go to the jury? It appears from the evidence that the appellant had received from the Washington & Georgetown Railway Company a proposition to equip their cars with the fenders, of which he was the patentee, at a cost of \$35 per car. The appellant testifies that, not knowing what the cost of the fenders would be if built elsewhere than in his own shops, "he sent for Mr. Gwinn, of C. L. Gwinn & Co., who he knew was desirous of making them, and told him * * * to look over the cars of the railroad company, and make up his mind for what price he could put the fenders, complete, on the cars in Washington." Later on Gwinn returned, and said he could do the work for \$25 per car. The appellant said he thought the price too low; that they could not be made for that sum. Gwinn then stated he "was bet-

ter equipped for making fenders, and could make a profit at that price." The appellant then "told Gwinn that another matter to be considered" was, had he "the facilities and money to carry on the contract?" to which Gwinn replied that he had; "the only thing I ask of you is that, when I ask you from time to time to give me something on account to help out my pay roll, you will do it." The appellant said "he would help him; that he had no objection to giving him a little money as the work progressed, to meet current expenses; that he also told him to put the offer in writing, which was done as set out." This is a brief summary of that portion of the testimony that most strongly supports the contentions of the appellant. We have stated it at large, because we think it will enable us to arrive at the true meaning of the parties. The appellant was looking about for a machinist to manufacture the fenders. He sends for Gwinn to get an estimate of the cost from him, and, if practicable, to employ him. When the price is given him, he seeks to be satisfied that they can be made for the sum mentioned, as his own "price" with the railway company "must depend upon the price set by Gwinn." Being assured on this point, another matter concerns him, has Gwinn "the facilities and money to carry on the contract?" Gwinn tells him he has, but may have to ask him from time to time for "something" to help out his pay roll. This possible obstacle having been thus removed, he tells Gwinn to put his offer in writing, which is accordingly done in the letter already quoted. From this brief analysis of the proof, it must be apparent that there is no intention on the part of either the appellant or the appellee to enter into a contract with respect to advances. That something was said about advances is true, but they are referred to only as connected with the financial ability of Gwinn & Co., about which the appellant desired to be satisfied before he entered into contractual relations with them. But, apart from this, the terms of the alleged agreement are too vague and uncertain to give rise to a legal obligation. The words are, "The only thing I ask you is that, when I ask you from time to time to give me something on account to help out my pay roll, you will do it;" and the appellant replied "he would help him." Now, construing this alleged agreement in the most favorable way for the appellant, it leaves to the appellant the absolute right to determine the amounts of the advances, and the necessity and times when they are to be made. Such a contract is too vague and uncertain to confer any rights whatever upon Gwinn & Co., enforceable either in law or equity. *Thomson v. Gortner*, 73 Md. 482, 21 Atl. 371; *Taylor v. Brewer*, 1 Maule & S. 290; *Roberts v. Smith*, 4 Hurl. & N. 315; 3 Am. & Eng. Enc. Law, 842. For these reasons we are of opinion there was no evidence sufficient to enable the jury to find a

verbal agreement between the appellant and Gwinn & Co. which bound the former to make advances to the latter during the progress of the work on the fenders, and the court committed no error in excluding the testimony offered to prove it.

It may be remarked here that the defendant's first, second, and third prayers, which were rejected by the court below, are all based upon the theory that there was evidence before the jury from which they could find that the contract between Gwinn & Co. and the appellant required the latter to make advances to the former to complete the contract. In view of what has already been said, it follows that the assumption of such a theory cannot be maintained. All of these prayers were therefore properly refused.

The proof also shows that the consideration passing from the appellee to Gwinn & Co. for the order on the appellant was a loan of \$1,500, made about the time the order bears date. At the time of its presentation to the appellant for acceptance it is contended an agreement was entered into between the appellant and the appellee, the effect of which was to bind the appellee, in consideration of the acceptance, to make advances to Gwinn & Co. to enable them to complete their contract. This contention rests entirely upon the evidence of the appellant, and we will give what he states in his own language. He testifies that Mr. Shultz (the president of the appellee) came to his office on the 22d of May, and presented the order. The appellant, after stating he had given Gwinn & Co. a considerable amount of money since the date of the order, further said: "Mr. Shultz, I have no objection to protecting your bank to the extent of whatever is due Mr. Gwinn under this contract whenever the money is to be paid, but if I accept this order—Mr. Gwinn having been steadily calling on me for money, unless you or somebody is going to take care of him, he will never complete this order, for he has only three or four cars completed in Washington. He said: 'Well, I suppose somebody will have to take care of him. I suppose we will have to do it. We have always helped Mr. Gwinn, and I suppose we will have to take care of him.' I said: 'If you take care of him, then I have no objection to undertaking to pay you what is due him, when the contract is completed.' I sat down to write it [the acceptance] myself, and his exact language to me was, 'Have you any objection to putting in the amount you have advanced up to this time?' I said, 'No;' and I wrote at the bottom, 'About \$925.' * * * Mr. Shultz left there with that acceptance." On motion, this evidence was excluded by the court from the consideration of the jury. The general principle is familiar that parol evidence is not admissible to qualify the terms of a written instrument, it being conclusively presumed "that such writing expresses the entire contract, and all evidence of previous colloquium

or understanding must be excluded." *Delamater v. Chappell*, 48 Md. 244. It therefore cannot be successfully contended (nor has it been in this case) that this evidence is admissible for the purpose of establishing a contemporaneous agreement under which the appellant was to pay the appellee another or different amount than that called for by the order and its acceptance. Ought it to have been admitted to establish a parol agreement independent of, collateral to, and distinct from the written acceptance? If the evidence would warrant the finding of such an agreement, it ought to have gone to the jury, to enable them to determine what the contract was. *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918. But the question is, is this evidence of such a character? Could the jury, if they had been in possession of it, have reasonably and legally found that the acceptance was signed by the appellant by reason of a valid legal promise on the part of the appellee to make the advances? It is clear, unless the evidence is such as will warrant such a conclusion, it should not have been admitted; and in that event the whole case would rest upon a proper construction of the terms of the acceptance. Now, it must be borne in mind that on the 22d of May the situation was such that both the appellant and appellee were deeply interested in the ability of Gwinn & Co. to complete their contract with respect to the fenders. The appellant had agreed to furnish the railway company with 100 fenders at \$30 per car, and Gwinn & Co. had undertaken to manufacture them at \$25 per car. The appellant had already advanced to the extent of \$925, though he was under no legal obligation to do so in order to assist Gwinn & Co. in the completion of their work. On the other hand, the appellee had loaned them \$1,500, and to secure the repayment of this sum had taken an order for such sum as might become due under their contract with Blakistone. If Gwinn & Co. failed to complete their work, the appellant would suffer, if not lose, on his contract with the railway company; and, since nothing would then be due to Gwinn & Co. from the appellant, the order and the acceptance thereon would become valueless. In the light of these circumstances, it cannot be successfully maintained that the conversation already stated, in which the parties seem to have done nothing more than recognize and refer to the situation as it actually existed, can amount to a solemn engagement, or was intended to have the force and effect of varying, if not annulling, the terms of the written acceptance. It may be true that the appellant supposed the appellee, under all the circumstances, would make advances to Gwinn & Co.; indeed, he testified to that effect. But, notwithstanding his belief, there is not enough in the conversation to amount to a contract, or to justify a jury in finding that Mr. Shultz bound the appellee to make the ad-

vances. In fact there is no promise, express or implied, to that effect. The appellant did not require such a promise as a condition precedent to his signing the acceptance, but seems to be satisfied with the declaration that somebody will have to take care of Gwinn, and he supposed they would have to do it. *Anson*, Cont. p. 22. But, even if this were otherwise, the loose terms employed by the parties are not sufficient to constitute a valid contract. To "take care of Gwinn," even though the words be limited in their application to the completion of the fenders, is exceedingly indefinite. Do they mean that the appellee is to loan him money? If so, to what extent, or under what circumstances? Who is to determine these questions upon which the obligation of the appellee must be made to depend? A court should not allow loose expressions, such as this, to go to the jury for the purpose of raising obligations and rights between parties. *Thomson v. Gortner*, 73 Md. 475, 21 Atl. 371; *Delashmutt v. Thomas*, 45 Md. 140; *Recknagle v. Schmalz* (Iowa) 33 N. W. 365; *Taylor v. Brewer*, 1 Maule & S. 290; *Roberts v. Smith*, 4 Hurl. & N. 315. In the last case cited the plaintiff agreed to accept the appointment of secretary at a salary of \$300. "If the company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labor you may think me deserving of, and your means can afford." The defendant replied: "It is distinctly agreed, * * * if the company be not formed, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give you such sum of money as I may deem right as compensation * * * in the event of the company not being carried out." The plaintiff rendered service, but the company was not formed. It was held there was "a liability in honor, and not a liability by contract." In *Guthing v. Lynn*, 2 Barn. & Adol. 234, where the alleged contract was that, if the "horse proved lucky," the plaintiff should give five pounds more. Lord Freeberdren said these words were "too loose and vague to be considered in a court of law"; that they amounted "merely to one of those honorary engagements, which seem very much to prevail among persons in this way of business." So, in *Sherman v. Ketsmiller*, 17 Serg. & R. 47, the court said, "If a promise is so vague in its terms as to be incapable of being understood, or of being carried into effect, it cannot be enforced." It follows, from what has been said, there was no error in rejecting the evidence.

The defendant's fourth prayer is based on the theory that the appellant was at liberty to make the required advances to Gwinn to carry out their contract, provided they were made after Gwinn & Co. became insolvent, and unable to complete the contract, and after the refusal of the appellee. We have al-

ready said, if the appellee did not bind itself by a valid contract to make advances to Gwinn & Co., its right as against Blakistone depended alone on a proper construction of the terms of the order and its acceptance. We have held that Blakistone was under no legal obligation to "carry Gwinn & Co.," and, even if this were otherwise, there was no undertaking on the part of the appellee to take his place in that respect. In view of this, the well-established doctrine that imposes upon a party the duty, in certain situations, of minimizing loss, has no application whatever. The appellee has a right to stand upon the terms of the order and acceptance. The granting of the plaintiff's first prayer and the rejection of the defendant's fourth was, therefore, proper. We do not find error in the modification made in the defendant's fifth prayer. Judgment affirmed, with costs.

(87 Md. 261)

BALTIMORE CITY PASS. RY. CO. v. COONEY.

(Court of Appeals of Maryland. March 3, 1898.)

STREET RAILROADS—ACCIDENTS TO PERSONS ON TRACK—NEGLIGENCE—QUESTIONS FOR JURY—TRIAL—INSTRUCTIONS—EVIDENCE.

1. A verdict cannot be directed for defendant, in an action for negligence, when the evidence would support a verdict for plaintiff, although such evidence is contradicted.

2. Where a street car approached at a high rate of speed the place where several boys were standing on the track in full view of the motorman, without giving an alarm, the question of the company's negligence was for the jury.

3. Where one injured by a street car near the intersection of a street had been standing in the center of the track for three or four minutes, and the motorman had had an unobstructed view all the way from the street last passed, the question whether the motorman used due care to avoid the accident was for the jury.

4. The negligence of plaintiff in an action for injuries will not excuse defendant if, by the exercise of due care, he could have avoided the accident.

5. If one standing in the street at the side of the track when a car approaches, and not in its way, stumbles and falls under the car, the company is not liable, although the car approaches without giving alarm.

6. Where the court correctly instructed that defendant's failure to provide a fender on its street car was no ground for holding it responsible for the accident, it was not error to refuse to strike out testimony that there was no fender on the car, brought out by defendant's cross-examination of a witness while endeavoring to cast doubt on her account of the accident.

7. Where plaintiff was injured by a street car through the alleged negligence of the motorman, it was error to reject evidence whether the motorman could see plaintiff in the position he was in before the accident.

8. In an action for injuries caused by being run over by a street car, where defendant's theory was that plaintiff was injured while attempting to steal a ride by hanging to the side of the car, it was error to refuse to allow the master mechanic of defendant's street-car system, who had charge of the rolling stock, to testify that plaintiff could so ride on the car.

9. Evidence was not admissible, however, to show that one might so ride on other of defendant's cars than the one that ran over plaintiff.

10. No error can be predicated on the exclusion of evidence which is afterwards given by other witnesses.

Appeal from court of common pleas.

Action by Daniel J. Cooney, infant, by his next friend, Sarah Cooney, against the Baltimore City Passenger Railway Company, to recover for personal injuries sustained through defendant's negligence. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff offered the following prayers, among others: (1) "That if the jury find from the evidence in this case that on or about the 21st day of May, 1894, the plaintiff, while being on Bank street, was struck by a car of the defendant, then and there under the charge and control of the servant or servants of the defendant, and was run over and injured as alleged in the declaration, and further find that the injury to the plaintiff was caused by want of ordinary care and prudence on the part of the servant or servants of said defendant, and not by the want of ordinary care or caution on the part of the plaintiff directly contributing to the injury, as such care and caution on plaintiff's part is defined and explained in plaintiff's second prayer, that then the plaintiff is entitled to recover in this action." Granted. (2) "That the degree of ordinary care and caution required of the said plaintiff, as stated in the plaintiff's first prayer was such ordinary care and caution as ought, under the circumstances of this case, to be reasonably expected from one of the plaintiff's age and intelligence, as testified to by the witnesses." Granted. (3) "That even if the jury should find that there was want of ordinary care and caution on the part of the plaintiff, considering his age and intelligence, as mentioned in the plaintiff's first and second prayers, and testified to by the witnesses, yet the plaintiff is entitled to recover; provided the jury find the other facts set out in the first and second prayers of the plaintiff, and further find from the evidence that the servant or servants of the defendant could have avoided the injury complained of by the exercise of ordinary care and caution after such servant or servants of the defendant saw that the plaintiff was in danger of being struck by the car of defendant, or might by ordinary care and prudence have seen that the plaintiff was in such position of danger." Granted.

Following are the fourth and fifth bills of exceptions, viz.: (4) "Q. State whether or not you have ever seen boys stealing rides on electric cars similar in construction to this car, No. 412, of the Green Line, by riding on the truck bars, and holding on the wooden leg at the side of the car." To this question the plaintiff objected, and the court sustained the objection, and refused to permit the said question to be asked or answered, to which action of the court in refusing to permit said question to be asked, and in per-

mitting the answer thereto to be given in evidence, the defendant excepted, and prayed the court to sign and seal this, its fourth bill of exceptions, which is accordingly done, this 16th day of June, 1897." (5) "After the occurrences in the foregoing bills of exception, and giving of the evidence therein mentioned, which are hereby referred to and made a part of this bill of exceptions, the defendant's counsel asked the witness Tobe the following question: 'State whether or not you have sufficient familiarity with the construction of cars similar to 412 of the Green Line, constructed as that car was in May, 1894, to be able to tell whether it was practicable for boys to steal rides, by riding on the edge of the truck of the car, or on the truck bar at any place between the east end of the box and the west end of the box.' To this question the plaintiff objected, and the court sustained the objection, and refused to permit the said question to be asked or answered, to which action of the court in refusing to permit said question to be asked, and in permitting the answer thereto to be given in evidence, the defendant excepted, and prayed the court to sign and seal this, its fifth bill of exceptions, which is accordingly done, this 16th day of June, 1897."

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, BOYD, and PEARCE, JJ.

Arthur W. Machen and Wm. S. Bryan, Jr., for appellant. A. Leo Knott, J. Stonewall, and J. Healy, for appellee.

BOYD, J. This case is not unlike most suits for personal injuries, based on the alleged negligence of the defendant, in one respect, at least,—that there is a great conflict between the witnesses as to the particulars of the accident. It is not remarkable that persons present at an accident which results so seriously as that in this case should differ in their narrative of the details, but it is difficult to understand how they can vary as much as they do in this case. Seven apparently disinterested witnesses testified that the plaintiff was running along the side of the car that ran over him, and that he was attempting to ride on it by holding on to a ledge that projected from the side of the car, and resting his feet on the truck or some part of the running gear. Yet the plaintiff denied that, and swore he was standing in the center of the track with some other boys, with his back towards the east, the direction the car was coming from; that he "saw the boys make a break towards the north"; that he did not know what they were doing, but he tried to follow them, as he supposed he was in some danger, but stumbled and fell. One witness sustained him in most of his evidence, and another in some particulars. At the conclusion of the plaintiff's evidence, the defendant offered a

prayer that there was no legally sufficient evidence of negligence on the part of the defendant, to entitle the plaintiff to recover, and also another that the plaintiff's negligence, as appeared from his testimony, had directly contributed to cause the injury, and the verdict must be for the defendant. In passing on those prayers, we are, of course, required to accept as true the evidence offered by the plaintiff, however much we might differ with the jury as to what would have been a proper verdict. If the weight of testimony in favor of the losing side be so decided as to satisfy the trial court that the jury acted from passion, prejudice, or some motive other than a desire to do full justice to the parties, then it is the duty of that court, on proper application, to grant a new trial, and this court cannot review its action; but when there is evidence legally sufficient to sustain the verdict reached, if the evidence bearing on that side of the controversy be accepted as true, then the court cannot refuse to submit the case to the consideration of the jury. We must therefore, in passing on those two prayers, determine whether the evidence offered on behalf of the plaintiff precluded him from having his case submitted to the jury, for the reasons assigned in them.

At the time of the accident, the plaintiff was 11 years of age. He was returning home from school, which was held on the corner of Bank and Broadway streets, in the city of Baltimore. The defendant had two railway tracks on Bank street, on which the cars were propelled by electricity, the overhead trolley system having been adopted on that line a few weeks before the accident. There was a valve in connection with the city waterworks in the middle of the east-bound track, near the center of Spring street as it crosses Bank street, and an employé of the city was engaged in putting in an iron plate, to use his language, "to represent a water stop." A number of boys going from school were attracted by this work, and were standing near the workman, in or about the railway tracks. The plaintiff testified that he was going along the north side of Bank street, on the pavement, until he got near Spring street, when he saw some boys standing in the street on the north track; that he went out into the street, and then thus described what occurred: "And they walked up a little ways, and I caught up to them; and my face was towards the west. I saw them make a break towards the north; and I don't know what I did it for, but I just run with them, and because I saw them running; and I fell on my hands and feet, and the car struck me, and I saw it was going to cut me across my thighs, so I scrambled out in some way, and it caught my left leg below the knee." He said he had been standing there three or four minutes, in the center of the track, with his back towards the way the car was coming; that he heard no bell

or gong from the car before he was struck. Miss Oberman, one of his witnesses, after describing the position she was in, and referring to the man at work and the boys standing between the tracks, looking at him, said: "Joseph Cooney came down on the north side of Bank street, and got into the track, and, as he was there, the boys walked up to him. What they were doing I don't know; and, as they stood there, I noticed a car coming down at a very fast rate of speed. With that, I saw the boys make an attempt to run from the track, which they did, except Joseph; and, when he did, I saw him stumble, go down on his hands and feet, and the car went over him." Thomas J. Booz, who was riding on the car that injured the plaintiff, said that the motorman stopped at Caroline street, where other tracks crossed those on Bank street, and rang the gong there, but that he did not ring it as he approached Spring street. The accident, according to the testimony of the plaintiff's witnesses, happened about where the easterly side of Spring street intersects Bank street, and at a point about 220 feet, according to the plat in evidence, from the easterly side of the tracks on Caroline street, where the car stopped.

The danger to those lawfully using the streets of cities and towns by reason of the introduction of "rapid transit" on the street railways is apparent to the casual observer, and is forcibly brought to the attention of courts by the numerous cases that have been before them since the streets have been thus used. As street-railway companies have no exclusive right to the use of so much of the bed of the street as their tracks occupy, this court has more than once had occasion to point out the distinction between the rights and duties of persons injured by accidents on street railways and those of persons injured while trespassing on the rights of way of railroad companies owning their own tracks; and the duties of the companies cannot be more distinctly announced than was done in *Cooke v. Traction Co.*, 80 Md. 551, 31 Atl. 327. Assuming that the car that caused the injury to the plaintiff approached the crossing at Spring street at a very fast speed, without the motorman sounding the gong or giving any alarm, while there were a number of boys on the track in full view of him, which facts the plaintiff offered evidence tending to prove, the prayer which sought to take the case from the jury on the ground that there was no legally sufficient evidence of negligence on the part of the defendant was necessarily rejected, as, under the circumstances, the question of negligence vel non was for the jury. Then, again, if it be true that the plaintiff was standing in the center of the track, with his back towards the car, the question whether the motorman used due care to avoid the accident was also necessarily submitted to the jury. The track was straight between Caroline and Spring

streets, with an unobstructed view from one street to the other; and we know of no principle that would permit the court to say that, under such circumstances, the motorman was not guilty of negligence, assuming, as we have said, the plaintiff's evidence to be true. If he was thus standing on the track, the motorman could not have failed to see him if he exercised even a much less degree of care than is required of him; and, if he did see him in that position, it was manifestly his duty to check the speed of his car, or have it under control; but the evidence shows that the car was not stopped until it had gone some distance beyond Spring street. If the plaintiff did stand with his back towards the direction from which the car approached on that track for three or four minutes, as he says he did, he was clearly guilty of negligence. He was 11 years of age, was at that time in the fourth grade of the grammar school he attended, lived near Bank street, and went to school on it. Without some evidence that he was deficient in his mental faculties,—and there was none,—a boy of his age and opportunities must be presumed to know that it was negligence on his part to thus place himself on the railroad track. But, as we intimated above, that would not justify the motorman in running over him. Although the plaintiff may be guilty of negligence, the defendant cannot thereby excuse itself if, by the exercise of due care, its agent could have avoided the accident, after discovering the negligent party in his perilous position. The evidence of the plaintiff's witnesses was amply sufficient to authorize the court to submit the question to the jury. The cases in this state are so numerous on that subject that we will only cite some of those in which street railways have been parties. *Arnreich's Case*, 78 Md. 589, 28 Atl. 809; *McKewen's Case*, 80 Md. 593, 31 Atl. 797; *Appel's Case*, 80 Md. 603, 31 Atl. 964. This rule, which has been adopted as an exception to or modification of the general doctrine that a plaintiff who is guilty of contributory negligence cannot recover, is a very just one, as the law will not permit the loss of life, limb, or even property, to be deliberately and carelessly inflicted, when it could be by reasonable care and caution be avoided, merely because the injured person was negligent; but the rule should not be extended too far, but should be kept within proper bounds. When it is clear that the plaintiff was guilty of negligence, there must be evidence from which the jury can fairly and reasonably find the defendant liable for violation of duty after the plaintiff has thus negligently placed himself in danger, in order to avoid the legal effect of his own negligence. But in this case the evidence of the plaintiff shows that the motorman must either have seen him in the perilous position he occupied in time to warn him or stop the car, or must have failed to see him, after he had gotten on the track, because he was not

using such care as was required of him while thus rapidly moving through one of the public streets of the city. The second prayer offered at the close of the plaintiff's testimony was therefore properly rejected.

The tenth and eleventh prayers of the defendant were practically the same as those above referred to, and it will not be necessary for us to discuss them, as what we have already said disposes of them. It is true, the evidence of the defendant flatly contradicted that of the plaintiff, but that does not relieve us of the necessity of assuming the plaintiff's evidence to be true in passing on such prayers.

The only other prayer offered by the defendant which was rejected by the court is the eighth. In that ruling, we think, there was error. We have already referred at some length to the theory of the plaintiff in regard to the accident, and have also spoken of the testimony of a number of witnesses of defendant who swore that the boy was running along with and riding on the car. But, under the evidence, there was still another view the jury might have taken. They may have believed that the plaintiff was not running with or riding on the car, and yet have found that he was not standing on the track. The prayer is "that even if the jury find that the plaintiff, just before the accident, was standing in the street with the other boys mentioned in the testimony, and that, when the other boys ran, he also started to run, and fell, and, in consequence thereof, was run over by the car, and shall further find that the plaintiff, when so standing in the street, was at the side of the track, and not in the way of the car, then the verdict should be for the defendant." Mr. Booz, one of the plaintiff's witnesses, who was riding in the car, said that, just before he got to Spring street, he saw a group of little boys standing alongside of the track. The motorman said he stopped at Caroline street to take on some passengers, and, after crossing that street, he saw a crowd of boys and somebody there that attracted them. He started to ring his gong, running at a slow rate of speed; and, when he was about half way between Caroline and Spring streets, the man that was working there and the boys all passed to the north side of the street, and the track was clear. At another place he said: "I am certain that the boys and the gentleman that was working on the track got out of the way of the car, and passed to the north side of the street, and cleared the track two or three feet." Mr. Berryman, a passenger on the car, said: "I was looking out of the window, and saw a crowd of boys and a man digging in the street. They seemed to move to one side, and he kept going on. The track was clear, and the car going very slowly. The first I knew of the accident, the people in the rear part of the car were talking about it." If, in point of

fact, the plaintiff, when standing in the street, "was at the side of the track, and not in the way of the car," the motorman could not be required to have anticipated that the plaintiff would stumble, and thereby get on the track. Before that prayer was offered, the motorman, the man who was working in the street, four boys who were watching him, the conductor, and a passenger had testified that the gong was sounded as the car approached Spring street. That testimony was contradicted by the plaintiff and one witness swearing they did not hear it ring, and another, who was a passenger, who said it did not ring. There was thus some conflict on that question, although the great preponderance was on the side of the defendant; eight persons swearing it was rung, and only one swearing positively to the contrary. But if, in point of fact, the plaintiff was not on the track, and not in the way of the car, there was no reason, so far as he was concerned, to sound the gong. If he intentionally got on the track just as the car reached that point, without first looking to see if a car was coming, he was guilty of contributory negligence; and, if he got on by stumbling and falling on the track too late for the motorman to see him or to prevent running over him, the defendant is not liable. We said above that the defendant might be liable if the testimony of the plaintiff is believed, because there was evidence tending to show that the accident could have been avoided by the use of proper care and caution; but, if the track was clear as the car moved towards Spring street, the defendant would not be liable if the plaintiff stumbled and fell on the track as the car was passing. The prayer should have been granted, to meet that view of the case.

We do not see any reversible error in the rulings on the plaintiff's first and second prayers. They are very general, and of the character that is sometimes misleading; but, when taken in connection with the defendant's prayers that were granted, the jury ought not to have been misled by them. It is true that there was no special evidence offered as to the intelligence of the plaintiff; but he was a witness before the jury, and they had an opportunity to judge of his intelligence from his testimony. What we have said about the duty of defendant's agent after the plaintiff got on the track, as testified to by him, sufficiently states our views on that question, without discussing the plaintiff's third prayer. This disposes of the objections to the prayers urged before us.

The first exception was to the refusal of the court to strike out the evidence of one of the witnesses that there was no fender on the car. The defendant's seventh prayer, which was granted, instructed the jury that they were not at liberty to find from the evidence that the accident in question was

caused by any failure of duty on the part of the defendant in respect to providing a fender or guard. On cross-examination of Miss Oberman, the defendant had endeavored to cast doubt on her account of the accident, by asking her if there was not a fender that obstructed her view. The court was therefore right in refusing to strike out all evidence on that subject, especially as it instructed the jury as to the effect of it.

We can see no valid reason why the question asked the witness so embraced in the third bill of exceptions should not have been allowed. He had testified that he saw the plaintiff running along the side of the car, with his hand on a bar on the side, and a book in his right hand; that he fell, and went under the wheel. He was then asked whether the plaintiff was "in a position where the motorman could see him." The object of that testimony is apparent,—that the defendant hoped to show that the motorman could not see him in that position, and hence that no negligence could be attributed to him for not stopping the car or taking some steps to prevent his falling. It was a pertinent question as to whether he was near the front, the center, or rear of the car, and, if the witness could tell whether the motorman could see him in the position he was, it was proper for the jury to know that fact. There was therefore error in not allowing that question to be answered.

The sixth exception was to the refusal of the court to allow the defendant to ask the witness F. E. Tobe, who was master mechanic of defendant, whether a boy could "steal a ride" on the car that ran over the plaintiff by hanging on the ledge on the side of the car, and putting his feet on the truck or bar between the truck and wheel guard. As we have said, the theory of the defendant was that the plaintiff was injured in that way, while the plaintiff not only claimed that he was not, but may have contended before the jury that he could not have held on to the car in that way, as, indeed, was argued in this court. Manifestly, then, it was permissible for the defendant to show that a boy could so ride on the car; and the witness who had been master mechanic of the defendant for 6 years, and assistant master mechanic for 18 years, and who had charge of the entire rolling stock of the company, would be as competent as any one could be to express an opinion on that subject. His knowledge of the construction of the car would enable him to speak intelligently and positively, and he should therefore have been permitted to answer that question.

The questions contained in the fourth and fifth bills of exception propounded to that witness with reference to other cars of the company were properly ruled out, as it was as to this particular car, and not others, that the question was relevant. The refusal to allow the introduction of a photograph of

another car, in Green's Case, 56 Md. 84, is a similar ruling.

The action of the court on the offer to prove by William Dickell what he said to people on the car about the accident, as embraced in the seventh exception, would seem to require no consideration by us, as two witnesses were afterwards permitted to state what he did say. That character of evidence for the purpose of corroborating a witness who has been impeached was considered in *Railway Co. v. Knee*, 83 Md. 77, 34 Atl. 252, where the authorities are reviewed; but the cases in this state do not go to the extent of holding that the impeached witness can himself testify to what he said on other occasions, in order to corroborate his testimony given at the trial. But, as indicated above, we are not called upon to pass upon that question.

For error in rejecting the defendant's eighth prayer, and refusing to admit the testimony proffered as stated in the third and sixth bills of exception, the judgment must be reversed. Judgment reversed, with costs, and new trial awarded.

(86 Md. 494)

FRUSH et al. v. GREEN et al.

(Court of Appeals of Maryland. Jan. 4, 1898.)

DEEDS OF TRUST—CANCELLATION—UNDUE INFLUENCE—MENTAL INCAPACITY—DEPOSITION.

1. Grantor, a bachelor, about 68 years of age, who had for several months been afflicted with a distressing disease, which involved his nervous system, and had seriously impaired his mental faculties, five days before his death conveyed in trust his entire estate, for his own life, to a person in whom he had no confidence, and for whom he had, in health, frequently expressed a dislike, instead of a certain trust company, which he had repeatedly declared should have the settlement of his affairs, and naming in such deed, as the chief beneficiaries, the persons towards whom, though relatives, he was a comparative stranger, and thereby cutting off a niece, who had been a member of his family for several years (her mother being his housekeeper), and was the especial object of his affection, and the only person he had ever announced to disinterested individuals his intention to make provision for. It appeared that, a short time before his death, those who soon became his trustee and principal beneficiaries, with whom, in health, he had held no intercourse, suddenly manifested an interest in him, and thereafter constantly subjected him to officious attentions on their part; that on the day the deed in question was executed he was nervous and prostrated, and, in the opinion of his physician, mentally incapable of transacting business; and that the reasons for such change of purpose on his part, alleged to have been assigned by him on the day before he died, were either false in fact or utterly trivial. *Held*, that such deed was invalid, because procured by the exercise of undue influence, and executed at a time when grantor was mentally incapable of making a valid deed.

2. Where a party to the suit, who was required, under a subpoena duces tecum, to produce a certain paper, and dismissed by plaintiff without a question pertaining to the merits, volunteered, in response to the general interrogatory prescribed by Equity Rule No. 39, and propounded at request of defendants' solicitor, to

give a circumstantial and detailed account of the entire transaction involved, such answer should have been suppressed.

Appeal from circuit court of Baltimore city.

Bill by Fannie Bengel Frush and others against Charles F. Green and others to set aside a certain deed made by Luther M. Frush to defendant George A. Horner, as trustee, for the benefit, practically, of the other defendants. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

F. C. Slingluff and Thos. R. Clendinen, for appellants. Thomas M. Lanahan, Frank Gosnell, and Robert H. Smith, for appellees.

McSHERRY, C. J. This proceeding originated in circuit court No. 2 of Baltimore city by a bill in equity filed on July 18, 1895. The bill was filed by Miss Fannie Bengel Frush against sundry defendants. It recites, in substance, that the plaintiff was the niece of one Luther M. Frush, who had died five days prior to the filing of the bill. That on July the 8th, or five days anterior to his death, which occurred on the 13th, he purported to execute a deed of trust conveying to one George A. Horner all the property, real, personal, and mixed, of which the grantor was then possessed. That by the deed of trust, after making provision for the payment of his debts and reserving a life estate to himself, the grantor gave all of the ground rents owned by him to his sister Mrs. Leas, \$2,000 to his sister-in-law Mrs. Sarah E. Frush, \$3,000 to Miss May Callender Dolterveich, a piano to the plaintiff, and the entire rest and residue of his estate to four of the eight children of another sister, Mrs. Green, one of these four being the wife of the trustee, Horner. The bill proceeds to describe the cordial relations that existed between the plaintiff and her uncle, and to allege that, until within a month prior to his death, Luther M. Frush had been on bad terms with, and quite hostile to, his sister Mrs. Green and many of the members of her family. The bill charges that the deed was procured by the exercise of undue influence, and that at the time the deed purports to have been executed the grantor was not of sound mind and memory, capable of making a valid deed or contract. It prayed that a decree might be passed vacating and annulling the instrument. Six days later four children of William W. Frush, a deceased brother of Luther Frush, filed a petition in the case asking to be made co-plaintiffs, and leave was granted accordingly. Subsequently, for satisfactory reasons, one of these four new plaintiffs caused the bill to be dismissed as to himself. Later on, all the defendants answered, Mrs. Sarah E. Frush admitting the averments of the bill, the others denying them, and a great

mass of testimony was taken. The court below dismissed the bill on final hearing, and from that decree the plaintiffs have brought the cause up to this court on appeal.

The record is voluminous. It contains 870 closely-printed solid pages, which have been patiently perused. It recounts with minute and graphic detail a family wrangle over a dead man's estate, and it abounds with indications of the bitterness which such a contest usually engenders. To attempt to reconcile the flatly conflicting statements of many of the witnesses would be a hopeless task indeed; and it would swell this opinion far beyond any reasonable limits if we ventured into an analysis of the vast mass of evidence before us. A general outline of the leading and controlling events in the drama with which we have to deal, and a summary of the conclusions which we have finally drawn from a careful view of the whole field, will solve the questions that confront us.

William Frush, the father of Luther M. Frush, lived for many years on Madison avenue, in Baltimore city. At the time of his death his family consisted of himself, his son Luther, who was a bachelor, his daughter Mrs. Leas, who was a widow, his daughter-in-law Mrs. Sarah E. Frush, the widow of a deceased son, and his granddaughter Miss Fannie Bengel Frush, who was the daughter of Mrs. Sarah E. Frush. Mrs. Sarah E. Frush was the daughter of Dr. Leas. After the death of her mother, her father married again, his second wife being the Mrs. Leas just mentioned, the daughter of William Frush. Thus Mrs. Sarah Frush became, by marrying Mrs. Leas' brother, Mrs. Leas' sister-in-law; while prior to that Mrs. Leas, by marrying Mrs. Sarah Frush's father, had become Mrs. Frush's stepmother. When Dr. Leas married the second time, Mrs. Sarah Frush was a child 10 years of age living at her father's home. After she became a widow, Mrs. Frush and her infant daughter, now Miss Fannie Frush, left her father's house, and went to reside with her deceased husband's father, William Frush. There Mrs. Frush and Miss Fannie made their home until the death of William Frush, in 1892. When Dr. Leas died, his widow, the daughter of William Frush, returned to her father's home. Upon the death of the wife of William Frush, about 1879, Mrs. Sarah Frush became the housekeeper. Upon the death of William Frush, Luther Frush assumed his father's place as the head of the household, and Mrs. Sarah Frush continued in the position of housekeeper for her brother-in-law. It was in this domestic circle that Miss Fannie grew from childhood to womanhood, and the great preponderance of the evidence leads us to believe that she was a source of pride to her uncle Luther, and the person of all others upon whom was centered such affection as his rather selfish and undemonstrative nature was susceptible of. It

is certain that he spoke of her at various times, and to numbers of persons, in the most kindly terms, and, apart from the utterly trivial and inconsequential differences of opinion between them on rare occasions, there is, if we lay out of view for the moment the testimony of the individuals who are interested in sustaining this deed, no suggestion, from any reliable source, that the current of his feelings towards her ever changed till the day the deed of trust was made. In addition to his affection for her, which impressed more than one observer as rather that of a father for his child than that of an uncle for his niece, he repeatedly declared to disinterested witnesses—witnesses who can have no possible motive for misrepresenting or perverting the truth—that he intended to provide liberally for her; and these declarations were made when there was no question of his mental capacity to transact his business with intelligence and understanding. That he was warmly attached to Miss Fannie's mother is equally clear from the evidence. She was, as Dr. Bevan says, a woman of as big a heart as he ever saw about a sick man. She had been faithful in her management of his household, and, when a distressing and progressive disease smote him with a heavy hand, she was unremitting in her watchfulness and attention. There was every reason for the existence of the affection towards Miss Fannie which the witnesses describe. It is consistent with his declarations and his conduct, up to the making of the deed. If it be not true that this kindly relation existed between the uncle and niece, and if he really regarded her as a "terrible woman," as some of the appellees pretend that he said she was, there is but one mode of reconciling these inconsistent declarations, and that is by imputing to Luther Frush a low, repulsive duplicity that does not harmonize with his character as portrayed by the evidence. It is of vital consequence to the contesting beneficiaries under the deed that it be shown there were no cordial relations between Miss Fannie and her uncle, and they accordingly furnish the evidence themselves. At the very outset, we meet a conflict between wholly disinterested witnesses, who have nothing at stake in the pending cause, and these beneficiaries under the deed,—Mrs. Leas, a sister, who gets all the ground rents; Mrs. Green, a sister, whose four children get nearly or quite one-half, and perhaps more than one-half, of the estate; Mrs. Horner, one of Mrs. Green's children, who gets one-fourth of that half; Mr. Horner, her husband, who is also the trustee; and Miss Dolterveich, a stranger, who gets \$3,000. With motives such as these conditions inspire, to warp and bias their memories and to inflame their feelings, we are not prepared to accept their conclusions as to the alleged antipathy of Mr. Frush towards Miss Fannie, in preference to the contrary testimony

of many witnesses who have no interest, pecuniary or other sort, in the controversy.

It is a fact about which there is no dispute that for years prior to June, 1895, Mrs. Green, the mother of four of the beneficiaries who get about half of the entire estate, was not on speaking terms, or, at least, not on terms of intimacy, with her brother Luther, and that the latter took but little interest in her children. He had a dislike for Horner, and repeatedly spoke of him in disparaging terms. He had expressed an intention to have the Safe-Deposit & Trust Company settle up his affairs.

Without pausing at this juncture to trace the progress of his disease or to dwell on its obvious effect on his mental faculties, and passing over, for the time being, the events that transpired between the time that his malady became more virulent and the date of his death, we come to the day the deed of trust was executed. That deed was a deathbed transaction, and the dread of impending dissolution was evidently then before him. It bears date July 8, 1895, and was signed and acknowledged late in the afternoon or early in the evening. On the morning of the 13th he died. The deed reversed, by its dispositions, the declared purposes of the past. It cut off the only person he had ever announced to disinterested individuals his intention to make provision for; it conveyed in trust his whole estate for his own life to a person in whom he had no confidence, instead of to the trust company, as he had in health expressed his determination to do; and it named as the chief beneficiaries the persons towards whom, though his kindred, he was in fact a comparative stranger. Why this sudden, singular change? A complete and total revolution of intention, if intention existed at all in the act done? Rational and perfectly free beings do not, and under the very law of their existence cannot, do a voluntary act without some motive. It is just as impossible to conceive the notion of intelligent and voluntary action by such an agent without a motive of some sort as it is to evolve the idea of physical motion without an efficient cause. It is a general law, founded on experience and observation, that there is a uniformity in human action, and a consequent possibility of foreseeing it, sufficient to be the basis of confidence and the determination of action between man and man, from which it may be fairly implied that men will act in the near future precisely as they have been acting in the past. Naturally, then, and conformably to this law then, when Luther Frush came to make a disposition of his property, looking at his past conduct, including his past declarations, the results ought to have been in accord with, and not diametrically hostile to, the avowed purpose of his life. If there was no motive, or an utterly inadequate motive, tantamount to none at all, prompting him to reverse the declared and apparently settled purpose of

his life,—causing him to do precisely the opposite of that which would ordinarily have been expected of him from his antecedent conduct,—then the unexpected, unlooked for act that was done must have proceeded either from a mind acting without motive at all, or from the mind and dominion of some one else. In the first instance, the act would be the emanation of one incapable of intelligent action, and would be, therefore, invalid; in the second, it would be the product of some other intelligent agent, overmastering the ostensible actor, and would be, therefore, the outgrowth of an influence which the law denounces as undue. We distinguish a condition where there is no motive, or a totally inadequate motive tantamount to none at all, from a condition where simply no motive appears. In the one case, the act done is invalid in one or the other of the two ways just indicated; in the other, a suspicion of its integrity is at least suggested. The bare fact that the deed of trust reverses, and suddenly reverses, the whole course of the grantor's expressed intentions, suggests, at the outset, in the absence of an apparent rational or sufficient motive to induce or to account for the change, that the deed must have sprung either from one mentally disordered or from one under the dominion of an undue influence. No other hypothesis will explain its provisions unless some intelligent motive, not apparent, be discovered. To these two hypotheses, in the inverse order in which they have just been named, we now direct our attention.

Undue influence is not, of course, every mere entreaty or pressing solicitation that may be invoked to sway the conduct or to persuade the judgment of another; but it is that degree of importunity which deprives one of his free agency,—such as he is too weak or too feeble to resist, and such as will render the instrument executed under its supremacy not his free and unconstrained act. It often closely resembles and is near akin to actual fraud, and, like the latter, when most cunningly employed is exceedingly difficult to expose. From the very nature and secrecy of the wrong itself, it is rare that direct evidence can be procured to unmask it, and hence the results accomplished in a given case; the divergence of those results from the course which would ordinarily and naturally be looked for; the situation of the parties taking benefits under an instrument alleged to be the product of its dominion towards the person who has executed that instrument; their antecedent relations to and intercourse with each other; the legitimate, but unrecognized, claims of others upon the bounty of the one who has discarded them; their dependence upon him; his prior declarations; the instincts of justice and the promptings of gratitude of which every unbiased mind is sensible; the natural ties of affection, together with all the circumstances surrounding the entire transaction under in-

vestigation, and the inferences legitimately deducible from them,—often furnish, even in the teeth of directly contradictory testimony, ample ground for the conclusion that undue influence has been successfully resorted to, to accomplish an end which is grossly unjust, and whose very existence cannot be satisfactorily accounted for or explained except upon the theory that undue influence has produced it.

Luther M. Frush was a man about 68 years of age when the deed that is now being assailed was executed. For several months prior to his death he had been suffering greatly from a disease of the prostate gland, that finally developed into cancer. In January preceding his death he was taken severely ill at his home on Madison avenue. He was weakened, and his nervous system became involved. He required constant attention day and night. The attention was exacting, and included services of the most menial character. During the day his sister-in-law Mrs. Leas, and his niece Miss Fannie, took care of him, and during the night his sister-in-law remained in his room and looked after him. We need not go into the details of this incessant watchfulness and care. His sister Mrs. Green, whose four children are the chief beneficiaries, gave him no attention whatever, nor did any of her children. After he had rallied somewhat from this acute attack, he again went about. He took a trip to Atlantic City, but went in company with his sister-in-law, who carried with her a quantity of bed linen, which she used upon his bed to protect that of the hotel, and which she washed in her own room, and with her own hands, daily, and then dried before a gas jet. The constant escape of urine required her to wash his under and his outer garments, and to dry them in the same way; and, besides this, she kept clean and disinfected the catheter which it was necessary for him to use. Upon his return from Atlantic City he had not improved, and his physician, Dr. Bevan, advised him to ride out frequently in the country. When it became difficult for him to do this in his conveyance he used the street cars. Despite all this, and despite the medical attention, his disease grew steadily worse. It was a progressive disease. As it advanced it lowered his vitality, increased his irritability, and correspondingly affected his mental forces. During all this time there is not the slightest indication of a change in his feelings towards his niece, nor is there any suggestion that his antipathy towards the Greens and the Horners had in the least been modified. About this period there appears the first trace or footprint of the scheme that ultimately culminated in the deed of trust. When one of his nephews—one of the sons of his deceased brother, William—called at his house to see him, Mrs. Leas informed the visitor, her own nephew, that his Uncle Luther was too indisposed to receive him; that he needed absolute quiet and rest. Assuming this to be true, he remained in the dining room a few moments, until Mrs. Horn-

er, one of Mrs. Green's daughters and the wife of the trustee, entered, and, upon her being told the same thing as to her uncle's condition that Mrs. Leas had just stated to the nephew, Mrs. Horner exclaimed that she would not think of disturbing her uncle. Thereupon young Frush departed from the dining room, his aunt, Mrs. Leas, saying to him that, as he knew the way to the front door, she would not accompany him. On his way through the hall he met Miss Fannie, to whom he narrated what Mrs. Leas had said, but he was informed by Miss Fannie that he could see his uncle, who was sitting up, and she immediately took him to the uncle's room. He had scarcely taken his seat when Mrs. Leas and Mrs. Horner, who both supposed he had left the house, entered the room together, and upon seeing him were considerably embarrassed. Not long after this event Luther Frush is found at the residence of Mrs. Horner in Walbrook, and this is the first time he ever had been under her roof. He spent a week there. He at once sent to the city for Mrs. Sarah Frush, and she went out every night, and cared for him precisely as she had regularly done at his home on Madison avenue. This she did each night that he remained at Mrs. Horner's, returning every morning to the city. The first whisper (aside from the testimony of Miss Dolterveich) that we hear of any expressions by Luther Frush of unfriendly feelings towards Miss Fannie and her mother comes from the inmates of the Horner household. These expressions are alleged to have been spoken by Luther Frush during the week he spent at the Horners, and that was the week beginning with May the 31st, less than a month and a half before he died. But it is utterly incomprehensible how Luther Frush could have spoken of Mrs. Frush and her daughter in the disparaging terms these interested witnesses say that he used while he was depending on Mrs. Sarah Frush to care for him in the Horner house during each night, and to transact much of his business in the city during the day. The sentiments attributed to him, alleged to have been uttered by him at the very time he was acting towards this sister-in-law and niece in a way that flatly contradicted the imputed sentiments, is a very strong circumstance to show either that he gave utterance to no such statements at all, or, if he did, that they were the coinage of others' brains impressed upon his enfeebled and his falling mind. Upon the expiration of the week he spent at the Horners he took possession of a furnished cottage, which he leased on the Pimlico road. This was early in June. Mrs. Leas, Mrs. Sarah Frush, and Miss Fannie accompanied him. The Greens and the Horners soon began to visit him with great regularity. It was apparent that he was nearing the end of his life. Their attentions were in marked contrast with their former neglect. With the steady progression of his disease, and the corresponding decay of his physical and mental powers, the assiduous watchfulness of the very persons who a few weeks

previously had been shunned and disliked by him significantly increased, though even then no one of them rendered the menial service which Mrs. Frush and Miss Fannie continued faithfully to perform. George A. Horner grew particularly demonstrative and his visits became more frequent. He was informed through Mrs. Leas that Frush wanted him to fix up his (Frush's) affairs, and he was urged to go frequently to the Pimlico cottage. When he visited the sick man he would sit with his arm around him, though the odor from the disease was scarcely endurable. Horner, whom Frush distrusted, whose house Frush had never entered until the last of May, would get upon the bed where the invalid was lying, and would fondle with him there, and rub his head, and pat him, though the cancerous affection had attacked his nose, and though the bedclothing was saturated with offensive exudations. His sister Mrs. Green, whom he had denounced as a "blatherskite," constantly hovered about him; and finally, on July 6th, after he had so far deteriorated as to be no longer able to leave his bed, Horner was closeted with him, Miss Fannie having first been requested by Horner to retire from the room. When that interview closed Horner went away with a memorandum for a deed of trust. Mrs. Leas supposed a will was to be drawn, and she told Helderman that a will was to be executed that evening. The memorandum was prepared by Horner, and was taken by him to Mr. Donaldson, who was Mr. Frush's legal adviser. A discussion at once arose between Mr. Donaldson and Mr. Horner as to the fee for preparing the deed. Mr. Donaldson said to Mr. Horner: "I have been Mr. Frush's attorney now for several years, and I do not know that he has ever had any discussion or any question about a fee with me, and you can just say to Mr. Frush that whatever is the proper fee that I can arrange with him when I see him." To this Mr. Horner replied: "No, Mr. Frush is not attending to this business. I am attending to it now. I am making these arrangements. I am the trustee; and I want to know what you are going to charge." Subsequently, the same day, Mr. Donaldson went to see Mr. Frush, and, though he had grave misgivings as to whether he ought to prepare the deed, finally he did prepare it; and on the morning of July 8th, in company with Horner and a magistrate, he went to the cottage on the Pimlico road, and Mr. Frush's signature was appended to the paper, and his acknowledgment was certified by the justice of the peace. Just as Mr. Donaldson left, Dr. Bevan arrived. The doctor found considerable excitement in the household, and he saw that his patient was decidedly worse. Frush was nervous and prostrated, and needed an anodyne, which was then administered. Dr. Bevan is emphatic in the statement that, when he reached his patient's bedside that evening, Frush was not mentally capable of transacting business, and this was certainly within 30 minutes after the deed had been signed. We allude to this testimony of

the physician at this point, not for the purpose of discussing now the first of the two hypotheses before alluded to, but merely as reflecting upon the question of undue influence. A man in the mental condition in which the doctor found Frush that evening must have been shortly anterior thereto an easy subject for the persistent and unduly importunate to influence and control, if he were not, in fact, so far deprived of his mental faculties as to be wholly incapable of making a valid deed or contract at all.

We have stated the substance of the contents of the deed, and we have said that every provision of it, except the gift to Mrs. Leas and the small gift to Mrs. Frush, was directly the opposite of what he had long before declared he intended to make. Not only is this so, as we have already suggested, but the very persons he disliked the most were made the chief beneficiaries, and the one person for whom he entertained the warmest regard was practically ignored. The results accomplished by the deed are widely divergent from the course which would ordinarily and naturally have been looked for. The instincts of a just man and the promptings of a grateful one towards those who had so faithfully taken care of him were stifled or suppressed, though, had his mind been uninfluenced, he would, in obedience to the most natural of impulses, have been fully sensible of them. The obviously designing demeanor of Horner, and his selection as trustee, though the grantor had in health expressed a lack of confidence in his business capacity, and the evident effort of some of the beneficiaries to cultivate in his last sickness an aged relative who, when in health, they either never recognized or else studiously neglected, and who, had he been peculiarly destitute, they most probably never would have noticed, and certainly never would have courted, are all circumstances that proclaim the presence and denote the sway of an influence sufficient to warp, and eventually to overthrow, a settled purpose, though the act done to change that purpose be surrounded by the outward semblances of deliberation. So strikingly are such circumstances at variance with the ordinary conduct of men, and so conclusively are they indicative of the intervention of an agency superior to a grantor's volition, especially when he is on the verge of the grave, that generally they call for the assignment of a motive sufficiently cogent to justify the doing of the act complained of, or the act itself, standing without explanation, is tainted with the gravest suspicion, if nothing worse. It is not surprising, then, to find the contesting beneficiaries attributing to Luther Frush some motive for making the dispositions which the deed contains. But the alleged motives, such as they are, have been proved only by interested witnesses, and were brought to light under conditions that confirm the con-

clusion that no motives of his, or having an origin in his own mind, ever influenced Frush at all.

Generally speaking, a man may dispose as he pleases of that which is his own, and he is under no obligation to assign a reason for his conduct. When it is assumed or conceded that he has made a disposition that he intended to make, it must also be assumed or conceded that there were volition and intelligence in the act that was done. And when there is volition, and when there is intelligence, it is wholly immaterial as to what motive prompted or induced the act. When, however, a reason is assigned for the doing of an act, which act, standing alone, is so flagrantly unjust as of itself to suggest a suspicion that it was either not voluntary, or else that it was not the emanation of a capable mind, then the truth or the existence of that reason is essentially open to examination upon an inquiry as to the freedom or intelligence with which the act, asserted to have proceeded from that reason, was done, and the solution of the inquiry may largely depend upon the ultimate result reached upon the examination of the truth or the existence of the reason or the motive assigned for the performance of the act itself. We are now brought to a consideration of the reasons advanced for the disinheriting of Miss Fannie.

Within a day or two after the deed had been executed it was suggested by Mr. Robert Green, the father-in-law of Mr. Horner, the trustee, that it would be advisable to have witnesses go out and ascertain the intentions of Mr. Frush as expressed in the deed, so as to be able to testify thereto in the event that the deed were assailed. Mr. Horner then conferred with his counsel, who advised him to the same effect. Accordingly, Mr. Horner took three witnesses to the Pimlico cottage on Thursday, July 11th, but the physician peremptorily prohibited them from entering the sick room. On Friday morning, the 12th, they returned, and, after Mr. Horner had first gone in the room and remained for 10 minutes with the sick man, the witnesses were ushered in. Mrs. Leas was there before the witnesses entered, and while she was there this is what took place: "Mr. Horner said to my brother, 'Uncle Luther, I think Aunt Lizzie [that is, Mrs. Leas] and I have got ourselves in trouble.' He said, 'They accuse us of making your deed. Would you mind, if I bring some of my friends in, of telling them that we did not,—telling them you made it yourself?' He said, 'None; not in the least.' So Mr. Horner then went out, and brought these gentlemen in." Mr. Frush was propped in bed with pillows. The trained nurses were not present. What took place will be stated in the language of one of the three witnesses. Mr. Manahan thus describes the unusual scene: "Well, I went in with Mr. George Horner. He said, 'Uncle Luther, this is Mr.

Manahan; you met him at my house.' He said, 'Yes; I remember meeting some one out there, but I don't exactly remember him;' and then Mr. Frush said, 'I have inquired as to Mr. Horner's honesty and veracity, and I am satisfied.' Mrs. Leas asked him if she had influenced him, and he said, 'No.' George Horner asked him if he, or any one else, had influenced him, and he said, 'No;' and he added, looking at George Horner, that 'if I had listened to you I would have done more for Fannie'; and then Mr. George Horner asked him if he or any one else of the family had asked him to make a will or a deed of trust, and he said, 'No.' He said, 'I made the deed myself; knew what was in it when I signed it;' and then he added that some one had said that his sister had influenced him, but he said there was nothing that could influence him, or anybody that could influence him at all, and that the only thing that could influence him was sickness; and then he was asked the question why he did not leave more to Fannie, and he said that she was not affectionate and congenial, and never had been from a child, and everything he did never seemed to please her. He said that he only made one request of her. She wanted to go to some other city, Philadelphia or New York, and he had told her no, but she could do as she pleased; that some day she would regret it, and she said she didn't want his money; and then he was asked the question if he had ever ordered Fannie to leave the house, and he said, 'Yes; lots of times;' and he was then asked if that had occurred within the last two years, and he said, 'Yes; lots of times.' Mrs. Frush came into the room during part of the conversation, and Mr. Frush he noticed her when she came in, and he kept looking at her all the time, during the time she was in there; that is, he followed her with his eyes." The witness was then asked, "Who asked the questions of Mr. Frush?" and the witness replied, "Mr. George A. Horner." Upon cross-examination the same witness was asked, "Did Mr. George Horner during this interview say anything to Mrs. Frush?" and he replied, "Well, he asked her— He told her that she hadn't any right in the room. No; he said, 'No one asked you to come in here.' He said, 'Please retire.'" The two other witnesses go over about the same narrative. Here, then, we have, within 24 hours before Mr. Frush died, this remarkable spectacle: A man on the brink of the grave, dying from a disease that seriously impaired his mental faculties, sensibly under the influence of opiates administered to allay his physical sufferings, undergoing, at the hands of a person in whose integrity he had publicly declared he had no confidence, a cross-examination as to his reasons and motives for doing, four days before, an act which, if unexplained, was, to say the least of it, in itself exceedingly suspicious. After the secret interview

lasting 10 minutes, during a greater part of which Mrs. Leas was not present, the very first words he uttered when the witnesses were brought before him, and that were not in response to some question or suggestion, were a certification to Horner's integrity. When did he make the investigation about Mr. Horner's honesty and veracity, and from whom did he learn that he had all along before been in error respecting Mr. Horner? No line or sentence in the record furnishes an answer. Why did he follow Mrs. Frush with his eyes when she entered the room? And why did George A. Horner request her to retire? Was Luther Frush then conscious that he had been drilled to say things about his niece that were not true, and was that look towards that niece's mother a lingering but silent and helpless protest against the words his tongue was unwillingly uttering? Was George Horner, when he requested Mrs. Frush to leave the room, apprehensive that her presence would rekindle sufficient intelligence or independence in the dying man to change this plan of vindication into proof that would crush the deed to atoms? Who can tell? But if the witnesses were summoned to ascertain whether the deed was the result of Luther Frush's own free will and intelligence, and if Horner knew that there had been no undue influence exerted, and believed that the grantor was in the full possession of his mental faculties, what possible reason could he have had for wishing to exclude Mrs. Frush from the room? Her presence could not have varied the truth. Not a question was put to him to test whether he knew what the contents of the deed really were. Such a course seems to have been studiously avoided. If it was designed to establish by these witnesses that Mr. Frush knew what he had done, what better or more satisfactory way of showing this than to have requested him to repeat the dispositions which the deed had made? The deed had previously been placed on record, and its contents were not a secret, and there would, therefore, have been no impropriety in their being stated. Was the expedient left untried because it was known that it would fail?

The chief purpose of the gathering seems to have been to procure from Luther Frush his reasons for ignoring Miss Fannie. If she had had no claims to be an object of her uncle's bounty, or if there had been no reason to make it probable that her uncle would provide for her in the final disposition of his property, there was obviously no necessity for extorting from him, while the shadows of death were gathering around him, motives for the doing of an act that was a natural act for him to do. And just here the anxiety of Mr. Horner to bolster up the deed overreached his discretion, and the dying man gave motives for his conduct that are fabrications and not facts. Where an act unjust in itself, unexpected when the whole past

conduct of the person doing it is considered, and utterly at variance with his asserted intentions consistently expressed, needs, in order to be upheld as free and voluntary, an explanation of the motives that induced its performance, if the motives assigned are in reality untrue, and there is no pretense that there are any others, the conclusion is irresistible that the act is a mere mechanical and not an intelligent act at all. If Miss Fannie was cut off for the reasons assigned by Mr. Frush in the presence of the three witnesses, and those reasons were not real, existing reasons, then she was cut off for no reason, and an intelligent agent cannot act without some reason.

It must be borne in mind that there is no pretense that Mr. Frush believed, upon evidence of any kind, the existence of these reasons as facts, though they were not facts. Such belief could exist as the result of deception. As given by him through these three witnesses, they are stated as facts within his personal knowledge; and if, in reality, they are untrue, we have a case where a man in falling physical strength and with impaired mental powers suddenly reverses the purposes of his life, and assigns as an explanation for his conduct, when those who have become his chief beneficiaries seek to uphold his act by his own words, motives that he knows, if he is conscious at all, are utterly and entirely false; and, in the face of such a condition, a court of equity is asked to say that such an act is voluntary and intelligent.

He gave three reasons for disinheriting Miss Fannie, and these were—First, that she was not affectionate and congenial, and never had been; second, that she had gone to Philadelphia or New York on one occasion against his wishes; and, third, that she had said she did not want his money. And then he added, in response to one of Mr. Horner's questions, that he had often ordered her to leave the house. There is another reason, given through Mrs. Leas, and it is this: that Miss Fannie had asked her uncle for a piano. The first of these reasons is utterly without foundation in fact. Apart from the interested witnesses, there is not a human being who has testified that Mr. Frush ever dreamed that his niece was not affectionate towards him. She was as dutiful as a child. She washed his false teeth every morning, washed his face, helped to dress him, and frequently during the day cleansed his cancerous nose with a quill, and this she did continuously until and including the day the deed was made. She denies that she went to New York or Philadelphia against his wishes, and she emphatically denounces as false the statements that she said she did not want his money. It is a little singular that the sole act of alleged disobedience was so vaguely stated. If the incident had ever occurred, and had made an impression on Frush sufficiently strong to be a reason for

disinheriting her, he would surely have remembered enough of the details to recollect the name of the city to which she had gone against his will. We have said that many witnesses have given evidence that he spoke words of praise respecting her, and that he expressed his intention to provide for her. Some of these statements were long after the alleged happening of the events which on his deathbed he assigned as the motives for cutting her off entirely. Can it be possible that this man permitted this young woman to render him the services above but imperfectly indicated, if he had in fact repeatedly, within two years before his death, ordered her to leave his house? The reasons given by him on the 12th of July to account for the results of the deed made on the 8th are false in fact and utterly trivial. The one to which Mrs. Leas has testified is no less puerile. That Frush should cut his niece off because she had asked him to give her a piano, and then, in the very instrument by which she was cut off, that he should give her that same piano, is simply preposterous. But the reasons given by Mr. Horner to Mr. Donaldson on the 8th of July as those which Mr. Frush had assigned for disinheriting Miss Fannie are utterly at variance with those which the witnesses say that Frush stated in their hearing on the 12th. Mr. Donaldson testified that when he took the original memorandum from Mr. Horner's hands, and saw that the piano was left to Miss Fannie, "I said to him, 'This is strange;' and he said, 'Well, Mr. Frush says she has been trying to buy his piano from him, and had been after him for his money,' etc., 'and that is the reason he has treated her in this way.'" Why she should want to buy his piano from him at the same time she was importuning him to give it to her, and why she should be "after him for his money" at the very moment she declared she did not want his money, has not been and cannot be explained. If he believed these conflicting and these driveling reasons that he assigned to be true, he was manifestly laboring under palpable delusions. If he did not believe them to be true, then he assigned as reasons for his act things that did not exist, and which from their contradictory character could not possibly exist, and he consequently had no reasons at all. His act, without reasons, was either irrational, or the result of an influence which he was too weak mentally to resist.

As soon as the deed of trust had been executed and placed on record a marked change in the household followed. Mrs. Sarah Frush was supplanted by professional nurses, who were employed to do what neither Mrs. Green nor Mrs. Horner would or did do, but what Mrs. Frush and Miss Fannie had for months most faithfully performed. Mrs. Frush no longer directed the domestic affairs, but the successful masters of the dying man assumed and asserted control. Up to the time the deed was executed neither

Mr. nor Mrs. Horner nor Mrs. Green remained over night at Frush's house. After the deed had been signed some one of them, or some one of Mrs. Green's children, was always present. "They never left ~~um~~ alone after that," says the colored servant whom the appellees produced as a witness. They evidently believed that a deed of trust could not be successfully assailed, and their whole demeanor indicated that they felt secure until the suggestion that the three witnesses ought to be assembled was made. When these witnesses did appear, the day before his death, Mrs. Green tells us in her testimony that Mrs. Frush put this question to them, "Gentlemen, are you going to swear the rights away of a poor orphan girl?" and that she (Mrs. Green), addressing Mrs. Frush, said, "Haman, stand back! stand back! You have made a gallows to hang me and my children on, and you have got your head now in a halter." Obviously, that halter was the deed of trust, and Mrs. Green gloated over what it had accomplished. She evidently assumed that the devotion and attention shown by Mrs. Frush and Miss Fannie to Luther Frush during all his sickness, and up to the time the trained nurses were employed, had sprung from a sordid hope of gain; and when the deed had been procured, and was, as Mrs. Green supposed, impregnable, she charged her sister-in-law, in the presence of strangers, with having built a gallows on which to hang Mrs. Green and her children,—with having striven to get his estate,—and she exultingly declared that Mrs. Frush's own head was then in the halter. If Mrs. Green meant that Mrs. Frush had resorted to sinister means with a view to deprive Mrs. Green or Mrs. Green's children of a share of Luther Frush's estate, she essentially implied that she herself had foiled her sister-in-law, and had successfully availed of equally questionable methods to deprive Mrs. Frush and Miss Fannie of any share of that same estate. But, if there could be a doubt on this subject of undue influence, Mrs. Leas set it all at rest in two interviews with Mrs. Classen. In the first, which took place on July 12th, the day before Frush died, Mrs. Leas told Mrs. Classen "they were going to have three or four gentlemen there to bring it in that Mr. Horner hadn't persuaded Mr. Frush to do those things"; and on the 16th or 17th of the same month, and three or four days after Frush had died, Mrs. Leas told the same witness "about they had got exactly what they wanted; that Miss Fannie was not to have anything but the piano,—her having nothing else but the piano."

We come, now, to the question of mental capacity. To render a deed or a will invalid because of the want of sufficient capacity to execute it, it is not necessary that the grantor or the testator should be insane. Where he fully understands the nature of the business in which he is engaged, and has sufficient capacity to make a disposition of his

estate, with judgment and understanding in reference to the amount and situation of his property and the relative claims of the different persons who ought to be the objects of his bounty, he is treated as being possessed of a testamentary capacity. *Davis v. Calvert*, 5 Gill & J. 302. While this is the general rule, each case must in a great degree depend upon its own peculiar facts and circumstances. *McElwee v. Ferguson*, 43 Md. 484. The testimony of the attending physician is unequivocal and explicit that Frush was on July 8th utterly incapable of making a valid deed or contract. Dr. Bevan was familiar with the man's physical condition, and he knew that it had seriously impaired his mind. Such testimony, from such a source, is worth vastly more than that of the three witnesses who saw him the day before his death, and who were total strangers to him; and it outweighs the opinions of Brunt, and the magistrate, and the other four witnesses, who had stated that Frush was mentally competent to do what he did. Dr. Crim, who attended Frush before Dr. Bevan was called in, gives like testimony to that of Dr. Bevan, though covering a different period of time. And then, Dr. Morris, the president of the board of the state lunacy commission; Dr. Hill, the physician in charge of Mt. Hope Insane Asylum; and Dr. Smart, physician at the state institution for the feeble minded,—all concur, after reading the testimony of the attending physician and the other witnesses adduced by the plaintiffs, in saying that Luther Frush was not possessed, when he made the deed, of sufficient mental capacity to make a valid deed or contract; and both Dr. Morris and Dr. Hill, when recalled, after all the testimony on both sides had been delivered, and after having read it all, reiterated the opinions expressed in the first place. Dr. Rush, an expert called by the defendants, gave the opinion that Frush was competent, though he admits that, if Frush was possessed of delusions respecting his niece, he was not competent to make an intelligent disposition of his property as respects her; and he further admits, in answer to the eighty-sixth cross interrogatory propounded to him, that he had expressed the opinion that insane people are competent to make wills.

It is a noticeable fact that the trained nurses who had been employed to take the place of Mrs. Sarah Frush were not called by the defendants to testify to Frush's mental capacity, though casual acquaintances who had met him but a few times in the last weeks of his life, and who had never known him before, were placed upon the witness stand in behalf of these same defendants.

There is one witness, and but one, outside of the Green and Horner families and their servants and Mrs. Leas, who undertakes to give any evidence touching Frush's alleged declarations in regard to Miss Fannie, and

that witness is Miss Dolterveich, one of the defendants. We feel constrained to place reliance upon the great preponderance of evidence that is in conflict with that of Miss Dolterveich. It seems most singular that Frush should have made the declarations that this young lady rehearses—evidently of great hostility—to Miss Fannie at the very time his conduct towards her and his treatment of his niece were the very opposite of that which would have been natural had he entertained the sentiments imputed to him.

We have wholly rejected the testimony of George Horner, the trustee, given in answer to the general interrogatory. Mr. Horner was placed upon the witness stand by the plaintiffs under a subpoena duces tecum requiring him to produce a certain paper showing the amount and details of the property which had gone into his possession as trustee. He was asked whether he had the paper, and, upon his replying in the affirmative, the paper was produced and filed. The plaintiffs then dismissed him, without asking a single question pertaining to the merits of the case. The defendants' solicitors then stated that they had no cross-interrogatories to propound, but they requested the examiner to put the general interrogatory prescribed by Equity Rule No. 39. This was done, and Mr. Horner proceeded, against the protest of the plaintiffs' solicitors, to give a circumstantial and detailed account of his acquaintance with Frush, and his interviews with him, and to testify, from written memoranda, fully and at large to the whole merits of the controversy. Fourteen and a half pages of the record are taken up with this one answer. Horner, being a party to the deed, was not a competent witness upon his own offer or upon the call of his co-defendants. We do not understand that it was the object of Rule 39 to supersede all other rules respecting the admissibility of evidence, and the regular, orderly method of its introduction. Nor was it ever intended by the rule to throw wide open the door for bringing in irrelevant and incompetent testimony not germane to the subject about which the witness had been interrogated, nor to make competent an incompetent witness. If such is the effect of the rule,—if it permits anything and everything a witness may himself judge to be relevant and material to be put on the record,—it places in the power of a hostile witness the ability to spring a surprise upon the party forced to call him for a mere formal matter of proof. Especially would this be the case when the witness is an incompetent one, under the law, to give any testimony upon his own offer. It was said in *Blunt v. Strong*, 60 Ala. 576: "To such interrogatory no answer should be allowed of matter that is not germane to the subject of some special inquiry, and in a measure the complement of testimony previously given. To allow otherwise would be to permit interrogatories to become a delu-

sion and a snare." The answer of Horner ought to have been suppressed.

For the reasons we have given, we think the learned judge of the court below was in error in dismissing the bill of complaint; and because, in our opinion, the deed of trust of July 8th was procured by the exercise of undue influence, and was executed at a time that Luther M. Frush was not mentally capable of making a valid deed or contract, the decree appealed from will be reversed, and the cause will be remanded, that a new decree may be signed annulling and setting aside the deed assailed in these proceedings. Decree reversed, and cause remanded, the costs above and below to be paid out of the estate of Luther M. Frush.

(37 Md. 373)

SLINGLUFF et al. v. JOHNS et al.

(Court of Appeals of Maryland. March 3, 1898.)

WILLS—CONSTRUCTION—DESIGNATION OF BENEFICIARIES.

1. Testator provided that, if his daughters died without issue, the portion devised for their benefit "should, at their death, revert to my children who may survive, or to the descendants of their children, and be equally divided between them." Both daughters died without issue, leaving brothers and children of a deceased brother. The entire will manifested an intent to establish absolute equality of distribution among testator's descendants. *Held*, that while, in the absence of the words "or to the descendants of their children," etc., the children of the deceased brother could not take, such words could not, in view of testator's intent, be rejected as meaningless, and the court would construe "or" in said clause as "and," and "their" as "my," and consequently the deceased brother's children would share in the estate with the surviving brothers.

2. Such children would take not per capita, but only what their father would have taken had he survived the daughters.

Appeal from circuit court of Baltimore city.

Bill by James Carroll Johns and others against Ann Montgomery Slingluff and others. From a decree for complainants, defendants appeal. Reversed.

Argued before McSHERRY, O. J., and BRYAN, BRISCOE, FOWLER, PAGE, ROBERTS, BOYD, and PEARCE, JJ.

Fielder C. Slingluff and Schmucker & White-lock, for appellants. Wm. F. Porter, for appellees.

PEARCE, J. This suit was instituted to procure a construction of the following clause in the will of the late Rev. Dr. Henry V. D. Johns: "Aware of the liability to loss of their patrimonial estates by females through injudicious marriages or mismanagement, I hereby appoint my two eldest sons to act as trustees of that portion of my estate which I have devised to my two daughters. This property I hereby intrust to my two eldest sons, * * * to be sacredly kept and safely invested for the sole and exclusive use of my two daughters, Fidella and Lavinia, and for their children, if

they marry, and have descendants. If they should not marry, or marry, and die without child or children, my will is that this portion of my estate hereby intrusted to my sons for the benefit of their sisters should, at their death, revert to my children who may survive, or to the descendants of their children, and be equally divided between them." The testator died in 1859, leaving six children surviving him, namely, Dr. Montgomery Johns, Henry V. D. Johns, James Carroll Johns, and Dr. John Kensey Johns, and two daughters, Fidelity R. Johns and Lavinia M. Johns. Dr. Montgomery Johns died in 1871, leaving children still surviving. Fidelity married, and died many years ago, leaving no issue; and Lavinia died in October, 1896, unmarried, and without issue. Henry, James, and John were all living at Lavinia's death, and the question is whether Lavinia's share now goes exclusively to the three children of testator surviving at her death, or whether the children of Montgomery, the deceased son, take what would have been his share had he survived Lavinia. The circuit court of Baltimore city held that the children of Montgomery are not entitled to take his share, and from that decision this appeal is taken.

In reaching this conclusion, exclusive controlling effect was given by the circuit court to two well-established general rules of construction: First, that where a life estate is created, and a gift is made over to survivors, the period of survivorship must be referred to the death of the life tenant, or first legatee, and not of the testator; and, second, that where words are used in themselves meaningless, and which cannot be corrected by alteration, addition, or transposition upon any sound principle of construction, they shall be altogether rejected. Applying these rules, it was concluded: First, that the words "to my children who may survive," if they stood alone, would clearly mean only those who survived Lavinia; and, second, that the succeeding words, "or to the descendants of their children, to be equally divided between them," are meaningless, without taking undue liberties by way of alteration, and therefore cannot qualify the preceding words, but must be rejected in construing the will, and for this reason the children of Montgomery must be excluded from the bounty of the testator. It is too clear for controversy under the decision in *Rieff v. Strite*, 54 Md. 303, and other Maryland cases, that, in the absence of the words "or to the descendants of their children," etc., or of any other qualifying words, only those children of the testator could take who survived Lavinia, and it therefore only remains for us to determine whether this will is to be controlled by the second rule applied by the circuit court in deciding the case, and we have given to this question that full and careful consideration which is due not only to the interest of those concerned, but to the recognized learning and ability of the judge from whose decision this appeal is taken. The construc-

tion of every will must be determined upon its own peculiar circumstances as they appear in the will itself, and therefore it is that the mere fact that similar language has been elsewhere construed and interpreted in the light of facts there disclosed cannot be accepted as necessarily controlling in other cases. The maxim that, "the intention of the testator, when apparent on the face of the will, must be gratified, if it be lawful to do so," must always be invoked when any particular clause of the will is obscurely or inaptly expressed, though, when so invoked, great care is required that the privilege of construing the will be not perverted into the privilege of reconstructing it. In *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702, this court expressed with much force and clearness the manner and spirit in which this duty of construing a written instrument should be approached, saying: "Obviously, the most simple and natural way to ascertain what a testator's or grantor's intention was is to read what he has written, because what he has written was designed by him to express that intention. It is true, there are many other rules of construction to which resort is sometimes had. * * * Generally speaking, they are not suffered to defeat a clearly manifested intention. * * * If we lay aside and put out of view for a moment these artificial rules, and read the language of the deed and will as it would strike the mind of one unacquainted with such rules, there will be little, if any, difficulty in discovering with reasonable certainty what the testator or grantor actually intended to do. This is permissible because we are seeking to discover what he meant, and we must, therefore, put ourselves as nearly as possible in his place." In *Association v. Mackenzie*, 85 Md. 136, 36 Atl. 755, the court said: "When a written instrument, of whatever character, is brought before a court for adjudication, the first inquiry must be directed to its meaning. Until this is ascertained, every step in the proceeding must be futile and useless. * * * No general rules have been devised which are adapted to all cases, and it is not possible, in the nature of things, that any can be devised. Courts must ascertain the meaning of written instruments when it is possible for them to do so, seeking the aid of all rational methods of interpretation." These utterances may be properly repeated and emphasized here as announcing the primary rule in construing written instruments; and it must be borne in mind in this connection that "the predominant idea of the testator's mind, when discovered, is to be heeded as against all doubtful and conflicting provisions which might of themselves defeat it, and that, the general intent and the particular intent being inconsistent, the latter must be sacrificed to the former." *Schouler, Wills*, § 476. We think it is manifest from an analysis of the will of Rev. Dr. Johns that the predominant idea of the testator was equality of bounty to all his family, and that, while he selected and de-

ignated the particular property each member of the family would receive, the scheme of his will was practically to dispose of his estate as the law would have done if he had died intestate. There are numerous indications, we think, of this purpose: First. While disposing of a very considerable estate, ample to have warranted an absolute devise or bequest to his wife, suitable to her needs and social station, had he deemed this the proper mode of provision, he gives her absolutely only his dwelling, horses, and carriage, all of which were specially appropriate for her personal use and comfort; and then gives her, for life only, one-third of the net income of his real and personal estate, however devised or bequeathed to his children. Second. The library, which is so usually left intact to such one or more of the children as may be best qualified for its enjoyment, is bequeathed among all his children, after their mother had selected what she wished. Third. The devise to his two sons John and Henry being, as he states, disproportioned to the devises to Montgomery and James, he therefore required John and Henry to pay to Montgomery and James \$2,000 to equalize them. Fourth. In his codicil, having concluded that he had overvalued the lands devised to John and Henry, and had undervalued those devised to Montgomery and James, he revoked the above legacy of \$2,000, because, as he said, he was desirous of doing impartially by all his children. Fifth. Both in the will and codicil he gave to his executors full discretionary power to sell and reinvest "all such stocks, grounds, rents, etc., as may need such change, with a view to equalize the apportionments, and to make just and fair portions to each of my children." Finally, fearing the loss by his daughters of their patrimonial estates, he made the provision we are now considering, and it seems to be plain that in this he had a twofold purpose, viz.: First, to prevent the wasting of their estates by their husbands, if they should marry, and the consequent disherison of their issue; and, second, in the absence of such issue of theirs, to prevent the diversion of their estates from his own family. We think he intended these portions of his estate in any event to go to his descendants, preferably to such of his descendants as traced title through his daughters, in order to preserve that absolute equality of bounty which we have found to be the predominant idea of his will; and, in the absence of issue of these daughters, then to his other descendants, no matter what degree should represent these descendants, at the daughter's death. Though the word "family" is not used in this will, as in *Taylor v. Watson*, 35 Md. 519, yet the idea of the family, we think, pervades and permeates the four corners of the will. Here, as there, he had no idea of distinguishing between his sons "iving at the death of Fidella and Lavinia

and the issue of his sons then deceased, all of whom were equally dear to him, and equally objects of his bounty, "which he designed should flow in the broadest stream among his descendants." Under the rule applied in the court below, if Montgomery, Henry, and James had all died before either Fidella or Lavinia, each leaving issue, and John alone had survived Fidella and Lavinia, but without issue, the whole estate of Lavinia, and the half of Fidella's estate, would have gone to John, and would have been subjected to such alienation by deed or will, as he might choose, to the exclusion of every other descendant of the testator. Is it rational to conclude, in view of the general intent which we have found, that he designed such a result as this? And, if not, could that result be properly allowed by segregating, in the construction of this will, the first clause we are considering, and by rejecting altogether the second clause, instead of giving effect to the general intent by alteration of this second clause, not by indulging in imagination or conjecture, but as the result of a thorough and rational analysis of the whole will, thus avoiding the defeat of the predominant idea of the will, through the rigid application of a rule of last resort to a single doubtful clause. The learned judge who decided this case in the circuit court held that a construction to admit the children of Montgomery Johns to a share of this fund could not be made without doing great violence to the language of the will, and that no such plain, unequivocal, and overruling intent of the testator appeared as would warrant the change of language necessary to this end, and that the intent suggested in fact rested upon nothing except the general idea (altogether apart from the words of the will) that a testator would naturally desire the descendants of a deceased child to take the share of their parent. We have said, however, that, in our opinion, there does appear from the whole scheme of the will, and from its very words, a predominant intent to establish absolute equality of distribution among the testator's descendants. And this conclusion is reached by applying the principle so clearly and happily expressed in *Rhodes v. Rhodes*, 7 App. Cas. 206, where the words of a clause creating certain interests, literally taken, expressed an intention to postpone vesting until after the death of Mrs. Rhodes, while other parts of the will seemed to indicate an intention that they should vest immediately on the testator's death; Lord Blackburn saying: "It seems impossible to answer this question without examining the whole will at perhaps tedious length, for every indication of intention that those interests should vest adds greatly to those that go before or come after. The force of the whole of such indications, taken together, is far greater than the sum of the forces of each taken separately."

We shall now endeavor to show that as great, if not greater, violence is done to the language of this will by the rejection of the clause under consideration as will be done by so altering its language as to carry out what we have said is the predominant idea of the testator. All that is necessary for this purpose is that the word "or" be construed "and" and the word "their" be changed into "my." The construing of "or" as "and," and the converse, both in wills and deeds, is freely admitted by courts whenever it is held to be unequivocally clear that the true general intent will thereby be given effect; and, if we are correct in our analysis of this will, the change of "or" into "and" becomes an imperative duty. To change the word "their" into "my" is, however, a stronger measure, a higher exercise of judicial authority, and can only be justified by a clear explanatory context, as we think is here found. "Wherever it is apparent, not only that the testator has used the wrong word, but also what is the right one, the alteration is warranted by the established rules of construction." 1 Jarm. Wills (6th Ed.) 504. And this author cites the case of *Doe v. Gallini*, 5 Barn. & Adol. 621, in which the word "all" was changed into "any," and the words "without issue" were read "leaving issue," in order to render the language of the will sensible, and consistent with the context. In *Keith v. Perry*, 1 Desaus. Eq. 353, there was a bequest to a daughter Mary for life, and at her death to the heirs of her body, and to their heirs forever. There was also a bequest to another daughter, Susanna, for life, and at her death to the heirs of her body, and to her heirs or assigns forever; and the able chancery court of South Carolina determined that the last "her" should be construed "their." In *Association v. Mackenzie*, supra, the court has collected a number of cases showing "how readily the courts will brush aside the language of an instrument when it stands in the way of its meaning." The principle on which all these cases are placed is "that the court is bound to ascertain, whenever it is possible, the true meaning of the paper, even in direct opposition to the terms employed." In the recent case of *Ruckle v. Grafflin* (in this court; not yet officially reported), 39 Atl. 624, the question was whether land passed under the residuary clause of the will, being designated therein merely by the word "effects"; and it was held that the inquiry was not into the accurate or technical meaning of the word, but into the intention which the testator had in using it, and that, as the testatrix had by previous clauses disposed of both real and personal estates, and in the residuary clause had disposed of "all the remainder of my effects," it was clear that she used the word "effects" indiscriminately for "real and personal estate," and for this reason the land passed. In the present case, if the tes-

tator had stopped with the words "my children who may survive," it would have been clear, conceding, as we do, that the survivorship is referable to the death of Lavinia, that the children of Montgomery could not take any part of Lavinia's share. But he did not stop here. He added (construing "or" "and"), "and the descendants of their children, to be equally divided between them." This whole clause cannot be a clerical error, an insertion by the draftsman without the direction or sanction of the testator. It was designed to mean something, and, however obscure by itself, or inaptly expressed, it undeniably declares an intention that the estate in question should not go exclusively to the children of the testator who survived his daughters. Taken literally, it would admit to participation with a surviving child the grandchildren of a deceased child, but would exclude the children of another deceased child. Can any natural ground be assigned for such admission and such exclusion in one breath, and can it be reconciled by any ingenuity with the other provisions of this otherwise just, consistent, and harmonious instrument? The astute counsel of the appellees evidently felt the necessity of diverting attention from this difficulty when they suggested that "descendants of their children" meant descendants of Fidella's and Lavinia's children; but this would defeat the interest of Fidella's and Lavinia's children, if they had left both children and grandchildren, and would thus contravene the clear intent that their children should take "if they should marry and have descendants." This construction also wholly ignores the significant use of the word "revert," which indicates that the estate was to go back from Fidella to collaterals, and not down in the direct line to their descendants in any degree, the whole contingency there contemplated being total failure of issue of Fidella and Lavinia. If, then, it cannot mean, for the reasons we have stated (reasons which the circuit court found sufficiently strong to warrant the rejection of the whole clause), the grandchild of a deceased child of testator, nor the grandchildren of Fidella and Lavinia, whose descendants can it mean but those of his own deceased children? To reject these words altogether is certainly to do violence to the language of the will, and defeats what we regard as the manifest general intent of the testator, while the alterations proposed do less violence to the language, and are made in accordance with the intent we have found to be reasonably apparent. In the case of *Turner v. Withers*, 23 Md. 40, relied on by the appellees as decisive of this case, there were no qualifying words as in this case. So with the case of *Hill v. Bank*, 45 N. H. 273, also relied on, in which the court said: "This, we think, is the rule when the bequest is in these terms, and nothing more,

subject, of course, to be controlled by a manifestation in the will of a different intention;" and in *Demill v. Reid*, 71 Md. 192, 17 Atl. 1014, Judge Miller cited the New Hampshire case above, emphasizing the qualification equally with the rule. Having construed "or" as "and," the devise cannot be substitutional, in the sense held by the circuit court, viz. that the descendants of the testator's grandchildren are substituted only upon failure of all testator's children; and when "their" is changed into "my," upon the views and authorities we have stated, all difficulty as to whether the distribution is to be per stirpes or per capita vanishes, since it is then plain that the descendants of testator's children represent the deceased parent, and necessarily take per stirpes (or by representation). They take, under the altered language of the will, by virtue of the reverting directed by the testator to his children then surviving, and to the descendants of his (my) children; and the words, "to be equally divided among them," being properly referred to this reverting, imply an equal division, not between the individuals who take, but between the respective stocks that take, viz. the surviving children and the deceased children. In *Jarm. Wills*, p. 1051, it is said that generally, where a devise or bequest is made to a person and the children of another person, they take per capita, and not per stirpes, but that this mode of construction will yield to a very faint glimpse of a different intention in the context; and he cites in support of this text *Alder v. Beall*, 11 Gill & J. 123, which fully sustains him, as does the later case of *Levering v. Levering*, 14 Md. 38. The statement of *Jarman* is also recognized in *Brittain v. Carson*, 46 Md. 186, though the general rule was there applied, only because there was nothing in that will to show that the grandchildren were to take by representation. It follows from what we have said that the decree must be reversed, and the cause remanded for the purpose of having the principles of this opinion carried into effect. Decree reversed, and cause remanded, the costs above and below to be paid out of the estate.

(87 Md. 330)

SKINNER et al. v. GAITHER.

(Court of Appeals of Maryland. March 3, 1898.)

CONTRACTS—CONSTRUCTION—MONEY RECEIVED—TRUSTS.

1. Where an agreement provided that nothing therein should be understood as fixing on one party any individual liability, beyond the application of certain property for such debts as might be due the other party, such restrictions cannot be extended to a debt which the agreement declares to be due to others.

2. A portion of the assets of an estate consisted of stock which had been pledged by deceased. The administratrix paid over to a surety on the note given by deceased for said loan the proceeds of a policy on the life of deceased, payable to his children, which was paid by said

surety on the loan. Said stock was never fully redeemed, and never came into the hands of the administratrix. Held, that the claim of the children against the surety for the proceeds of the policy was not affected by the fact that the debt on which the surety applied it was secured by the collateral of deceased.

Appeal from circuit court No. 2 of Baltimore city.

Petitions by Trueman Skinner and others for leave to file claims against George Skinner, insolvent, with his trustee. Thomas H. Galther opposed. Dismissed. Petitioners appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, PAGE, BOYD, and PEARCE, JJ.

Rich. S. Culbreth, for appellants. Fred. G. Dugan, for appellee.

PEARCE, J. George Skinner, trading as George Skinner & Co., made a deed of trust for the benefit of his creditors on the 30th day of April, 1896, to Robert Goldsborough Keene. The circuit court No. 2 of Baltimore city assumed jurisdiction of the trust, which was administered under its orders. On the 1st day of February, 1897, the trustee having made his report, an auditor's account was filed, showing the sum of \$2,968.01 in the trustee's hands for distribution among the creditors of the estate. There were but five claims filed, aggregating \$6,025.81. The claim of the appellee was \$5,208.32, and his dividend was \$2,565.60. Each of the appellants had a small claim on which their respective dividends were \$67.04 and \$71.11, but there is no contest as to these claims. On the 13th of February, 1897, a petition was filed by Mrs. Isabella S. Turner, a widow, and the mother, by a former marriage, of the appellants, alleging: That on the 21st of April, 1888, the firm of George Skinner & Co. was composed of herself and George Skinner, and that on that date they entered into a written agreement that the firm should be dissolved on and from that date. That George Skinner should purchase the stock in trade of the firm, and close up the business. That out of the assets of the firm he should pay to the said Isabella S. Turner the yearly sum of \$1,000 during the settlement of the firm affairs; to himself, the sum of \$2,000, due him by the former firm of Skinner & Co. for services rendered; to Miss Susan Constable, the sum of \$1,000; to Thomas H. Galther, \$5,000; to William and Trueman Skinner, infant sons of Trueman Skinner, deceased, \$10,000, being the proceeds of a policy of insurance upon the life of their father; and to Mrs. Mary Ligan, \$45,000; and that after the payment of these sums, the assets of the firm should be divided between the parties to the agreement according to their several interests, as should be thereafter determined. It was then specially provided that no individual liability should be understood to be fixed upon the said George Skinner for debts due by said firm to Isabella S. Turner, beyond the assets of the firm. The prayer of the petition was for an account of all sums received and paid by

said George Skinner under said agreement, and that such sums as should be found to be due to her, and to her two sons, should be decreed to be claims against the trust estate, and should be admitted to dividend therein. The original agreement was filed with the petition, and its execution was subsequently duly proved. An order nisi was passed granting the prayer of the petition, and, after proof of service of this order, the same was made absolute, and leave was granted to take testimony in support of the averments of the petition. On the 9th of July, 1897, the appellants filed a petition reciting so much of their mother's petition as was material, and alleging that the net proceeds of the policy heretofore mentioned was \$9,902.20, and that the same was received by their mother as their guardian, March 3, 1883, and was by her paid on the 19th of November, 1883, to the said George Skinner, who received the same with full knowledge of the character of the fund, and of the appellants' interest therein, as well as of the fact that there was no legal authority for such disposition of the same; and that the said George Skinner, in pursuance of previous understanding and agreement between himself and their mother, applied the same in part payment of a debt due by their father to Thomas H. Gaither, Sr., the father of the appellee, upon which debt the said George Skinner was liable, either as co-maker or surety. The prayer of the petition was that the appellants be made parties plaintiffs to their mother's petition, and have leave to take testimony to support their claim. An order to this effect was made. The case was argued on the testimony thus taken, and both petitions were on the 4th of November, 1897, dismissed, and the auditor's account ratified, except as to one small claim, which was suspended for defect of proof, and from that order this appeal was taken. There was no written opinion filed with this order, and we are thus not advised of the ground upon which the decision was rested.

During the taking of the testimony Mrs. Turner became satisfied there was nothing remaining due to her under this agreement, and she abandoned any personal claim against the trust estate. It was also admitted that all other sums required by said agreement to be paid had been fully paid by said Skinner, and the only claim which it is sought to establish is for the sum of \$9,902.20 due these appellants, with interest from November 19, 1883. The proof shows that their father, Trueman Skinner, died in November, 1882, and that these appellants, who were twin children, were his only children, and were born in 1870. It is also shown, without contradiction, that Mrs. Turner, then Mrs. Skinner, after duly qualifying as guardian of these children, received from the Mutual Life Insurance Company of New York, on the 3d of March, 1883, the sum of \$9,902.20, the net proceeds of a policy of insurance for \$10,000 upon the life of their father, which she deposited in bank to her individual account, together with other sums belonging to

her, the whole aggregating \$17,818.85; and that this whole amount was drawn out by her on two checks, to the order of Skinner & Co., one dated May 1, 1883, for \$7,500, and one dated November 10, 1883, for \$10,318.85. A certified copy of this life policy is in the record, as well as copies of the two checks above, and of the bank account of Mrs. Skinner upon which these checks were drawn. Mrs. Skinner testified, and the documentary evidence showed, that the sum of \$9,902.20, the proceeds of the life policy, was included in the check for \$10,318.85 given to Skinner & Co., November 19, 1883. She further testified that she gave this check to Skinner & Co. under the advice and at the request of George Skinner, to be used in paying the debts of the firm, and that no part of this sum has ever been repaid to her, or to either of her sons. She testifies, in conformity with the agreement recited, that at that time, and up to April 21, 1888, she and George Skinner composed the firm of Skinner & Co. Louis M. Reardon, a bookkeeper of Skinner & Co. from 1881 to 1886, examining the letter of the insurance company inclosing the draft to Mrs. Skinner as guardian for \$9,902.20, and speaking from his own knowledge of the transaction at the time, testified that this check was not for the net proceeds of the \$10,000 policy upon the life of Trueman Skinner, for his two sons; that he himself received it from the insurance company, and gave it either to Mrs. Skinner or to George Skinner. Examining the books of the firm kept by him, and the check for \$10,318.85 from Mrs. Skinner to Skinner & Co., and speaking again from his own knowledge of the transaction, he testified that the books of the firm show that on November 19, 1883, the firm received that amount through Mrs. Skinner's check, and that it was paid by Skinner & Co. the same day to Thomas H. Gaither, Sr., the father of the appellee, in part payment of a debt of about \$22,000 then due by Trueman Skinner, deceased, to Gaither, and that he had heard George Skinner say that he was security on this debt, or was bound by it, or had made himself liable for it, by signing some of the notes, and that no part of the sum thus paid by Mrs. Skinner as guardian to Skinner & Co. had ever been returned by the firm. He still further testified that he was familiar with the origin and history of the loan from Thomas H. Gaither, Sr., to Trueman Skinner; that Skinner borrowed about \$20,000, to purchase 300 shares of Texas Pacific stock, then selling in the 60's; that the stock was bought, and was pledged to Mr. Gaither as collateral to the note or notes given for the loan; that, after Trueman Skinner's death, this debt was reduced to about one-half the original amount by the application of the amount received from Mrs. Skinner as guardian; that subsequently an assessment of \$10 per share was called on this stock, and that Gaither then delivered it to George Skinner to be sold, and the proceeds, so far as necessary, to be paid over to Gaither; that Skinner thereupon placed

the stock with J. J. Nicholson & Sons, who paid the assessment of \$3,000, and held the stock as security for some time, and finally sold it for about \$7,500, and paid the proceeds, less the assessment and brokerage, to George Skinner, about \$4,500, which sum, with several hundred dollars more, making \$5,000 in all, was paid over by George Skinner to Gaither on this debt. He also testified that during his connection with the firm, from 1881 to 1896, George Skinner alone composed the firm of Skinner & Co., except from February, 1892, to July, 1895, when Thomas H. Gaither, Jr., was a member of the firm; that with this exception he knew no one connected with the business but George Skinner; and that he knew nothing of any private arrangement between Mrs. Skinner and George Skinner. George Skinner testified that he executed the agreement of April 21, 1888, with Isabella S. Turner; that he knew there was a life policy of \$10,000 on the life of his brother Trueman Skinner for his two sons, and that he kept it in his safe; that the net amount thereof, \$9,902.20, was paid to Mrs. Isabella S. Turner as guardian; that he got from her the check for \$10,318.85 for the purpose of paying it to Thomas H. Gaither, Sr., on a debt due by Trueman Skinner, either upon his note or note of Skinner & Co.; that he did not recollect whether Skinner & Co. indorsed, or he, individually, but that at that time he alone composed the firm of Skinner & Co.; that he knew the money belonged to Trueman and William C. Skinner, but that he owed Gaither a good deal, and that he thought he had better pay that money to him, and stop the interest; that no part of this \$9,902.20 had been paid to Mrs. Turner, or to Trueman, or to William C. Skinner; that he used every cent of the \$17,818.85 received from Mrs. Skinner, by the two checks mentioned, to pay Mr. Gaither; and that, in addition thereto, the 300 shares of Texas Pacific stock were sold as testified to by Reardon, and the proceeds paid Gaither on his debt. He also testified that Mrs. Turner was never known in the business; that all of it belonged to his brother's estate and his creditors; and he surrendered it. These transactions all occurred in 1883 and in 1888. The firm of Skinner & Co. was dissolved, and George Skinner, in the agreement mentioned, solemnly engaged to pay Trueman and William C. Skinner the sum of \$10,000, which he now testifies, after the lapse of 10 years, has never been paid, in whole or in part.

We have thus recited at considerable length the substance of the testimony of the only three witnesses examined, in order that the facts might appear from which our conclusions are drawn. There is perhaps some confusion and possible doubt as to whether Isabella S. Turner was in fact a member of the firm of Skinner & Co.; but, for the purposes of this case, we do not think it material to be decided. If she were such member, she might be liable, as such, for this amount used by her firm; but this could not affect George Skinner, who would be equally liable for it whether he was

a co-partner with Isabella Skinner or was the sole member of the firm; nor, in the view we take of the case, is it really material whether George Skinner was or was not originally liable in any manner upon the Gaither debt, since in the arrangement of April 21, 1888, he assumed this debt to the extent of the \$10,000 received from Mrs. Turner as guardian, and this assumption was based upon a valid consideration, since he acquired under that agreement the stock, etc., of the whole firm, whether it belonged to himself and Mrs. Turner as co-partners, as stated in their agreement (by which he should be bound in any event), or whether it belonged to his brother's creditors, as he testifies,—the only creditors of his brother, so far as appears, 16 years after his death, being these appellants. The proof is incontestable, from three uncontradicted witnesses, confirmed by all the documentary evidence in the case, that this sum of \$9,902.20, belonging to these appellants, was received and applied for his own benefit by George Skinner in the manner and for the purposes we have set forth, and that no part of this sum has ever been repaid. The assets of George Skinner are in a court of equity, under appropriate proceedings for distribution among his creditors. The appellants have presented their claim for a dividend. George Skinner admits the indebtedness, and the appellee (to his credit) has not availed himself of the plea of limitations in his own interest. Why, then, should the claim not be allowed?

In the argument in this court two grounds were taken by the appellee: First, that the agreement of April 21, 1888, provided that nothing therein should be understood as fixing upon George Skinner any individual liability beyond the application of the assets of Skinner & Co., but a reference to the agreement itself shows that this personal immunity is expressly restricted to such debts as may be due Isabella Turner from said firm, and can, by no stretch of authority or imagination, be extended to a debt which the agreement itself declares to be due Trueman and William C. Skinner. Inasmuch as George Skinner was, upon his own testimony, clearly liable, either as co-maker or as surety, upon the Gaither debt, and the money of the appellants was knowingly used by him to relieve himself, to that extent, from liability to Gaither, he thereby became personally liable to the appellants for the amount so applied by him, and his engagement made in the agreement, for the payment of this sum, was but a recognition of the debt demanded by common honesty. The second ground taken by the appellants was that the account of Isabella S. Turner, as administratrix of Trueman Skinner, shows that she charged herself, as part of the inventory, with the sum of \$11,100, the appraised value of the 300 shares of Texas Pacific stock, and that she had credit in said account for \$22,257.44 paid Thomas H. Gaither, and that the \$9,902.20 belonging to her sons, and employed, as before shown, in paying the Gaither debt, was more

than restored to her through this stock, and that thus her sons can look only to her for restoration of the amount. But this stock, though pledged to Gaither as collateral security for his loan, was still assets of her husband's estate, subject to the equitable lien of Gaither, and the correct mode of charging this in the inventory would have been to set out there the fact that it was so pledged, and then, when the stock was sold by the pledgee, the administratrix could have been allowed for it, in whole or in part, according to the facts. But the proof in this case is clear and uncontradicted that, though thus charged as administratrix with this stock, not one cent of it ever came into her hands, and it is equally clear that the overpayment of \$12,327.23, shown by this account, includes this \$9,902.20 belonging to her sons, and diverted from them to the payment of the Gaither debt. There has been no attempt by the appellants to subject these assets to a trust in their favor, and we therefore dismiss that phase of appellee's argument.

We can perceive no ground upon which these appellants can be denied the right to participate in the distribution of these assets, and we regard their right so to participate as clearly established. In view of the conclusion we have reached, that this debt was a personal debt of George Skinner's, it is unnecessary to consider how far he might otherwise be liable for aiding Mrs. Turner in committing the breach of trust, which she did commit, however unwittingly. We shall reverse the decree, and remand the cause for further proceedings in conformity with this opinion. Decree reversed, with costs to the appellants, and cause remanded.

(185 Pa. St. 179)

IN RE JOHNSTON'S ESTATE.

(Supreme Court of Pennsylvania. March 21, 1898.)

WILLS—PERPETUITIES—DEVISES—POWERS.

1. A devise to trustees, to hold and manage for 75 years, and annually pay the income to testator's children, does not violate the rule against perpetuities; the estate, both legal and equitable, being vested at once.

2. A devise of a remainder to testator's children that may be living 75 years after his death and the legal descendants of any of his children then dead, such descendants to take such portion as their deceased parent would have taken if then living, is void, as creating a perpetuity; the estate being contingent by reason of the uncertainty as to the persons who will take, which cannot be eliminated before the end of 75 years.

3. A power of sale given to trustees, to be exercised 75 years after testator's death, is void, as violative of the law as to perpetuities.

4. A devise to trustees, to hold and manage for 75 years, and annually pay the income to testator's children, is void; being adopted as a means, in connection with the remainder over to such of testator's children as might be living at the termination of the 75 years, to avoid the statute of perpetuities, and the main purpose of testator being defeated by the devise in remainder being void, as against perpetuities.

Appeal from court of common pleas, Franklin county.

In the matter of the estate of George Johnston, deceased. Bill by Joseph Johnston, son of deceased, against Robert C. Johnston, trustee, and others, to have a devise, in trust, contained in the will of deceased, declared void. Decree for plaintiff. Defendants appeal. Affirmed.

The part of the will containing the devise, and the opinion of the court below, are as follows:

Will.

"I give and devise the said five tracts of land last above described unto my executors, hereinafter named, and to their successors in the trust (to be chosen in the manner hereinafter appointed), upon the following trusts, and no other, to wit: That the said executors and their successors in the trust shall have, take, and hold the said five tracts of land (subject as hereinafter mentioned) for and during the period of seventy-five years after my decease, and they (the said executors) are to have the exclusive control and management of the said five tracts of land during the aforesaid period, to take, receive, and collect the annual rents, issues, and profits thereof, and out of the rents, issues, and profits of the said five tracts of land the said executors shall pay all debts due by me, as well also all charges, interest, dowers, claims, or demands charged upon either of the said five tracts of land, and also all the costs of repair, taxes, and expenses of keeping the same in good repair; they shall also pay, out of the rents, issues, and profits of the said five tracts of land, all legacies hereinafter bequeathed, as well as the dower and interest on the same in the tract of land herein bequeathed to my daughter, Elizabeth Johnston; and, so soon as the net income from the said five tracts of land shall be sufficient to meet all the aforesaid demands, I direct that my executors shall pay the same, and make a full settlement of the estate without unnecessary delay; and, so soon as the said settlement is made, I direct my children then living to choose some suitable person as trustee, and to the person so chosen (or his successor, in the case of his death, who shall be chosen in the same way, or, in the case of the death of all my children, by a majority of their issue) I give and bequeath all the power and authority necessary to execute this trust. And I hereby direct the said trustee, or his successor in the trust, after collecting the rents, issues, and profits of said five tracts of land, and paying out the necessary expense of keeping the same in good order and repair, and paying the taxes and a reasonable compensation for his services, shall annually, on the first day of May in each year, during the said period of seventy-five years, divide and distribute among all my children, share and share alike, and the children of such of my children as may during said period depart this life; the children of such deceased children to have and take, however, only such portion and share of said rents, issues, and profits as their deceased parents would have taken, if living. The said mode of distribution to obtain,

also, in regard to said rents, issues, and profits, among descendants of more remote degree than children's children. And after the expiration of the said period of seventy-five years the said trustee, chosen as aforesaid, or his successor in the trust, shall have the right, and they are hereby fully authorized and empowered, to sell said five tracts of land, and to make, execute, and deliver good and sufficient deeds to the purchasers thereof, as fully and completely as I myself might and could do. The proceeds of the sale of the said five tracts of land to be distributed and divided by the said trustee, or his successor, to and among all my children, share and share alike, that may be then living, and the legal descendants of any of my said children that may then be dead; the legal descendants of such deceased child or children to take, however, only such share and portion of the said proceeds as their deceased parent would have taken, if then living."

Opinion.

"The question presented is an interesting one, and we have given it our best consideration. It is first of all necessary that we have a clear understanding of what is meant by a perpetuity, and the rule which prohibits grants creating them, or tending to create them, clearly stated. Perpetuities have been variously defined, and the rule against them has been expressed with quite as much variety. Whatever confusion there is among the cases, and it is not a little, may be due to this circumstance; but, in whatever terms defined or expressed, there is such a uniform and consistent recognition of the essential features and principles in every definition and rule, that, so far as these are concerned, there is no conflict whatever between them. All are not alike clear, but, if closely studied, all will be found consistent with each other. Nowhere do we find a more intelligible and satisfactory statement of doctrine and rule than is given in the case of *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 28, in a summary as lucid as it is comprehensive. It is as follows: '(1) Perpetuities are grants of property wherein the vesting of an estate or interest is unlawfully postponed; and they are called "perpetuities," not because the grant, as written, would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title or its vesting. (2) The law allows the vesting of an estate or interest, or the power of alienation, to be postponed for the period of lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints, and therefore as void, and consequently the estate or interests dependent upon them are void; and nothing is denounced by the law as a perpetuity that does not transgress this rule.' Next, it is important that we distinguish clearly between the two separate and distinct estates or interests which this de-

vises attempts to create: First, a term of seventy-five years in a trustee for certain beneficiaries; then, upon its determination, an absolute interest over to those, in effect, who would be entitled to take if the testator had then died intestate. To determine whether the devise is repugnant to the rule, and, if so, in what particular and with what result, these several estates must be considered separately, since it sometimes happens, where several estates are created in the same subject, that, while one must fall because of its offense, the other may stand. Thus prepared for the inquiry, it may not prove so difficult as it at first appears.

"First, then, as to the particular estate,—the term for years given to the trustee: There are many reported cases—among them *Barnum v. Barnum*, 26 Md. 119; *Deford v. Deford*, 36 Md. 168; *Thorndike v. Loring*, 15 Gray, 391; *Fosdick v. Fosdick*, 6 Allen, 41—in which devises not distinguishable from this are held to be violative of the rule, on the ground that the trusts of the wills required for their execution a longer period than the rule allows. If the doctrine of these cases be correct, then, clearly enough, this particular estate offends against the rule, since not only is there a possibility that the seventy-five years from the death of the testator will carry beyond the lifetime of the last surviving child of the testator, with twenty-one years and nine months added thereto, but, in view of the ages of these children, it is altogether probable that this will result. Besides, in such a case as this, a still shorter limit must be applied; for the rule is that, where the testator fails to avail himself of lives in being, and adopts a term of years, without reference to any life in being, the term cannot extend beyond twenty-one years from his death. 'If an absolute term is taken, and no anterior term for a life in being is referred to, such absolute term cannot be longer than twenty-one years.' *Perry, Trusts*, p. 349. So we have a manifest repugnance between the devise and the rule, if the doctrine of the cases referred to be correct. It does not appear that these cases have been overruled, yet Prof. Gray, in his work on *Perpetuities* (pages 166-176), insists that in all of them the rule had been both misunderstood and misapplied. His argument to us seems complete, as it is convincing. Beginning with the origin of the rule, and tracing its development through all stages, he shows how, in its design and purpose, and uniform acceptance and application, except in the cases criticised, it was directed against future contingent interests only, and never could have had any reference whatever to vested estates. In this he is sustained by the terms of every definition that has been given of a perpetuity, and by every authority on the general subject. The cases referred to are not so many attempts to enlarge and widen the rule, so as to embrace other subjects than those originally intended, but, as he insists, proceed upon a misapprehension of its purpose and scope. The variance

between them and the doctrine as stated in *City of Philadelphia v. Girard's Heirs*, supra, must strike any one, and it is impossible to see how both can be correct. The particular estates which they condemn are present vested interests, whereas the rule applies only to future estates. They condemn them because the trusts with which they are clothed may require in their execution a larger period than that prescribed by the rule. But Prof. Gray shows, clearly enough, that the rule has no concern with anything but the beginning of the estate; that it requires a vesting within the period, and, where this occurs, the extent or continuance of it is something wholly outside of its operation. And so, in section 232, he asserts as admitted and established doctrine that an interest is not obnoxious to the rule if it begin within a life in being and twenty-one years thereafter, though it may extend beyond. The same thing is asserted by Lewis in his work on *Perpetuities*, on page 144, and with equal clearness and emphasis. He says: 'The remoteness against which the rule is directed is remoteness in the commencement, or first taking effect, of limitations, and not in the cesser or determination of them. An estate that is to arise within the prescribed period may be so limited as to be determined on the happening of any event, however remote.' There is, of course, no disputing such authority as this; and the doctrine is so clearly expressed, as in the authority we have cited from our own State Reports, that it admits of no two interpretations. Manifestly, the cases criticised are reconcilable with neither. Applying, then, this doctrine and rule to the particular estate created by the devise we are considering, rather than subjecting it to the rulings made in these cases which have been referred to, it seems, judged of by itself, unrelated to other parts, to stand clear of the rule. Here the particular estate, both legal and equitable, vested at once. There was nothing future about it, except its continuance. It began within the prescribed limits, and it is of no consequence, so far as concerns the rule, that it extends beyond it. Each of the testator's children took a present vested interest in the term of seventy-five years, the full enjoyment of which nothing could defeat but his or her death before its expiration,—not transmissible, because not an estate of inheritance, but otherwise as freely alienable as any other estate or interest. It is impossible to see how the rule against perpetuities can be applicable in such a case as this.

"The ulterior estate—that is, the gift over to testator's children and grandchildren, upon the determination of the estate given to the trustee—must stand or fall by the same test. The determining question must be, is this a vested interest, or is its vesting suspended until the expiration of the particular estate? If the former, it, too, is outside of the operation of the rule; but, if the latter, the rule necessarily applies, and as certainly condemns it, since, if there be any suspension at all, it is for sev-

enty-five years, whereas the utmost limit in a case like this is twenty-one years. An estate is said to be vested in interest when there is a present fixed right in some one of future enjoyment of it; it is not vested, but contingent, when either the person who is to enjoy it or the event upon which the estate is to arise is uncertain. The rule, as stated in *Smith, Ex. Int.* p. 281, is as follows: 'Where real or personal estate is devised or bequeathed to such children, or to such child or individuals, as shall attain a given age, or the children who shall sustain a given character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class, preceding such restrictive description, so that the uncertain even forms part of the description of the devisee or legatee, the interest so devised is necessarily contingent, on account of the person. For, until the age is attained, the character is sustained, or the act performed, the person is unascertained; there is no person answering to the description of the person who is to take as devisee or legatee.' In our case, a sale of the land is directed at the expiration of seventy-five years from testator's death, and the proceeds are bequeathed in the following language: 'To and among all my said children, share and share alike, that may be then living, and the legal descendants of any of my said children that may then be dead; the legal descendants of said deceased child or children to take, however, only such share or portion of the said proceeds of sale as their deceased parent would have taken if then living.' There is here no distinct gift to the whole class of children. Those only are to take who survive the determination of the particular estate. The language used makes a fair equivalent of a bequest to such children 'as shall attain a given age.' Not for seventy-five years can there be any person answering to the description of the persons who are to take as devisees or legatees. It is not as though the parties had been individuated, as in *McClure's Appeal*, 72 Pa. St. 414, where the interest was held to be vested. The peculiar features of that case are said, in the subsequent case of *Cascaden's Estate*, 153 Pa. St. 172, 25 Atl. 1075, to have controlled its decision. The case last mentioned approaches most closely the case in hand. There the bequest was as follows: 'When the youngest child arrives at the full age of twenty-one years, then I direct all my said real estate and investments to be converted into money by my executors, and divided as follows: I give and bequeath to my wife, out of said moneys, fifteen thousand dollars, and all the rest, residue, and remainder I direct to be divided among my said children, share and share alike, subject to the deduction which I have before directed to be made. Should any of my children die before the youngest child arrives at the age of twenty-one years, leaving children, then the said share shall be divided among said children, share and share alike; or, if he or she shall die without leaving children, then

his or her share shall be divided among the remaining children, share and share alike.' It was held that the interests given to the children did not vest until the youngest arrived at the age of twenty-one years. In the opinion, the court distinguished clearly between the facts of this and of McClure's Appeal, *supra*. They said: 'In that case [McClure's Appeal] the testator directed the residue of his estate, if any, remaining after the death of his wife, to be equally divided between his nephews and nieces, individuating them by their names, and declaring that each is to have an equal share. It was said in the opinion of the court: "The gift is to his nephews and nieces, not as a class, but by name as individuals, without words of survivorship, and with no bequest over, in the event of their death, in the life of the widow." Herein that case differs from the one in hand. In the latter the testator does not individuate his children and give each one a share by name. In fact, the names of his children are nowhere mentioned in the will. The gift to them is to a class, and the distribution is to be made among them, share and share alike, when his youngest child shall arrive at the age of twenty-one years, and the share of such child as shall die before that period without leaving children shall be divided among the remaining children, share and share alike. It is obvious that, had Mrs. Manrise [a daughter of the testator] died prior to the distribution without leaving children, her share would have gone to the surviving brothers and sisters under the terms of the will. But it was contended that, because she left a child surviving her, her interest in the estate vested in her descended to and vested in her child. Had this child lived until the period of distribution, there can be no doubt she would have been entitled to her mother's share. As she died before that time, to hold that she is entitled to her mother's share is to accord to her a higher estate than her mother possessed. The estate of the latter was contingent upon her living until the youngest child came of age.' In the present case it is the event—that is, the determination of the term of years—that is to indicate which, if any, of the testator's children or grandchildren are to take. The taking is made contingent upon their surviving that period. Many authorities might be cited in support of the view we take of this part of the devise in question,—that its effect is to create a future contingent interest,—but it is hardly necessary to do more than we have. What gives it greater confirmation than any adjudication upon a case with general features the same (since all the cases are more or less distinguishable from each other, and each stands upon its own peculiarities) is the undisguised and unmistakable purpose of the devise to accomplish this very result,—as manifest, we think, as though expressed in words. After all, it is the intention of the testator that governs.

It is impossible, as we read this will, to conclude that the testator intended that any of his children should take an estate or interest in the remainder which would be transmissible or alienable during the continuance of the particular estate. And yet to hold these interests vested would give them this quality. On the contrary, it is obvious that the testator's chief and controlling purpose throughout was to tie up his estate, and hold it intact beyond the power of either children or grandchildren to interfere with the final distribution he proposed at the end of seventy-five years.

"And it may be that we must yet allow to this purpose a still wider and more controlling effect, since, having determined that this ulterior estate is a future contingent interest, repugnant to the rule, and therefore void for remoteness, it remains to consider in what condition this leaves the particular estate. As we have said, this latter, standing by itself, unrelated to other parts, does not offend against the rule; but this needs to be qualified somewhat. The estate it grants is free from offense, since it is freely alienable and in no sense tends to a perpetuity; but it contains a power to sell which flatly contravenes the rule, and which dare not be exercised. The rule with respect to powers contained in a grant is the same as that which applies to estates. 'If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. This happens when a donee of the power and the occasion on which it can be exercised may both, by possibility, be in existence beyond the limits of the rule.' Gray, *Perp.* 306. So, then, we have nothing left of this whole devise but a simple estate of seventy-five years in a trustee, every other interest in the land passing directly and immediately to the heirs of George Johnston, the testator; in other words, the heirs taking the fee in the lands subject to this term of years, if the latter be allowed to stand. The result would be easily reached if the beneficiaries under the trust were the 'heirs' of the testator, but they are not. The gift is to his children and the legal descendants of such as shall die during the period. The rule with respect to void ulterior limitations is stated by Lewis (page 420) as follows: 'As to prior limitations, the invalidity of a limitation on account of remoteness places all prior gifts in the same situation as if it had been omitted entirely from the disposition scheme. * * * A limitation of a life estate, or other partial interest, with a remainder expectant upon it, which is void for remoteness, of course, remains in statu quo prius, neither receiving enlargement nor suffering diminution.' If this rule admits of no exception, but is to be applied in every case, then this particular estate must stand. But that is a conclusion that, it would seem, ought, if possible, to be avoided; for the devise, stripped of

the power of sale, and avoided as to the larger estate over, cannot with any reason be said to express the testator's wishes. It will not be pretended that the particular estate was designed to serve any purpose of its own, distinct from the limitation over. On the contrary, it is evident that it was adopted simply as a means to an end,—a hook upon which to hang suspended a tied-up estate, until such time as testator desired it to be opened and parted. How does it in any way enforce testator's wishes to leave the hook in its place, when there is no estate to suspend it upon? The estate which he expected to suspend for seventy-five years, if we are right in our previous conclusions, the law has disposed of,—vested it at once in his heirs who have the right to dispose of their interests therein at any time. The whole scheme of the testator in this regard has been defeated. Instead of observing his will, is it not rather enforcing one not his to keep alive under such circumstances an estate which he contemplated only in connection with another and larger one which the law has annulled? It would seem that such a case ought, upon reason, to be excepted out of the general rule. In *McSorley v. Leary*, 4 Sandf. Ch. 414, it is held that, if a part of the testator's general scheme is that the estate shall be kept entire for any unlawful period, no part of the provisions can be sustained, but the estate to which the void provisions relate will vest immediately in the heir. 'When a will contains distinct and independent provisions, so that different portions of the property, or different estates or interests in the same portions of the property, are created, some of which are valid and others invalid, the valid will be preserved, unless those which are invalid and those which are valid are so dependent upon each other that they cannot be separated without defeating the general intent of the testator.' *Haxtun v. Corse*, 2 Barb. Ch. 506. The rule is stated in argument in *Darling v. Rogers*, 22 Wend. 495, as follows: 'Where a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole instrument, taken together, was evidently never the intention of the testator; otherwise, when the good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest.' In *Hawley v. James*, 16 Wend. 61, in which the decision of the chancellor was reversed, it is distinctly asserted in the opinion of the chief justice that valid life estates, prior to void remainders, will not be upheld if upholding them would work injustice and defeat the main object of the testator. Prof. Gray, in his work on *Perpetuities*, clearly recognizes such exceptions to the general rule. In discussing those cases which seem to have overlooked that part of the rule which makes it applicable only to future

contingent interests, he makes special reference, on page 172, to the case of *Thorn-dike v. Loring*, 15 Gray, 391, which of all the cases we have seen most nearly approaches this in its essential features. In that case a fund was given by will to trustees for fifty years (it is of no consequence in this connection that it was given to accumulate); then to be paid over to those who would be entitled to the testator's estate if he had died intestate. The court held that the gift to the trustees was void for remoteness; that therefore the whole trust fell; that a residuary clause in the will took effect; and that the estate passed at once to the residuary legatees. Prof. Gray shows that the particular estate did not offend against the rule; that it was good in law or equity, though the ulterior gift was not. Nevertheless he sustains the action of the court in setting aside the whole trust, in the following language: 'It may be fairly urged in support of the decision in *Thorn-dike v. Loring* that the trust was created solely for the purpose of making an invalid gift, and that, its sole object being illegal, the whole trust failed.'

'It is equally clear that in the present case the only purpose the testator had, in connection with the trust he established, was to make an invalid gift. His aim was to control the disposition of his property beyond the period that the law allows, and this devise was the scheme adopted to accomplish it. It was a manifest attempt to accomplish an illegal object, and for this reason, if for no other, the whole scheme should fail. A like result follows from the circumstance that the two estates are not separable; that is to say, they are so related that upholding the one and avoiding the other would clearly defeat the main, if not the only, purpose of the testator in making the devise. No cases are to be found in Pennsylvania, supporting the view here expressed, but neither can any be found which are in conflict with it. There are cases—*Lawrence's Estate*, 136 Pa. St. 354, 20 Atl. 521, and others—which recognize the general rule as stated by Lewis, viz. that a prior estate neither receives enlargement nor suffers diminution when a remainder expectant upon it is declared void for remoteness. But the question whether this general rule admits of exceptions is nowhere discussed in any of them. Elsewhere, we have seen, the rule is not invariably applied, and a recognized exception is where, as in this case, the failure of the ulterior estate disturbs, so as to defeat, the main and dominant purpose of the testator. Another is where the particular prior estate is adopted as a means for the accomplishment of that which the law forbids. The present case falls within both exceptions. Our conclusion is that the devise of the six several tracts of land described in the bill, contained in the last will of George Johnston,

deceased, is wholly and entirely void, and that, as to these lands, the said George Johnston died intestate. It follows that the plaintiff, who is a son and heir at law, is entitled to the relief prayed for. Let a decree in accordance herewith be prepared and submitted."

E. J. McCune and W. Rush Gillan, for appellants. Sharpe & Sharpe, for appellee.

PER CURIAM. The very able and exhaustive opinion of the learned court below in this case is so full and complete, and evinces such a painstaking care in its preparation, and is so entirely satisfactory to us, that we adopt it as the opinion of this court, and on it we affirm the decree of the common pleas. Decree affirmed, and appeal dismissed, at the cost of the appellants.

(185 Pa. St. 233)

GERNERD v. GERNERD.

(Supreme Court of Pennsylvania. March 28, 1898.)

WIFE — ACTION FOR INDUCING HUSBAND TO DESERT HER — LIMITATIONS.

1. Since removal of disability of married women, a wife may maintain action for the wrongful inducing of her husband to leave her.

2. An action by wife for inducing her husband to leave her is not for words spoken, within the statute of limitations, though words are proven as one of the means employed by defendant to effect his purpose.

Appeal from court of common pleas, Lehigh county.

Action by Laura Gernernd against Charles A. Gernernd. Judgment for plaintiff. Defendant appeals. Affirmed.

Evan Holben and R. E. Wright, for appellant. E. J. Lichtenwalner and Edward Harvey, for appellee.

FELL, J. The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of *Winsmore v. Greenbank* (decided in 1745) *Willes*, 577. The right of a wife to maintain an action for the same cause has been denied, because of the common-law unity of husband and wife, and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery when her husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship, and aid of the other, and the injury is the same whether it affects the husband or the wife. Where the wife has been freed from her common-law disabilities, and may sue in her own name and right for torts done her, we see no reason

to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognized and sustained in jurisdictions where she has the capacity to sue, notably in the cases of *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Foot v. Card*, 58 Conn. 4, 18 Atl. 1027; *Seaver v. Adams* (N. H.) 19 Atl. 776; *Westlake v. Westlake*, 34 Ohio St. 621; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842; *Bassett v. Bassett*, 20 Ill. App. 543; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202; *Clow v. Chapman*, 125 Mo. 101, 28 S. W. 328; *Mehrhoff v. Mehrhoff*, 26 Fed. 13. The New York and Indiana cases cited overrule the earlier cases in those states in which a different conclusion had been reached. The only decisions in which we find the right denied are *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522, and *Doe v. Roe*, 82 Me. 503, 20 Atl. 83. Of late years, the right of the wife to sue has generally been maintained by text writers. It is said in *Bigelow, Torts*, 153: "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife." And in *Cooley, Torts*, 228: "We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." In 1 *Jag. Torts*, p. 467, many of the cases on the subject are referred to, and the conclusion is thus stated: "On the other hand, it has been insisted that in natural justice no reason exists why the right of the wife to maintain an action against the seducer of her husband should not be co-extensive with the right of action against her seducer. The weight of authorities and the tendency of the legislation strongly incline to the latter opinion." The same proposition is stated in 1 *Am. & Eng. Enc. Law* (2d Ed.) p. 166, and in 1 *Bish. Mar. & Div. § 1358*. The defendant in this action was the father of the plaintiff's husband, and the case was one to be carefully guarded at the trial. The intent with which he acted was material in determining his liability. It was his right to advise his son, and in so doing in good faith, and with a proper motive, he should not be regarded in the same light as a mere intermeddler. A clear case of want of justification on the part of the parents should be shown before they should be held responsible. *Cooley, Torts*, 265; *Hutcheson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439; *Hulling v. Huling*, 32 Ill. App. 519; *Tasker v. Stanley*, 153 Mass. 143, 26 N. E. 417; *Fratini v. Caslini* (Vt.) 44 Am. St. Rep. 850, note (s. c. 29 Atl. 252). On the trial the plaintiff was held to distinct and clear proof that the defendant wrongfully and maliciously caused her husband to abandon her. Every right which the defendant could properly claim in this regard was carefully stated in a very

clear and adequate charge. The claim that the action was, in effect, an action for words spoken, and consequently barred by the statute of limitations, cannot be sustained. It was not either in form or in substance an action of slander, and the words proven were only one of the many means employed by the defendant to effect his purpose. The judgment is affirmed.

(185 Pa. St. 235)

WILKINSON v. BECKER.

(Supreme Court of Pennsylvania. March 28, 1898.)

BUILDING CONTRACT—ELECTION TO COMPLETE AT CONTRACTOR'S EXPENSE.

Notice by defendant owner of a building to plaintiff, who had contracted to do the plumbing in it, that certain things had not been properly done, and that he would not accept the plumbing till all was complete, and, "unless you immediately comply with the contract, I will employ a plumber to do so, and deduct the cost from the contract price," is an election by defendant to complete the work if plaintiff did not, entitling plaintiff to contract price less expense of completion, and does not require formal acceptance by plaintiff, and waives the architect's approval as a prerequisite to recovery.

Appeal from court of common pleas, Montgomery county.

Action by John M. Wilkinson against Henry Becker to enforce mechanic's lien. Judgment for plaintiff. Defendant appeals. Affirmed.

W. Henry Sutton, for appellant. H. H. Gilyson and William F. Solly, for appellee.

FELL, J. The lien filed in this case was for plumbing and gas fitting done under a written contract. The defense set up was that the plaintiff had not substantially performed the contract, and that therefore nothing was due him. On this issue the case was tried. The rule as to substantial performance was fully stated in the charge, and the jury was instructed that the mere possession and use of the house by the defendant could not be considered as an acceptance of defective work, and that it imposed no liability on him to pay any part of the contract price if the whole contract had not been substantially completed. It is conceded that the instruction on this subject was quite as favorable to the defendant as he was entitled to.

The principal objections to the charge now insisted on relate to the instruction as to the effect of the letter of November 8, 1890, written by the defendant to the plaintiff, and to the direction to the jury that, if the defendant undertook to complete the work, and deduct the cost from the contract price, he could not set up the nonperformance of the contract as ground for withholding from the plaintiff the whole of the contract price. In the letter of November 8th, the defendant, after mentioning a number of particulars in which he claims the work is incomplete, says: "These things and others have not

been properly done, and must be remedied. I will not accept the plumbing and gasfitting until all is complete, and, unless you immediately comply with the contract, I will employ a competent plumber to do so, and deduct the cost from the contract price." In considering the effect to be given to this notice, all the circumstances must be considered. A dispute between the parties as to the character of the work had existed for a year and a half before the letter was written; and during this period there had been no suggestion by the defendant that the defects of which he complained were of such a character as to release him from payment of the whole price, and the plaintiff's right to a just compensation had been repeatedly recognized by the defendant. The defendant had moved into the house before the work was completed, and during its progress he had supervised it, ordered changes, and directed the workmen what to do. After he had occupied the house for four months, in answer to a demand for settlement, he wrote the plaintiff, explaining the delay, but making no objection to the work done or to the nonperformance of the contract. Fifteen months before the date of this letter, the defendant had written to the plaintiff that he would proceed to remedy the defects, and "charge the cost to him"; and, in pursuance of this notice, the plaintiff's workmen had gone to the house, and attempted to make the work satisfactory to the defendant. The position of the plaintiff throughout had been that he had fully complied with the contract, and that the objections to the work had not been made in good faith, but to delay or avoid payment; and when his efforts to make the work satisfactory to the defendant, or to adjust their differences, had failed, he assented to the proposition made, rather than prolong a fruitless controversy, and was willing that the cost of remedying any defects shown to exist should be charged to him.

We see no error in holding that this notice was an election by the defendant to complete the work if the plaintiff failed to do so, and that the plaintiff could recover the contract price less the cost necessary to complete the work in accordance with the specifications. It was the right of the defendant to hold the plaintiff to the terms of the contract, and, if there was a failure of performance in material matters, he was not liable for any part of the contract price. His use and occupation of the house imposed no liability on him to pay for the defective work, and none would have been imposed by remedying the defects and supplying the omissions in the work. But the notice given left the plaintiff free to do the work himself, or to have it done at his cost by the defendant. It did not leave the defendant free to assert that he was not answerable for the value of the work done because the whole had not been completed.

If the architect's approval was a prerequisite to recovery by the plaintiff, it was waived by an undertaking by the defendant to complete the work, and deduct the cost from the contract price. We agree with the learned trial judge that, as the notice was an affirmation only of the defendant's rights under the agreement, its formal acceptance by the plaintiff was not essential, and that the evidence did not show that an agreement to arbitrate had been entered into by the parties. The case was carefully and ably tried, and we find no error in the record. The judgment is affirmed.

(185 Pa. St. 217)

UNION TRUST CO. v. CITIZENS' TRUST & SURETY CO.

(Supreme Court of Pennsylvania. March 28, 1898.)

GUARANTY — PERFORMANCE OF BUILDING CONTRACT.

A policy by which defendant undertook to protect plaintiff against loss by reason of mechanics' liens for work or material furnished K. "in and about the erection of the buildings" which he had contracted to erect for plaintiff, and to "guaranty the completion of the buildings to be erected on the said lots under said contract," may be sued on to recover the advance payment made by plaintiff in accordance with the contract, K. having, after receiving it, abandoned the work.

Appeal from court of common pleas, Philadelphia county.

Action by the Union Trust Company, guardian, against the Citizens' Trust & Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

David Jay Myers, for appellant. E. Spencer Miller and J. Howard Gendell, for appellee.

WILLIAMS, J. The building contract that gives rise to this litigation was a little outside of the customary form, but it is by no means difficult to understand. The Union Trust Company, the plaintiff, was the guardian of several minors, who were owners of land in Luzerne county which had been laid out in village lots in a projected village called "Heidelberg." As such guardian, and with the leave of the orphans' court of Luzerne county, it entered into a contract with H. E. Klein for the building of five dwelling houses upon five of these lots. The purport of the contract was that Klein should furnish the materials and labor necessary to complete the five houses in a good and workmanlike manner for the price of \$1,200 for each house. The trust company was to advance to Klein \$1,000 of the price of each house in its own bond, which was to be secured by a separate mortgage covering the lot on which the house was to be erected. The remaining \$200 of the price of each house was to be paid when the contract was fully performed by Klein. But, as the \$1,000 on each house was to be paid in advance of

any work done upon it, the propriety of securing the trust company against any default upon the part of Klein was recognized in the contract, and provision was made for this purpose, under and in pursuance of which the contract or policy now sued on was made by the defendant, the Citizens' Trust & Surety Company, and delivered to the plaintiff. Two of the bonds provided for in the building contract were then delivered to Klein as an advance payment of \$1,000 upon each of two of the contemplated houses. This advance was made to enable Klein to provide means for doing the work under his contract, and had the same effect upon the Union Trust Company, guardian, as a certificate of no set-off would have done. This contract or policy of insurance undertook explicitly to insure and protect the Union Trust Company against all loss by reason of mechanics' liens for work or material furnished to Klein "in and about the erection of the buildings" provided for in the building contract, and also to "guaranty the completion of the buildings to be erected on the said lots under the said contract." After all this was done, Klein began work upon the cellars for the two dwelling houses, and continued until the excavations therefor were finished. He then, for some reason that does not appear, abandoned his contract, and has made no effort since that time to build either of the houses, and they have never been built by the defendant, who was surety for his performance. Meantime he has assigned both of the bonds received by him as an advance payment upon his contract from the Union Trust Company. He does not appear to have disposed of either of them for its full value, but to have pledged them for sums of money received by him, amounting in the aggregate to about \$900. This would have been all right, and perfectly fair, if he had gone on, and built the houses; but he did not do this. He did nothing in the way of performance except to dig the cellars. How, now, shall the Union Trust Company protect itself from loss? Clearly, by resorting to the contract or policy of the defendant, in which the full performance of his contract by Klein is expressly guarantied. This, it will be noticed, is not a guaranty of the ability of Klein to do the work, or of his solvency, but a "guaranty" that he will complete the work as he had contracted to do. When he did not complete it, a right of action accrued. The defendant can be called upon to meet its own engagement whenever the fact that Klein has failed to meet his becomes apparent. If Klein had built the houses, and liens were being enforced against them, the defendant could not be called upon to pay, under its policy, until the amount of such liens had been ascertained, for until then the extent of its liability upon its own covenants could not be fixed. But the covenant on which the plaintiff rests this action is that in which the defendant undertakes to be

liable to the extent of \$2,000 for the performance of the building contract by Klein. The breach alleged is the total failure on his part to build at all. The damages claimed are the \$2,000 paid in advance, for which the plaintiff has received nothing. The learned judge of the court below held correctly that, as the case stood at the close of the evidence, the plaintiff was entitled to recover. The rejection of the offer to show the value of the lots upon which these houses were to be erected furnishes no ground for reversal. The value of the lots was not a relevant subject. The plaintiff was suing to recover its advance payment made upon the security of the defendant's undertaking guarantying full performance by Klein of his contract. It was conceded that he did not perform. The value of the lots was unimportant, and immaterial, therefore, to the defense, and the evidence offered was properly rejected. The plaintiff is entitled to have its bonds returned to it, or, if that cannot be done, to be reimbursed for its loss. The order made by the learned judge of the court below fixing the amounts due to the persons now in possession of said bonds, and providing for this assignment, was equitable, and should have been accepted by the defendant. It may yet furnish a basis upon which the rights of the respective parties may be adjusted. The assignments of error are overruled, and the judgment is affirmed.

(185 Pa. St. 223)

ALBERTSON v. CITY OF PHILADELPHIA.
(Supreme Court of Pennsylvania. March 28, 1898.)

OPENING STREET—DAMAGES—EVIDENCE.

Where, after defendant's witness, in an action for damages for opening street, has testified as an expert to value of the land before and after the opening, and on cross-examination has stated that his estimate of the value after the opening did not include the cost of street improvements, the question is asked him, "What would the street improvements cost?" it is presumably an attempt to show, as an independent matter, the cost of future improvements, which is not permissible; and therefore, in absence of a showing that it is to test correctness of the witness' estimate, objection to it is properly sustained.

Appeal from court of common pleas, Philadelphia county.

Action by Lewis Albertson against the city of Philadelphia. From an adverse judgment, plaintiff appeals. Affirmed.

Wm. H. Shoemaker and Wm. S. Stenger, for appellant. Francis L. Wayland, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

FELL, J. On the trial of an action to recover damages caused by the opening of a street, the defendant called a witness, who testified as an expert to the value of the land before and after the street was opened. On cross-examination this witness gave an

estimate of the value of each piece of land after the street was opened, and stated that the estimate did not include the cost of street improvements. He was then asked, "What would the street improvements cost?" This question was objected to by the counsel for the defendant, and the objection was sustained. This gave rise to the only exception taken during a trial of unusual length, and the only matter now presented for consideration. The cost of future municipal improvements cannot be shown to establish an independent item of claim for damages caused by the opening of a street, but it is the undoubted right of either party to ascertain by cross-examination whether the witnesses of the other, in estimating the difference in market value before and after the opening, have taken into consideration the probable expense to the owner of such improvements, and the effect which they would have upon the value of the land. *Harris v. Railroad Co.*, 141 Pa. St. 242, 21 Atl. 590; *Dawson v. City of Pittsburgh*, 159 Pa. St. 317, 28 Atl. 171; *Reyenthaler v. City of Philadelphia*, 160 Pa. St. 195, 28 Atl. 840. It would have been competent to have tested the correctness of the witness' estimate by questions directed to show what elements of advantage or disadvantage to the property he had considered in forming his opinion, but the question asked disclosed no such purpose. When it was objected to, no offer was made to sustain it, and there was no explanation of its purpose. Presumably, it was an attempt to show as an independent matter the cost of future improvements, and there was no error in sustaining the objection to it. The judgment is affirmed.

(185 Pa. St. 233)

MARSHALL v. HERSHEY.
(Supreme Court of Pennsylvania. March 28, 1898.)

WATER RIGHTS—EXTENT OF CLAIM.

Where plaintiff, in an action by a lower against an upper owner of lands on a stream, to have his rights to the use of the water determined, claims in his statement the natural flow of the stream, and at the trial, while conceding defendant's right to divert a part, distinctly asserts his right to have at all times an uninterrupted flow of water sufficient for his needs, he cannot be held to have fixed a standard for measurement of the amount he was entitled to, by his testimony, in relation to the history of the water supply, that after diversion, by a mill race, of the stream, which originally passed through his land, his water supply was for some time taken from the race by means of a pipe, which had always furnished enough when not obstructed, though it appeared that this was a 2½-inch pipe; as the amount that will pass through a pipe depends on the head of water and the inclination of the pipe and its position in relation to the current.

Appeal from court of common pleas, Chester county.

Trespass by James Y. Marshall against Emanuel Hershey for diverting plaintiff's wa-

ter supply. Judgment for defendant. Plaintiff appeals. Reversed.

J. Carroll Hayes and Wm. M. Hayes, for appellant. Arthur T. Parke and J. Frank E. Hause, for appellee.

FELL, J. The judgment in a prior action between the same parties determined the right of the plaintiff to the use of so much of the water of a stream which ran through his farm as was necessary for agricultural and domestic purposes. On the trial of that action the plaintiff, whose land is below that of the defendant, conceded the defendant's prescriptive right to divert a part of the water to his mill, but he claimed that enough should be left to flow in the natural channel to supply the needs of his farm and dwelling. The defendant claimed the right to use all of the water, and had diverted all of it to his mill. The issue raised was decided in favor of the plaintiff, and his right thus established. The present action was defended on the ground that at the former trial the plaintiff had fixed a standard for the measurement of the amount of water to which he was entitled, and that he had since received all that he then claimed. Part of the testimony of the first trial was read to the jury, and it was left to them to find whether the plaintiff had at that trial fixed a standard, and, if so, whether he had been supplied according to his own measure.

It appeared at the first trial that the plaintiff had purchased his property 24 years before the commencement of any litigation concerning the water right, and that at that time, at or near the point where the water was diverted to the defendant's mill, a wooden pump stock 10 feet long, with a bore of $2\frac{1}{2}$ inches, extended through an embankment, and conducted water from the mill race to the natural channel, and that when it was unobstructed the supply was sufficient. This pump stock had been removed 10 or 12 years before the trial. After its removal the plaintiff's supply of water came by means of a ditch, until it was finally shut off altogether by the defendant. Immediately after the trial the defendant opened a ditch across the embankment, which furnished an adequate supply, but a few weeks later he closed this ditch, and placed a pump stock, with a bore of two and a half inches, through the embankment, and then claimed that he was furnishing water according to the standard set up by the plaintiff for the measurement of his right, although the amount thus furnished was insufficient for the plaintiff's use. In fact, at times there was not enough thus furnished to reach the plaintiff's property. By the statement filed in the former action the plaintiff did not limit his right, but claimed the natural flow of the stream. At the trial he conceded the right of the defendant to divert a part, but he distinctly asserted his right to have at all times an uninterrupted flow of water sufficient for his needs. Whether he had this right was the question submitted by

the charge and decided by the verdict and judgment. The plaintiff had shown that a part of the stream had passed in its original channel through his property immemorially, until the defendant had diverted all of the water. In describing the condition of the stream when he first took possession of his property, 24 years before, he spoke of the pump stock by means of which the water was conducted from the mill race, and of its removal, and the substitution of a drain for the same purpose, and said that the supply had always been sufficient unless the stock or drain became obstructed. This was in support of his claim of a right to have enough water, by showing that an uninterrupted supply had always been furnished; and nothing that he then said can be construed as limiting the right which he asserted by setting up a standard by which the water should be measured out to him through a $2\frac{1}{2}$ -inch pipe. The uncertainty of such a standard, as to both the quantity and sufficiency of the supply, is manifest. The quantity of water that would pass through the pipe would depend on the head of water in the mill race and the inclination of the pipe and its position in relation to the current, and a quantity sufficient during a wet season might be insufficient during a dry one. We speak only of the testimony of the first trial which was introduced at the second, as it is all that the record presents. In this we find nothing which justified the submission of the question to the jury. The assignments of error, from the eighth to the fourteenth, inclusive, are sustained, and the judgment is reversed, with a venire facias de novo.

(185 Pa. St. 172)

In re HOOPES' ESTATE.

Appeal of HARRIS.

(Supreme Court of Pennsylvania. March 21, 1898.)

WILL—CONSTRUCTION—SUBSTITUTION OF LEGATEE.

Provision of a will that if a legatee shall not survive to receive his portion, and shall leave no children to inherit it, his share shall revert to testator's estate, does not substitute the children as legatees, but they must take by inheritance from the legatee, which they cannot do, the legatee dying before testator.

Appeal from orphans' court, Chester county.

In the matter of the estate of A. Taylor Hoopes, deceased. From decree of orphans' court making absolute rule to dismiss appeal of W. S. Harris, guardian, from decree of register of wills admitting a certain instrument to probate as the will of deceased, said Harris appeals. Affirmed.

The opinion of orphans' court is as follows (HEMPHILL, J.):

"We are asked to dismiss this appeal upon the grounds, because—First, the decree of the register of wills entered May 16, 1892, probating decedent's will of May 17, 1888, has become final and conclusive; and, second, the petitioner, as guardian of the minor children

of W. Cooper Wetherill, deceased, has no interest under the alleged will of January 27, 1888. The guardian claims that the interest of his wards in the estate of the decedent, which entitles him to his appeal, arises under the will of January 27, 1888, through a bequest of \$2,000 to their father, W. Cooper Wetherill, deceased. In said will, among a number of bequests to be paid out of the proceeds of the sale of his farm is one of \$2,000 to William Cooper Wetherill, the father of these minors; but, as Mr. Wetherill's death preceded that of the testator, this legacy would lapse unless otherwise disposed of by the will. The guardian claims that such disposition has been made by the substitution of his children, and points to the following clause of the will as making it: 'In case any one to whom I have herein named (or made) a bequest shall not survive to receive his or her portion, and shall leave no child or children to inherit it, the share of any or all such legatees shall revert to my estate.' This is not a clause of substitution; for, if under it the children take, it must be by inheritance, and the legacy consequently have to first vest in the parent legatee. As Mr. Wetherill died before the testator, the legacy bequeathed to him never vested in him, and his children, consequently, could not inherit it from him, and have, therefore, no interest under this will.

"If, however, we are wrong in our construction of the will, the appeal has been taken too late. The decree of the register probating the will of May 17, 1888, was entered May 16, 1892, and no appeal was taken therefrom until May 15, 1897, five years, less a day, thereafter. This decree was, under the act of March 15, 1832, conclusive as to the personal estate unless appealed from within three years, and its legality could not be inquired into collaterally. *Carpenter v. Cameron*, 7 Watts, 51. The appeal in this case was consequently not taken in time, and for this reason, as well as for want of interest in the appellant, must be dismissed. The rule is therefore made absolute, and the appeal dismissed."

W. S. Harris, for appellant. Alfred P. Reid and J. Frank E. Hause, for appellee.

PER CURIAM. For reasons given by the learned president of the orphans' court in his opinion, sent up with the record, he was clearly right in dismissing the appeal referred to in the specification of error. Decree affirmed, and appeal dismissed, at appellant's costs.

(185 Pa. St. 75)

JONES v. PHILADELPHIA TRACTION CO.
(Supreme Court of Pennsylvania. March 21, 1898.)

INJURY TO EMPLOYE—INDEPENDENT CONTRACTORS.

An employé of one of several independent contractors constructing a power house, injured by the blowing off of a cap from the end

of a steam pipe, part of the steam plant in course of construction by another contractor, cannot hold the owner responsible therefor because of failure of its engineer, who designed the system, to provide a drip in the pipe by which water formed by condensation of steam could be removed, it appearing that drips do not work automatically, and, even when used with care, do not keep pipes entirely free from water; that the accident was caused by the sudden turning of a valve by an employé of the steam-plant contractor, which allowed steam to enter too rapidly a section of the pipe which was cold; that poor material or workmanship would have been sufficient to cause the accident; and that, though the pressure of steam alone, in the absence of water, would not have caused it, neither would the presence of water of itself.

Appeal from court of common pleas, Philadelphia county.

Action by Henry Jones against the Philadelphia Traction Company. Judgment for defendant. Plaintiff appeals. Affirmed.

George Demming and Frank H. Mulen, for appellant. S. Davis Page and Thomas Leaming, for appellee.

FELL, J. The plaintiff, at the time of his injury, was employed by a bricklayer, who was one of a number of independent contractors engaged in building a power house for the corporation defendant. He was injured by the blowing off of a cap from the end of a steam-supply pipe, which was a part of the steam plant in the course of construction by another contractor. The cap of the pipe was blown off because of the sudden turning of a valve, which allowed the steam to enter too rapidly a section of the pipe which was cold. The valve was turned by an employé of the contractor for the steam plant. The only connection of the defendant with the happening of the accident was the fact that its engineer had designed the system of steam piping, and the negligence alleged was his failure to provide for a drip or trap in the steam pipe by means of which water formed by the condensation of steam could be removed. The witness upon whom the plaintiff relied to prove that the design was defective stated that there should have been a trap or drip on the pipe, and that, in his opinion, the accident "was due to one of three causes,—improper design, poor material and workmanship, or bad management." It further appeared from the testimony that the pressure of steam alone would not have forced the cap off if the pipes had been free from water, and that the presence of water in the pipes would not of itself have caused the accident if the steam had been turned on gradually. It appeared also that drip pipes are in common use as a means by which water may be drained from steam pipes, but that it is impracticable even by their use to keep the pipes entirely free from water, and that the sudden turning of the valve was, therefore, negligence. For poor material and workmanship or bad management the defendant was not responsible. Either of these

was sufficient to have caused the accident, and the latter was shown to have been the immediate cause. As to the question of improper design, drip pipes were the only appliances shown to be in general use, and, as they do not act automatically, and, even when used with care, do not keep the pipes entirely free from water, their presence would not of itself have lessened the danger, nor could their absence have operated as an independent cause of the accident. Under this testimony the jury could not properly have found the defendant responsible for the plaintiff's injury, and there was no error in entering a nonsuit. The judgment is affirmed.

(185 Pa. St. 208)

In re COMLY'S ESTATE.

(Supreme Court of Pennsylvania. March 28, 1898.)

COMMON-LAW MARRIAGE—EVIDENCE.

Evidence that prior to alleged common-law marriage the woman had illicit intercourse with others is not admissible to disprove the marriage.

Sterrett, C. J., and Mitchell, J., dissenting.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Joseph H. Comly, deceased. From decree of orphans' court overruling exceptions to the adjudication of the auditing judge that Annie P. Comly was married to deceased, and, with her child, was entitled to the whole estate, Eleanor P. Comly and others appeal. Affirmed.

W. Horace Hepburn and John Shalcross, for appellants. Alfred D. Willer, for appellee.

WILLIAMS, J. The facts brought to our attention by this record are of a very unsavory sort, but a question is raised upon them which compels their consideration. The estate of Joseph H. Comly has been settled by Eleanor P. Comly, the administratrix, and the fund raised is now for distribution. A woman appears, alleging that she was the wife of the decedent, having been married to him about 10 years before his death, and having cohabited with him during these years. The marriage set up was not solemnized in the usual manner, but was entered into by a verbal contract, made, as is alleged, between the claimant and Comly, that they would take each other for husband and wife, respectively, until death should separate them. She testified distinctly to the making of the marriage contract; that Comly provided and furnished for her a house, in which they lived and cohabited; that a child was subsequently born to them; and that he had openly acknowledged her to be his wife on many occasions, and the child to be his child. There was much evidence given in the court below

tending to discredit this story, and lead to the conclusion that the relation between Comly and the claimant was a meretricious one. There was, on the other hand, considerable evidence that was fairly corroborative of the testimony of the claimant, and that tended strongly to show that Comly had recognized and spoken of the claimant as his wife on many occasions, and had recognized the child born after the alleged marriage as his own. If this evidence was competent, its value was to be determined by the court before which it was given, and from it that court was to find whether the claimant was the widow of Comly, entitled to share as such in his estate, or was an imposter, having no claims whatever upon it. The assignments of error from the sixth to the tenth, inclusive, are directed to the rejection of offers to show that prior to the alleged marriage with Comly, in October, 1885, the claimant had lived in illicit relations with one William Conn and other persons. This evidence did not tend to contradict her story of the marriage with Comly, and it seems to have been offered for that purpose. Her fidelity to Comly during the 10 years between the alleged marriage and his death was not attacked. She lived during these years in a home provided by him, cohabited with him, and was known in the circle in which she moved as his wife. Her previous misconduct could not diminish the value of these circumstances, and, when offered for that purpose, was properly rejected. The remaining assignments allege error in the court below in finding as a fact from all the evidence that the marriage between the claimant and Comly actually took place as claimed by her. There was evidence properly before the court from which this finding could be made. There was also a mass of circumstances shown by the testimony that seemed to indicate that the relation existing between these parties was an illicit one. The court below had the witnesses before them, and could judge of their credibility. They have, after a careful consideration of all the testimony, given credit to the claimant. We are asked to say that this was error. It certainly was not a mistake in law. If it was a mistake in reaching a conclusion of fact, the burden is on the appellant to point out the mistake clearly. It is not enough to demonstrate that the fact is doubtful. It is not enough that the finding appears to be against the balance of the testimony. Nor yet is it enough that we may think we would have reached a different conclusion if the question had been for us to decide in the first instance. The court below had, as we have not, the witnesses before them, and were, therefore, better able to say to whom credit ought to be given, and from whom it ought to be withheld, than we can be. Their findings of fact must stand, therefore, until the appellant shall point out to us clearly the mistake of

which he complains. We are unable, in view of these considerations, to reverse the findings of the orphans' court, and for this reason the decree resting on their findings is affirmed; the costs of this appeal to be paid out of the fund.

STERRETT, C. J., and MITCHELL, J., dissent.

(20 R. I. 439)

McCANNA v. NEW ENGLAND R. CO.

(Supreme Court of Rhode Island. March 29, 1898.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff, driving a spirited horse, approached a railroad crossing, with which he was perfectly familiar, from a direction from which he could have an unobstructed view for a considerable distance, until he got near the crossing, when his view would be obstructed by a bank. He trotted his horse with a slack rein until within 60 or 70 feet of the crossing, when he heard the whistle of a regular train. It was too late for him to stop. His horse became unmanageable, and plunged forward, striking the rear of the third car. Plaintiff was thrown to the ground, and the horse died from his injuries. *Held*, plaintiff's contributory negligence barred recovery.

Action by William McCanna against the New England Railroad Company. Verdict for plaintiff, and defendant petitions for a new trial. Granted.

Page & Page and Arthur Cushing, for plaintiff. James M. Ripley and John Henshaw, for defendant.

TILLINGHAST, J. This is an action of trespass on the case for negligence. It was tried in the common pleas division, and resulted in a verdict for the plaintiff for \$500, and the defendant now petitions for a new trial on the grounds (1) that the verdict was against the evidence and the weight thereof, and (2) that the verdict was against the law. The injuries complained of were received by the plaintiff on the 9th of October, 1895, at about 4 o'clock in the afternoon, at a railroad crossing on the main road between East Blackstone, Mass., and Woonsocket, R. I., in the following manner: The plaintiff, who is an undertaker, had been to a burying ground with a funeral, and was returning along said road to Woonsocket, driving a one-horse hearse, and when he reached the point where the road crosses the railroad at grade, his horse, which was a spirited one, became unmanageable by reason of the approaching train, and, despite the efforts of the plaintiff to control him, plunged forward, and ran into the rear part of the third car of the limited express train running from Boston to Willimantic. The train was a regular one, and was on time when the accident occurred. The hearse was overturned, and the plaintiff was thrown to the ground and injured by the collision, and the horse was so badly injured that he afterwards died in consequence there-

of. The evidence shows that a person approaching said crossing from the direction in which the plaintiff was approaching it would have an unobstructed view of the railroad for a considerable distance until he gets near to the crossing, when a hill or bank, covered with trees and shrubbery, would shut off his view until he comes near to said crossing. The plaintiff's declaration alleges negligence on the part of the defendant (a) in its failure to blow the whistle; (b) in its failure to ring the bell; (c) in its failure to maintain any gate or flagman at said crossing; and (d) in its failure to give any warning or signal whatever that its locomotive and train were approaching said crossing. The plaintiff was perfectly familiar with the crossing, and had been over it five times before, the same day. He testified that he was looking out for any train that might come along; that he was listening, with his head inclined to the left, and that the first he knew of the approach of the train was when he heard the whistle blow, he then being about 70 feet from the track; that he then gathered up the slack reins, and tried to stop his horse, but could not, as it threw up its head, and made a plunge forward, striking the third car, as aforesaid. On cross-examination plaintiff testified that he was trotting his horse right along until he got within 60 feet or so of the crossing, trying to listen at the same time "with one ear," and that, as he could not hear anything, there was no occasion for him to stop; that, the first he knew, he heard the whistle, and then it was too late to pull up; that, if he had heard the train coming, he would have stopped, but, not hearing it, he did not stop. He further testified that his carriage rattled along, making some noise, while he was trying to listen as aforesaid, and that a hack was being driven just behind him. The plaintiff offered no testimony except his own in support of his case.

It is very clear that upon such testimony as this the plaintiff has no legal claim against the defendant. In attempting to cross the railroad in the manner above stated, he was guilty of gross negligence. He was evidently driving with a slack rein. He did not stop, or even slacken the speed of his horse; and, according to his own testimony, the only listening which he did—if, indeed, it can be said that he listened at all, within the fair and practical meaning of the term—was of such a perfunctory sort as to be of no avail. The fact that his view of the track was obstructed was not only no excuse for his attempting to cross the same without observing the customary rule, but rendered its observance, in so far, at least, as stopping and listening were concerned, all the more necessary and imperative. The further fact that he was driving a spirited horse also called for the exercise of a higher degree of care than would otherwise have been required, the well-understood rule everywhere being that the degree of care to be exercised in a given

case must be commensurate with the degree of danger. Moreover, the duty to look and listen before crossing a railroad track at grade requires the traveler to select a position, if practicable, from which an observation can be made; that is to say, "he must exercise care to make the act of looking and listening reasonably effective." 3 Elliott, R. R. § 1166; Patt. Ry. Acc. Law, 171, and cases cited. Had the plaintiff stopped and listened at a reasonable distance from said crossing, in the circumstances of the case, as it was clearly his duty to have done, and as even a modicum of common sense and common prudence would seem to have dictated, no harm could have befallen him. Having failed to observe such a simple and reasonable precaution, the law can afford him no redress. In the case of *Pepper v. Pacific Co.*, 105 Cal. 389, 38 Pac. 974, cited by defendant, the court say: "If he could not see an approaching train because his vision was obstructed, ordinary care for his own safety required him to stop, in order that his hearing should not also be obstructed; and, in any event, to make his approach so slowly as to give him complete control of his team, and enable him to stop instantly if occasion required." In *Chase v. Railroad Co.*, 167 Mass. 383, 45 N. E. 911, the court state the rule as follows: "The general rule in this commonwealth undoubtedly is that, as a railroad crossing is a dangerous place, a traveler on the highway is bound to make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to danger; that, if he fails so to use his senses, without reasonable excuse, he falls to use reasonable care; and that the burden is on the plaintiff to show such care, even though the defendant is in fault. So, too, it may be said to be a general, although not a universal, rule that, if there is anything to obstruct the view of a traveler on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety." To the same general effect are *Littaur v. Railroad Co.*, 61 Fed. 591, *Rhoades v. Railroad Co.* (Mich.) 25 N. W. 182, and *Chase v. Railroad Co.*, 78 Me. 353, 5 Atl. 771, cited by defendant. It is true, as suggested by plaintiff's counsel, that in *Ormsbee v. Railroad Co.*, 14 R. I. 102, this court held, in substance, that the rule requiring a traveler to stop and look and listen before attempting to cross a railroad was subject to certain exceptions, one of which is that, where the view of the track is so obstructed that the traveler is unable to see up and down the same as he approaches it, he is obliged to act upon his judgment at the time as to what precaution he shall take; that is, that where compliance with the rule is impracticable or unavailing, he is excused from observing it. We approve of the doctrine thus enunciated. Of course, the rule is, and must necessarily be, subject to exceptions, as, indeed, what rule of law or of

human conduct is not? If looking or listening, or both, should, for some reason, be rendered unavailing and useless, then the law would excuse the traveler therefrom, as it never requires the performance of a useless or futile act. So, again, as said in the *Ormsbee Case*, "where the direct act of some agent of the company had put the person off his guard, and induced him to cross the track without precaution," this would excuse the traveler from observing said rule. These exceptions, however, furnish no support to the plaintiff's case; for, while his view was obstructed in manner aforesaid, yet there was evidently nothing which interfered with his hearing the approaching train, except the noise made by his own carriage, and perhaps that of the hack in his rear; and there can be no doubt whatever that, if he had stopped and listened, he would have heard the approaching train. As it is clear, therefore, that the plaintiff's own negligence was the proximate cause of the injury, there is no occasion for us to consider the alleged negligence on the part of the defendant, or to consider the evidence offered by it in the case. Petition for new trial granted.

(30 R. I. 418)

PREFONTAINE v. ROBERG.

(Supreme Court of Rhode Island. March 14, 1898.)

PLEADING AND PROOF—AMENDMENT.

1. The fact that plaintiff had advanced money to discharge a mortgage and to erect a new building on land owned by him and defendant as tenants in common is not admissible under a declaration alleging that defendant had erected the building for their common benefit, and that he had collected the rents, and had failed to account to plaintiff for his share thereof.

2. Amendment of declaration so as to admit proof of advances made by plaintiff should be permitted.

Exceptions from court of common pleas, Providence county.

Action by Hermengilde Prefontaine against Oscar J. Roberg. Judgment for plaintiff, and defendant brings exceptions. Sustained.

This was an action brought by Prefontaine, as tenant in common with Roberg, the defendant, against him for an account as balliff. The first count in the declaration stated that the defendant had failed to render an account of the rents and profits derived from the real estate belonging to the plaintiff and defendant equally as tenants in common, the defendant being in charge and receiving the rents and profits for the two, although he had been often requested to render such an account. The second count, repeating the allegations of tenancy in common, and that defendant collected the rents and profits as balliff, also alleged that the defendant had received various specified sums from the People's Savings Bank and the City Lumber Company for the purpose of erecting a building on said land, and had erected it for the common benefit of the plaintiff and the

defendant, and had also received the rents and profits therefrom, yet, though requested, he had refused to render an account thereof, etc. To this the defendant pleaded: (1) He never was bailiff to the plaintiff, nor ever received said rents and profits. (2) He never received more than his just share of said rents and profits. (3) He has fully accounted to the plaintiff. (4) He never had the care, etc., of said premises to collect said rents and profits, etc. (5) He never received any moneys for the use of the plaintiff. After issues joined and a hearing before the court (jury trial being waived), the case was sent to an auditor, who heard the parties and their testimony, etc., and made his report. The defendant excepted to the auditor's report: (1) Because the auditor found that the plaintiff, during the erection of the house in the case mentioned, advanced \$309.75, the testimony substantiating this not being admissible under the pleadings, and should have been excluded. (2) Because the auditor found that the plaintiff and the defendant had each paid one-half of \$250 paid on account of a certain mortgage on said premises.

T. W. Gilchrist, for plaintiff. Archambault & Gaulin, for defendant.

MATTESON, C. J. We think that the defendant's exceptions relating to the allowance by the auditor of moneys paid by the plaintiff on the joint account of himself and the defendant, on the ground that such moneys were not mentioned in the declaration, were well taken; but we think that the plaintiff may be permitted, on motion, to amend his declaration in respect to the sums allowed. *Spicers v. Harvey*, 9 R. I. 582.

(20 R. I. 417)

RYAN et al. v. MAHAN et al.

(Supreme Court of Rhode Island. March 11, 1898.)

TESTAMENTARY POWERS.

A testator devised his estate to his widow for her use during her life, with power to sell or dispose of for her support. *Held*, that the power was personal, and, where she failed to exercise it, the estate did not become liable for debts incurred by her for her support.

Bill in equity by Martin A. Ryan and others against John Mahan and others. Dismissed.

Chas. E. Gorman, for complainants. A. B. Crafts, for respondents.

PER CURIAM. We know of no principle by which the debts incurred by Mary Mahan, the widow of John Mahan, for her support and comfort, can be collected from or made a charge on her husband's estate. His will gave his estate to her for her use and benefit during her life, and conferred on her power to sell or dispose of it for her support and comfort. Her interest in the estate ceased with her life. The power to sell was

personal to her. She died without exercising it, and no one has power to execute it in her stead. *Phillips v. Wood*, 16 R. I. 274, 15 Atl. 88; *Brown v. Phillips*, 16 R. I. 612, 18 Atl. 249; *Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 14 R. I. 625.

(20 R. I. 432)

KELLEY v. SCHUYLER.

SAME v. DONNELLEY.

(Supreme Court of Rhode Island. March 24, 1898.)

TRESPASS—EVIDENCE—ADMISSIBILITY—REPLEVIN—SERVICE OF WRIT.

1. Plaintiff brought trespass against an officer who had executed a writ of replevin. The evidence was conflicting whether he took away certain goods belonging to plaintiff, and not described in the writ. The replevin suit had not been tried. *Held* not error to permit plaintiff to prove the value of said goods.

2. An officer has no right to break an outer door of a dwelling house to execute a writ of replevin.

Separate actions by Charles J. Kelley against George H. Schuyler and Joseph Donnelley. Verdicts for plaintiff, and defendants petition for a new trial. Denied.

Joseph Osfield, Jr., for plaintiff. Claude J. Farnsworth and Thomas W. Robinson, for defendants.

TILLINGHAUST, J. These are actions of trespass *quare clausum fregit*, for breaking and entering the plaintiff's dwelling house, and taking and carrying away certain articles of personal property of the plaintiff therefrom. The facts are substantially these: One Josephine Donnelley died at the plaintiff's house, leaving there certain articles of personal property. One Thomas O'Brien was appointed administrator on the estate of said Josephine, and he afterwards sued out of the district court of the Tenth judicial district a writ of replevin against the plaintiff in the present suits, to obtain possession of said personal property, the plaintiff having refused to deliver the same. The defendant George H. Schuyler, who was a constable, went to plaintiff's house to serve said writ, but was refused admittance. After obtaining advice from his attorney, he went again, on the 12th day of February, 1897, and, being again refused admittance he, with the assistance of the defendant Donnelley, broke and entered the house, by prying open the outside door, which was locked. They also forced an inner door, which was fastened, and then proceeded to take and carry away, by virtue of the authority contained in the writ of replevin, certain goods and chattels which the defendant Donnelley pointed out to the officer as the property of said O'Brien, administrator. The evidence is conflicting as to whether the defendants took and carried away certain other goods and chattels belonging to the defendant in addition to those described in the writ. The replevin

suit was pending in said district court at the time of the trial of these cases, and, so far as appears, has not yet been tried, so that there has been no judicial determination as to the ownership of the goods and chattels replevied. At the trial of the cases in the common pleas division, the plaintiff recovered a verdict in each for the sum of \$100; and the defendants respectively have petitioned for a new trial on several grounds, two only of which are now relied on, viz.: (1) That the court erred in admitting evidence as to the value of the goods taken; and (2) that it refused to charge the jury that the officer charged with the service of said writ of replevin was justified in breaking and entering the plaintiff's house, after a demand and refusal of admittance, for the purpose of making service of said writ, and that said writ was a full and complete protection to the defendant. The court, on the contrary, charged the jury, in substance, that the officer had no right to break and enter the plaintiff's house for the purpose of serving said writ, and that both he and the defendant Donnelley committed a trespass in so doing. The defendants duly excepted to the rulings. The only question before us, therefore, is as to the correctness of said rulings.

We think the first ruling complained of was correct. The evidence offered as to the value of the articles taken away by the defendants, as we understand it, was finally limited to those articles which the plaintiff claimed belonged to him or his family, and which were not included in the replevin writ. As to such articles, of course the plaintiff had the right to prove their value.

We think the second ruling also was correct; for, while there seems to be some slight conflict in the authorities as to whether an officer who has broken into a dwelling house, and made an attachment or taken property found therein, in pursuance of his precept, may not lawfully hold the same, although the decided weight of authority is to the contrary (see the leading cases of *Isley v. Nichols*, 12 Pick. 270; *People v. Hubbard*, 24 Wend. 369; *State v. Hooker*, 17 Vt. 670-673; 2 Freem. Ex'ns [2d Ed.] § 255, and cases cited), yet it is almost universally conceded that the officer who breaks and enters a dwelling house for the purpose of serving any civil process therein, except perhaps as hereinafter mentioned, is a trespasser; this position being based on the ground that the law will not permit the sanctity of one's dwelling house, which from very ancient times has been regarded as his castle, to be violated in this way. In short, the law provides, and wisely, too, we think, that the means of obtaining possession of personal property in civil process must be in subordination to the common-law rights of the defendant. "Public policy," says Campbell, J., in *Bailey v. Wright*, 39 Mich. 96, "requires, above all things, that courts and

officers executing their process shall respect the lawful rights of all persons. The practical permission which overzealous officers would receive to commit wrongs with substantial impunity, if their levies should be held good without regard to the manner of their enforcement, would remove every check on lawlessness. To hold that an act is lawful which may be lawfully resisted is absurd. Such misconduct should neither be justified nor winked at." Blackstone says a sheriff may not break open any outer doors to execute either a fieri facias or a capias ad satisfaciendum; but he must enter peaceably, and may then, after a request and refusal, break open any inner doors belonging to the defendant, in order to take the goods. 3 Bl. Comm. 417. And in *Snyder v. Brosse*, 51 Ill. 357, the court say: "It is believed that what is said by Blackstone regarding said writs is true of all civil process." Cases to the same general effect are numerous; but in view of the fact that in *Clark v. Wilson*, 14 R. I. 11, this court held the same doctrine, it is unnecessary to cite them. In that case, *Durfee, C. J.*, said: "It is perfectly well settled that an officer ordinarily has no authority to break an outer door or window of a dwelling house in order to enter it for the purpose of executing a civil writ or process."

But the defendants' contention, as we understand it, is that, in serving a writ of replevin, at any rate, the officer has the right, after demanding admittance and being refused, to break into a dwelling house, in order to execute his precept. Some authority for this distinction is to be found in a few of the cases cited by defendants' counsel, but it is too vague and unsatisfactory to be controlling. Thus, in *Keith v. Johnson*, 1 Dana, 604, cited by defendants, it was held that the sheriff, having an execution under the statute of that state passed in 1828, had the right to make a forcible entry into the defendant's house, to levy it on a slave for which it had issued on a judgment in detinet. An examination of the case, however, shows that, while the court was of the opinion that such a right existed at common law, yet that the decision was based upon the statute. We do not therefore consider the case of much value as an authority for the defendants. *Kneass v. Fidler*, 2 Serg. & R. 263, while it was an action of replevin, is not only not an authority in support of the defendants' position, but rather to the contrary, as there it did not appear how the defendants got into the house, and the court said it could not be presumed that they broke the outer door. The case of *Link v. Harrington*, 23 Mo. App. 429, is very blindly reported, and it is impossible to tell whether the officer entered a dwelling house or not, but probably not, as no dwelling house is mentioned; and the natural inference is that the premises referred to, which the officer entered for the purpose of levying a writ of attachment upon certain goods therein belonging to a third party, of which premises it

is stated that he assumed exclusive control for 24 hours or more, consisted of some building other than a dwelling house. In *Wells*, Repl. § 287, also cited by defendant, the author says: "Authorities in modern times upon this question are meager, but it has been held that the sheriff had a right to enter the defendant's house to search for goods described in a writ of replevin;" and, in support of this statement, he refers, among others, to *Semayne's Case*, 5 Coke, 91; also, 1 Smith, Lead. Cas. 213. That case is not an authority in support of the proposition above enunciated, except to a limited extent, as will be presently shown, but is generally to the contrary, and was cited by *Durfee*, C. J., in support of his opinion in *Clark v. Wilson*, supra. It was held in *Semayne's Case* that, in all cases where the king is party, the sheriff may break the house, either to arrest or do other execution of the king's process, if he cannot otherwise enter, and also that, where the door is open, the sheriff may enter and do execution at the suit of a subject, and so also may the lord, and distrain for his rent service. But it was also held that it was not lawful for the sheriff, on request made and denial, at the suit of a common person, to break the defendant's house, scil. to execute any process at the suit of a subject. The limited extent to which the case is an authority for the proposition above stated by Mr. Wells is in circumstances like the following, viz.: Where the goods of A. are brought and conveyed into the dwelling house of B., with his knowledge and consent, to prevent a lawful execution, or to escape the ordinary process of law, this amounts to fraud and covin on the part of B.; and in such case the sheriff, after denial of admittance on request made, may break the house; "for the privilege of one's house," said the judges, "extends only to him and his family and to his own proper goods, or to those which are lawfully and without fraud and covin there." See cases cited on page 218 (star page 188) of 1 Smith, Lead. Cas., in a note to *Semayne's Case*. To the same effect are *Burdett v. Abbott*, 14 East, 157, and *De Grafenreid v. Mitchell*, 15 Am. Dec. 648. The statute of Westm. I. c. 17, cited by defendant, even conceding it to be in force in this state, is but an affirmation of the common-law doctrine above enunciated. It declares, in effect, that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him conveyed to his house or castle to prevent the owner to have a replevin of his goods, provided the sheriff first make demand for the goods. See, also, 8 Bac. Abr. p. 547, § 7. The other cases cited by Mr. Wells in support of the text, viz. *State v. Smith*, 1 N. H. 346, and the cases referred to in a note to *McGee v. Given*, 4 Blackf. 18, go no further, at the most, than to sustain the ruling made in *Semayne's Case*, supra, and do not hold, generally, that an officer may break into a dwelling house to serve a writ of replevin. *Boggs v. Vandyke*, 3 Har. (Del.) 288, is a case where the sheriff attempt-

ed to justify the breaking and entering the plaintiff's house and taking his goods, by showing that he did so in connection with the service of an execution against the plaintiff. The court ruled that the officer had no right to open an outer door, and sustained the plaintiff's action of trespass. See, also, *Haggerty v. Wilber*, 16 Johns. 287. We have examined the other cases which are referred to in a general way by the defendants, viz. those cited in 2 Am. & Eng. Enc. Law (2d Ed.) p. 853, note 1, but do not find that they are controlling, or that they furnish much support for the defendants' claim in the case at bar. Indeed, most of the cases are directly to the contrary. See, for instance, *Calvert v. Stone*, 10 B. Mon. 152, decided by the same court as was *Keith v. Johnson*, supra, and nearly 20 years afterwards, and *State v. Hooker*, supra, and *People v. Hubbard*, supra.

A somewhat careful investigation of the authorities independently of those cited by counsel confirms us in the opinion at which we have arrived. *Murfree*, Sher. § 288, lays down the broad proposition that "an officer cannot break the outer doors of a house to execute a *fi. fa.* or any other civil process against the owner, and, if he does so, he becomes a trespasser." *Hitchcock* on New England Sheriffs and Constables takes the same view, and cites with approval the Rhode Island case of *Clark v. Wilson*, supra. See, also, *Drake*, Attachm. § 200; *Cobbey*, Repl. § 647. In *Prettyman v. Dean*, 2 Har. (Del.) 494, which was an ordinary case of replevin, *Clayton*, C. J., in delivering the opinion of the court, said: "The sheriff has a right to enter a house peaceably, where he finds the house open, for the purpose of executing a replevin. Being in, he has the right to execute his writ. If property be concealed, he has the right to break open inner doors, and generally to use such force as is necessary to enable him to obey the command of his writ." The late case of *State v. Beckner*, 132 Ind. 371, 31 N. E. 960, is clearly in point. There the officer was sued on his official bond, and the question which arose was whether he had the right to forcibly enter the dwelling house of the relator to serve a writ of replevin. The court decided that the writ was but a civil process, and did not authorize him to force the outer door of a dwelling house. Whether there is any sufficient reason, on principle, for making the distinction referred to in the books, between an ordinary case of replevin and a case where the goods and chattels sought to be obtained have been distrained or are fraudulently concealed by the defendant in his house, may be open to doubt. See 2 Freeman, Ex'ns (2d Ed.) p. 817, § 256. But conceding that in such circumstances an officer would be warranted in breaking into a dwelling house to make service of such a writ, or of a writ of *fi. fa.* against a stranger whose goods are wrongfully withheld from the officer in the house, yet, as the cases at bar do not fall within either of those classes, the fact that the law may be as intimated by Mr. Freeman, and also

in *Douglas v. State*, 6 Yerg. 529, 8 Bac. Abr. p. 547, *Burton v. Wilkinson*, 18 Vt. 189, and other cases hereinbefore cited, cannot control our decision. The case out of which the present suits arise was a simple and ordinary case of replevin; and we are very clearly of the opinion that the defendants committed a trespass when they broke and entered the plaintiff's house to make service of said writ. Petition for new trial denied, and cases remitted to the common pleas division, with direction to enter judgment on the verdicts.

(20 R. I. 429)

In re REYNOLDS.

(Supreme Court of Rhode Island. March 18, 1898.)

WILLS—CONSTRUCTION.

1. Testator gave his wharf to his son for life, remainder to his children then living. He bequeathed the income of certain bank stock to his son for life, the stock, after his death, to be divided among his children then living. All the residue of his estate he gave to his son. When the son died, he had grandchildren, but no children, living, and he bequeathed the bank stock to his widow. *Held*, that the testator meant his son's children, and not his grandchildren, living at the time of the son's death in the bequest of bank stock.

2. Where testator gives certain real estate for life to his son, remainder to his children then living, and the interest of certain stock to his son for life, the stock, after death, to such children, and the children die pending the life of the son, the latter takes the land and the stock under a clause of the will giving him the residue of the estate.

Case stated from probate court.

Bill by Annie C. Reynolds for the construction of the will of Isaac Reynolds.

Dexter B. Potter, for petitioner. Warren W. Chase, for respondents.

MATTESON, O. J. This is a case stated for the opinion of the court. Isaac Reynolds, of North Kingstown, died January 11, 1864, leaving a last will and testament, dated April 16, 1853, which was duly admitted to probate February 8, 1864. The fourth clause of this will gives the testator's wharf estate to his son, Stephen D. Reynolds, during his natural life, and the fifth clause disposes of the remainder in said wharf estate as follows: "After the decease of my said son, Stephen D. Reynolds, I give and devise to his children living at his decease all my wharf estate, with all the buildings and improvements thereon, to them, their heirs and assigns forever, to be equally divided between them." The fourth clause of the will also bequeathed the interest, income, and dividends of certain bank stocks named therein to the said Stephen D. Reynolds during his natural life. The fifth clause disposes of these bank stocks, on the decease of said Stephen, as follows: "I also give and bequeath, after the decease of my said son, unto all his children then living, to be equally divided between them, the following bank stocks,"—specifying the same shares enu-

merated in the fourth clause. By the sixth clause of the will the testator gives all the residue of his estate, both real and personal, to his said son, Stephen D. Reynolds, his heirs and assigns forever. At the date of the will, April 16, 1853, the testator had a daughter, who is still living, but is not interested in the questions presented for our opinion, and a son, the said Stephen, who then had two children,—a son, Albert F. Reynolds, and a daughter, Sarah E. Straight. Albert died December 3, 1862, before the testator, leaving a daughter, Lydia W. Reynolds. Sarah died April 8, 1864, after the testator, leaving two sons, Stephen R. Straight and Erastus H. Straight, and one daughter, Olara M. Straight. Stephen D. Reynolds died September 28, 1866, leaving no children, but leaving the grandchildren named above as his only issue, and also leaving a widow, Annie C. Reynolds, and a last will and testament, in which he bequeathed the bank stock in question to his widow. The questions submitted for our opinion are: (1) What is the true meaning of the word "children," as used in the fifth clause of the will, with reference to the remainder in said real estate and to said shares of bank stock? Is it equivalent to the word "issue" or to the word "descendants," or does it mean children of the first degree only? (2) Did Stephen D. Reynolds ever have more than a life estate in said real estate, or was he, at the time of his death, by virtue of the residuary clause of said will, seized therein in fee simple, thus entitling his widow, Annie C. Reynolds, to dower therein? (3) Had said Stephen D. Reynolds, at the time of his death, title to said bank stock, so that he could bequeath the same to said Annie C. Reynolds in his will, or was the title thereto in the grandchildren of said Stephen? The word "children," as ordinarily used in a will, means immediate descendants, i. e. of the first generation. It does not include grandchildren or more remote issue unless it is necessary to give it that meaning in order to give effect to the will, or unless the testator has shown by other language in his will that he does not use the word in its ordinary sense, but intends it to have a more extended signification. *Williams v. Knight*, 18 R. I. 336, 27 Atl. 210, and cases cited. It is unnecessary to give the word "children" any other than its ordinary signification to give effect to the will in the present instance, and we see nothing in it to indicate any intention of the testator to use the word in a more extended sense. The effect of the fifth clause is to create a contingent remainder in the real estate, and a contingent gift of the bank stock, on the decease of the life tenant, in and to his children living at that time. The language is too clear to leave room for construction. Our opinion is, therefore, that the word "children," as used in the fifth clause of the will, means children of the first generation, and that it does not have the more extended meaning of the word "issue" or the word "descendants." The contingent remainder in the real estate and contingent gift

of the bank stock, on the determination of the life estate of Stephen D. Reynolds, having lapsed by the death of his children, Albert F. Reynolds and Sarah E. Straight, during his lifetime, and there having been no gift over of the real estate and bank stock, we are of the opinion that these passed, under the residuary clause, to the said Stephen D. Reynolds. *Peckham v. Newton*, 15 R. I. 324, 4 Atl. 758. It follows that the said Stephen, on the death of the latter of his two children, became seised in fee of said real estate, and that his widow, Annie C. Reynolds, is entitled to her dower therein. For the same reason we are of the opinion that the said Stephen D. Reynolds, at his decease, also had title to said bank stocks, so that he could bequeath the same to his widow, said Annie C. Reynolds.

(67 N. H. 571)

HILLIARD v. BEATTIE.

(Supreme Court of New Hampshire. Grafton. March 16, 1894.)

ASSIGNMENTS—POWER COUPLED WITH AN INTEREST—ESTOPPEL.

1. Where plaintiff, pending an action for damages, assigned his suit to a debtor by writings under seal, and empowered his assignee to settle such suit "for such sum as he shall think reasonable," and apply the proceeds on the debt, and stipulated that, unless he should pay a specified sum by a certain day, such assignee should have full authority to settle such suit, "without any notice and according to his own discretion," the power thereby conferred, being coupled with an interest, was irrevocable by the grantor, and survived to the representatives of the deceased grantee.

2. Plaintiff was estopped to question a settlement of a pending suit for damages, which he had assigned, under seal, and for a valuable consideration, effected by the administrators of the deceased assignee, in good faith, relying on the unlimited power conferred on their intestate by virtue of such assignment, the devolution of which on them had been distinctly recognized by plaintiff, and without knowledge on their part of an alleged parol agreement, between plaintiff and their intestate, inconsistent with such assignment.

Trespass by one Hilliard against one Beattie for assault and battery, being the same case reported in 59 N. H. 462. Defendant moved to enter the action "Neither party." Facts found by the court. Motion granted.

April 8, 1892, the plaintiff assigned the suit to Jacob Benton by a sealed writing, which specifies that it is made as part security for certain indebtedness, and authorizes and empowers said Benton to settle said suit for such sum as he shall think reasonable, and apply the proceeds in payment of the indebtedness. November 25, 1889, the plaintiff and Benton made and delivered to each other a sealed paper, in duplicate, in which Benton agrees to accept \$2,400 from the plaintiff in full settlement of the plaintiff's indebtedness, if paid on or before May 25, 1890, and, on such payment, to surrender the above-mentioned assignment; and the plaintiff agrees, if he shall not pay the said sum

by the date named, the said Benton shall have full authority to settle said suit, without any notice whatever, and according to his own discretion. In July, 1892, involuntary proceedings in insolvency were begun against the plaintiff, and are still pending. The plaintiff has not been discharged. The plaintiff proved, subject to exception, that, on the day the proceedings in insolvency were begun, Benton agreed with him not to press him in regard to his indebtedness, if he would make an effort to raise money to try this case within a reasonable time, and, if he should not be able to raise money for trying the case, Benton would help him raise it, and try his case after he should receive his discharge in insolvency. In September, 1892, Benton died. In December or January following, his administrators had an interview with the plaintiff in reference to his indebtedness to the estate, in which he requested them to prove in the insolvency proceedings certain notes given by him to Benton, and to await the termination of the proceedings before enforcing the assignment. January 11, 1893, they wrote him, declining his request, and expressing their purpose to settle this case, in order to close up the Benton estate more speedily. January 21, 1893, the plaintiff wrote them a letter, in which he expressed his disappointment at their decision, asked them not to settle the case without giving him all the chance they could with justice to their estate, to redeem his obligation, and requested them to write him how long they would wait for him. January 28, 1893, no part of the indebtedness of \$2,400 having been paid, the administrators, acting in good faith, and having no knowledge of the agreement made by Benton on the day of the beginning of insolvency proceedings against the plaintiff, made a settlement of this case with the defendant for \$1,250, and made and delivered to him a sealed paper written on the back of the plaintiff's assignment, wherein they assigned to the defendant all the interest Benton had in the assignment and in the suit, guaranteed that they had a right to assign it, agreed to indemnify him against all loss, cost, damage, or expense thereafter occasioned to him by the plaintiff by reason of the suit, and agreed that the suit should be entered "Neither party" at the next term of court. In May, 1893, the plaintiff, being dissatisfied with the settlement, tendered to the administrators the amount received by them from the defendant, with interest from the time they received it, and also tendered the same sum to the defendant, but both tenders were refused. The administrators waited a reasonable time after Benton's death, before settling the suit, for the plaintiff to pay his indebtedness, but not a reasonable time if they were bound to wait a reasonable time after receiving his letter of January 21st.

Henry Heywood, Everett Fletcher, and Bingham, Mitchell & Batchellor, for plain-

tiff. Drew, Jordan & Buckley, Bingham & Bingham, and Burelgh & Adams, for defendant.

BLODGETT, J. It is unnecessary to determine whether the assignment of April 8, 1882, was valid or otherwise as an assignment. It is sufficient for the present purpose that, for a valuable consideration, it authorized and empowered the assignee to settle this suit "for such sum as he shall think reasonable," and apply the proceeds in payment of the assignor's indebtedness to him; and the subsequent agreement of November 25, 1880, also expressly stipulates that, unless the assignor shall pay a given sum of money to the assignee on or before a certain day, the latter shall have full authority to settle the suit, "without any notice and according to his own discretion." The effect was not to constitute a mere personal trust in the assignee; for, while both instruments empowered him to settle the suit at his pleasure, each of them gave him a power, coupled with an equitable interest, at least, in its subject-matter. "When power is given to a person, who derives under the instrument creating the power, or otherwise, a present or future interest in the subject-matter over which the power is to be exercised, it is then a power coupled with an interest" (*Mansfield v. Mansfield*, 6 Conn. 559), and is irrevocable by the grantor, and survives to the representatives of the deceased grantee. See, generally, *Bergen v. Bennett*, 1 Caines, Cas. 1, 2 Am. Dec. 281, and note, 291; *Hunt v. Rousmaniere*, 2 Mason, 342, Fed. Cas. No. 6,898; *Dartmouth College v. Woodward*, 4 Wheat. 700; *Hutchins v. Hebbard*, 34 N. Y. 24; *Knapp v. Alvord*, 10 Paige, 205; *Raymond v. Squire*, 11 Johns. 47; *Goodwin v. Bowden*, 54 Me. 524; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Cassiday v. McKenzie*, 39 Am. Dec. 82, note, 83, 11 Pac. 820; *Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635; *Robinson v. Allison*, 74 Ala. 254; *Loring v. Marsh*, 2 Cliff. 311, Fed. Cas. No. 8,514; *Davis v. Lane*, 10 N. H. 156, 160; *Jordan v. Gillen*, 44 N. H. 424, 427; 18 Am. & Eng. Enc. Law, 888-891, and authorities cited.

But if the rights of the grantee in the suit did not pass to his administrators, and even if the grantee himself had none, it is quite immaterial. There is another ground that forecloses the plaintiff. He is without standing, equitable or legal. Having voluntarily, under his own hand and seal, and for a valuable consideration, clothed Benton with the unfettered power to settle the suit, and Benton's administrators, trusting to such apparent authority as well as to the distinct recognition of their right to exercise it contained in the plaintiff's letter of January 21, 1893, having in good faith effected its settlement, and without knowledge of the parol agreement of their intestate proved by the plaintiff at the hearing, he cannot now be heard to impeach the settlement. He is estopped

alike at law and in equity both by his acts of omission and commission. In effect, he stands no differently as to the settlement than he would if he had given the administrators the most formal authority to make it as his agents. Motion granted.

SMITH and CARPENTER, JJ., did not sit. The others concurred.

(69 N. H. 147)

CLARK v. PARSONS.

(Supreme Court of New Hampshire. Rockingham. July 30, 1897.)

ADVERSE POSSESSION—MERGER OF LIFE ESTATE—ESTOPPEL.

1. One who, under the mistaken belief that he had a fee-simple estate acquired from the life tenant and one of two remainder-men, took possession and improved the estate, could not, until the death of the life tenant, acquire title by adverse possession against the other remainder-man.

2. A grant of a life estate, and of the estate of one tenant in common of the remainder, to a common grantee, does not merge the life estate in the fee, so as to extinguish the life estate in the entire property.

3. A remainder-man entitled to the undivided half of a remainder after a life estate is terminated is not estopped from asserting his right by reason of making no claim during the life of the life tenant, as against a grantee of the life tenant and the other remainder-man, who took possession and made improvements before the life estate terminated, and which was known to the silent remainder-man.

Bill in equity by Henry F. Clark against Warren Parsons. Judgment for defendant.

Bill in equity to remove a cloud upon the plaintiff's title to a parcel of land in Rye, of which the defendant, by his answer, claims to own an undivided half. Facts found by a referee. November 13, 1820, Parsons conveyed the premises in question, with other land, to Amos S. Parsons, by warranty deed. Amos had three sons, Joseph, James M., and Isaac D., and by his will, duly probated February 14, 1851, gave all his real estate, including the disputed premises, to Joseph for life, with remainder to James and Isaac. Isaac lived in Portsmouth, and died at sea, leaving two sons, William R. and Lewis P. December 14, 1865, Joseph and James conveyed a tract of land containing about three-fourths of an acre, and known as the "Sea Field," with other land (all being part of the land devised by Amos), to William Berry; and Berry entered into occupation of the premises, and continued in occupation till April 3, 1868, when he conveyed the same to O. W. Trefethen. Trefethen occupied until September 2, 1871, when he conveyed the part called the "Sea Field" to Crosby and Henry Knox. In 1872 the Knoxes laid the sea field out into house lots, and built a large house on the lot the title to which is in issue in this action. December 5, 1872, Crosby Knox conveyed his interest in the sea field, including the premises in question, to G. W. Stone; and April 2, 1873, Henry Knox conveyed his interest in the same premises to Stone, who oc-

cupied them until July 6, 1880, when he conveyed them to George H. Emery, who, June 6, 1891, conveyed them to the plaintiff, who has occupied them ever since. All these conveyances were made by warranty deeds, duly recorded. None of the grantees, unless it was Berry, examined the records, and there was no evidence whether Berry did or not. Each relied on the warranty in his deed. April 15, 1876, Isaac's son William, and January 27, 1877, his son Lewis, conveyed, by deed, each all his interest or title to the lands of which Amos died seised, to the defendant. Their deeds were immediately recorded. Joseph died December 20, 1891. Amos was seised of the sea field at the time of his death. The defendant is 77 years old, and was acquainted with the land, and knew all about the title long before he purchased it, in 1876 and 1877. He was about the place in 1872, saw a plan of the house to be erected thereon before it was built, the house while they were building it, and knew the Knoxes had laid the sea field out into house lots, and were selling them, and building houses thereon; but he never told them that their title was defective. In 1874, Stone built a stable, put up a tank, and laid out more than \$300 on the premises. Emery made improvements while he owned the property, to the extent of five or six hundred dollars. In 1881 the owners of the premises built additions to the house, at a cost of 1,200. In 1885 the owners of the sea field, which included the lot in question, built a heavy stone wall upon that part of the field next to the seashore, at considerable expense. The defendant knew when the additions to the house were made, and saw the work being done, but did not then, nor at any time thereafter, during the life tenant's term, make claim upon or give notice to any occupant of the land that he owned or claimed to own any interest therein. He also knew, or ought to have known, of the construction of the wall. After the defendant bought out Isaac's sons, he never claimed to any one, until after the death of the life tenant, that he owned one-half of the land. At the trial, the defendant testified that he made no claim to the land until after the death of the life tenant, because counsel advised him it was unnecessary to do so. Berry and his grantees have been in open, notorious, exclusive occupation of the premises since 1865, and have paid all taxes and insurance thereon. They had no actual notice of any adverse claim, or of any defect in their title, until after the death of Joseph, in 1891; but, believing the deed of Joseph and James conveyed a good title, expended their money relying thereon. The defendant either knew or ought to have known that the plaintiff was, and that his grantors had been, occupying the premises under a claim of exclusive ownership, and without any actual knowledge of any adverse claim or defect in their title until after the death of the life tenant.

S. W. Emery, for plaintiff. Calvin Page, for Knox and Stone. Sargent & Hollis, for G. H.

Emery. W. H. Sawyer, for Stone. Frink & Marvin, for defendant.

WALLACE, J. The plaintiff has not acquired title to the premises by adverse possession as against the defendant, nor did the statute of limitations begin to run against an action for possession until the death of the life tenant, Joseph, in 1891. *Foster v. Marshall*, 22 N. H. 491; *Bodwell v. Nutter*, 63 N. H. 446, 448, 3 Atl. 421; *Mixter v. Woodcock*, 154 Mass. 535, 28 N. E. 907.

But it is urged that Isaac or his sons might at any time after the deed to Berry by Joseph and James, December 14, 1865, have maintained an action to establish their title to the remainder, according to the doctrine of *Walker v. Walker*, 63 N. H. 321. That case only gives the remainder-man the right to establish his title when it is questioned. It is a right of which he may avail himself or not, as he may elect. If he does avail himself of it, and the controversy is decided in his favor, it gives him no right to the possession or to a writ of possession during the existence of the life estate. Until the termination of the life estate, no right of entry or right of possession exists in favor of the reversioner. Until the right of entry and the right of possession to the property accrue, the statute of limitations does not begin to run against an action for the possession.

It is claimed that, when the life estate and the estate of one tenant in common of the remainder were granted to Berry, a merger of the life estate in the fee was effected by the coincidence of the two estates in one person, and that the life estate in the entire property was thereby extinguished. It is a sufficient answer to say that the life estate in the undivided half of the remainder belonging to Isaac could not merge in the undivided half of the remainder belonging to Berry; neither could the conveyance of the life estate to Berry, construed as a surrender, inure to the benefit of Isaac or those who claim under him. "Merger is co-extensive with the interest merged, as in the case of joint tenants and tenants in common; and it is only to the extent of the part in which the owner has two several estates. An estate may merge for one part of the land, and continue in the remaining part of it." 4 Kent, Comm. 100, 101; *Clark v. Clark*, 56 N. H. 105, 113; *McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. 607.

Another question which arises is whether the defendant is estopped by his silence to assert his title to the land in question. The general principle of estoppel in pais is that where one, by his words, conduct, or silence, "causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things, as existing at the same time." *Pickard v. Sears*, 6 Adol. & E. 469; *Corbett v. Norcross*, 35 N. H. 99; *Richardson v. Chickering*, 41 N. H. 390; *Horn*

v. Cole, 51 N. H. 287; Stevens v. Dennett, 51 N. H. 324; Allen v. Shaw, 61 N. H. 95. It is essential to the application of this principle that the party setting up the estoppel be ignorant of the truth of the matter in regard to which he claims he has been misled, and induced to act to his injury by the conduct or silence of the party to be estopped. If he was fully acquainted with the facts of the case, there would be no estoppel. In respect to the title to real estate, if the party claiming the estoppel is acquainted with the true state of the title, or has an equal means with the other party of ascertaining it, as in the case of a duly recorded deed, there will be no estoppel, at least from mere silence. Odlin v. Gove, 41 N. H. 465, 477; Wood v. Griffin, 46 N. H. 230, 237; Allen v. Shaw, 61 N. H. 95; Jones v. Aqueduct Co., 62 N. H. 488; Brant v. Coal Co., 93 U. S. 326, 337.

The plaintiff claims that the defendant is estopped to assert title to the premises, because, after he acquired the title, he remained silent while the plaintiff made some permanent improvements. The situation of the title was shown by the records, and the information in regard to it was equally open to both parties. Although the plaintiff and those under whom he claims had no actual knowledge of the defect in their title, they had, by the records, constructive notice of it. Their failure to examine the records was not caused by anything said or done by the defendant. They might and should have informed themselves as to the title of the premises before purchasing or making permanent improvements. Their failure to do so was their own fault, and they cannot resort to an estoppel based upon the defendant's silence to avoid the consequences of their own negligence.

It is not found, nor does it appear, that the plaintiff will be injured by the defendant's assertion of his title. Upon partition of the entire common property, it may be that the defendant's share can be assigned to him without affecting the plaintiff's title to his improvements. Holbrook v. Bowman, 62 N. H. 313, 320, 321. Whether the plaintiff can or cannot avail himself of the betterment law is a question not considered. Judgment for the defendant. All concurred.

(67 N. H. 392)

TOWN OF THORNTON v. GILMAN.

(Supreme Court of New Hampshire. Grafton. March 17, 1893.)

GUARDIAN DE SON TORT—PURCHASE OF WARD'S LAND.

1. A guardian de son tort cannot purchase his ward's land at a tax sale.

2. One who is party to arrangements by which a ward's lands are bought for taxes by a guardian de son tort, and understands fully the assumed relations, cannot acquire from the guardian a valid title to the land.

Writ of entry by town of Thornton against Charles W. Gilman. Judgment for defendant.

For several years before 1885, Sarah J. Cram was the owner of the land described in the writ, which is situated in Thornton. From 1885 to her death, in 1890, she was mentally incapable of doing business, but no guardian was appointed over her. In 1886 her brother, Jonathan Gilman, represented to the selectmen of Thornton, where she was living upon her place, that she was sick and in need of assistance from the town. In accordance with an arrangement then entered into, Jonathan cared for her at his home for several years, converting some of her personal property into money, which he accounted for to the town, and bid off her real estate at a tax sale, taking a deed of it from the collector in his own name. He then conveyed the land to the town, which had paid out more than its value in the support of Mrs. Cram. Jonathan's death occurred a few days before that of Mrs. Cram. His son, the defendant, is one of her heirs, and is in possession of the land, claiming title by inheritance.

Burleigh & Adams, for plaintiff. Joseph C. Story and Bingham & Mitchell, for defendant.

PER CURIAM.¹ Jonathan Gilman assumed the care of his sister and her property when it became necessary that some one other than herself should perform that duty. In legal phraseology, he became her guardian de son tort. Without a technical appointment, he performed duties pertaining to that office, and in consequence thereof became subject to many of its liabilities. For many purposes he was bound to properly discharge the official duties which he assumed, and was generally subject to the same rules and remedies as a trustee legally appointed. Perry, Trusts, § 245; Hanna v. Spotts, 5 B. Mon. 362, 365; Jacox v. Jacox, 40 Mich. 473, 480; Bowe v. Bowe, 42 Mich. 195, 3 N. W. 843; Blomfield v. Eyre, 8 Beav. 250; Drury v. Conner, 1 Har. & G. 220, 230; Chaney v. Smallwood, 1 Gill, 367; Bennett v. Austin, 81 N. Y. 308, 322. If he had been a de jure guardian of his sister and her estate, he could not have acquired a valid title to her land sold for the taxes assessed against her. Blackw. Tax Titles, § 566; Drew v. Morrill, 62 N. H. 565; Saunders v. Farmer, Id. 572; Laton v. Balcom, 64 N. H. 92, 6 Atl. 37. His duty to protect her estate in his assumed relation to her was as great as it would have been if he had had an appointment from the probate court; and his performance of that duty, with or without a formal appointment, was not legally consistent with his status as a purchaser of her land at a tax sale. As the town was a party to the arrangement by which the land was sold, and understood fully the relations which the assumed guardian sustained to Mrs.

¹ See footnote 36 Atl. 607.

Cram, it acquired no title to the land. Blackw. Tax Titles, § 275. Judgment for the defendant.

SMITH, J., did not sit. The others concurred.

(67 N. H. 368)

CHASE v. WILLARD.

(Supreme Court of New Hampshire. Hillsboro. March 17, 1893.)

SALES—WARRANTY—TITLE—RESCISSIION.

Gen. Laws, c. 137, § 13, prohibiting the mortgagor from selling the property without the mortgagee's written consent on the mortgage, does not prevent title from passing by a sale not so authorized; and where the mortgagor sold the property under a warranty that it was free from incumbrance, and the mortgagee had given his verbal consent to the sale, there was but a technical breach of warranty, giving no right to the buyer to rescind.

Trover by S. F. Chase against Charles Willard for \$175 in bank bills. Facts found by the court. The defendant sold and delivered to the plaintiff certain chattels, "warranted free from any incumbrance" for \$175, which was paid in bank bills. The chattels were subject to a mortgage to one McKean, who verbally authorized the defendant to make the sale. The plaintiff did not learn of the mortgage till some time later, when, claiming the right to rescind the sale on that account, he tendered the chattels to the defendant, and demanded the bills. Judgment for defendant.

George B. French, for plaintiff. W. W. Bailey, for defendant.

PER CURIAM.¹ The plaintiff has suffered no practical damage by the alleged breach of the warranty of title. It was his intention to receive, and the defendant's to convey to him, an absolute title to the chattels. The written warranty that they were "free from any incumbrance" means that the title conveyed should be absolute in the vendee. Whether the vendor had in fact the entire right of disposing of the chattels is immaterial; for by the sale that right passed to the plaintiff. The statute (Gen. Laws, c. 137, § 13) prohibiting the mortgagor from selling the mortgaged property without the consent of the mortgagee, in writing, upon the mortgage, did not prevent the title from passing. Gage v. Whittier, 17 N. H. 312; Patrick v. Meserve, 18 N. H. 300; Roberts v. Crawford, 54 N. H. 532; Bank v. Raymond, 57 N. H. 144. If the defendant did not have the right of selling the property to every one, he had the right of selling it to the plaintiff free from any incumbrance; and the plaintiff, having received the title he contracted for, cannot now rescind the contract, on the ground that the defendant did not have the right to sell the property generally, or to dispose of it in all ways as the absolute owner of it. It is not understood that a technical breach of a contract of warranty in an

immaterial respect, resulting in no appreciable damage to the vendee, authorizes him to repudiate the contract, and exercise the remedial power of rescission. 2 Kent, Comm. 475, 476; 2 Schouler, Pers. Prop. § 597; Stoddart v. Smith, 5 Bin. 355, 363; Case v. Hall, 24 Wend. 102; Flight v. Booth, 1 Bing. N. C. 377. Whether assumpsit for nominal damages or an action for a breach of the warranty could be maintained, we need not inquire. It would be inequitable to allow an amendment to be made for the purpose of raising either of those questions. Judgment for the defendant.

CARPENTER, J., not sitting.

(67 N. H. 368)

WHEELER v. EATON.

(Supreme Court of New Hampshire. Hillsboro. March 17, 1893.)

REPLEVIN—ATTACHMENT—RELEASE.

The owner of property attached as belonging to another may maintain replevin therefor, although, on his demanding the property, the levying officer stated that he might have it if it was his, where the officer retained the same possession of the property after such statement as he had before.

Replevin by Benjamin Wheeler against Alvin S. Eaton. Facts found by a referee. The defendant is a deputy sheriff. Upon a writ in favor of one Spalding against Gustus Wheeler, he attached, as the property of Gustus, "one hundred thousand feet of pine boards, more or less, situated * * * on land of Gustus Wheeler, in Hollis, in said county," and left an attested copy of the writ and of his return thereon with the town clerk. He posted a notice of the attachment near the boards in question. Gustus did not own the field or the boards named in the return, but they were the property of the plaintiff. Upon the plaintiff's request that the attachment be released, the defendant replied that he had attached no boards belonging to the plaintiff, but had attached all boards belonging to Gustus, and that the plaintiff could take away the boards if they belonged to him. The plaintiff, believing that he could not legally exercise control over the boards until the attachment should be released, replevied them. The court ordered judgment for the defendant, and the plaintiff excepted. Exceptions sustained, and judgment for plaintiff.

J. B. Parker, for plaintiff. C. W. Holtt and J. J. Doyle, for defendant.

PER CURIAM.¹ If the boards had been the property of Gustus, it is admitted that the attachment would have constituted a valid lien upon them, and that they would have been in the constructive possession of the officer. Gen. Laws, c. 224, § 16. But the question of title did not affect his possession of the property; and, unless he afterwards

¹ See footnote 36 Atl. 607.

¹ See footnote 36 Atl. 607.

parted with that possession, he cannot justify his act as against the true owner. When he informed the plaintiff that he had not attached the plaintiff's boards, but had attached all boards belonging to Gustus, and that the plaintiff could take them away if they belonged to him, both parties understood that the attachment was not released, and that the plaintiff would take them at his peril. The permission given him to take them was contingent, depending upon the question of title, which the officer did not attempt to decide. He retained the same possession of the boards after this conversation that he had before. He still had the plaintiff's property without right. Exceptions sustained. Judgment for the plaintiff.

CLARK, J., did not sit. The others concurred.

(87 N. H. 335)

DAVIS v. ÆTNA MUT. FIRE INS. CO.

(Supreme Court of New Hampshire. Merri-mack. March 17, 1893.)

INSURANCE—AGENCY—MISREPRESENTATIONS—
QUESTION FOR JURY.

1. A provision in a policy that, if any broker or other person than the insured should procure the policy, he should be deemed the agent of the insured, is not invalid under the laws of Massachusetts; and hence the question whether one acted as the agent of the insurer or of the insured must be determined by the intention of the parties, as evidenced by the policy and other facts submitted to the jury.

2. Where the policy sued on provided that the insured, by the acceptance of the policy, warranted that she had not omitted to state to the company any information material to the risk, it is immaterial that the omission was the result of accident or mistake.

3. Where the application for insurance failed to show, in the diagram of the buildings to be insured, either a one-story building used for the storage of paints, or a railroad track passing near the risk, or to state that the applicant was a woman, and it was represented that the main building was on the street, when it was 130 feet distant, with buildings between, the question whether there was a false representation of matters material to the contract, increasing the risk of loss, should have been submitted to the jury.

Action by one Davis against the Ætina Mutual Fire Insurance Company. There was a judgment on a verdict directed for plaintiff, and defendants except. Verdict set aside.

Assumpsit, upon a policy of insurance, issued by the defendants, a corporation formed under the laws of this state, and located here, to the plaintiff, a woman residing in Massachusetts, insuring her against loss by fire upon a mill building in that state. The policy does not conform to the standard form prescribed by the statutes of New Hampshire or Massachusetts, but is the form used by the defendants in insuring property located outside this state. It contains the following provisions: "(1) The assured, by the acceptance of this policy, hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance, or con-

tained or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to the company any information material to the risk.

(2) If any broker or other person than the assured has procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of the company, in any transaction relating to the insurance. (3) It is hereby understood and agreed by and between the company and the assured that this policy is made and accepted with reference to the foregoing terms and conditions, and those printed on the back hereof, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing, and indorsed hereon." The plaintiff applied to an insurance broker in Boston for the insurance, and he applied to a firm of general insurance brokers in Indianapolis, who sent the application to the defendants. The defendants sent the policy to the Indianapolis brokers, who forwarded it to the Boston broker, and he delivered it to the plaintiff. The defendants allowed a commission to the Indianapolis brokers, who allowed a portion of it to the Boston broker. The only information the defendants had relative to the location of the risk was contained in the application and a diagram sent to them by the Indianapolis brokers. The diagram represented a part of the buildings of a foundry as located on one side of the risk, but in a way that showed the representation was incomplete. A one-story building, with an iron roof, used for the storage of paints, etc., located within a few feet of the risk, on the opposite side from the foundry buildings, and a railroad track passing near the risk, were not represented. The building insured was represented as located upon a street, when in fact it was 130 feet or more distant from the street, with buildings between. The application stated that the building was insured in the Hartford and other companies, and did not state that the applicant was a woman. At the time the application was made, the Hartford Company's policy had been canceled. The plaintiff claimed that the contract was made in this state; that the Indianapolis brokers were the agents of the defendants by force of section 3, c. 172, Gen. Laws; and that their representations with reference to the risk did not bind the plaintiff. The court ruled in accordance with the plaintiff's claims, and, as the defendants offered no evidence, ordered a verdict for the plaintiff, and the defendants excepted.

Samuel O. Eastman, for plaintiff. Streeter, Walker & Chase, for defendants.

PER CURIAM.¹ It has already been decided that this contract of insurance is to be

¹ See footnote 36 Atl. 607.

construed in accordance with the laws of Massachusetts. *Davis v. Insurance Co.*, 67 N. H. 218, 34 Atl. 464. Hence the plaintiff's contention that the statutes of this state (Gen. Laws, c. 172, § 3; Laws 1879, c. 13) charging an insurance company with knowledge of the risk possessed by a third party who prepares the application, whether technically its agent or not, apply to this contract, cannot be sustained. These statutory provisions were not embodied in, and do not control, the Massachusetts contract. The parties intended that their contract should be construed by the laws of the state where the plaintiff resided, and where the property insured was situated. "All contracts of insurance on property in this commonwealth shall be deemed to be made therein." Laws Mass. 1887, c. 214, § 3. The ruling that the Indianapolis brokers were agents of the defendants, and that their knowledge of facts or their representations relating to the risk bound the defendants, is erroneous, under the statutes of that state. The agreement between the parties contained in the policy was that, "if any broker or other person than the assured has procured this policy, * * * he shall be deemed to be the agent of the assured, and not of the company, in any transaction relating to the insurance." This is evidence that the brokers, in negotiating for the insurance, and procuring the policy, were acting as the plaintiff's agents; and the question is whether a finding of fact that they sustained that relation to her can be sustained under Massachusetts law. The question relates to the capacity of the parties to bind themselves by this provision of the contract. If it is not opposed to the statutes of that state, there is no reason why it was not competent for them to make it. Whether a similar provision in a New Hampshire contract of insurance would be held invalid under our statutes is immaterial. An "insurance broker" is defined to be a person who, "for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected." Laws Mass. 1887, c. 214, § 93. Section 90 of the same chapter provides that "an insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance by an insurance company shall, for the purpose of receiving the premiums therefor, be held to be a company's agent, whatever conditions or stipulations may be contained in the policy or contract; and such agent or broker knowingly procuring, by fraudulent representations, payment or an obligation for the payment of a premium of insurance shall be punished," etc. Our attention has not been called to any other statutory provision in that state restricting the agency clause in insurance policies. Section 90 restricts the power of parties to define their liability under that clause in a single particular

only, which is not material in this case. With that exception, the general common-law power of the parties in this respect remains unchanged. The intention of the parties, therefore, evidenced by the policy and such other facts and circumstances as may be competent, must determine the question whether the brokers who procured this policy for the plaintiff were her agents or the agents of the company; and this question is one of fact for the jury.

The defendants insist, not only that the verdict should be set aside, but that judgment should be ordered in their favor, on the ground that the plaintiff suppressed material facts in her application, and was guilty of a breach of the warranty contained in the policy, or of a misrepresentation sufficient to avoid the policy. The plaintiff warranted in the policy that she had not "omitted to state to the company any information material to the risk." This stipulation, being incorporated in the policy, may be "considered as a warranty." Section 59. The plaintiff, having accepted the policy with this provision in it, is bound by it. *Godgård v. Insurance Co.*, 108 Mass. 56, 59; *Insurance Co. v. Buffum*, 115 Mass. 343. Hence she cannot recover in this action if she omitted to give the defendants information material to the risk, whether the omission was intentional, or the result merely of accident or mistake. *Campbell v. Insurance Co.*, 98 Mass. 381, 389. But whether the plaintiff's suppression of material facts relating to the risk is held to constitute a breach of the stipulated warranty may be of little practical importance, since it may also be held to be a false representation of matters material to the contract. "Representations to insurers before or at the time of making a contract are a presentation of the elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract; its foundation, on the faith of which it is entered into. If wrongly presented in any respect material to the risk, the policy that may be issued thereupon will not take effect. To enforce it would be to apply the insurance to a risk that was never presented." *Campbell v. Insurance Co.*, 98 Mass. 390; *Kimball v. Insurance Co.*, 9 Allen, 540; *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420; *Boardman v. Insurance Co.*, 20 N. H. 551; *Marshall v. Insurance Co.*, 27 N. H. 157. This principle is recognized in section 21 of the chapter above referred to, which provides that "no oral or written misrepresentations made in the negotiation of a contract or policy of insurance, by the assured or on his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss." The inference is that, if the matter misrepresented did increase the risk of loss, it would avoid the policy as at common law; and such was the decision in *Ring v. Assurance Co.*, 145 Mass. 426, 14 N. E. 525. In that case the assured represented that there were no houses within 100 feet of

the house containing the chattels to be insured. This representation was not contained in the policy. The jury were, in effect, instructed that if the representation was made innocently, by mistake, it would not avoid the policy, although it related to a fact that was material to the risk, and was false. It was held that this was error, and that the plaintiffs could not recover if they had made misrepresentations on matters which increased the risk of loss, although not made with intent to deceive. Applying the provisions of the Massachusetts statutes, construed by the decisions in that state, it is apparent that the defendants are not liable if the plaintiff, before or at the time of the contract, suppressed information which, if disclosed, would have rendered the risk more hazardous than she represented it to be. This result does not depend on the question of her warranty, or of her good faith in the transaction.

Whether, however, her failure to disclose facts relating to the risk, which the defendants now complain of, constitutes a breach of the warranty contained in the policy, or whether it amounts to a misrepresentation of the risk assumed under the contract, the defendants cannot escape liability for the loss, unless those facts were material to the risk. Any matter is material to the risk which increases the danger of loss, and would influence an insurance company, in the reasonable prosecution of its business, to decide whether to take the risk, and what premium to charge for it if taken. The premium bears a relation to the risk incurred, increasing as the danger of loss increases. "The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed." *Kyte v. Assurance Co.*, 149 Mass. 116, 123, 21 N. E. 361, 362. Absence of legislation in Massachusetts upon this subject leaves this obvious principle in full force, and makes it one element in the test of the materiality of the undisclosed facts. But whether certain facts are material to the risk under this or other competent tests is ordinarily a question of fact for the jury, as well as the inquiry whether there was misrepresentation in regard to them. *Boardman v. Insurance Co.*, 20 N. H. 551; *Patten v. Insurance Co.*, 40 N. H. 375, 381; *Clark v. Insurance Co.*, Id. 333, 338; *Luce v. Insurance Co.*, 105 Mass. 297, 301; *Ring v. Assurance Co.*, supra. In this case the danger of loss by fire to the insured building may have been increased by the proximity of the building used for the storage of palnts, or by the fact that locomotives frequently pass near the risk. The location of the building at a considerable distance from the street may have rendered the risk extra-hazardous for many reasons. If the defendants had been informed that they were asked to insure a manufacturing establishment owned by a woman, located as this was represented to be, they might have charged a higher rate, or they might have declined to place insurance upon the property, on the ground that a woman might not be able to give that personal atten-

tion to the care of it that a man could if he were the owner of it. *Baldwin v. Insurance Co.*, 60 N. H. 424. All these matters are proper subjects for the consideration of the jury. The court cannot say, as a matter of law, that any of them affected the insurable character of this property.

The fact that the policy in suit does not conform to the standard policy prescribed by the statutes of Massachusetts (section 60) is not important in the present inquiry. A policy issued in violation of the statute "shall nevertheless be binding on the company issuing the same" (section 105), and, as provided in the standard form, "shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured." While the defendants cannot escape liability on the ground that the policy in suit does not conform to the standard established in that state, the plaintiff cannot avoid the common-law result of her misrepresentation of material facts. Verdict set aside.

BLODGETT and CHASE, JJ., did not sit. The others concurred.

(81 N. J. L. 375)

ULSHOWSKI v. HILL

(Supreme Court of New Jersey. Feb. 23, 1898.)

ACTION FOR TORT—WHEN LIES.

A person is not legally responsible for an injury which results to another from a lawful act, done by him in a lawful manner, and without any carelessness or negligence on his part. (Syllabus by the Court.)

Case certified from circuit court, Hudson county; Nevins, Judge.

Action by Joseph Ulshowski against Thomas Hill. Plaintiff had judgment. On rule to show cause why a new trial should not be granted. Case certified. Rule made absolute.

Argued November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

Wm. H. Speer, Jr., for plaintiff. Corbin & Corbin, for defendant.

GUMMERE, J. The defendant is the owner of a plot of land on Steuben street, in Jersey City, upon the rear of which there stood a frame building. In the latter part of May, 1894, he began the removal of this building, tearing it down story by story. When the men who were engaged in the demolition of the building ceased work on the evening of the 28th of May, they had taken down the third and second stories, leaving nothing remaining except the first story and the cellar posts. This first story had the weather boards and sheathing on; the cellar posts were intact; and the building was left in a perfectly safe condition. Very early the next morning, and before the workmen had returned to their work, a large number of Poles, who resided in the neighborhood, came upon the defendant's prop-

erty. broke into the partially destroyed building, and proceeded to tear off and carry away the weather boards and sheathing, and to cut out the joists. The defendant, on his arrival at the premises, about half past 7 in the morning, found the building in such a condition, from these depredations, that he became seriously alarmed lest it should fall and injure those about it. He thereupon concluded to have it pulled down, and, after the rope was made fast, an attempt was made to pull the building over towards the front of the lot. Instead of falling in that direction, however, a portion of the building fell the opposite way, striking a large clothes pole which stood upon the adjoining premises, where the plaintiff lived, and broke it off near the ground. The plaintiff, who was a child only three or four years old, had been left by his mother lying upon a pile of boards near this pole; and, when it fell, it struck and seriously injured him. Most of these facts appear in the plaintiff's case. Those of them which appear in the defendant's case are undisputed. For the injuries thus received, the plaintiff brought this suit, alleging that they were due to the negligence of the defendant in so pulling down his house as to cause it to fall against the pole. The jury found in his favor.

It seems to me that the facts above recited negative the idea that the defendant was in any way negligent in what he did. The natural result of pulling the building in the direction in which it was desired that it should fall would have been to cause the building to fall in that direction; and, when the defendant gave orders that this should be done, he did what a prudent and careful man would ordinarily have done under similar circumstances. He was not bound to anticipate that the laws of nature might be reversed, and that the building, by being pulled in one direction, would possibly fall in another. That he had a right to pull down his building upon his own property, provided he did so in a careful manner, cannot be denied; nor can he be held responsible for injuries arising from such act. Chief Justice Beasley, in discussing this principle in *Marshall v. Wellwood*, 38 N. J. Law, 339, on page 343 of the opinion, says: "No man is, in law, an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damage complained of must have come from a wrongful act. Mr. Addison, in his work on *Torts* (volume 1, p. 3), very correctly states this rule. He says: 'A man may, however, sustain grievous damage at the hands of another; and yet if it be the result of a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages.' * * * Everywhere, in all branches of the law, the general principle that blame must be imputable as a ground of responsibility for damage proceeding from a lawful act is

apparent." It seems to me, therefore, that, as there was nothing in this case upon which the jury could have found that the plaintiff's injury resulted from the want of care of the defendant or his agents, the court should have directed a verdict for the defendant. This direction was refused, although requested. The circuit court is advised that the rule to show cause should be made absolute.

(61 N. J. L. 248)

NORTH HUDSON COUNTY RY. CO. v. ANDERSON.

(Court of Errors and Appeals of New Jersey. March 1, 1898.)

LEGAL TENDER—MUTILATED BANK NOTE.

1. A dollar bill from the upper left-hand corner of which a piece one inch and a half by one inch and a quarter had been torn is not a legal tender for car fare, and the conductor may eject a passenger who refuses to make other payment. He was not bound to accept a bill which was substantially mutilated. If any part was absent which might aid in determining whether it was genuine, he was under no duty to receive it.

2. The rules of the treasury department of the United States in regard to the redemption of mutilated notes relate simply to redemption, and do not affect the question of legal tender.

(Syllabus by the Court.)

Error to supreme court.

Action by Clarence Anderson against the North Hudson County Railway Company. Plaintiff had judgment, and defendant brings error. Reversed.

George Holmes, for plaintiff in error.
Warren Dixon, for defendant in error.

VAN SYCKEL, J. Anderson, the plaintiff below, tendered the conductor on a car of the company defendant below a mutilated one dollar note for his car fare. The conductor refused to accept the note, because it was imperfect, and put Anderson off the car for not paying his fare. Thereupon Anderson brought suit to recover damages for the alleged wrongful act of the conductor. The evidence of Anderson was that a piece one inch and a quarter by one inch and a half had been torn from the upper left-hand corner of the bill, while the evidence on the part of the company was that the piece torn off was two and a half inches by one inch and three-quarters. The trial court was requested by the counsel of the company to charge the jury that the note was not a legal tender for the car fare, which request the court refused to grant. On the contrary, the court did charge that the note was a legal tender. To the refusal to charge as requested, and to the charge as made, the defendant company excepted, and error is thereupon assigned.

The case of *Railroad Co. v. Morgan*, 52 N. J. Law, 60, 18 Atl. 904, is relied upon to support the ruling of the trial court; but it is not parallel. There a genuine silver coin, worn smooth by use, not appreciably di-

minished in weight, and distinguishable as a coin duly issued from the mint, was held to be a legal tender. The United States statutes make certain paper money legal tender, but there is no provision that part of such notes shall be impressed with that quality. The rules of the treasury department with regard to the redemption of mutilated notes relate simply to redemption, and do not make such notes legal tender. The company was not under any obligation to take upon itself the burden of applying to the treasury department at Washington for a perfect note, or to assume the risk of failing to obtain it. The conductor had the right to demand an entire bill, and was not bound to accept one from which a portion had been torn. If any part was absent which might aid in determining whether it was a genuine bill, he was under no duty to receive it. The portion torn off the bill presented in this case constituted a substantial mutilation of it. It was not a legal tender, and the trial court erred in refusing so to charge. The judgment below should therefore be reversed.

(61 N. J. L. 411)

STATE (BENTON et al., Prosecutors) v. CITY OF ELIZABETH et al.

(Supreme Court of New Jersey. March 1, 1898.)

CERTIORARI—MUNICIPAL CORPORATIONS—POWERS—PRIVILEGES—CORPORATIONS.

Dissenting opinion. For majority opinion, see 39 Atl. 683.

VAN SYCKEL, J. The evidence shows that the laying of the proposed pipe line by the defendant company, for the transit of crude petroleum through the city of Elizabeth, will be injurious to the property of the prosecutors; and that gives them a standing in this court to contest the validity of the ordinance passed by the common council of Elizabeth, which gives to said company the privilege of opening certain streets in said city, and laying its pipes across them. I do not question the authority of *Duncan v. Hayes*, 22 N. J. Eq. 25, and like cases cited on behalf of the defendants, but regard them as having no pertinency to this controversy. No rule is more firmly settled than that persons specially injured by the official action of a common council may challenge its legality. The National Transit Company is a foreign corporation, without any authority from this state to lay its pipe line. I find no authority in the common council to pass this ordinance, and cannot distinguish this case from the following cases in our own courts, in which the existence of such power was denied: *State v. Inhabitants of Trenton*, 36 N. J. Law, 79; *State v. Mayor, etc., of City of Newark*, 49 N. J. Law, 344, 8 Atl. 128; *Hutchinson v. State*, 39 N. J. Eq. 569. In these cases our courts refused to recognize the right of the common council to grant the use of the street until authority was conferred upon it by the legislature to make such grant, although the con-

sent of abutting landowners was obtained. In the case of *Montgomery v. Inhabitants of Trenton* the municipal ordinance granted to certain persons the right to lay a railroad track across West State street, with the consent of abutting landowners, and in such a way as not to interfere with travel on the street. This court said that the common council of the city of Trenton had no power over streets other than that conferred by the city charter, and that the ordinance must fall unless authority could be found for it in the corporation act. The provision of the charter of Trenton relied upon to support the ordinance is as follows: "The common council shall have power to regulate, clean, and keep in repair streets, etc., in said city, and to prescribe the manner in which corporations or persons shall exercise any privilege granted to them in the use of any street, avenue, highway, or alley in said city, or in digging up any street, avenue, highway, or alley for the purpose of laying down pipes or any other purpose whatever." It will be observed that the language used in the city charter of Elizabeth upon this subject is precisely that of the charter of Trenton, and it must therefore receive the same interpretation. This court, in construing this provision of the Trenton charter in the case above cited, said that, if it applied to privileges granted by legislative enactment, it did not support the action of council, because there was no such legislative authority; and, if it applied to privileges granted by common council, it must be interpreted to mean such privileges as might lawfully be granted. It was further declared that, in measuring the extent of the power of council, the object and purpose for which it was given must always be regarded as the test, and that only those things which are fairly within the idea of regulating streets, with a view to their use as streets, are competent subjects of corporate legislation. The idea that the power of council to prescribe the manner in which corporations shall exercise any privilege granted to them in the use of streets related to grants made by property owners to corporations to use the public highways found no countenance whatever in the view of the court. On the contrary, that interpretation was expressly excluded by restricting municipal action to those instances where grants were made under legislative sanction, and by refusing to accept the consent of abutting owners as a justification for the passage of the ordinance. The right of common council to regulate the exercise of such privileges does not attach until the legislative authority for it is acquired. The company must be endowed with capacity to receive the right to occupy the street before council can consent to the use of the street by the company. The argument of the defendant in this case is that the ordinance merely expresses the consent of the municipality to the use of the street so far as the public is concerned, and is therefore within its power. To the like contention made under the charter of Newark in *Telegraph Co. v. Mayor, etc., of Newark, supra*,

the present Chief Justice replied as follows: "Nor can this resolution be sustained on the theory that it merely expresses the consent of this municipality representing the inhabitants within it, to such an obstruction of its public streets. Authority to thus consent must obviously have been conferred by the legislature. No such authority can be discovered in the charter." Following the previous declarations of the court in the Trenton Case, the Newark ordinance was denounced as illegal, and incapable of being validated by the consent of abutting owners. The rule established by these cases is that the privilege granted must have its basis in legislation to authorize council to consent; and it must be alike applicable, whether the proposed structure is upon the surface of the street, or involves a digging up of the street to lay pipes under the surface.

We are dealing in this case only with the public right in the highways, and with the power of the common council to grant to private corporations the use of the highway so far as it is within public control. The cases before referred to, which are in accord with many decisions in other states, circumscribe the legitimate action of the common council, in relation to the public right in the highways, to the exercise of such authority as is clearly conferred by the legislature. No such authority appears in this case. But if the consent of the abutting owners constituted a grant, within the meaning of the city charter, the Central Railroad Company is without authority to lay a pipe line through the city over its right of way for the purpose of transporting petroleum across the state, and cannot bestow such a right upon the foreign corporation. The right of common council to permit an abutting owner of land to use the street to lay a pipe for the convenience of his land, as a right appurtenant thereto, does not imply the right to permit this foreign corporation to occupy the street for the purpose of its pipe line. It may be true that these prosecutors could not intervene to prevent the conveyance by the Central Railroad Company to the National Transit Company, or to set aside such conveyance; but, when the grantee sets it up in defense of an act which is specially injurious to the prosecutors, it is competent for them to deny that any legal support to the ordinance can be derived from such grant. If it is *ultra vires*, it gives no support to the action of the common council. A grant to support the ordinance must be derived from one who has a right to make it. In my judgment, the ordinance is illegal, and should be set aside. For the reasons herein stated, I cannot concur in the opinion of the majority of the court.

(61 N. J. L. 335)

KEER v. STATE.

(Supreme Court of New Jersey. Feb. 23, 1898.)

CRIMINAL LAW—VENUE.

By virtue of the second section of the act relating to the jurisdiction of counties (1 Gen.

St. p. 1003, § 33) all criminal offenses which are committed on any highway of this state which divides any of the counties therein are triable in the county in which the offender last resided previous to the commission of such offense.

(Syllabus by the Court.)

Error to court of quarter sessions, Middlesex county; Strong, Judge.

Arthur J. Keer, convicted of malicious mischief, brings error. Affirmed.

Argued November term, 1897, before the CHIEF JUSTICE, and DEPUE, GUMMERE, and LUDLOW, JJ.

F. Woodbridge, for plaintiff in error. John S. Voorhees, Prosecutor of the Pleas, for the State.

GUMMERE, J. The plaintiff in error was convicted of malicious mischief in unlawfully and maliciously breaking and injuring a buggy wagon, the property of one Charles A. Oliver. The illegal act was done while the plaintiff in error was driving along the Trenton turnpike, through the center of which road the dividing line runs which separates the county of Middlesex from the county of Somerset. At the close of the state's case a motion was made to discharge the prisoner on the ground that the state had failed to prove that the offense charged in the indictment had been committed in the county of Middlesex, it not having been shown on which side of the center line of the road the prisoner was when he maliciously broke Oliver's buggy. The motion to discharge having been overruled by the trial court, an exception was taken to the ruling, and we are now asked to set aside the conviction for this alleged error.

The motion was properly refused. By the second section of the act relating to the jurisdiction of counties it is provided that, "where any treason, murder, or other offence, hath been or shall be hereafter committed on any of the rivers, creeks, highways, or roads which divide or hereafter shall divide any of the counties within this state, such offences shall be inquired of and tried by a jury of that county where the offender last resided." 1 Gen. St. p. 1003, § 33. In the present case it was shown that the prisoner, prior to and at the time of the commission of the offense for which he was indicted, was a resident of the county of Middlesex, and that he continued to reside there at the time of his trial. By force of the statutory provision referred to the offense was triable in the Middlesex sessions, and the jurisdictional facts had been proved when the state rested.

Other errors have been assigned, but they are not of sufficient importance to require special discussion. They attack the frame of the indictment, the admission of testimony, and the charge of the court. It is enough to say that they have, each of them, been considered by us, and found to be without substance. The judgment should be affirmed.

(61 N. J. L. 450)

STATE (COOK et al., Prosecutors) v. GROSSARTH.

(Supreme Court of New Jersey. Feb. 21, 1898.)

APPEAL FROM DISTRICT COURT—MATTERS OF LAW.

By the district court acts an appeal is given on matter of law only. By "An act concerning appeals from district courts in this state," approved March 24, 1892 (1 Gen. St. p. 1264), an appeal is given "both as to matter of law and fact," in cases where the debt, demand, or matter in dispute, exclusive of costs, is not less than \$25, and all inconsistent laws are repealed. *Held*, that the right to appeal on matter of law only, in cases involving less than \$25, still subsists.

(Syllabus by the Court.)

Certiorari to Jersey City district court.

Action by Lewis Grossarth against Robert C. Cook and others to the district court. Judgment in favor of plaintiff, whose demand was less than \$25. On refusal to nonsuit, defendants brought certiorari. Dismissed.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

R. P. Wortendyke, for plaintiffs. M. Salinger, for defendant.

COLLINS, J. Under the district court acts (Newark P. L. 1873, p. 696; 1 Gen. St. p. 1216), the determination of facts is conclusive, but an appeal is given, on matter of law only, to the courts of common pleas. The judgments of the pleas are reviewable in this court, but where there is jurisdiction in the district court, and an appeal to the common pleas, a direct certiorari to the district court is not permitted. Statutes of this character are constitutional. *Traphagen v. West Hoboken Tp.*, 39 N. J. Law, 232-236. Like restriction on the writ is upheld as to courts for the trial of small causes. *Ritter v. Kunkle*, 39 N. J. Law, 269; *Wahrman v. Horan*, 46 N. J. Law, 466; *White v. Neptune City*, 56 N. J. Law, 222, 28 Atl. 378. As the law stood, therefore, until March 24, 1892, no certiorari would have been allowed upon the case above stated. The present writ rests on the assumption that a statute then approved took away the right of appeal in cases involving less than \$25, thus subjecting the judgment to this court's prerogative review. Such statute reads as follows:

"An act concerning appeals from district courts in this state.

"1. Be it enacted by the senate and general assembly of the state of New Jersey, that from any judgment obtained in any district court established by law in any city of this state, whether by general or special statute, where the debt, demand or matter in dispute, exclusive of costs, be for a sum not less than twenty-five dollars, except judgment given by confession, either party may appeal, both as to matter of law and fact, to the court of common pleas of the county to be holden next after the rendering of such judgment; which appeal the judge of said district court

is hereby directed to grant in the same manner as appeals are now had and taken in the court for the trial of small causes: Provided always, that no appeal shall be granted to remove any judgment entered against the party demanding the appeal, for any amount beyond the costs of suit, where such judgment shall have been rendered on the verdict of a jury, or on the report of referees, unless the party shall, at the time of taking the same, file an affidavit made by the party, or in his absence by his agent, stating that the said appeal is not intended for the purpose of delay, and that the affiant verily believes that the appellant hath a just and legal ground of appeal upon the merits of the case; which affidavits shall be sent up to the court to which the appeal is taken, with the other papers in the cause.

"2. And be it enacted, that the causes thus appealed to the said courts of common pleas shall be tried de novo in said courts, and that the taxed costs in said courts of common pleas upon said appeals shall be the same as those now allowed by law in the trial of appeals from the courts for the trial of small causes in said courts, except that there shall be allowed as the attorney's fee, to the prevailing party, to be taxed therein, the sum of five dollars, in all causes where the judgment appealed from does not exceed one hundred dollars, and ten dollars in causes where the judgment appealed from exceeds the sum of one hundred dollars.

"3. And be it enacted, that all appeals under this act shall be taken within five days from the rendering of the judgment, and that they shall be put on the list for trial at the first term of the court of common pleas to which the same shall be appealed; provided, however, that if said appeal is taken within the five days prior to the beginning of such term, in that case the said appeal shall be put on the list for trial at the next term thereafter.

"4. And be it enacted, that all acts and parts of acts inconsistent with this act be and the same are hereby repealed, and this act shall take effect immediately." 1 Gen. St. p. 1264.

Of course, it is not inconsistent with the terms of this act that the right to an appeal on matter of law only, in cases involving less than \$25, should still subsist; but, if the legislative purpose was to embrace the whole subject of appeals from district courts, the new statute did nevertheless supersede all previous legislation on the subject. *Roche v. Jersey City*, 40 N. J. Law, 257. We, however, can find no such purpose. Undoubtedly the whole subject of appeals, in cases involving \$25 and upward, is covered by it; but cases involving a less sum are not dealt with at all. Evidence inheres in the act itself that some cases were meant to be excluded. After the grant of the right to appeal, both as to matter of law and fact, in the specified class of cases, it is provided that causes "thus appealed" shall be tried

de novo, and that the costs on "said appeal" shall be as stated, and that all appeals "under this act" shall be taken within a time named, which is a shorter time than that fixed by the district court acts. A review in some way of legal error could not be denied in any case, and it is not to be supposed that the legislature meant to cut off the simple, cheap, and expeditious review by appeal to the local county court afforded by the original acts, although in petty cases it was thought wise to leave parties bound by the determination of facts on the district court. Our conclusion is that appeals from district courts in cases where the debt, demand, or matter in dispute is less than \$25 are left undisturbed by the act of 1892. We are therefore precluded from considering the questions presented in this case, and the certiorari is dismissed, with costs.

(61 N. J. L. 468)

STATE (McEWEN, Prosecutor) v. BOARD OF HEALTH OF WOODBRIDGE TP.

(Supreme Court of New Jersey. Feb. 21, 1898.)

JURY TRIAL—VIOLATION OF HEALTH ACT.

1. A jury trial is not permitted by the health act of 1887 (2 Gen. St. p. 1638, § 18).

2. To sustain a judgment under that act, there must be a conviction in the form prescribed by the supplement of 1888 (2 Gen. St. p. 1642, § 41).

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Joseph McEwen, against the board of health of the township of Woodbridge, in the county of Middlesex, to review a judgment of a justice. Reversed.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Ephraim Cutter, for prosecutor. William M. Brown, for defendant.

COLLINS, J. The return in this case certifies a transcript of proceedings in a "justice's court," reciting sworn complaint and process against the prosecutors for violation of an ordinance of a local board of health, passed under section 18 of the health act of 1887 (2 Gen. St. p. 1638), a trial by jury, a verdict for \$25, and the following entry: "I therefore gave judgment in said amount against the defendant and in favor of the plaintiffs, and costs, seven dollars and eighty-five cents,"—signed by a justice of the peace. The legislation involved in this case, so far as its sanction is concerned, is anomalous, and defies construction; for it inextricably blends together a civil and a quasi criminal jurisdiction. But, whether we consider the authorized judgment as one in a summary proceeding, as in *Holworth v. Newark*, 50 N. J. Law, 85, 11 Atl. 31, was declared of that directed in a statute identical with said section 18, or as one in a civil suit for a penalty, as in *White v. Neptune City*, 56 N. J. Law, 222, 28 Atl. 378, was adjudged with respect to legislation containing

features found in said section as supplemented in 1888 (2 Gen. St. p. 1642), the certified judgment cannot stand, because:

1. There was a trial by jury, for which there is no warrant in the statute. *White v. Neptune City*, ubi supra. The defendant urges that such mode of trial was at the prosecutor's request, but the transcript does not so certify, and we can presume nothing.

2. There was no conviction. The supplement of 1888 expressly requires one as a foundation for judgment, prescribes its terms, and provides that it shall be signed by the magistrate. The judgment must be reversed, with costs.

(61 N. J. L. 493)

CLIFFORD v. HUDSON COUNTY COURT OF OYER AND TERMINER.

(Supreme Court of New Jersey. Feb. 23, 1898.)

CRIMINAL LAW—RECORD.

On an application for a writ of mandamus to compel a court of oyer and terminer to amend its record by inserting therein that an indictment was tried by a struck jury, *held*, that the manner in which the 12 jurors who tried an indictment were selected from the body of the county forms no part of the record of the court. (Syllabus by the Court.)

Application of Edward Clifford for a writ of mandamus to compel the Hudson county court of oyer and terminer to amend his record to show therein that an indictment was tried by a struck jury. Denied.

Argued February term, 1898, before DE PUE, VAN SYCKEL, and GARRISON, JJ.

Wm. D. Daly, for the motion.

GARRISON, J. Edward Clifford was indicted for murder, and tried before the Hudson oyer and terminer, where he was found guilty of murder of the first degree, and sentenced to be hung. This judgment was affirmed in this court (37 Atl. 1101), and in the court of errors and appeals, upon successive writs of error (39 Atl. 721).

Application is now made for a mandamus to compel the court of oyer and terminer to amend its record by inserting therein that the indictment was tried by a struck jury, and not by a petit jury; that is, that the jury was selected in the method prescribed by the eighteenth section of the jury act, and not by that prescribed in the thirteenth and following sections.

This application loses sight of the essential difference between the record of a court and the history of the trial of a cause therein. The record of a court contains only those things that are essential to the validity of the proceeding, such as the nature of the issue, the presence of a judge, and, in respect to the jury, that it was of the proper number of proper men, properly qualified and returned by the proper officer,—a venire at common law. From this point down to the return of the verdict, the record is silent.

The occurrences of this interval appertain to the conduct of the trial by the court, and of these the record does not speak. They are made to appear by methods provided for that purpose at common law and by statute. Hence all objections to the array that have not been pleaded, all inquiry into the way in which it was selected, all exceptions to the panel, all challenges to individual jurors, all questions touching the service of the list, as well as all other similar matters, form no part of the record, and would be no part of it even if inserted by the clerk from his minutes of the trial. The history of the trial in these respects could at common law be certified only by a bill of exceptions sealed by the trial court, which is still the rule save as the mode of certification has been modified by the legislature.

This rule of practice is illustrated in the case of *Peak v. State*, 50 N. J. Law, 198, 12 Atl. 701, and in *Moschell v. State*, 53 N. J. Law, 498, 22 Atl. 50, where a criminal cause was tried by a struck jury.

From this brief exposition it follows that the fact that the jury that tried this indictment was selected from the body of the county by the statutory method of striking a jury cannot be made a part of the record of the court of oyer and terminer.

This disposes of the application for a mandamus, which is for this reason denied.

(61 N. J. L. 211)

AGRICULTURAL INS. CO. OF WATERTOWN, N. Y., v. FRITZ.

(Court of Errors and Appeals of New Jersey. March 1, 1898.)

INSURANCE—CONTRACT—AUTHORITY OF AGENT.

1. R. F. agreed with one C., who solicited insurance for the A. Ins. Co., that certain property then belonging to her husband should be insured in a specified sum, and for a stipulated premium and time, and that she would pay a balance of premium within a short time. Within that time she went to the office of an agent of the insurance company, and there saw C., who, taking the balance of premium offered, said that they were not ready for her, but would send "the paper" through the mail. Subsequently a policy of insurance written upon the blank policy in use by the insuring company, made in her name as the insured, came by post to R. F., who accepted and retained it with her valuables until after the property insured was destroyed by fire. *Held*, that the contract made with the company was that which was stated in the policy, and was not a parol contract for insurance, with the husband of R. F.

2. To bind a principal by a contract made with one dealt with as its agent, it is necessary for the plaintiff to establish by due proof the existence of sufficient power in the agent to make the contract.

(Syllabus by the Court.)

Error to circuit court, Camden county; Garrison, Judge.

Suit by Rachel Fritz, as executrix of the will of George Fritz, deceased, against the Agricultural Insurance Company of Water-

town, N. Y., to recover on a fire insurance policy. Plaintiff had judgment, and defendant brings error. Reversed.

Rachel Fritz, as the executrix of the will of George Fritz, deceased, declared against the Agricultural Insurance Company of Watertown, N. Y., upon a contract of insurance, alleging that the insurance company, in consideration of \$12 paid to it by George Fritz, undertook to indemnify George Fritz against loss by fire to the extent of \$700 upon his dwelling house, in Gloucester county, in this state, and \$300 upon his household furniture, and \$200 upon his piano, in that dwelling, for the term of three years from the 1st of January, 1892, and that the property insured, which was fully worth the amount of that insurance, was wholly destroyed by fire on the 22d of November, 1894; to which declaration the insurance company pleaded, first, the general issue, and then that the contract sued upon had been reduced to writing, which writing contained several conditions, among which was one to the effect that, if the insured property should be mortgaged during the term of the insurance, the insurance should be void, unless the mortgaging thereof should be assented to by the insurance company, and another to the effect that suit, for recovery of a claim under the contract, should not be sustainable unless it should be commenced within 12 months next after the happening of the fire insured against, and that both those conditions had been violated, the former by mortgage without consent, on the 11th of May, 1892, and the latter by the fact that this suit was commenced on the 31st of July, 1896, which was more than 12 months after the fire, which occurred on the 20th of November, 1894. At the trial it was proved that George Fritz had been insured by the Agricultural Insurance Company in respect to the same property upon two former occasions, by written policies of insurance,—one covering the period of time between April 19, 1881, and April 19, 1884, and the other covering a period of time from October 29, 1884, to October 29, 1887; that the contract of insurance in suit was negotiated by Rachel Fritz, the wife of George Fritz, with one Chambers, who was known to her to be travelling about the country as a solicitor of insurance for the plaintiff in error; that, prior to her first interview with Chambers, George Fritz had given her \$8 with which to secure \$1,000 insurance; that Chambers persuaded her that the insurance should be \$1,500, and she agreed with him that it should be that sum, covering a period of three years, for a premium of \$12, and paid him the \$8 her husband had given her, and agreed to pay an additional \$4 at Vineland; that, less than a week later, she went to Vineland, to the office of James Loughran & Son, the agents of the insurance company at Vineland, and there saw Chambers, to whom she handed the \$4; that Chambers

then said to her that "they" were not ready for her, that he would send "the paper" through the mail; that, two weeks later, she received through the mail a policy of insurance upon the blanks then used by the company, containing all the terms she had agreed upon in addition to its usual conditions, among which were the two pleaded, but insuring Rachel instead of George Fritz; that she did not look at it, but put it in the drawer of a sideboard, where valuable papers were kept, and there it remained locked up until it was rescued by her daughter, by her direction, while the house was on fire; that, before the fire, George Fritz died, leaving a will, dated on the 11th of May, 1888, by which he devised and bequeathed his entire estate to his wife; and that, after the fire, the policy was examined by a son of Mrs. Fritz, who discovered that it was made out in the name of Mrs. Fritz as the person insured. When the plaintiff below rested, the defendant moved that she was nonsuited—First, because she had failed to make proof of the contract sued upon; and, second, because she had not shown that Chambers had power to make either the contract urged in suit or any other contract which would bind the insurance company. The trial justice denied the nonsuit. At the conclusion of the defendant's proofs, which were limited to evidence that Mrs. Fritz, under oath, made proof of the loss under the written policy delivered to her, the defendant asked the trial justice to instruct the jury to find for it, with which request the trial justice refused to comply. Exception was duly taken to these determinations of the trial court, and upon them, among others, error has been assigned.

James Buchanan and A. H. Sawyer, for plaintiff in error. John J. Crandall, for defendant in error.

MCGILL, C. (after stating the facts). The only testimony offered to establish the contract sued upon was given by Rachel Fritz. Stated in narrative form, it is this: "Mr. Chambers came around again on the 26th of January, and I told him that he would have it insured for \$1,000. He said that I ought to have it insured for \$1,500, and I told him I had not any more money but \$8. Then he told me I could go down to Vineland, and pay the other \$4." She states that this conversation took place on Saturday; that she paid Chambers the \$8, and on the following Wednesday took \$4 to Vineland, and gave it to Chambers, in Mr. Loughran's office; and that Chambers then said to her that "he [using her language] would send the paper through the mail, or something like that, and that they were not ready for me, or something to that effect; and I came out, and in two weeks after I got the paper through the mail, and I never opened it. It was in a large envelope. * * * I put it in a sideboard drawer. I never even opened it.

* * * Well, of course, the sideboard drawer was saved, and it was along with some other papers. I never opened it, and never knew what was in it. * * * I had a lot of papers in there, not exactly that one paper or two papers, but it was a drawer that I always kept locked, and kept the key; and, of course, while the fire was raging, I got my daughter to go in and take this sideboard drawer out, and that is all that I saved of it. I know there was papers in there I really needed,—other things. Q. In the interview with Mr. Chambers, did he tell you, you would shortly receive a policy through the mail? A. I don't know what Mr. Chambers said at all. He said he wasn't ready for me, and he would send this paper through the mail." Mrs. Fritz does not, anywhere in her testimony, say that it was her purpose to have a verbal contract of insurance. Nor does she say that she did not expect an insurance policy in writing after the fashion of the two former policies. There is nothing in the language in which she states the negotiations she had with Chambers which is inconsistent with the assumption that she negotiated for future insurance to be procured by Chambers. On the contrary, the import of the language used, and the interpretation given to the negotiation by the subsequent conduct of both Mrs. Fritz and Chambers, in that the latter announced that "the paper" should be sent through the mail, and the former failed to remonstrate that the insurance contract was already complete without writing, but without reply, in silent acquiescence in the fact that she was to have "the paper," went away, and afterwards accepted the policy which came, as the insurance intended, and put it away with the valuable papers of the household, indicate, with irresistible force, that a written policy of insurance was that which was bargained for. And, whatever may have been the condition of Mrs. Fritz's mind, it is clear that Chambers did not contemplate a verbal contract. When she handed him the \$4, he apologized that "they" were not ready for her, and promised that "the paper" should be sent her by mail. We think that the testimony of Mrs. Fritz will bear but one construction,—that her mind and the mind of Chambers met in agreement that the contract of insurance negotiated for was to be expressed by the paper which should reach her by mail; and we think that the testimony does not prove that either she or Chambers intended or understood that they had completed the insurance. Their bargaining was to be completed by the issuance of a policy by the company.

The contract being for a policy of insurance, it will be assumed that the form of policy intended was the form then used by the insuring company. *Hubbard v. Insurance Co.*, 33 Iowa, 325; *Smith v. Insurance Co.*, 64 Iowa, 713, 21 N. W. 145; *De Grove v. Insurance Co.*, 61 N. Y. 594; *Insurance Co.*

v. Robinson, 56 Pa. St. 256. Such was the form of the policy sent to Mrs. Fritz. The policy sent and accepted, as the result of the negotiation with Chambers, is with Rachel Fritz as the insured. So far as the evidence shows, it is the only contract that was made. It may possibly be that Mrs. Fritz intended that it should be made with her husband, or it may be that in view of her husband's will, then executed, which provided that his entire property should at his death become hers, she conceived that she had an insurable interest; or it may be that the insertion of her name in the policy, instead of her husband's, was a mistake. Whatever the truth may be in that respect, the fact remains that the only contract assented to by the company was with the wife. We think that the contract declared upon was not proved.

Passing to the second ground for nonsuit or direction of the jury, an even more obvious error appears. There is not a particle of evidence that Chambers had power to bind the plaintiff in error to a verbal insurance contract. It is disclosed in the fact that he was accustomed to solicit insurance for the plaintiff in error, and in the fact that, after his negotiation in the case of Fritz, a policy was issued in accordance with the conclusion reached between him and Mrs. Fritz, that he had some connection with that company. But there is no evidence to show that he could do more than solicit a contract of insurance, and submit to the company the proposition he should be able to procure. Proof of mere assumption of authority by him, without proof also of acquiescence by the company in the appearance he held out, or of ratification by it of his acts in pursuance of the power assumed with knowledge of the assumption, which shall have misled the insured as to the true extent of the authority he possessed, will not establish the extent of the agent's power. *Stringham v. Insurance Co.*, 42 N. Y. 280; *Bush v. Insurance Co.*, 63 N. Y. 531; *Ewell's Evans*, Ag. 16, note. The proofs do not show an agency in chambers sufficiently general to justify an inference that he possessed authority to bind the plaintiff in error in the parol contract alleged. At best, it makes him appear to have been a mere solicitor for insurance, under the stipulations and conditions of the policy in use by the plaintiff in error. It is impossible to infer from anything that appears in proof that he possessed power to disregard the carefully and maturely considered stipulations and conditions of the policy of insurance, in use by the plaintiff in error, and make the ill-guarded, naked parol contract sued upon. *De Grove v. Insurance Co.*, supra. It is clear that the authority of Chambers to make the contract sued upon did not appear.

Because of the plain insufficiency of the proofs to establish the contract alleged in the declaration, the jury should have been controlled as the plaintiff in error requested. *American Saw Co. v. First Nat. Bank* (N. J. Err. & App.) 38 Atl. 662. The judgment below will be reversed.

(56 N. J. E. 674)

BLEAKLEY v. NELSON et al.

(Court of Chancery of New Jersey. March 7, 1898.)

CHATTEL MORTGAGE—FAILURE TO RECORD—ASSIGNMENT OF CHOSE IN ACTION.

1. A chattel mortgage not recorded in the clerk's office of the county in which the mortgagor resided at the time of its execution, and a sale made under it by the mortgagee, are void as against the creditors of the mortgagor.

2. A transfer or assignment of a chose in action as security for the payment of a debt will be recognized and enforced in equity.

3. Such an assignment is not a chattel mortgage within the meaning of the chattel mortgage act (2 Gen. St. p. 2113).

(Syllabus by the Court.)

Application by E. G. C. Bleakley, receiver, etc., for a preliminary injunction against Alfred B. Nelson and another. Granted.

This is an application for a preliminary injunction to restrain the removal or disposition of certain chattels, and also certain moneys due upon a contract between the defendant Nelson and the Seaside Park Company. The complainant is the receiver under appointment in aid of a recovery had by J. C. McNaughton & Co. against the defendant Nelson in Ocean county circuit court. The judgment was entered and execution issued on September 20, 1897. An order for discovery was made on December 17, 1897, and receiver appointed December 28, 1897. The defendant Nelson made a chattel mortgage to the defendant Morgan, dated September 2, 1897, to secure \$7,945.62, the sum of five promissory notes which Nelson had theretofore given to Morgan. The articles mortgaged were included in the schedule at the end of the instrument, and specified a number of chattels, and also "all moneys due and to become due to me from the Seaside Park Company arising from a contract made with said company by me on the 26th of February, 1897." By virtue of the chattel mortgage the mortgagee made sale of the goods mortgaged on the 13th day of November, 1897, and bought them in for \$60. It appears without dispute that Morgan had actually loaned to Nelson the amount of money named in the promissory notes, aggregating \$7,945.62, and that there remains yet due thereon \$4,899.24, less whatever credit might be allowable by the application of the proceeds of the sale under the chattel mortgage. Nelson, the mortgagor, resided in Mercer county at the time of the execution of the chattel mortgage, and continued in possession of the goods mortgaged until the time the mortgagee sold them. The chattel mortgage was recorded on September 9, 1897, in Ocean county.

George H. Pierce, for complainant. Linton Satterthwaite, for defendants.

GREY, V. C. (after stating the facts). This chattel mortgage is criticised on several grounds. The affidavit of the mortgagee is declared to be an insufficient statement of the consideration, and it is insisted that the chattel mort-

gage is void because not recorded in the clerk's office of the county in which the mortgagor resided; and the sale by the chattel mortgagee under the chattel mortgage is alleged to have been made before the chattel mortgage came to be due. The mortgage upon the goods and chattels was, in my view, a nullity as against the complainant Bleakley, receiver, etc., under the judgment of J. O. McNaughton & Co. against Nelson, because of the undisputed fact that it was not recorded in that county in which the mortgagor resided at the time of the execution of the chattel mortgage, as required by the chattel mortgage act (2 Gen. St. §§ 52, 53, p. 2113). The statute, in section 52, declares that every mortgage on goods and chattels, not accompanied by an immediate delivery, and followed by actual and continued possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor * * * unless the mortgage * * * be recorded as directed in the succeeding section. Section 53 directs that the chattel mortgage be recorded in the clerk's office of the county where the mortgagor shall reside at the time of the execution thereof. The mortgage, so far as it operated upon the goods and chattels of the mortgagor, was, by the express terms of the statute, a nullity as to the complainant, who stands as receiver for a creditor. The obvious intent of the act is to fix one place where the creditors and intending subsequent mortgagees and purchasers from the mortgagor may go in order to ascertain whether his apparent ownership of goods or chattels in his possession is incumbered by a mortgage. Notice is imputed to creditors, subsequent mortgagees, and purchasers if the terms of the statute directing the recording of the mortgage are observed; but the whole scheme of constructive notice by the record would be perverted if they could be held to be notified by a record made elsewhere than in the place where the statute directed them to look. The creditors who were to be protected by these provisions are the creditors at large of the mortgagor without exception. *Roe v. Meding*, 53 N. J. Eq. 366, 33 Atl. 394. Their rights may have accrued prior or subsequent to the mortgage. In either case they are entitled to the benefit of that statute. *Williamson v. Railroad Co.*, 29 N. J. Eq. 338. The mortgage upon the goods and chattels being a nullity as to the complainant, the sale of those goods and chattels which was attempted to be made by the mortgagee under this authority was also a nullity as to him, whether the chattel mortgage was in other respects void or not. As there was no chattel mortgage, there could be no sale under it. The goods and chattels named in the chattel mortgage stand, as to the complainant's judgment and execution, in the same position as if there had been neither chattel mortgage nor sale. The complainant is entitled to an injunction to restrain the disposition and removal of the goods and chattels by the defendants under the authority of this void chattel mortgage, and the sale made thereunder.

The mortgage, as to its effect upon the monies due and to become due on the contract made by the mortgagor with the Seaside Park Company, stands in a different position. This item is a chose in action, and is not within the operation of the chattel mortgage act. That statute applies only to mortgages upon goods and chattels, and by its terms refers to such goods and chattels as are capable of delivery, and of actual and continued possession. The object of the act is to make invalid as against the creditors of the mortgagor all mortgages on goods and chattels unless possession be taken of them, or the mortgage be recorded as provided by the act. The old doctrine assumed that the possessor of personal property was the owner of it, and that secret gifts or charges on that property, made while he continued to use it as his own, were frauds upon creditors who dealt with him. *Twyne's Case*, 3 Coke, 80. But the property which was so treated was of such a visible and tangible character that the possession of it was manifest to creditors who might, by reason thereof, give credit to the possessor, and be injured by the subsequent assertion of the secret title. *Runyon v. Groshon* (1858) 12 N. J. Eq. 86, contains an instructive collation of the cases showing the advance to the doctrine now accepted, that the continued possession of the chattels by the vendor or mortgagor, though prima facie indicative of fraud, may yet be explained away by proof by the vendee or mortgagee that the transaction was in good faith, and without fraud. *Miller v. Shreve* (1861) 29 N. J. Law, 250, confirmed this view; and in 1864 the first statute was passed compelling the filing and yearly renewal of chattel mortgages in the county clerk's office as a prerequisite to their validity as against creditors, subsequent mortgagees, and bona fide purchasers. The obvious purpose of this and subsequent legislation on the subject is to avoid the creation of secret liens upon personal property, leaving its possession with the creator of the lien, who might obtain credit from those who dealt with him by reason of his apparent ownership of the goods, or make further mortgage or sale of them to parties ignorant of the existing liens. These evils, however, do not arise; neither do the corrective statutes either in terms or spirit apply to mortgages or other disposition of that sort of property which is not of a physical character, and of which there is no apparent possession which could tempt parties to deal with the possessor as with one having values which could be relied upon to pay the debts thus incurred. A Massachusetts statute required "mortgages of personal property" to be recorded, which language is somewhat wider than that used in an act which named only mortgages on "goods and chattels." In *Marsh v. Woodbury*, 1 Metc. (Mass.) 436, this act was held to apply only to goods capable of delivery, and not to a conditional assignment of a chose in action, and that it was not necessary that such an assignment should be recorded. This case was cited with approval, as to this prin-

ciple, in *Williamson v. Railroad Co.*, 26 N. J. Eq. 403, where it was held that the "act concerning chattel mortgages" did not extend to a mortgage of the capital stock of a corporation. In *Bacon v. Bonham*, 27 N. J. Eq. 209, there was an assignment of a legacy expectant as security for the repayment of a loan. A judgment creditor filed his bill to compel discovery and application of the assets to the payment of his claim. It was held that in equity it was a good transfer as security for the loan, and not within the operation of the act concerning chattel mortgages, which did not apply to mortgages of chose in action. The decree was affirmed on appeal, though no allusion was made in the opinion to the operation of the chattel mortgage act. *Bacon v. Bonham*, 33 N. J. Eq. 614. I think the principles laid down in this case, both as to the scope of equitable assignments and the limits of the application of the chattel mortgage act, control the disposition of the case under consideration. Bonds and mortgages have been held in this state to be goods and chattels, within the operation of section 6 of the statute of frauds. *Greenwood v. Law*, 55 N. J. Law, 168, 26 Atl. 134. And it has been decided that trover will lie for their recovery as goods and chattels under the act authorizing suit against the executor of a testator who, in his lifetime, had converted goods or chattels (*Rev. Laws 1820*, p. 174). *Elmer's Dig.* p. 165, § 5; *Terhune v. Bray's Ex'rs*, 16 N. J. Law, 54. Chief Justice Hornblower declared that bonds and other documentary securities must, in law, be decreed to be goods and chattels. I do not consider that these rulings should affect the views I have expressed, as the contract with the Seaside Park, now under consideration, was in no sense a security, being simply an executory agreement for compensation for labor and material, and entirely distinct from that class of personality the mortgaging of which led to the passage of the chattel mortgage acts. There is neither allegation nor proof of fraud in the transaction between the defendant Nelson, the mortgagor, and the defendant Morgan, the defendant mortgagee. The evidence all goes to show good faith, and a transfer of the benefits of Nelson's contract with the Seaside Park as a security for moneys which Morgan had loaned him. This took place on September 2, 1894, several weeks before the judgment creditor had entered his judgment, and necessarily before any proceedings for discovery, etc., had been instituted. The title of a receiver, such as the complainant, as to the choses in action of the defendant in the judgment, has been defined in *Coleman v. Roff*, 45 N. J. Law, 11, to relate to the time of the issuing of execution. This was on September 20, 1897. At this time the equitable assignment to the defendant Morgan to secure the payment of his debt was complete, and all that remained to the defendant Nelson was his equity in the benefits of the contract after the payment of his debt to Morgan. What amount is collectible on the contract does not appear, but the defendant in

the judgment (Nelson), being entitled to any surplus over the amount necessary to pay Morgan's debt, should be restrained from further disposing of his interest, if there be any. The injunction may go against Nelson to this extent as to these moneys. I will advise the issuing of an injunction restraining the defendant Nelson to the extent indicated by the views above expressed.

(61 N. J. L. 532)

MAYHEW et al. v. FORD et al.

(Supreme Court of New Jersey. March 14, 1898.)

DILATORY PLEA—VERIFICATION—TRESPASS QUARE CLAUSUM—PLEA.

1. In an action quare clausum fregit, by tenants in common in possession, a special plea that one of the plaintiffs was, before and at the commencement of the suit, an infant under the age of 21 years, and has declared by attorney, instead of by guardian or next friend duly appointed by the court, is a dilatory plea, and is not good, as against a motion to strike it out, unless an affidavit be filed therewith proving the truth thereof, or some probable cause be shown to induce the court to believe that the matter of the plea set forth is true according to the provisions of section 115 of the practice act (2 Gen. St. p. 2552).

2. A plea in bar of an action of tort, quare clausum fregit, that the close in the declaration described is the close soil and freehold of one of the defendants jointly sued with the other, wherefore the one in his or her own right, and the other as his or her servant, and by his or her command, committed the alleged trespasses, as they severally had the right to do, is a plea of liberum tenementum, and is a good plea in bar of the action.

(Syllabus by the Court.)

On motion by Maud H. Mayhew and another to strike out certain pleas made by Benjamin F. Ford and another to a declaration. Denied.

Argued November term, 1897, before GARRISON and LIPPINCOTT, JJ.

Leverett Newcomb, for plaintiffs. William W. Benthall, for defendants.

LIPPINCOTT, J. This is an action of tort, by Maud H. Mayhew and Alfred W. Mayhew, as plaintiffs, against the defendants, for a trespass quare clausum fregit, upon a certain close of the plaintiffs, situate in the township of Franklin, in the county of Gloucester, in this state. The declaration contains a particular description of the close, and avers that the plaintiffs are tenants in common thereof, and that the defendants, on the 1st day of June, 1897, broke and entered the same, and broke open the fences thereof, and cut and carried away the grass and herbage, and, with cattle, depastured the same, to the damage of the plaintiffs. The first plea is the general issue. The second plea avers that the plaintiffs ought not to have or maintain their said action, because Alfred W. Mayhew, one of the plaintiffs, was before and at the commencement thereof, and still is, an infant under the age of 21 years, and has declared by attorney, instead

of by guardian or next friend duly appointed by the court to prosecute the action. The third plea avers that the action cannot be maintained because the said close in the said declaration described, on which, etc., was, and still is, the close, soil, and freehold of the said Nellie M. Ford; wherefore the said Nellie M. Ford, in her own right, and Benjamin F. Ford, as her servant, and by her command, committed the said several trespasses in the said declaration mentioned, as they lawfully might. Both pleas conclude with the usual verification.

The second plea is a dilatory one, and in form pleaded in bar to the action, and not in abatement. This plea does not deny or strike at the right of action. It tends only to delay the trial on the merits of the case. It questions not the cause of action, but the mode in which the remedy is sought. 3 Bl. Comm. 301; Gould, Pl. (4th Ed.) 29; 1 Burrills, Prac. 151. Section 155 of the practice act (2 Gen. St. p. 2552) provides "that no dilatory plea or plea of another judgment shall be received unless the party offering such plea do offer therewith to be filed an affidavit proving the truth thereof, or do show some probable cause to the court to induce them to believe that the matter therein set forth is true." There is no such verification as required by the statute annexed to this plea or filed with it, nor any probable cause of its truth shown. The only verification to the plea in this case is that the pleas are not intended for the purpose of delay, and that the defendants verily believe that they have a just and legal defense on the merits of the case. The verification by way of oath to a dilatory plea must be of the character required by the statute. 1 Chit. Pl. (13th Am. Ed.) 462, 702. Foxwist v. Tremaine, 2 Saund. 207c, note 1; Bank v. Wallace, 9 N. J. Law, 83; Hixon v. Schooley, 26 N. J. Law, 461; Parks v. McClellan, 44 N. J. Law, 552. The second plea must be stricken out.

The third plea is one of liberum tenementum. This is a good plea to an action of trespass quare clausum fregit. 1 Chit. Pl. (13th Am. Ed.) 503. It seems, upon the authority of Phillips v. Phillips, 21 N. J. Law, 42, if there should be a new assignment in this class of actions, then a replication of liberum tenementum would be bad pleading. Therefore the motion to strike out the third plea is denied.

The plaintiffs, succeeding in their motion to strike out the second plea, are entitled to costs against the defendants.

(61 N. J. L. 421)

STATE (BARR et al., Prosecutors) v. FLEMING.

(Supreme Court of New Jersey. Feb. 21, 1898.)

DOCKETING JUDGMENT OF JUSTICE—STATEMENT.

In docketing the judgment of a justice's court under the act of April 4, 1892 (2 Gen. St.

p. 1898), it is not necessary that the statement of the justice should expressly negative the issue and return of execution, when none has been issued, provided the statement be accompanied by the affidavit required by the proviso of the act.

(Syllabus by the Court.)

Certiorari to court of common pleas, Middlesex county.

Action by James Fleming against Henry J. Barr and another. Plaintiff had judgment, and defendants bring certiorari to review the docketing of the same. Proceedings affirmed.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

A. H. Strong, for plaintiffs. Voorhees & Booraem, for defendant.

DIXON, J. The plaintiff below, having obtained a judgment against the defendant in a court for the trial of small causes, had it docketed in the Middlesex common pleas, and the defendant now insists that the docketing is illegal. The only ground specified in the reasons filed or referred to in the briefs of counsel for this contention is that the statement of the justice does not set forth the date of the issue and return of execution, nor in terms allege that no execution had been issued. The pertinent statutes are the seventy-second paragraph of the justice's court act (2 Gen. St. p. 1879), and the act of April 4, 1892 (Id. p. 1898). Paragraph 72 prescribes three preliminaries for the legal docketing of a judgment: (1) That an execution out of the justice's court be issued, and properly returned; (2) that there be filed with the clerk of the court of common pleas a transcript of the proceedings from the justice's docket, and a certified copy of the state of demand, the set-off, and the return of the constable; and (3) that there be likewise filed an affidavit of the party or his agent that at the time of filing such transcript a certain amount stated, not less than \$10, was still due, and that he believed the debtor was not possessed of goods and chattels sufficient to satisfy the amount due. The act of April 4, 1892, requires to be filed only a statement containing the names of the justice and of the parties, the amount and date of the judgment, and "the date of issue and return of execution, if any." This plainly is in lieu of the transcript and copies previously required. The act also expressly dispenses with the necessity of issuing and returning an execution in the justice's court, and gives to the said statement "the same force and effect as if execution had been issued and returned as now required by law: provided, however, that an affidavit of the plaintiff or his attorney shall be filed with the clerk of the court of common pleas with said statement, setting forth that the said judgment about to be docketed is bona fide, and is still due and unpaid, in whole or in part." This affidavit seems to be in lieu of

the issue and return of execution. This act does not purport to repeal paragraph 72, before mentioned; and whether it leaves, as essential to lawful docketing, the filing of the affidavit concerning the sufficiency of the debtor's goods and chattels to satisfy the debt, which that paragraph requires, is a question which, in view of the special reason assigned, and the limited scope of the briefs submitted in this case, we are not at liberty to decide. We think that under the act of April 4, 1892, an express negation of the issue and return of execution in the justice's statement is not requisite. The filing of the affidavit mentioned in the proviso of that act, which is made a substitute for the issue and return of execution, sufficiently indicates that no execution had been issued. Under paragraph 72 a copy of the set-off, if any, must have been filed with the transcript; but it was never thought necessary to aver that no set-off had been presented. Upon the reasons assigned, the proceedings under review are affirmed, with costs.

(56 N. J. E. 585)

**WIMPFHEIMER et al. v. PRUDENTIAL
INS. CO. OF AMERICA et al.**

(Court of Chancery of New Jersey. March 17, 1898.)

**MORTGAGES—FORECLOSURE SALE—REDEMPTION—
RIGHTS OF PURCHASER AT SALE—DEED—
SETTING ASIDE SALE—PARTIES.**

1. A subsequent incumbrancer, who was a party to the foreclosure suit on a prior mortgage, after foreclosure sale, and a purchase by the prior mortgagee, cannot redeem from the prior mortgagee without setting the sale aside as to all parties thereto.

2. Where the right to redeem is disputed between two subsequent incumbrancers, the prior mortgagee may decline to allow either to redeem except by decree in a suit to which the claimants are parties.

3. A sale under a decree foreclosing the equity of redemption of all the defendants thereto vests in the purchaser not only the rights of the mortgagee under whose mortgage the premises were sold, but all rights of the defendants in the suit.

4. One having the right to redeem a mortgage is not entitled to a conveyance of or subrogation to the rights which the prior mortgagee has as purchaser under foreclosure sale, in addition to his rights as mortgagee.

5. On confirmation by the court of a foreclosure sale, the deed issued to the purchaser relates back to the time of the sale.

6. In a suit to set aside a foreclosure sale for the purpose of redemption, all the parties to the foreclosure proceedings who would have been proper parties to the suit to redeem if there had been no sale, and all intervening incumbrancers, must be made parties.

Suit by Adolph Wimpfheimer and others against the Prudential Insurance Company of America and others to redeem a mortgage after foreclosure sale. Right to redeem denied.

T. N. McCarter, Jr., and R. V. Lindabury, for complainants. J. E. Howell and Guild & Lum, for defendant Prudential Ins. Co. Adrian Riker, for defendant Edelhof.

EMERY, V. C. This is a bill to redeem, filed by the judgment creditor of the mortgagors against a prior mortgagee, who purchased the mortgaged premises at a foreclosure sale made under its mortgage, and in proceedings to which the judgment creditors and others were parties. The defendants' mortgage was executed prior to the recovery of complainants' judgment against the mortgagors, and three other mortgages on the premises now held by the McGall Hat Company as assignee were also executed and delivered by the mortgagors prior to the recovery of the complainants' judgment. The mortgagors also, on May 2, 1895, two days prior to the recovery of complainants' judgment (May 4, 1895), made an assignment to the defendant Edelhof for the benefit of their creditors under the statute; but this assignment was not recorded until May 6, 1895, two days after the recovery of complainants' judgment. These intervening mortgagees and their assignee and the assignee for the benefit of creditors were also made parties to the foreclosure suit on the prior mortgage, together with other creditors who had recovered judgments or claimed interests subsequent to the judgment obtained by the present complainants. The mortgagors and their wives were also made parties defendant to the foreclosure suit. In this foreclosure suit the facts above stated as to the order and priority in point of time of the incumbrances and conveyances of the equity of redemption were set out in the foreclosure bill, but no other facts relating to respective priorities of the defendants were set out, and the bill to foreclose, alleging simply that these respective defendants claimed some interest in the premises, charged that all such interests were subsequent to its mortgage. The prior mortgage was not disputed by any defendants, and decree pro confesso was taken against all the defendants, including the present complainants. Rule 24, regulating the practice in such cases, is as follows: "Where the bill in a foreclosure suit shall be ordered to be taken as confessed against a defendant, no report or decree shall be made by which his rights or claims are postponed to those of any other defendant, unless the priority of the rights or claims of such other defendant, and the facts upon which it depends, are distinctly set forth in the bill, and any controversies between such defendants may be settled upon application for the surplus moneys." The foreclosure bill was taken as confessed against all of the defendants, and the master's report in the cause found the amount due the insurance company, the complainant, on its mortgage on April 2, 1897, to be \$26,979.19, and on April 5, 1897, final decree was duly entered in the foreclosure suit in the usual form, directing sale to be made of the mortgaged premises by the sheriff of Essex county, to pay the complainant's debt, with interest and costs, and to pay the

same to complainant, and to bring the surplus, if any, into court, unless otherwise disposed of. The final decree contained also the following usual clause: "And it is further ordered, adjudged, and decreed that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises when sold, as aforesaid, by virtue of this decree." At the time of the filing of this bill of foreclosure and at the time of the decree a suit was pending on a bill filed by the McGall Hat Company, the assignee of the three mortgages subsequent to the first mortgage (together amounting to over \$72,000), for the foreclosure of these mortgages, to which suit the first mortgagee was not made party, but in which the present complainants were defendants, and in which as such defendants they attacked the validity of these second mortgages and claimed priority over them, notwithstanding their priority in date. This cause had been heard, but decision thereon had not been rendered, and pending decision the sale under the first mortgage foreclosure suit had been adjourned from time to time until the day previous to the sale, when the conclusions of the vice chancellor, by whom the case was heard, were sent to counsel, and were received on that day by the present complainants' counsel. The conclusions reached affirmed the validity of the mortgages which were contested by the present complainants. Complainant's counsel thereupon applied to the first mortgagee through its solicitor and officers for a further short adjournment of the sale in order to communicate with his client, who was temporarily absent, but this was refused, and against complainant's protest the sale proceeded on July 13, 1897, and the premises were then struck off and sold to the complainant for the amount of its decree. The complainants were allowed, under the rule (205), five days to object to the confirmation of the sale, which is now required to be made under that rule, but they made no objections, and the sale for \$26,852.50 to complainant was duly confirmed by order dated July 24, 1897, and the sheriff was thereby directed to execute a good and sufficient conveyance to the present defendant company for the premises sold. The present complainants, on the day after the sale, but before the confirmation, tendered to the defendant company the amount of its decree for costs and interest for the redemption of the premises. The defendant refused to accept the tender, and the complainants, on July 22, 1897, one day before the expiration of the time for confirmation of the sale under the rules, filed this bill to redeem against the defendant, it being the only party defendant to the original bill. The defendant company was served on July 23, 1897. At the hearing an amendment was made to the bill by consent, making Edelhof, the assignee for creditors, a party defendant, al-

leging that he has no funds to redeem the mortgage, and asking that complainants, if not entitled to redeem for their sole benefit, may be permitted to redeem on behalf of themselves and other creditors of the assignors who may file claims with him within the time required by law. An answer by the assignee admits the lack of funds for redemption.

The bill in this case is not filed to set aside the sale as improvidently or unfairly made, simply for the purpose of obtaining a resale of the premises upon the ground that the sale was an improper use of the process of the court, but the relief prayed by the bill proceeds rather on the assumption that the sale, as to all the parties in the original suit except the complainants, must stand. None of these original defendants except Edelhof are now made parties to this suit, and the claim, as insisted on at the hearing, is that on the redemption by complainants they are entitled to be subrogated to the entire rights of the insurance company against the other parties defendant under its decree and execution. And to the special objection made in the answers and on the hearing, that to a bill for redemption of a prior mortgage all the intervening incumbrancers must be made parties, the answer of complainants is that those intervening incumbrancers have no interest, because they have all been foreclosed of any equity of redemption by the sale and by the deed thereunder. The principal question presented at the hearing therefore was whether a subsequent incumbrancer, who is a party to a foreclosure suit on a prior mortgage, after a sale under foreclosure, and a purchase at the sale by this prior mortgagee, may, if he files a bill before confirmation of the sale, redeem the prior mortgage without making the intervening incumbrancers or any of the defendants in the foreclosure parties, allowing the sale to stand as against them. I think a right of redemption of this character does not exist. Up to the time of the sale under the process, and even after decree for sale, the right of redemption which any subsequent incumbrancer might have would probably continue to exist, and might be made effectual by petition in the original suit, or by original bill, proper notice being given to those who, on the record in the original suit, appear to be, as in this instance, incumbrancers prior in point of time, or otherwise entitled to claim the right of redemption. But under our practice the final decree in foreclosure suits deals expressly with and disposes of the whole subject of rights of redemption when a sale is made, and as long as the sale stands. The language of the decree is that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, when sold as aforesaid, by virtue of the decree. The sale, when made, therefore, under the decree, does, by the express language of the decree itself, dispose of the very right of redemption or equity which is now sought to be exer-

cised; and, if a sale has been made, then, as it seems to me, so long as that decree stands, and has been carried out by the sale, it must conclude the complainants from any right which is a mere right of redemption.

A subsequent incumbrancer, such as a second mortgagee or judgment creditor, is not, under our decisions, entitled merely as such incumbrancer to redeem a prior mortgage, and, unless some special equity exist in the subsequent incumbrancer, the prior mortgagee has a right to retain his security, and may refuse to surrender it. *Bigelow v. Cassidy*, 26 N. J. Eq. 557. And where the right to redeem is disputed between two subsequent incumbrancers the prior mortgagee would, as it seems to me, where he has notice of this dispute, be justified in declining to allow either claimant to redeem, except by decree in a suit to which the claimants were parties. Without such decree, the redemption would be at his risk. The right to redeem by either claimant could then be so controlled by decree, if necessary, as not to exclude the other from the right to redeem, if eventually established in his favor. Any person having the right to redeem a mortgage is entitled to a subrogation to the mortgagor's rights under the mortgage and decree, but not to the conveyance of any other rights, nor to any other rights than those which the mortgagor has under his mortgage; and the reason why, it seems to me, that under our practice a redemption cannot be made after a sale under the usual decree is that the sale, when made under the decree, and so long as it stands against the defendants, vests in the purchaser, as purchaser, not only the rights of the complainant under his mortgage and decree, but also all the rights of the defendants in the suit. *Baldwin v. Howell*, 45 N. J. Eq. 519, 538, 15 Atl. 236; *Mount v. Manhattan Co.*, 43 N. J. Eq. 25, 9 Atl. 114, affirmed on appeal, 44 N. J. Eq. 297, 18 Atl. 80. A defendant standing on an alleged right of redeeming the prior mortgage is not entitled to a conveyance of or subrogation to the rights which the prior mortgagee has, as purchaser under the sale, in addition to his rights as mortgagee. The defendant company in this case at the time of the tender did not occupy the position merely of the holder of a prior incumbrance secured by mortgage and decree thereon, but was a purchaser of all the rights of redemption of all the defendants in the mortgaged premises, including the present complainants' right to redeem, and was bound by its contract of sale as such purchaser, not only to the present complainants, but to all of the defendants in the suit. By the contract of sale the purchaser became at once subject to the obligations of purchaser, which could be enforced against him upon the confirmation of the sale, either by petition in the suit or bill for specific performance. *Silver v. Campbell*, 25 N. J. Eq. 465; *Bowne v. Ritter*, 26 N. J. Eq. 456. On sales by sheriff under execution, at common law, the deed, when delivered, relates back to the time of sale. *Morse v. Bank* (Err. & App.

1890) 47 N. J. Eq. 279, 281, 20 Atl. 961, and cases cited. On the principle of these cases the equitable rights of the parties are fixed by the contract of sale, subject only to confirmation by the court, and, if confirmed, the deed, as to the rights conveyed, must relate back to the time of sale. In the present case the confirmation of the sale is proved, but, although a deed is alleged in the answer to have been delivered, no deed was offered at the hearing. The case therefore is now to be disposed of on the basis of the defendant company's equitable rights as purchaser under a sale confirmed, by which it is at any time entitled to a deed from the sheriff conveying to it the rights of all parties to the suit, complainant and defendant, as if the deed had been delivered on the day of sale. The present application of the complainants by tender after the sale, and when these additional rights and obligations of the defendant company had thus become those of the purchasers also of the equities of redemption, instead of mere prior incumbrancers, is practically, therefore, an application to compel the purchaser to assign the benefit of its bid to them. And at the hearing this is in effect the actual claim made. The amount bid in this case by the purchaser was the amount due on its mortgage and decree, but, if a right of redemption on the part of one defendant in a foreclosure decree, and of the character now asserted, exists, I fail to see why a complainant or any other prior incumbrancer who happens to be a purchaser at the sale for any amount more or less than his bid cannot be compelled by a tender of his debt after sale, and a bill filed within 10 days before confirmation, to give up the benefit of his purchase, in order that a defendant may, if he chooses, exercise a right of redemption which was expressly purchased at the sale, by force of the decree. In my opinion, therefore, the complainants' right of redemption was cut off by the sale which was subsequently confirmed, and relief based merely on this right could not be given at all without setting aside the sale as to all parties. And in a suit to set aside the sale for the purpose of redemption it seems clear that, in any event, all of the parties to the original suit who would have been proper parties to a suit to redeem if there had been no sale must be made parties. According to the authorities, on a bill to redeem a prior mortgage the intervening incumbrancers must, at all events, be parties. *Story*, Eq. Pl. § 185, etc.; *1 Daniell*, Ch. Prac. (6th Ed.) 212. And where, upon a record, a disputed second mortgage is prior to a subsequent judgment, the latter, on applying to redeem the first mortgage, must bring in the second mortgagee for the protection of the first mortgagee, as the second mortgagee otherwise would be entitled to redeem the first mortgage. This is according to the principles settled in *Hicks v. Campbell*, 19 N. J. Eq. 183; *Wilson v. Bellows* (Err. & App. 1878) 30 N. J. Eq. 282.

In the present case it will be noticed that on the bill in the foreclosure suit the three

McGall Company mortgages appear as liens prior in time to the complainants' judgment, and the present complainants did not, by any answer or other proceeding in that suit, give notice to the prior mortgagees that, so far as the right of redemption was concerned, their right was prior to the McGall Company mortgages. The prior mortgagee therefore would have been justified, on the record as it stood, and without regard to the decision adverse to the complainants in the other cause, in declining without further order in the cause to allow the complainants the right to redeem after final decree for sale in the suit, and a direction to pay the surplus money into court. As between the McGall Company and the complainants, the right to redemption was a right which, although prima facie belonging to the McGall Company, was in fact a disputed equity of redemption, and the precise case exists referred to in the statutes relating to redemption of mortgages by the mortgagor. These statutes (2 Gen. St. p. 2102, etc.), providing for redemption of mortgages by order of court of law, and when no bill to foreclose was pending, expressly provided (section 3) that the right of redemption with order to assign the mortgage should not extend to any case where the right of redemption was controverted between different defendants in the same cause. Upon redemption by the mortgagor, the mortgagee must reassign or convey his rights as mortgagee in the premises to the person redeeming, and the qualification expressly made on redemption under order of courts of law was intended to leave the right of redemption, when disputed, to the disposition of a court of equity. I think, therefore, that relief to complainants, based on their present bill purely as a bill to redeem against the purchaser for their own benefit, and while allowing the sale to stand as against the intervening mortgagees and the other parties to the suit, must be denied. When the necessary parties are all before the court, the complainants are entitled to an adjudication upon the case made in their bill for setting aside the sale as made by surprise, and for an inadequate price, and, if it should be so set aside, then to have an adjudication upon their right to redeem. But where it appears by the record itself that the complainants' right to redeem, if the sale be set aside, is disputed, then the right of complainants to redeem, if allowed, must be finally settled, as it seems to me, on terms equitable to all parties claiming or interested in the right of redemption, and after hearing. This must, in the present case, be upon a bill to set aside the sale altogether, and as against all parties, and then to redeem, to which suit the intervening mortgagees, the assignee for creditors, and, as it now appears to me, the mortgagors, as persons interested in the claim to redemption, are necessary parties. At the hearing, ap-

plication was made to amend for the purpose of adding parties to a redemption suit, if thought necessary; and therefore, instead of dismissing the bill without prejudice to the filing of a new bill adding the necessary parties, the cause will be directed to stand over, with liberty to complainants to bring in such parties by amendment or supplemental bill within a time to be fixed by the order, and on their failure so to do the bill will be dismissed. 1 Daniell, Ch. Prac. (6th Ed.) 204, notes, 421. This direction is based on the complainants' bill and case as presented at the hearing, treated as a bill purely for the ultimate purpose of redemption. Relief by way of setting aside the sale and ordering a resale was not prayed by the bill, nor asked at the hearing; but the bill contains a prayer for general relief, and, if complainants' counsel desire, I will, before advising decree, hear them on the question whether, on the bill and proofs as they now stand, they are entitled in this suit, and with the present parties, to a decree setting aside the sale as to all parties to the original suit, and ordering a resale, and, if so, upon what terms.

(61 N. J. L. 525)

BUCK v. STATE.

(Supreme Court of New Jersey. March 7, 1898.)

INTOXICATING LIQUORS—ILLEGAL SALES—INDICTMENT—EVIDENCE.

1. In a county which includes, within its territorial limits, incorporated cities, boroughs, towns, and townships, which by their charters provide for the control, licensing, and regulation of the sale of spirituous, vinous, malt, or brewed liquors, an indictment against any persons for the sale of such liquors without a license, or for the keeping of a disorderly house because of the habitual or other sale of such liquors by the keeper thereof without a license, must contain, as necessary and essential to the validity of the indictment, an averment of the city, borough, town, or township in the county in which the sale or sales which constitute the offense charged occurred.

2. Under such indictment, evidence showing sales, outside the limits of the city, borough, town, or township in which they are averred in the indictment, is not admissible, and will not sustain the indictment.

3. An indictment which averred that such sales were made at the city of Bridgeton, in the county of Cumberland, the charter of which provides (P. L. 1875, pp. 354-368; 2 Gen. St. p. 1707, § 60, etc.; P. L. 1884, p. 545, § 17) for the license, control, and regulation of the sales of such liquors, cannot be sustained by the proof that sales of such liquors were made, by the person charged with such sales, outside of the limits of the city of Bridgeton, in a township of which the city forms no part.

(Syllabus by the Court.)

Error to court of quarter sessions, Cumberland county; Hoagland, Judge.

John Buck, convicted for the illegal sale of spirituous liquors, brings error. Reversed.

Argued February term, 1897, before MAGIE, C. J., and VAN SYCKEL and LIPPINCOTT, JJ.

J. J. Crandall, for plaintiff in error. W. A. Logue, for defendant in error.

LIPPINCOTT, J. This writ of error removes into this court for review the judgment of the court of general quarter sessions of the peace of the county of Cumberland, upon a conviction under an indictment against the plaintiff in error, for the illegal sale of spirituous liquors. The indictment, in its several counts, avers that the defendant, not being licensed to keep an inn or tavern, or to sell spirituous, vinous, malt, or brewed liquors, did sell by retail such liquors at the city of Bridgeton, in the county of Cumberland. One count of the indictment charges the defendant with the keeping of a disorderly house, because of certain alleged sales of such liquor in his place within such city. On the trial of the defendant, no evidence was offered or produced of any sale or sales of liquor within the territorial limits of the city of Bridgeton in any quantity whatever. The trial court admitted evidence, against objection and over exception, of the sales of liquor by the defendant in one of the townships of the county, about two miles south of, and outside of the limits of, the city. The city of Bridgeton is not within the territorial limits of any township of that county. An exception was duly taken to the admission of this evidence, and error has been assigned thereon. The trial court was requested to charge the jury "that if they found no act of selling any of such liquors within the limits of the city, as laid in the indictment, then they should render a verdict of not guilty." This request was refused, and the court charged the jury that if they found the defendant sold the liquor in a quantity of less than five gallons anywhere in the county of Cumberland, outside the limits of the city of Bridgeton, they would be authorized "to find the defendant guilty as charged in the indictment." The court refused to charge as requested, to which refusal an exception was taken. Exception was also taken to the charge in this respect to which reference has been made. Upon these exceptions also error has been assigned.

The question which arises is whether, in order to sustain a conviction, the sales of liquor upon which the conviction was founded must be proved as laid in the indictment to have taken place at the city of Bridgeton. By the thirtieth section of an act of the legislature entitled "An act to revise and amend the charter of the city of Bridgeton," approved March 25, 1875 (P. L. 1875, pp. 354-368), it is enacted "that the sole and exclusive power to grant licenses to persons to keep inns and taverns within said city and to prohibit the keeping of the same except by persons duly licensed shall be vested in the city council on such terms and under such limitations, regulations and restrictions as the said city council shall by their ordinances impose." By the twenty-sixth section of the same act it was enacted that the city council shall have power within the city

to make, establish, publish and modify, amend and repeal ordinances for the following purposes: " * * * (4) To license and regulate restaurants, victualing houses or cellars, ale and lager beer saloons or gardens, billiard tables, bowling alleys, shooting galleries and other public places of amusements, and to fix the sums to be paid for license, and to prohibit the keeping of the same except by persons duly licensed." Under these statutes, the sole power to license inns and taverns and ale and beer saloons in the city of Bridgeton, if the council chooses to pass an ordinance therefor, is vested in the common council of the city. The power to license inns and taverns and ale and beer saloons in the townships of the county of Cumberland is vested in the court of common pleas of the county. 2 Gen. St. p. 1788, § 1, etc.; 2 Gen. St. p. 1797, § 60, etc. See, also, P. L. 1864, p. 545, § 17.

Upon the trial of this indictment for the sale of liquors without license at the city of Bridgeton, the proof of a license of the common council to sell such liquors would constitute a perfect defense; but such license would constitute no defense whatever to such sale in any of the townships of the county. In the latter case it is only the license of the court of common pleas which would justify such sales. The general rule is that, in indictments for offenses of commission, every act which is a necessary ingredient in the offense must be laid with time and place; and in practice this is or is considered to be repeated in every averment of the criminal act. Hale, P. C. 178; Cro. Jac. 41; Archb. Cr. Pl. & Prac. 11. At common law it was necessary to lay as the place of the commission of the offense, besides the county, some particular vicinage, of such dimensions that all living in it might be supposed to have knowledge of the transaction inquired into. 2 Hawk. P. C. 22. By statute of 6 Geo. IV., it was sufficient to aver the county as the place of commission. In the United States this practice has been generally accepted, to lay the commission of the offense within the county, where the county is coterminous with the jurisdiction of the court (Whart. Cr. Pl. & Prac. [8th Ed.] 146; Whart. Cr. Ev. § 107; *People v. Lafuente*, 6 Cal. 202), though it is otherwise when the jurisdiction of the court embraces but a part of the county (2 Hale, P. C. 166; *McBride v. State*, 10 Humph. 615; *R. N. Stanbury L. & C.* 128; *People v. Barrett*, 1 Johns. 66; *State v. G. S.*, 1 Tyler, 295; *State v. Jones*, 9 N. J. Law, 357); and also this would be otherwise when different statutes, relating to and regulating the subject-matter of the offense, prevail in the respective municipal subdivisions of a county. It was necessary in this indictment, to comply with these rules, to aver the place of the commission of the offense; and, while the jurisdiction of the trial court was coterminous with the county so far as the jurisdiction of the offense of sales without license was concerned, yet the laws applicable to licenses for, and the regulation of, the sales of

such liquor, differed in the city of Bridgeton from the statutes relating thereto which prevailed in the other portions of the county. A sale without a license was an essential ingredient of the offense, and the notice to the defendant by indictment was that he would be called upon to justify such a sale in the city of Bridgeton by a license granted to him by the common council of that city, and not by a license to make such a sale in any of the townships of the county. In view of the statutes, it was a local offense, and its commission necessarily attached to a particular place. *Paul v. Gloucester Co.*, 50 N. J. Law, 585, 15 Atl. 272; *State v. Fay*, 44 N. J. Law, 474; *Loughridge v. State* (Miss.) 3 South. 667. In New York it was held that when, in an indictment for arson, the tenement was averred to be in the Sixth ward, and the proof was that it was in the Fifth ward, the variance was fatal. *People v. Slater*, 5 Hill. 401.

If the illegality of the sale of liquor depends upon its having been made within a particular portion of the county, such as a certain city or township, the sale must be so charged in the indictment, and proved as laid. *Reg. v. St. John*, 9 Car. & P. 40; *Whart. Cr. Ev.* § 109; *Whart. Cr. Pl.* (6th Ed.) 145. This is rendered necessary in some cases by reason of the difference of penalties provided by the statute for selling by retail in different places. *Grimme v. Com.*, 5 B. Mon. 263; *State v. Peterson*, 38 Minn. 143, 36 N. W. 443; *Rogers v. State*, 58 N. J. Law, 220, 33 Atl. 283. In some municipalities, under ordinances duly authorized, sales can only be punished in the manner provided by such ordinances. *Young v. Com.* 14 Bush. 161, was a case where a general law in relation to the sale of liquor was in force, and also a local option law applicable to counties and subdivisions of counties; and the court held the indictment should allege the place of sale, and prove it as laid to constitute the offense,—i. e. in civil district No. 5. *Hagan v. State*, 4 Kan. 89-93. In *Com. v. Barnard*, 6 Gray, 488, it was said that in a county in which there are incorporated towns and cities, and they are invested with more or less power to regulate the traffic in liquor, it would seem more appropriate to name the town or city in the indictment. And an indictment for selling liquor contrary to the statute should state the place where and the time when the sale was made. 10 Am. & Eng. Enc. Law, p. 766, and cases cited; *Black, Intox. Liq.* § 461. The lawful traffic of the sale of such liquors is had under a license for that purpose designating the borough, town, township, or city. The offense of the unlawful sale is committed by a sale at such a place without a license to sell at such a place. An indictment, on familiar principles, should aver the commission of the offense with such certainty as to give notice of the character of the offense charged, and to distinguish it from other offenses of a kindred nature. It is the right of the defendant to know what defenses he can make to the specific offense alleged in the indictment. He may

be licensed to sell at one place in the county, and relying on his license, and the consciousness of having sold at no other place, would confidently go into the trial, and yet be met by proof of sales at another place. This proof the defendant could not anticipate; yet, if it had been averred in the indictment against him, he might have prepared himself with testimony to repel it. It can be readily alleged in any given case where the sale was made, and this averment is material to the rights of the defendant, and the evidence must be confined to its proof.

The conclusion reached is that evidence of sales at other places than in the city of Bridgeton should not have been admitted, and that the request to charge that if the jury found no act of selling any such liquors within the limits of the city of Bridgeton, as laid in the indictment, then they should render a verdict of not guilty, should have been granted. The judgment must be reversed, and a venire de novo awarded.

(61 N. J. L. 520)

STATE (APP et al., Prosecutors) v. TOWN OF STOCKTON.

(Supreme Court of New Jersey. March 7, 1898.)

TOWNS—IMPROVEMENT OF STREETS—PETITION—PRESENTATION—ESTOPPEL—ILLEGAL ASSESSMENT—CURATIVE ACT.

1. Proceedings to improve streets in towns, by grading the same, under the sixty-fourth section of the act of the legislature of this state entitled "An act providing for the formation, establishment and government of towns," approved March 7, 1895 (P. L. 1895, p. 218), can only be taken upon the presentation to the council of such town of a petition for such improvement signed by the owners of one-sixth of the lands fronting on such street or part thereof to be so improved, and the council has no power to make such petition a basis for a contract for any other improvement than that requested by the petition, in such a manner that the cost and expense of such other improvement, or any portion thereof, can be assessed upon the lands specially benefited thereby.

2. The presentation of the petition is a jurisdictional fact, without which the council are absolutely without any warrant or power to make any improvement of the character mentioned in the sixty-fourth section of said act, and no such improvement can be initiated without a petition applying for such improvement.

3. Where no such power exists to make such an improvement, the inaction or silence of the landowner whose lands are supposed to be benefited thereby creates no estoppel against him to deny the liability of his lands for an assessment for such benefits, and he is not to be considered in laches by reason of such inaction or silence.

4. Where an assessment is absolutely void because of the want of authority by municipal authorities to make the improvement out of which the assessment arose, the statute entitled "A general act respecting taxes, assessments, and water rents," approved March 23, 1881 (P. L. 1881, p. 194), can have no remedial or curative effect whatever. That act only provides against the setting aside of assessments because of irregularity, or defect in form, or illegality in the making and levying of the same.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Joseph P. App and others, against the town of

Stockton, in the county of Camden, to review an assessment. Assessment set aside.

Argued November term, 1897, before GARRISON and LIPPINCOTT, JJ.

Henry I. Budd, Jr., for prosecutors. Jonas S. Miller, for defendants.

LIPPINCOTT, J. This writ of certiorari brings into this court an assessment against the prosecutors for paving, metaling, improving, macadamizing, and guttering Arlington street from Federal street to Westfield avenue, in the town of Stockton, in the county of Camden. Under the head of "improving" was included the grading of the street. The whole cost and expense of the improvement was \$1,878.69. The proceedings for this improvement were taken under the provision of an act of the legislature entitled "An act providing for the formation, establishment and government of towns," approved March 7, 1895 (P. L. 1895, p. 218). Section 64 of that act provided "that any street or section of the street may be graded, flagged, macadamized, paved, guttered, curbed, or have a sidewalk of any material constructed thereon, or be otherwise improved in the following manner, namely, on the petition in writing to the council by the owners of one sixth of the lands fronting on the street or section to be improved, or upon like petition of ten freeholders." This section further provides for the publication of notices of the presentation of the petition, and of the time fixed for the hearing before the council of the town, the passage of the ordinance for the improvement, the advertising for bids, and the awarding of the contract for the work and material for the improvement. A subsequent section of the act provides for the assessment of the cost and expense of the improvement upon the lands benefited to the extent of the special benefit conferred. The act contains no authority to make any such improvements except as thus provided. On July 22, 1895, the requisite number of landowners presented a petition to the council of the town for the grading of this section of Arlington street. Upon presentation to the council of the petition it was ordered filed with the town clerk, and a meeting was fixed for October 7, 1895, to consider the matter. On October 22, 1895, in due conformity with the provisions of the statute, an ordinance was adopted by the council to grade this section of the street. The proposals to grade the street were advertised for, and on the 7th day of December, 1895, the contract was awarded. The contract contained the provision not only to grade the street, but also provided for the metaling, and the placing of gutters along this section of the street; and the cost and expense of the whole work, including the grading, was computed, and the assessment against the prosecutors includes their pro rata share of the cost of the whole

work. All the proceedings of the council up to and including the adoption of the ordinance speak only of the grading of this section of the street. The advertisement for proposals to do the work was expressly limited to the grading of this street, and this object was distinctly stated by the chairman of the council at the meeting at which the contract was awarded. Under these circumstances the assessment for a portion of the cost of paving, metaling, and curbing this street against the prosecutors cannot be sustained. The cost of grading this street is included in the cost and expense of the whole improvement, and in no wise does it appear that the cost and expense of grading were severed from the expense of the other improvement. The cost of grading, paving, metaling, and curbing were all included in one gross sum under the contract, and thus assessed against the property owners. No such improvement could be carried on or completed without the initiatory steps of the presentation of a petition under the sixty-fourth section of the act referred to; at least none by which any portion of the cost and expense of the improvement could be assessed against the landowners specially benefited thereby. Without this petition, the town council was vested with no legal power to thus improve the street, and then assess benefits against the landowners benefited; and the contract made by the town, so far as the imposition of any burden upon the prosecutors was concerned, was of no validity whatever. Such improvement can only be made by municipal authorities under the powers granted them by legislative enactment, and in conformity therewith. The presentation of the petition is a jurisdictional fact, which, being wanting, left the council without any power whatever, and the presentation of a petition for one character of improvement did not authorize the council to proceed to make another and very different one. The jurisdiction of the council was to proceed to grade this street, and not to metal, macadamize, and curb it. The power of the council in the matter of this character of street improvements was a specially delegated authority, and the proceedings thereunder were legal only when in strict conformity with its direction. *Terhune v. City of Passaic*, 41 N. J. Law, 90. The presentation of this petition was a condition precedent to the exercise of the power to grade this street, and was a jurisdictional requisite. The improvement, if any was ordered made at all, must have been confined to that requested in the petition, and cost and expense incurred could only be for the grading, and an assessment for any other expense would be a void assessment. 2 Dill. Mun. Corp. (4th Ed.) §§ 604, 605, 800, 801; *City of Camden v. Mulford*, 26 N. J. Law, 49; *Woodruff v. City of Elizabeth*, 30 N. J. Law, 176; *State v. City of Hudson*, 29 N. J. Law, 104. This doctrine is now universally enforced. This assessment is void because the council

had no authority whatever to make the improvement out of which it arose.

It need only be said, in answer to a contention made by counsel for the defendants that the act entitled "A general act respecting taxes, assessments and water rates," approved March 23, 1881 (P. L. 1881, p. 194), can have no application as curative of this assessment. That act only provides against the setting aside of an assessment because of any irregularity or defect in form in assessing the same. In this case the improvement made was wholly unauthorized, and the assessment is one which lacks any legal basis whatever. The lands of the prosecutors were never assessable for any of the costs and expenses of this improvement.

Again, it is contended that the prosecutors are estopped from denying the validity of this assessment. If the defect consisted of an irregularity only, this contention might prevail. It is said the prosecutors were inactive and silent in the face of the progress of this improvement, and that they are in laches, and estopped from making the objection now urged against the assessment. But this improvement out of which this assessment arose not being within the power of the council of the town to make, and unauthorized by the act under which it could have exercised this power, the alleged inaction or silence of the prosecutors during the progress of the work created no laches or estoppel on their part. They had the right to rest upon the fact that they could not be assessed for the cost of this absolutely unauthorized work, even if they had the knowledge that it was being done, any more than they would have been chargeable if it had been done by some mere volunteer. They were chargeable only with the knowledge that they had applied for certain work to be done, and that the council were unauthorized to do any other work, the expense of which could be imposed upon their property. Where municipal officers exercise powers not conferred by charter in the making of street improvements, they are in no sense agents or representatives of the property owners, and no liability attaches to the latter from the mere inaction or silence for improvements so made. The doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers, who, in so doing, were contravening public policy, as well as known, positive law. *Schumm v. Seymour*, 24 N. J. Eq. 143. This assessment must be set aside, with costs.

This would appear, so far as the return to the writ and the facts before the court are concerned, to end the matter. The cost and expense of the grading of this section of the street, if they be severable from the cost and expense of the whole improvement, may be assessable upon the property specially benefited thereby. If they be so severable, an application can be made to this court for any relief to which the defendants may be entitled.

(56 N. J. E. 690)

TRENTON POTTERIES CO. v. OLIPHANT
et al.

(Court of Chancery of New Jersey. March 19, 1898.)

CONTRACT BY FIRM—CONSTRUCTION—JOINT AND SEVERAL AGREEMENT—BREACH—RESTRAINT OF TRADE—PUBLIC POLICY—REASONABLENESS OF COVENANT—EXPANSION OF BUSINESS—MONOPOLY—COMPETITION.

1. Where an agreement is expressed, "We, the undersigned, do business under the firm name of O. & Co.," and contains a clause, "We also agree that we will not directly or indirectly engage in business," etc., and is signed only by the firm name "O. & Co.," and has no words of severance, it is a joint undertaking that the firm of O. & Co. will not engage, etc., and not a several agreement that its component members will not.

2. Where the agreement not to compete is both joint and several that the covenantors "will not nor will either of them, directly or indirectly, engage in the business," etc., and a covenantor afterwards takes part in originating a competing corporation to engage in the business, rents property to it for that purpose, and actively participates in its management, it is a breach of the covenant.

3. Where the covenantors actively participate in the management of a business which competes with that which they sold, and which they agreed to abandon, it is a breach of the covenant, whether they participate in the new venture as principals or agents, or as members of a partnership, or as the employes of or in the conduct of a corporation, as its officers.

4. Contracts in general restraint of trade—that is, restraining a man from pursuing his business anywhere in the United States—are void as against public policy.

5. Contracts in partial restraint of trade—that is, those which restrain from pursuing a business within a defined area less than the whole country—will be enforced if the space of exclusion is no wider than is reasonably required for the protection of the covenantee in the enjoyment of the business to which the covenant relates, and not so large as to interfere with the interests of the public.

6. In ascertaining whether the exclusion is wider than is required for the protection of the covenantee, and therefore uselessly in restraint of trade, each case will be considered and determined on the facts attendant upon the particular transaction.

7. The intention of the purchaser and covenantee to produce from a plant one of several classes of goods for which it was used does not make a covenant unreasonable which restrains the vendor from competition in the manufacture of all the classes of articles which the plant could produce.

8. It is not the intention with which the covenantee bought, but the relation of the covenant to the thing sold, which furnishes the guide by which to ascertain the reasonableness of the restraint imposed by the covenant.

9. Where the covenant as expressed is made partial in its area of restraint, only by the naming of exceptions which are colorable and pretentious, so that the covenant in fact restrains the covenantor from pursuing his business anywhere in the whole country, it is in general restraint of trade, and void, as against public policy.

10. Where the area within which the vendor and covenantor is excluded from competition covers whole groups of states over which the business sold did not extend, the covenant is wider than is necessary for the protection of the covenantee in the enjoyment of the thing sold, and is void as against public policy.

11. If the covenant is expressed by the par-

ties to exclude from the competition in several separate and distinct places, as to some of which the exclusion is reasonable, while as to others it is not, the court will consider the covenant to be divisible, and will enforce it within the reasonable area; but the court will not select from a contiguous area, which is in itself unreasonable, such a portion as would, had it been distinctly named by the parties, have been deemed to be a reasonable extent of exclusion, and thus force the divisibility of the covenant, and compel its performance in the selected space.

12. It is the business as it existed at the time of the sale that the vendors convey, and in respect to which they covenanted not to compete, and the reasonableness of the covenant restraining the vendors from competition will be tested by the relation of the extent of territory over which the business was done when it was sold to the area from which they are by the covenant excluded. If they are not shut out from any more space than is necessary to enable the purchaser and covenantee to enjoy the thing sold, the covenant is reasonable, and will be enforced; if they are so excluded, the covenant is injurious to the public, and will not be enforced.

13. The expansion of the business, by purchases of like concerns by the covenantees from other parties, by increased capital, and by combinations and control of production and sales, will not be considered to justify the too great breadth of the covenant when it was made.

14. Where the members of a manufacturers' association produce nearly the whole quantity of an article necessary to the comfort and health of the community, and have agreed to make their prices such as the majority of the members shall prescribe, a scheme to buy and combine into one company the plants of a majority of the members, obtain the control of prices at which all the members shall sell, put the vendors under a covenant not to compete, and thus secure the ability to dictate the prices which the public must pay for the productions of all the members of the association, is an effort to create a monopoly in an article of general necessity, and is against public policy.

15. The covenants to restrain competition, though they may be several as between the vendors and the vendee, will be considered as part of a single plan to secure a monopoly. If they are executory, a court of equity will not enforce them.

(Syllabus by the Court.)

Bill by the Trenton Potteries Company to restrain Richard C. Oliphant and others from continuing the pottery business. Dismissed.

The bill of complaint in this cause was filed by the Trenton Potteries Company, a corporation of this state, as complainant, against Richard C. Oliphant, Hughes Oliphant, Robert N. Oliphant, Sidney M. Oliphant, James V. Oliphant, Samuel D. Oliphant, and Henry D. Oliphant, defendants, setting up the sale by the defendants to the complainant of the Delaware Pottery, and its good will and business, its recipes and formulæ, by the several agreements hereinafter referred to, and charging that the defendants had thereby covenanted not to engage in the business of manufacturing pottery ware, except under certain circumstances, set out in the covenants and bill; and that, through the pretense of the incorporation of the Bellmark Pottery, they had enticed away the employes of the complain-

ant, and induced them to work for the Bellmark Pottery Company, and were manufacturing pottery ware in breach of their covenants with the complainant; and praying that the defendants, and each and every of them, might be enjoined from engaging, directly or indirectly, in the business of the manufacture of pottery ware, save in the capacity of agents or employes of the complainant, excepting within the territory and the time specified in the covenants, and from using the complainant's recipes and formulæ.

The defendants filed their joint and several answers to the bill. They deny that James V. Oliphant ever made the covenants not to engage in the business. They admit that the original agreement for the sale of the Delaware Pottery, etc., which was dated January 23, 1891, and which is hereinafter called an option, was made by Richard C. Oliphant, acting for the firm of Oliphant & Co., but they deny that James was then a member of the firm. They also admit the execution of the other agreements hereinafter set out, by all the defendants except James. They admit the sale and conveyance of the Delaware Pottery, with its equipments and good will, recipes, and formulæ to the complainant, by intermediate conveyances through Mr. Tapscott and Mr. Hancock. They also admit that all the defendants, excepting James, made the covenant hereinafter referred to, dated July 6, 1892, agreeing not to engage in the business of the manufacture of pottery ware within any of the states of the United States, except, etc., but aver that it is void because it is in restraint of trade. They admit the employment of the defendants by the complainant company after the purchase of the defendants' pottery, and that they quit the complainant's service at varying periods, from June to September, 1893. They deny that while they were in the complainant's employ they entered into any combination to engage in the pottery business contrary to their covenants, or to promote a company to be incorporated for that purpose, and say that they had no connection with any pottery business other than complainant's until after they had severed their connection with the complainant. They deny that they enticed away the complainant's employes, and that the Bellmark Pottery was not incorporated in good faith. They admit that, since quitting the complainant's service, Hughes, Robert N., Sidney M., and James V. Oliphant have been employed by the Bellmark Pottery, and that Samuel D., Hughes, and Sidney M. Oliphant rent to that company its real estate and hold stock in it. They deny that either Richard C. or Henry D. Oliphant has ever, since their connection with the complainant company, been engaged in any way in any pottery business; and state that Samuel D. Oliphant has had no other connection with that business than as holder of stock in the Bellmark Pottery, and lessor to that company of the lands

which it occupies. They deny that any recipe or formula ever used in the Delaware Pottery has ever been used in the Bellmark Pottery, but they admit that the Bellmark Pottery has sold its product to dealers who have heretofore dealt with the Delaware Pottery. They set forth the ages of the defendants to show the unreasonableness of the covenant restraining them for 50 years from engaging in the pottery business, reciting that Samuel D. Oliphant, the father, is now 69 years old, and his sons, the other defendants, are from 26 to 38 years old. They allege that the exception of Arizona and Nevada from the area within which the defendants are by the covenant prohibited from engaging in manufacturing pottery was made for the purpose of giving the covenant the appearance of being limited to a less space than the whole United States; that the Delaware Pottery, when sold by them, was engaged in making only druggists' and sanitary ware, and that the production of druggists', sanitary, crockery, terra cotta, and tile are each separate branches of the pottery business, not in competition with each other. They further reply that sanitary ware is an article of prime necessity; that when the complainant company was formed sanitary ware was made by only seven factories in Trenton, one in Baltimore, and one in Tiffin, Ohio; that these produced 94 per cent. of all the sanitary ware output, and they state that the complainant company was formed for the purpose of obtaining a monopoly of the manufacture of sanitary ware, and to suppress competition in the sale thereof; that the complainant obtained the covenants sought to be enforced, restraining the defendants from engaging in the manufacture of pottery, in aid of an unlawful purpose to secure a monopoly of the manufacture of sanitary ware; that it at the same time took like covenants against competition from every other sanitary pottery in Trenton, except one, and sought to secure that one; that the defendants did not wish to give an option and join the combination, but they were told by the agents of the complainant company that the other sanitary pottery proprietors had already signed such options, or were about to do so, and that the Delaware Pottery should not stand out against the combination and compete in business with them. They further aver that the promoters of the complainant company, as part of their scheme to obtain a monopoly of the sanitary pottery business, secured the control of the Brewer Pottery, at Tiffin, Ohio. They insist that the complainant company seeks to enforce the covenants restraining the defendants from engaging in the manufacture of pottery as part of the scheme to monopolize the sanitary pottery business, and that those covenants are, for the reasons stated, in restraint of trade, and void and nonenforceable.

This case is in some particulars one of first instance in New Jersey in the application of the law concerning the enforcement of covenants which are claimed to be in restraint of trade and to aid the creation of a monopoly. The evidence shows these facts, which gave rise to the disputes between the parties, referred to in the pleadings in the cause:

In the latter part of the year 1890, and in the month of January, 1891, there were engaged, in the business of the manufacture of sanitary pottery ware (under which general designation were included sinks, urinals, water-closets, and the like), eight different potteries,—the Equitable, Enterprise, Crescent, Delaware, Empire, Willets, Maddocks, and the Maryland. All, except the Maryland, were located in Trenton, N. J. The Maryland was at Baltimore. These eight potteries comprised all of the potteries in the United States which were then engaged in the production of sanitary ware (except a small concern at Wells-ville, Ohio), and had formed an association called the "American Sanitary Pottery Association," for the purpose of securing uniform action as to the prices of the ware which they manufactured and sold. The prices at which the goods produced by the associated concerns should be sold were fixed by a majority vote of the several members. Each pottery had its individual vote in the association, and the vote of the majority controlled, and all were by their agreement bound to sell only by the prices that the association should fix. The several potteries comprising the association were separately and independently owned. All of them were in partnership or individual ownership, except the Crescent, which was a corporation.

At this time Mr. T. L. Tapscott was a broker in the city of New York, who had organized the New York Biscuit Company, a combination of several concerns in one corporation, and who had also had some relations with the Diamond Match Company, another combination. In 1890, Mr. Tapscott's attention was called to these potteries by one of the parties who had been connected with the Biscuit Company, and it was suggested that he "undertake" the Trenton potteries. He sought a conference with and saw Mr. Skirm, of the Enterprise Pottery, and Mr. Magowan, of the Empire, and, on receiving assurances from one of them that he would sell his pottery and could get options on others, he asked them to obtain them. Mr. Tapscott then sought to interest some of the capitalists who were in the Diamond Match Company, but the scheme at this time seems to have lagged, because the capitalists refused to go further. Several months later, in 1890, Mr. Tapscott succeeded in interesting Mr. Davison, a New York lawyer, who controlled considerable capital, and, after a conference between Tapscott, Davison, and Skirm, the former wrote up options for the purchase of the potteries, and gave them to the latter to procure signatures. Mr. Tapscott testifies that Skirm succeeded in getting

perhaps five of the options signed, but he did not think he got Willets, who "were making very little sanitary; they make mostly bric-a-brac." The latter statement is significant, as it shows that at this early date the plan in view was not the purchase of potteries generally, but of those potteries which produced sanitary ware, and Willets was of no special importance, as they were making very little sanitary ware. Among these earlier options obtained by Mr. Skirm was one from the Oliphants (the defendants) for the purchase of the Delaware Pottery. These options were not properly signed, and seem to have been abandoned. Mr. Tapscott, however, had not given up the scheme. He was introduced by Mr. Davison to Mr. Bayne, his brother-in-law, as a party who would take part in the negotiations, and further conference was had, resulting in a meeting at Mr. Skirm's house, at which it was proposed to get properly signed options, with the amount of the price left blank, so that it could be filled in with a sum sufficient to cover the expenses, etc., of the managers of the scheme. These latter options they obtained from the owners of the Enterprise, Empire, Crescent, Equitable, and Delaware Potteries, all dated January 23, 1891. The following is a copy of the option then given by Oliphant & Co. upon their Delaware Pottery: "Trenton, N. J., January 23d, 1891. F. L. Tapscott, Esq.—Dear Sir: We, the undersigned, do business under the firm name of Oliphant & Company, and own and control the Delaware Pottery. We own good will, brands, patents, molds, designs, horses, wagons, trucks, tools, and all necessary implements used in our pottery business, and have the right to carry on a general business in the manufacture and sale of clay products. We will sell the plants, consisting of land, buildings, and fixed machinery, which, it is understood, includes all the real estate, together with all the good will, brands, patents, trade-marks, designs, molds, and all other appurtenances in any way connected with the real estate or the business of our firms, with the right to use our or their names, for the sum of 406,000 dollars. We will also turn over to you guaranteed book accounts and cash to the extent of \$36,300; also stock, both manufactured, unmanufactured, and in process of manufacture, to the extent of \$69,700. Both of these latter amounts are included in and form part of the price aforesaid, to wit, \$406,000. The items, which include book accounts, cash, stock, both manufactured, unmanufactured, and in process of manufacture, may be modified after actual examination, and accordingly increased or decreased as such examination shall at that time disclose the fact to be, and said increase or decrease added or deducted from the price, as the case may be. On demand, and the tender to us, as above, at any time within ninety days from January 23d, 1891, we agree to transfer to you legally, free and clear of all incumbrances or debts of any kind, all the above-named properties, including their and our good will, plants, brands,

patents, and right to use their and our names, and all other property in any way connected with said business. This option is to run to you or your assigns. For and in consideration of the sum of one dollar, to us in hand paid, the receipt of which is hereby acknowledged, you shall have the sole and exclusive right or option to buy the business as aforesaid for the term of ninety days from date, and if, at the expiration of said term of ninety days, you have not made demand on us, nor notified us of your intention to exercise this option, and demanded that we transfer to you properties as above, then this option shall be null and void, and this paper shall be returned to us and canceled. We also agree that we will not, directly nor indirectly, engage in the business of the manufacture of pottery ware, except in the capacity of your agent or employé, or as your assigns, within any state in the United States of America, or within the District of Columbia, except in the state of Nevada and the territory of Arizona, for a period of fifty years from this date. The foregoing option is executed upon the sole condition, and is not to be operative, in any event, unless complied with; that is, at the time you, or your assigns, may elect to accept the said option, and ask for an examination of the books and accounts of said business, you will deposit with us two and one-half per cent. of the purchase price aforesaid, in cash, as an earnest of good faith, and as a forfeit to be retained by us if the statements which we have this day made to you in writing are found to be substantially as represented, and you fail to complete the purchase. In witness whereof we have hereunto set our hands and seals this 23d day of January, 1891. Oliphant & Co. [Seal.] Witnessed by Chas. H. Skirm."

The options of January 23, 1891, obtained from the four other pottery owners were the same as the above, save that the clause by which the givers agree not to engage in business is varied in two of them from that above taken from the Delaware Pottery. The Crescent was a corporation, and by the clause of restraint in that option the covenantor agreed that it would not engage in the business of the manufacture of pottery ware, "now made by the five potteries of which this is one, except," etc. The equitable clause on this subject only bound the covenantors not to engage in the manufacture of "sanitary ware, except," etc.—another indication that the object was to secure the sanitary ware potteries.

At the same time that the options were obtained, January 23, 1891, a circular letter of inquiry was prepared by Davison for answer by the pottery owners, addressed to Tapscott, and one question asked of the owners was, "Will you take part of the purchase money in stock of the new company? If so, what amount?" This inquiry, almost at the inception of the dealing, indicates that the parties then contemplated the formation of the new company, in which the owners of the combined potteries might take stock. That this was a

continued design is further shown by the letter of Oliphant & Co., dated May 2, 1892, to Mr. Tapscott, making their change of price and acceptance of the company's stock conditional upon an issue of preferred and common stock only to the amounts named in their letter, and the final execution of the purpose is shown by the subsequent incorporation of the complainant, the Trenton Potteries Company, with power to issue common and preferred exactly in accordance with the amounts indicated by these precedent references. It should be observed that this proffer of an agreement to sell the Delaware Pottery is made in terms by a partnership, is signed only in the partnership name, and, as to all things agreed to be done or to be avoided, is a joint agreement, and not several, and relates to the acts which the partnership, as such, agrees it will or will not do. So the clause agreeing not to engage in business in the manufacture of pottery is joint, and appears to be an undertaking by the firm that it will not engage in such business, etc., but not an engagement that its several members shall not separately so engage. On February 6, 1891, within two weeks after securing this option of January 23, 1891, Mr. Tapscott assigned it, with the others, to Mr. Davison, who, on the same day, assigned them to Mr. Bayne. This was probably done to enable the options to be offered for sale abroad, and for this purpose Mr. Bayne took certified copies of them to Europe. The assignments are absolute, and appear to divest Mr. Tapscott of all interest in the option, but he still continued to assume to deal with them as if he were the sole owner, and his authority so to act was never questioned by any one.

Mr. Bayne's mission to sell the options in Europe was a failure, and they then turned their attention to securing American capital to aid them to carry forward the venture. Considerable time elapsed while these efforts were being made, and the three-months limitations named in the options had expired. The firm of Oliphant & Co., which at the time of the giving of the Delaware Pottery option of January 23, 1891, consisted of Samuel D., Richard C., Hughes, and Henry D. Oliphant, had about January 1, 1892, received as additional members Robert N., Sidney M., and James V. Oliphant. It became necessary, if anything more were to be done, to have a renewal of the expired options. Mr. Tapscott, on February 1, 1892, obtained this, as to the Delaware Pottery, by a letter of that date, addressed to him, in these words: "Delaware Pottery. Oliphant & Co., Manufacturing Pottery. Trenton, N. J., February 1st, 1892. F. L. Tapscott, Esq.—Dear Sir: In consideration of one dollar, to us in hand paid, the receipt of which is hereby duly acknowledged, we extend the option heretofore given to you on our pottery for ninety days from date. This extension to be attached to and become part of the original option. [Signed] Richard C. Oliphant. Hughes Oliphant. Robert N. Oliphant. James V. Oliphant. S. M. Oliphant. Henry D.

Oliphant. S. D. Oliphant. Witnessed by Robert N. Oliphant as to Hughes Oliphant. Witnessed by Richard C. Oliphant as to Robert N. Oliphant, James V. Oliphant, and S. M. Oliphant, and Hughes Oliphant. Witnessed by Lewis W. Scott as to Henry D. Oliphant and S. D. Oliphant." Like extension renewals were obtained from the other pottery owners.

Mr. Tapscott, after considerable effort, finally succeeded in interesting Mr. Morse, who was associated with the bankers, A. M. Kidder & Co., in the proposed purchase, and took him to Trenton, where he made a superficial outside examination of the potteries. From this time until the final consummation of the purchase, on the formation of the Trenton Potteries Company, the complainant, the management of the plan of purchase seems to have rested with Mr. Tapscott (in whose name all the options and extensions were taken), Mr. Bayne, Mr. Davison, and Mr. Morse, who was associated with the bankers, A. M. Kidder & Co. On May 2, 1892, Mr. Tapscott received from Oliphant & Co. the letter above referred to, agreeing that if "the capitalization does not exceed \$1,250,000 pref. 8 per cent. stock, and \$1,750,000 common stock, we agree to accept \$116,000 payable in cash, and \$103,000 payable in common stock, making a total price of \$219,000," including, however, "only \$50,000 of the guaranteed assets referred to in our option."

A certificate under date of May 3, 1892, was addressed to Mr. Tapscott by Oliphant & Co., stating their net profits for the preceding three years, and valuing their real estate, plant, and appurtenances at \$200,000, with an offer that several members of their firm would, if desired, become connected with "the new company to be formed." In this certificate there is also an extension of the option to enable Tapscott "to make examinations, organize company," etc. Like certificates were obtained about the same time from the four other owners. The same words are used in all of them, except as blanks have been filled by the different parties with varying sums applicable to each. Several are in the same handwriting, and it is quite plain that they all came originally from Mr. Tapscott, as one of the steps necessary to the consummation of the purchase of the sanitary potteries. On May 10, 1892, Oliphant & Co. acknowledged the deposit of \$2,900 by Mr. Tapscott and his associates with the New York Guaranty & Indemnity Company, to be forfeited to Oliphant & Co., if the purchasers defaulted. On May 20, 1892, Tapscott accepted the option for the purchase of the Delaware Pottery, and notified the Oliphants. On May 21st, the next day, they acknowledged notice of the exercise of the option and confirmed it. The signatures to this acknowledgment were Oliphant & Co., and all the members of the firm except James. On May 21, 1892, an agreement for the sale was made, the opening paragraph of which is as follows: "This agreement, made and entered into this 21st day of May, 1892, between Oli-

phant & Co., owners of the Delaware Pottery, party of the first part, and Frank L. Tapscott, of the county of Kings, state of New York, party of the second part, witnesseth." The agreement then proceeds, reciting the option of January 23, 1891, and Oliphant & Co. covenanted to sell and convey the Delaware Pottery, its real estate, plant, good will, and appurtenances, etc., to Tapscott or his assigns, upon 10 days' notice, and to execute and deliver such papers as may be necessary to complete the conveyance, "and such other papers as may be necessary to carry out the terms and conditions of such other agreements as we have heretofore executed." Tapscott agreed to pay the price, \$259,125.31, of which \$103,000 was to be in "the common stock of the company to be formed by the purchaser of said property." This agreement was signed by Tapscott, and also "Oliphant & Co.," and by all the members of the firm except James. By a separate memorandum, dated May 23, 1892, also under seal, and signed by James, he agrees "to all the terms and conditions mentioned and set forth in the agreements signed by the other owners of said pottery." Corresponding agreements, with slight and unimportant variances, were taken by Tapscott from the owners of the four other sanitary potteries, and he thus obtained the control of the purchase of the whole five, and power to direct their conveyance to whom he would, some upon two and others upon ten days' notice to be given by him. Having the purchase thus secured, they were ready to organize the purchasing company, and put its stock on the market.

Before the final option of May 23, 1892, was given, Messrs. Bayne and Tapscott had practically concluded their negotiations with the bankers, A. M. Kidder & Co., to finance the venture. On May 25, 1892, a prospectus was issued inviting the purchase of the stock of the new company by the public. This prospectus was "got up" by the bankers, was perhaps shown to the vendors, and was circulated generally wherever it was thought purchases of the new stock could be induced. It stated that "these five companies manufacture and sell about 75 per cent. of the entire output of the famous sanitary plumbing ware made in this country. * * * They are of absolute necessity to the community, and are in constantly increasing demand. * * * Those who retire (referring to the vendors) do so under contract not to engage, directly or indirectly, in any competing business."

The Trenton Potteries Company, the complainant in this suit, was, by a certificate dated the 27th day of May, 1892, and filed in the secretary of state's office on the 28th of that month, incorporated under the general corporation act of this state. Its capital stock was fixed to be issued, \$1,250,000 of preferred stock, and \$1,750,000 of common stock. Its objects were stated to be "to manufacture, buy, sell, and trade in pottery and earthenware and other like products, and in all ma-

terials commonly or conveniently used, manufactured, bought, and sold in connection therewith, or necessary or convenient in and about the transaction of the said business." The final conveyances, under the agreements of sale, were dated July 6, 1892. Those conveying the Delaware Pottery and plant were executed in several different instruments, all of the above date, but none of them were signed by James V. Oliphant. It is undisputed that the full consideration agreed to be paid has been received by the owners of the Delaware Pottery.

One of the conveyances transfers to Tapscott all the plant, machinery, and appurtenances of the Delaware Pottery in Trenton, N. J., together with all the good will, etc., tools, implements, etc. This purports to be made by the several members of the firm "doing business under the firm name of Oliphant & Co.," but is signed "Oliphant & Co., Richard C. Oliphant, Hughes Oliphant, and S. D. Oliphant." This instrument contains a joint covenant "to warrant and defend the sale of the said property hereby sold" against all persons. Another, of the same date, purporting to be made by "we, the undersigned," conveys to Tapscott "all recipes and formulæ for the bodies of the ware that is now being produced at said pottery," etc.; also glazes, colors, and mixtures, etc.; with an agreement that Tapscott shall have the exclusive use of the same, and that their verity shall be established by an affidavit of the undersigned, and that Tapscott may retain \$10,000 of the Oliphant stock until a test can be made of the genuineness of the recipes and formulæ. This is signed "Oliphant & Co.," and by all the members of the partnership except James. By a deed dated July 6, 1892, Richard C., Hughes, Henry D., and Samuel D. Oliphant, who held the title to the real estate on which the Delaware Pottery was located, joined with their wives in conveying it to William S. Hancock, for the benefit of the complainant, the Trenton Potteries Company; and Hancock, by a deed of the same date, immediately conveyed the premises to the complainant.

In addition to the above-recited conveyances, another was made which contains the covenant of restraint which is the subject of contention in this cause. It is in these words: "This agreement, made and entered into this sixth day of July, 1892, between Richard C. Oliphant, Hughes Oliphant, S. D. Oliphant, Henry D. Oliphant, Robert N. Oliphant, S. M. Oliphant, and James V. Oliphant, doing business under the firm name of Oliphant & Co., of Trenton, New Jersey, parties of the first part, and Frank L. Tapscott, of the county of Kings, state of New York, party of the second part. Whereas, the parties of the first part heretofore contracted to sell their certain pottery, located in the city of Trenton, New Jersey, to the party of the second part, and in consideration of said purchase by said party of the second part did agree with said party of the second part, and his assigns, as here-

after in this agreement set forth; and whereas, the party of the second part has conveyed the said pottery or caused the same to be conveyed to the Trenton Potteries Company: Now, therefore, in consideration of the premises, the said parties of the first part do hereby jointly and severally agree that they will not, nor will either of them, directly or indirectly, engage in the business of the manufacture of pottery ware, except in the capacity of agent or employé of the Trenton Potteries Company, or as its assigns, within any state in the United States of America, or within the District of Columbia, except in the state of Nevada and the territory of Arizona, for a period of fifty years from this date, and that this contract shall inure to the benefit of and may be enforced by the said Trenton Potteries Company, its successors or assigns. And the said Richard C. Oliphant, one of the parties of the first part, does hereby further covenant and agree that he will, if desired by the Trenton Potteries Company, and so long a time as said company shall so desire, not exceeding five years, remain as manager of said pottery at a salary of three thousand dollars for the first year, and thereafter at such a salary as may be fixed by the board of directors. In witness whereof the said parties of the first part have hereunto set their hands and seals the day and the year first above written. S. D. Oliphant. [Seal.] Richard C. Oliphant. [Seal.] Hughes D. Oliphant. [Seal.] Henry D. Oliphant. [Seal.] S. M. Oliphant. [Seal.] Robert N. Oliphant. [Seal.] In presence of (as to S. D. Oliphant, Richard C. Oliphant, and Hughes Oliphant) Lewis Cass Ledyard. Witness as to Henry D. Oliphant, Charles S. Chevrier. Witness as to S. M. Oliphant, Josiah Hollies. Witness as to Robert N. Oliphant, A. R. Chambers." It will be noticed that James V. Oliphant did not sign this instrument.

By another conveyance of the same date, July 6, 1892, Mr. Tapscott conveyed all the plant, machinery, and appurtenances of the Delaware Pottery, its good will and equipments, which had been conveyed to him, to the complainant, the Trenton Potteries Company. On the organization of the complainant company, the defendants Richard O., Hughes, Robert N., Sidney M., and James V. Oliphant entered into its employment in various capacities, and continued in its employ until the latter part of August or the first part of September, 1893, when they quit the service of the complainant. In the latter part of September, 1893, John C. Oliphant and Samuel D. Oliphant, Jr., sons of the defendant Samuel D. Oliphant, and brothers of the other defendants, and one Patrick Moohan, organized a pottery company, under the general corporation act of this state, called the "Bellmark Pottery Company." The certificate of incorporation was filed in the secretary of state's office on October 9, 1893, and declared that the objects for which the company was formed were to

"manufacture and sell all kinds of novelties, specialties, and staple ware, or other goods, merchandise, or products made of earthenware, wood, or metal, or any combinations thereof." Mr. John C. Oliphant was chosen president of the new company, and Mr. Alexander C. Oliphant, another brother, secretary and treasurer. These persons had not been members of the firm of Oliphant & Co., nor were they parties to the covenants under consideration. The defendants Samuel D. Oliphant, Hughes Oliphant, Sidney M. Oliphant, and Robert N. Oliphant all became stockholders in the new company. Hughes, Sidney M., Robert N., and James V. Oliphant took active employment in the Bellmark Company's business in various capacities. Mr. Robert N. Oliphant testifies that the production of the Bellmark Pottery is earthenware, pottery ware, and sanitary ware, of the same shapes, to some extent, as were made at the Delaware Pottery, and that sales of these products were made to some of the same people to whom they used to sell when they were running the Delaware Pottery Company. Mr. Alexander C. Oliphant, speaking of the business of the Bellmark Pottery, also testifies that "all of the stockholders were in active participation in the management of the firm." Its factory, when visited, showed that it was engaged in the production of sanitary ware in quantities; and, personally and by letter, trade was solicited for the sale of sanitary ware and druggists' supplies from persons who had been customers of Oliphant & Co. when they were manufacturing like articles at the Delaware Pottery, before they sold it to the complainant.

James Buchanan, William M. Lanning, Garrett D. W. Vroom, and Lewis Cass Ledyard, for complainant. Lowthorp & Oliphant, R. V. Lindabury, and Joseph H. Choate, for defendants.

GREY, V. C. (after stating the facts). Before entering upon the consideration of the construction of the covenants in dispute, I will review the evidence upon the issue raised by the denial of James V. Oliphant that he made them. The first agreement not to engage in the manufacture of pottery ware was that contained in the option given by Oliphant & Co. to Mr. Tapscott dated January 23, 1891. This instrument is in the form of a letter, opening: "Dear Sir: We, the undersigned, do business under the firm name of Oliphant & Company, and own and control the Delaware Pottery," etc. The letter proceeds with an offer to sell the Delaware Pottery, and its good will, equipments, etc., giving Mr. Tapscott an option to buy within 90 days from date, and then follows this clause: "We also agree that we will not, directly or indirectly, engage in the business of the manufacture of pottery ware, except in the capacity of your agent or em-

ployé, or as your assigns, within any state of the United States of America, or within the District of Columbia, except in the state of Nevada and the territory of Arizona, for a period of fifty years from this date." The letter is signed "Oliphant & Co." At the time this letter was written James V. Oliphant was not a member of the firm of Oliphant & Co. He is not shown to have taken any personal part in the giving of this option. It seems clear that when it was given he was no party to it. The exercise of the option was delayed for more than a year. Meanwhile, in January, 1892, James had become a member of the firm. Afterwards, on February 1, 1892, James joined with his fellow members of the firm in a letter to Mr. Tapscott, extending the option, and declaring "this extension to be attached to and become a part of the original option." The effect of this extension was a recognition and ratification of the original option by James, as binding upon him. On May 23, 1892, James executed a separate paper under seal, reciting notice of Tapscott's exercise of the option and purchase of the Delaware Pottery, of which he (James) was a part owner, and declaring: "I hereby agree to all the terms and conditions mentioned and set forth in the agreements signed by the other owners of the said pottery."

The above named were the only instruments connected with these transactions which James V. Oliphant is shown to have executed. By their terms James assented to the sale, and agreed to be bound by the terms and conditions of the agreements which had been signed by the other owners. I do not understand that any of these papers signed by James conferred any authority upon the other members of the firm to bind him to any new agreements differing from the original option, in the terms proffered. The language used is that of ratification and approval of what had been done, and not of undertaking to be bound by any different contract which the other owners might make in the future.

The instruments noted being the only ones which obligated James, and binding him only as to agreements which on or before May 23, 1892, the other owners of Delaware Pottery had signed, what had the others of the firm done at or prior to May 23, 1892, to bind themselves not to engage in the manufacture of pottery, etc.? The only agreement on this subject was the clause in the original option of January 23, 1891, above recited. This was a promise of Oliphant & Co. that they (Oliphant & Co.) would not engage in the manufacture of pottery ware, and related to a sale of the firm property, to protect which the agreement was made. It was in form a joint agreement by the firm, containing no words of severalty, and was signed by the firm name. Where two or more persons make a contract, if there be no express words of severance the general

presumption of the law is that the contract is joint. *Alpaugh v. Wood*, 53 N. J. Law, 644, 23 Atl. 261. In the agreement of January 23, 1891, there are no words of severance whatever. I think it must be taken to have been an agreement that the firm, as such, would not engage in the manufacture, etc. This was the only covenant not to engage in business, etc., which James ever accepted and ratified.

There is no pretense, either in the pleadings or proofs, that the partnership of Oliphant & Co., acting as a firm, has ever engaged in the manufacture of pottery ware in breach of its agreement in the original option. Any grounds upon which James can be individually bound not to so engage, etc., must be based upon the subsequent agreement and covenant of July 6, 1892. This was a new agreement under seal, purporting to be made between Richard C., Hughes, Samuel D., Henry D., Robert N., Sidney M., and James V. Oliphant, "doing business under the firm name of Oliphant & Co., of Trenton, N. J.," and Mr. Tapscott. This agreement contains this clause: "Now, therefore, in consideration of the premises, the said parties of the first part do hereby jointly and severally agree that they will not, nor will either of them, directly or indirectly, engage in the business of the manufacture of pottery ware, except in the capacity of agent or employé of the Trenton Potteries Company, or as its assigns, within any state in the United States of America, or in the District of Columbia, except in the state of Nevada and the territory of Arizona, for a period of fifty years from this date, and that this contract shall inure to the benefit of, and may be enforced by, the said Trenton Potteries Company, its successors or assigns." Although in its statement of parties James V. Oliphant is named as a party to this covenant, he did not in fact sign it. The signatures are the individual signatures of the other members of the firm, and not even the firm name of "Oliphant & Co." is signed. James did not sign it himself, nor did any one assume to sign it for him, in his name. Nor does it anywhere appear that James has bound himself by its terms. This new covenant of restraint is far wider in its operation upon the individuals bound by it than the clause of restraint contained in the original option. This purports to restrain the parties, jointly and severally, from engaging in the manufacture of pottery. It binds them all when associated together, and it binds each when acting in his individual capacity. The former one restrained only the firm from engaging as a partnership in the manufacture of pottery ware. This restrains each several member from separately personally so engaging. In my judgment, it has not been shown that there has been any breach of the agreement of restraint contained in the option of January 23, 1891, which was assented to by James V. Oliphant. As to this

later covenant of July 6, 1892, I think it is in no way binding upon him, as he neither executed it, authorized it, nor assented to it, and his separate memorandum of May 23, 1892, whereby he agreed to all the terms and conditions mentioned in the agreements signed by the others, must be related to such agreements as had been made by the others prior to that date, and cannot be construed to bind James to an agreement of an essentially different character, made weeks after that date, which he did not execute or authorize, and which he has not ratified.

As to the claim that the defendants broke their covenant not to use the recipes and formulae they sold to the complainant, the evidence seems to be quite insufficient to support the relief asked. The proof is that the Bellmark Pottery purchased its recipes from Mr. Moohan, one of its incorporators.

Another preliminary question which may be disposed of is raised by the contention of the defendants that, even admitting the validity of the covenant of July 6, 1892, they deny that the defendant Richard C. or Henry D. Oliphant has engaged in the business of the manufacture of pottery ware in any capacity whatever. This denial puts upon the complainant the burden of proving that these defendants did engage in that business in breach of the covenant. There is no evidence in the case which goes to show that either of these defendants has, since the making of the covenant of July 6, 1892, engaged in the business of the manufacture of pottery ware. The only allegation in the bill of any breach of the covenant is that the defendants broke it by originating the Bellmark Pottery, and through this means engaging in the business of manufacturing pottery ware. Richard C. Oliphant in his testimony denies any connection whatever with the Bellmark Pottery. There is no showing that since July 6, 1892, the defendant Henry D. Oliphant has had any connection with that undertaking.

I think there is an entire failure to show any engagement by either Richard C. or Henry D. Oliphant in the manufacture of pottery ware since July 6, 1892.

The defendants also deny that Samuel D. Oliphant had any connection with the pottery business, save as the owner of stock in the Bellmark Pottery, and as a landlord demising to that company the lands whereon it conducts its business. On the other hand, the complainant contends that Samuel D. Oliphant and the other covenantors presented John C. and S. D. Oliphant, Jr., as the apparent incorporators of the Bellmark Pottery Company, because they had not made any covenant not to engage in the pottery business, while in fact the real incorporators were Samuel D. Oliphant and those of his sons who had made the covenant. The proofs on this point show that the Bellmark Pottery was incorporated in September and October, 1893, by Samuel D. Oliphant, Jr.,

John C. Oliphant, and P. H. Moohan. Mr. John C. Oliphant, who was the holder of four shares of Bellmark (which were not paid for), was made president. The interest of Mr. S. D. Oliphant, Jr., is not shown. The testimony of Mr. Robert N. Oliphant shows that, by the original contract for the creation of the Bellmark Pottery Company, S. D. Oliphant, Robert N. Oliphant, Sidney M. Oliphant, Hughes Oliphant, and P. H. Moohan each agreed to take a one-fifth share. Mr. A. C. Oliphant, who had come to be owner of one share, to be paid for in services, became secretary and treasurer. Both of the officers of the new company were sons of Samuel D. Oliphant, and brothers of the other defendants who invested their money, but neither of these officers had made the covenant of July 6, 1892, not to engage in the pottery business. Mr. Robert N. Oliphant testifies that Mr. John C. Oliphant lived in Ohio, and had not been in Trenton between June 19, 1895, and the previous fall, and that he gave no attention whatever to the business. Robert further testifies that, though Alexander's single share of stock (which was of the par value of \$100, as appears by the certificate of incorporation) was to be paid for by services, he had not fully paid for it at the time of taking the testimony, June, 1895. Until June 15, 1895, long after the bill in this cause was filed attacking the bona fides of the Bellmark Company, Mr. A. C. Oliphant testifies there had been no board of directors of that company. The land on which the Bellmark Pottery was located was owned by Samuel D., Hughes, and Sidney M. Oliphant by an unrecorded deed. There was no lease by them to the Bellmark Pottery Company, but they received a rental of 8 per cent. on the stock of the company, paid in quarterly sums, of \$1,000 each.

It would naturally be difficult to understand how, without a board of directors, the affairs of a corporation could be carried on, which was incorporated in October, 1893, and immediately engaged in active business, and continued it until June 19, 1895, when the witness testified as to this extraordinary condition of affairs. But Mr. A. C. Oliphant, the secretary and treasurer of the company, explains this by testifying that "all of the stockholders were in the active participation in the management of the firm; in any formal matters the officers met for that." It is quite apparent from the testimony of the Oliphants that Mr. S. D. Oliphant was one of those who actively engaged in the management of the new concern, as one of these stockholders. He himself, though sworn as a witness, does not deny the statement of his son Robert that he was one of the originators of this new pottery company, which has come into direct competition with the purchaser of the Delaware Pottery, nor that he took an original one-fifth share in its stock, nor the statement of his other son, A. C.

Olliphant, that all the stockholders actively participated in the management of the new pottery business. The answer admits that he was a stockholder in the Bellmark. It is significant, I think, that when Mr. A. C. Olliphant was questioned as to its affairs as a "company," he in his answer uninvitedly designated it as a "firm."

If the sole connection of the defendant S. D. Olliphant with the business of the Bellmark Pottery were simply that of a holder of its capital stock and a lessor of the land it occupies, it might be questioned whether these acts were in themselves an engaging in the business of manufacturing pottery ware, for a man might lease land to a corporation, or purchase and hold its stock, without so engaging in the actual conduct of its affairs that the company would receive the benefit of his previous experience in the business in which it is engaged, or of his acquaintance with the trade in the goods produced; but, however this might be, should it appear that the covenantor was merely a lessor and stockholder, the above summary of the evidence on this point indicates that Mr. Samuel D. Olliphant was much more than a mere stockholder and lessor. He appears to have been one of those who originally arranged for the starting of the new Bellmark Pottery, and who, after it had begun business, had for several years participated in the active conduct of its affairs. I think he cannot be classed with Richard C. and Henry D. Olliphant, who had no connection with the Bellmark Pottery, but should stand with Hughes, Robert N., and Sidney M. Olliphant as actively engaged in the management of its affairs, and with them should be held to respond to the covenant of July 6, 1892, if it be found to be valid, and that their acts in the origination and conduct of the Bellmark Pottery Company were in breach of it.

Having ascertained which of the defendants were covenantors, and which have done the acts which are alleged to be in breach of the covenant, the next question arises, were the acts of these defendants a breach of that covenant? Hughes, Robert N., and Sidney M. Olliphant admit by their answer that they are devoting their time and energies to the performance of their duties as employes of the Bellmark Pottery Company; and the proof seems to me to be quite clear that the Bellmark Pottery Company, which these defendants are conducting, is engaged in producing pottery ware of substantially the same character as that manufactured at the Delaware Pottery before they sold it to the complainant. They are shown by the testimony of Mr. Robert N. Olliphant to be engaged in making pottery ware and sanitary ware of the same shapes as were made at the Delaware Pottery, and that they were selling these wares to some of the same people to whom they used to sell when running the Delaware Pottery. Other witnesses testify that the Bellmark Pottery Company is producing sanitary pottery ware, and also druggists' ware, and correspondence

is produced which shows solicitations by the Bellmark Company, addressed to customers who formerly bought such products from the Delaware Pottery, to buy from the Bellmark.

It must be noticed that the complainant does not in its bill allege these solicitations by the defendants of their old customers, who had traded with them when they owned the Delaware Pottery, to be inequitable acts, which have a tendency to injure or destroy the good will of the Delaware Pottery, which the complainant bought and paid for; nor does the complainant seek to restrain such acts of interference with the good will of that business. The complainant comes into court with the defendants' covenant not to engage in the business of manufacturing pottery ware, and asks the court to prohibit them from carrying on that business; in short, to compel the performance of that covenant. The facts showing interference with the good will are set up simply as evidences of the breach of the covenant, and the relief asked is that the defendants may be restrained from further breach; that is, from engaging directly or indirectly in the pottery business. The complainant stands solely on the covenant, and for its enforcement, and not on its equity to have the thing which it had bought protected from the acts of the vendors in striving to recover it. This differentiates the case in hand from *Althen v. Vreeland* (N. J. Ch.) 36 Atl. 479, where the bill was filed, not only to enforce an express covenant which was held to be illegal because in restraint of trade, but also on the general equity of the complainant to have the thing which he had bought protected from the efforts of the vendors to get it back again. These acts of the defendants in making the same goods, and selling them to their old customers, appear to put the defendants Samuel D. Olliphant, Hughes Olliphant, Robert N. Olliphant, and Sidney M. Olliphant in direct competition for business, in the manufacture of pottery ware, with the complainant, the vendee of the Delaware Pottery. This manufacture and sales by the defendants are under the name of the "Bellmark Pottery." The defendants' covenant is that "they will not, nor will either of them, directly or indirectly, engage in the business of the manufacture of pottery ware, except," etc. I do not think it matters in what capacity the parties, covenantors, engage in the business, whether as principals, individually, or as members of a partnership, or under employment of individuals or of a company, or as managers and active conductors of the business of making pottery ware by a corporation. Any and all of these undertakings must be held to be an "engaging in the business," etc., and must necessarily result in a breach of the covenant of July 6, 1892, if that covenant be held valid.

The question remains to be considered, was the covenant of July 6, 1892, such a covenant as the courts may be asked to enforce, or was it, when made, one of that class which is so far in restraint of trade that the courts for

that reason should refuse to enforce it? In the very earliest cases on this subject which have been considered by the courts all contracts which were in any degree in restraint of the conduct of trade were held to be void. The principle upon which these cases were decided was based upon the obvious truth that it is against the interests of the public that a man should be permitted to bargain away his right to earn his living, and thereby possibly become a public charge, and might also deprive the community of the benefit which it should derive from the exercise of his energy and skill in the prosecution of his business. Covenants by which the covenantor bound himself not to engage in any business, at any time, in any place, if any such were ever made, would undoubtedly always have been void, as in general restraint of trade, whenever sought to be enforced. The question is almost always presented of a covenant seeking to restrain the covenantor from engaging in some particular business, in which the covenantee is interested, or which is sold to him, leaving the former at liberty to pursue any other business without restraint. In some of the very early cases, in which the validity of such contracts was passed upon, these considerations of public policy influenced and controlled the courts to such an extent that covenants in restraint of trade, even if strictly limited as to the space within which the covenantor was excluded from prosecuting his business, were held to be invalid.

The case of *Mitchel v. Reynolds* (1711) 1 P. Wms. 181, arose on an assignment of the lease of a bake house, and a covenant not to engage in the business of a baker during the term of the lease, within a named limited district. The covenant was undoubtedly in restraint of trade, but the exclusion was only from a definite and limited area. The case was several times argued before the king's bench. In the opinion of Parker, C. J. (afterwards Lord Macclesfield), all the previous decisions are collated, and it was declared that the covenant, being for a valuable consideration, and restraining only over a limited space and for a limited time, was to be held valid. This case has always been deemed to be the leading one in the exposition of the doctrine of the law on the subject of contracts in restraint of trade, and has never been in terms overruled, though there is much variance in the application of the doctrine there laid down, and some modification of its principles. In these cases the disadvantages to the public occasioned by contracts in restraint of trade were looked at principally from the point of view which considered the injury to be apprehended from impediments which might be placed in the way of a member of society pursuing his lawful business, whereby he might be reduced to penury, and become a public charge, and the public at the same time lose the benefit of his productive labor, and contracts tending to lead to these consequences were held to be void. While all

business was in a primitive condition, and laws prohibited the practice of a trade without the previous service of an apprenticeship, and a man usually continued to follow during his whole life, in one place, the calling to which he was trained, and intercommunication between the different parts of the country was dilatory and difficult, it can well be understood that covenants which left the covenantor with no means of earning his living, a burden upon the public, and which deprived the community of the benefits of the practice of his trade, should be held to be against public policy and void. But as trade expanded, and ease and speed of travel led to more diversified industries, and to frequent changes from one business to another, it appeared to be a great convenience that one trader should be able to sell to another the business which he had built up, and, in order that he might induce the proposed vendee to buy, it was necessary that he should be able to agree not to compete with the purchaser in the prosecution of the same business which he had sold. This freedom to sell a business, and to covenant not to injure the thing sold by competition, was found to be so advantageous to the public that it became a matter of public policy that every man should be at liberty to sell or exchange his business in the most advantageous manner, and to preclude himself from interfering with his vendee in the enjoyment of the thing sold. The whole history of the law of covenants in restraint of trade is involved in the struggle for recognition and favor between these two principles,—between the old rule, that contracts restraining the individual from the free conduct of business are disadvantageous to the public, and the later one, that freedom to dispose of a business, with a covenant not to compete with the vendee, is a necessity to all trade, and advantageous to the public. The general rule touching contracts in restraint of trade has been broadly stated thus: Contracts in general restraint of trade—that is, restraining a man from pursuing his business anywhere—are deemed to be void, as against public policy. Contracts in partial restraint of trade have generally been those which restrained from the pursuit of a business within a defined area less than the whole country. In all cases where the restraint is partial as to its area it may be lawful, and will be enforced if the exclusion is no wider than is reasonably required for the fair protection of the covenantee in the enjoyment of the business to which the covenant relates, and not so large as to interfere with the interests of the public. *Brewer v. Marshall*, 19 N. J. Eq. 547; *Mandeville v. Harman*, 42 N. J. Eq. 189, 7 Atl. 37; *Sternberg v. O'Brien*, 48 N. J. Eq. 372, 22 Atl. 348; *Ellerman v. Chicago Junction Railway*, 49 N. J. Eq. 258, 23 Atl. 287; *Althen v. Vreeland* (N. J. Ch.) 36 Atl. 479. So far as statements by the decisions of the courts can define the law, this has been declared to be the law of this state. So, also,

contracts excluding from business with a limited class of persons, and those restraining from a trade within a certain space for a limited time, have been enforced by the courts, where the restraint is no wider than is necessary to secure to the covenantee the benefit of his covenant. In ascertaining whether the exclusion is wider than is required for the protection of the covenantee, and therefore uselessly in restraint of trade, the courts have inquired into all the circumstances of the particular case (*Sternberg v. O'Brien*, *ubi supra*), and it has been held that in this respect no fixed rule can be laid down. Each case must be determined as it arises upon the facts exhibited touching the business which is sought to be restrained, its nature, mode of conduct, place where, and people with whom, it is usually carried on. *Hitchcock v. Coker*, 6 Adol. & E. 438.

Upon this branch of the case in hand the defendants base their criticism of the covenant of July 6, 1892, now in question, upon three points: First. They contend that this covenant is unreasonable, in that it is much wider in the restraint which it imposes upon the covenantors than is in any way necessary for the protection of the covenantee in the enjoyment of the subject-matter of the sale to which the covenant relates. The defendants insist that the thing sold was a sanitary ware pottery manufacturing business, and, while admitting that they could by covenant lawfully agree not to engage in manufacturing sanitary pottery ware, they say the covenant, as expressed, prohibits them from engaging in the manufacture of pottery ware generally, and is in this respect far broader in its restraining effect upon the defendants than is sufficient to protect the complainant in the pursuit of the sanitary pottery ware manufacture. Secondly. The defendants insist that the covenant under consideration is in fact a restraint operating to exclude them from engaging in the business of manufacturing pottery ware anywhere in the United States; that the mention of the exception of the state of Nevada and the territory of Arizona is colorable only, and a mere pretense; that these places were selected for the exceptions because it was impossible to carry on such a business there, and with a design to evade the operation of the law which would declare a covenant in restraint of trade, which was unlimited as to area of exclusion, to be void as against public policy. They further contend that, even if the exceptions named were made in good faith, yet the remaining area from which the covenant was expressed to exclude the defendants far exceeds the space within which it was necessary to protect the complainant from the interference of the defendants, and that such an exclusion is unreasonably in restraint of trade, and the covenant is therefore void. Third. The defendants claim that the covenant is wider as to the time during which they are excluded from engaging in pottery

ware manufacture than the policy of the law will permit. They say the time of the expressed restraint, 50 years, though apparently limited, has been arranged so as in fact to cover the whole period of the lives of all the covenantors, and to be in effect as to them a perpetual exclusion from engaging in that business, and the covenant is therefore against public policy and void.

The first contention of the defendants is that the covenant is unreasonable because the covenant is broader in its restraint, as to the nature of the business from which the defendants are excluded, than is necessary to protect the complainant in the pursuit of the business sold. It appears that the business sold consisted of a manufacturing plant at Trenton known as the "Delaware Pottery," located at Trenton, N. J., and conducted by the firm of Oliphant & Co. For a number of years prior to 1892, when the sale was made to the complainant, it had been engaged in the pottery business. The plant consisted of seven kilns, with all the appliances, apparatus, and equipment necessary to the conduct of the pottery business. Immediately at the time of the sale the principal production of the Delaware Pottery was sanitary ware, such as urinals, wash-basins, water-closets, and also druggists' ware, consisting of mortars, pestles, and articles of druggists' supplies, and also, to a limited extent, crockery ware. For the convenient definition of the articles produced in the pottery trade they are designated by the different uses to which they are applied. Articles such as urinals, water-closets, and basins for sanitary washstands are termed "sanitary ware"; pestles, mortars, and other vessels used in the druggists' trade are called "druggists' ware"; wash-tubs, kitchen sinks, and the like are named "laundry ware"; pitchers, basins, bowls, plates, cups, and saucers would be termed "crockery ware." All these articles, differing widely as to their use, have no essential variance as to their ingredients or methods of manufacture or character as a finished product, save in their shapes or in the uses made of them. They are all composed of a base of plastic clay, to which their proper form is given by the manipulation of the potter, and they are then fixed in that form, and glazed by firing in a furnace. There is no greater variance between these several productions than there is in the products of an iron foundry. The kilns, appliances, and equipment of the Delaware Pottery had, before it was sold, been used to manufacture, not only sanitary ware, but druggists' ware and crockery ware, and had, without radical change, the inherent capacity to produce whatever pottery ware the conditions of the trade might at any time make profitable. When the sale was made of this pottery, its plant and equipment, to the complainant, they received by the conveyance a pottery, not limited to the manufacture

of sanitary ware, but capable of manufacturing the other products of the pottery business, as that business is usually described either in the trade or in common parlance. The fact that, at the time when the conveyance was made, the Delaware Pottery was engaged largely in the production of sanitary ware, did not alter the fact that it had been and might be, at the option of the owner, used for the production of pottery ware of another character. The thing sold was a pottery; not only a sanitary pottery, but also a druggists' ware pottery, and a crockery ware pottery, and, with slight alterations of ingredients, tools, and appliances (which are common in every manufacturing business), a laundry ware pottery. Such a plant and equipment might with entire propriety be designated, as it was, by the general character of its productions, the Delaware Pottery, and not the Delaware Sanitary Pottery, by the special class of ware which it was then producing. Nor do I think the covenant can be deemed to be unreasonably wide because it restrains from engaging in the business of manufacture of pottery ware generally, while the object and aim of the purchase was to use the plant solely or principally for the production of sanitary ware. The intention of the purchaser and covenantor to use the plant purchased to produce but one of the several classes of pottery which it could manufacture does not make the covenant unreasonable because it restrains from competition in the manufacture of all the classes of articles which the plant could produce. It is not the intention with which the covenantor bought which supplies the test, but the relation of the covenant to the thing actually sold, which furnishes the guide to ascertain the reasonableness of the restraint imposed by the covenant.

It is urged with much energy on the part of the defendants that the covenant, in order to be reasonable in excluding the defendants from pursuing a business, must go no further than to prohibit them from engaging in the manufacture of the particular kind of pottery which the defendants were making at the time of the sale, and that the covenant under consideration, which precludes them from engaging in the business of manufacturing pottery ware generally, is unreasonably wide, as it excludes the defendants from all the branches of the pottery business. It is insisted that the phrase, "our pottery business," used in the original option letter of January 23, 1891, is just as specific, just as limited, just as close a definition, as if they (the defendants) had said, "The sanitary pottery business which we are transacting," etc. I cannot give to these words so limited a meaning. They occur in the option letter of January 23, 1891, proffering the sale of the defendants' business to Tapscott. The whole sentence is: "We own good will, brands, patents, molds, designs,

horses, wagons, trucks, tools, and all necessary implements used in our pottery business, and have the right to carry on a general business in the manufacture and sale of clay products." The obvious intent of the offer is to tender a sale of the plant, equipment, and business, irrespective of the special articles produced at that time. Not one word in the whole letter mentions sanitary pottery in any connection. In my view, a much more certain indication of the character of the business conveyed is that given by the answer of Oliphant & Co. (of the same date as the option letter of January 23, 1891) to Tapscott (Exhibit A of October 31, 1895, for defendants) to his inquiry: "What kind of pottery do you manufacture? A. Plumbers' earthenware and sanitary specialties is our chief product. Also make drug ware and a small amount of crockery." From these statements it appears that the business in which the Oliphants were engaged when the negotiations for sale were pending, and which they sold, and in respect to which they covenanted, was a pottery ware manufactory, practically as wide as the whole pottery trade, in the character of its products. Mr. Hughes Oliphant testifies that the vendors were to agree not to engage in the pottery business, and it was not limited to sanitary ware. The thing sold being a pottery, used and usable at the time of the sale in the business of the manufacture of pottery ware generally, the covenant entered into by the defendants was not to "engage in the business of the manufacture of pottery ware," etc. The covenantor was entitled to take a covenant which would protect him in the enjoyment of the thing conveyed. This was a pottery manufacturing pottery ware of various kinds. The covenant is in its scope in this particular, as to the restraint from manufacturing pottery ware, simply co-extensive with the business conveyed, and is not on this ground open to criticism because wider than is necessary to protect the complainant.

The second contention of the defendants is that the covenant, in effect, excludes them from pursuing their business anywhere in the whole country, and on any construction is wider as to the space from which it assumes to prohibit them from engaging in the business sold than is reasonably necessary to protect the complainant in the enjoyment of that business. The principle that covenants in general restraint of trade, by which a man is precluded from engaging in business anywhere in the whole country, will be held void, has never been abandoned in this state, as is shown by the above-quoted decisions. But partial restraints from engaging in trade within a defined area, but leaving the covenantor, outside of the prescribed territory, still free to carry on his trade, may be lawful, and, if lawful, will be enforced by the courts. In considering the validity of these partial restraints,—that is, restraints from trading in a limited terri-

tory,—the courts held them to be lawful or not, accordingly as they were or were not in unreasonable restraint of trade. The court would consider the nature of the business or trade, the mode in which it was carried on, and the various circumstances which would enable it to determine whether the restriction imposed by the covenant was wider than the protection of the covenant in the enjoyment of the business sold would reasonably require. If, upon this examination, the contract shut out the covenantor from no greater area than it was necessary he should be excluded from in order that the covenantee should fully enjoy the thing to which the covenant related, it would be held valid; if, on the other hand, the covenant did exclude the covenantor from a greater territory than was necessary for the enjoyment of the covenantee, it would be held invalid. Until a very late period, almost all the cases presented to the courts related to trades or business which extended over but a part of the country, and the accepted rule seems to have been that covenants restraining from engaging in a business anywhere in the kingdom were in general restraint of trade, and void for that reason.

This view of the English law obtained from *Mitchel v. Reynolds* (in 1711) 1 P. Wms. 181, until the opinion of James, V. C., in *Cloth Co. v. Lonsont* (in 1869) L. R. 9 Eq. 345. The question arose on a covenant to keep a trade secret from disclosure or use anywhere in Europe, but the case was treated by James, V. C., as if controlled by the general principle, which he declares to be that there is to be no more restraint than is necessary for the protection of the purchaser, but intimates that this may, if necessary, be unlimited as to space. *Rousillon v. Rousillon*, 14 Ch. Div. 351, followed in 1880, and still further extended the benefit of the new doctrine in favor of purchasers. That case arose upon a covenant entered into by a traveling agent employed by champagne merchants, who agreed with his employers not to represent any other champagne house for two years after he left them, and not to establish himself or associate himself with any other persons or houses in the trade for ten years after he left them. The covenantor was employed in the business of the merchants, not only all over England and Scotland, but also in some foreign parts. There was in the covenant no limit as to the extent of the area from which the covenantor was excluded, and it was admitted to be unlimited as to space. The learned judge, Lord Justice Fry, held that the covenant was valid and should be enforced. The facts presented a novel question, not only because the scope of the business in which the covenantor was engaged substantially covered the whole kingdom, but also because essential parts of the business were carried on in foreign parts. The opinion, which is very forceful, discusses the law regarding contracts in restraint of trade, and declares the rule to be that the protection of the covenantee is the only test of the rea-

sonableness of the contract, and that this should be applied even where the area of exclusion covered the whole kingdom. The views expressed in Justice Fry's judgment have received support in *Badische Anilin und Soda Fabrik v. Schott*, [1892] 3 Ch. 447, which was also a covenant touching a business largely foreign. Lord Justice Bowen in the *Maxim-Nordenfeldt Case*, [1893] 1 Ch. Div. 630 (also involving a business extending over the kingdom and in foreign parts), has given a most luminous exposition of the law upon this subject. He disapproves of the statement of the doctrine in *Rousillon v. Rousillon*, and, on a review of all the cases, declares the rule to be that covenants which restrain from the conduct of a business anywhere in the whole kingdom are void, but partial or particular restraints—that is, those properly limited as to space of exclusion—may be valid if they do not impose any further restriction than is reasonably necessary for the protection of the covenantee. In the *Maxim-Nordenfeldt Case* the covenant, though restraining throughout the kingdom, and practically during the life of the covenantor, was yet, as to the specifically named business, deemed to be valid. Lord Bowen held that the nature of the contract in both the *Maxim-Nordenfeldt Case* and in the previous *Rousillon Case* were exceptions to the rule which governed English covenants in restraint of trade. These later opinions, holding that the covenant may lawfully protect the covenantee even if it exclude the covenantor from pursuing the business anywhere in the kingdom, have not been presented to our courts, and seem to stand in opposition to the expositions of the law on this subject delivered in New Jersey decisions. They become valuable, however, only when the circumstances of the particular case under consideration make their reasoning applicable. This might be when the business to which the covenant relates is co-extensive in its scope with the whole country; for all the English cases agree that if the business covers only a limited territory, and the restriction of the covenant be wider than is reasonably necessary for the protection of the covenantee in the enjoyment of the business in that territory, then the covenant is so far unnecessarily in restraint of trade as to be invalid.

In New Jersey the ancient English rule has been recognized and enforced by the court of errors and appeals in *Brewer v. Marshall*, *ubi supra*. In that case the vendor of a marl bed agreed not to sell any marl by the rood or quantity from his premises adjoining the above property, referring to the marl beds sold. An injunction had been allowed to enforce this covenant by restraining the alienee of the covenantor, and an appeal was taken from a decree dissolving this injunction. In the opinion of the court of errors the case of *Mitchel v. Reynolds* is referred to as stating the rule that all general restraints are illegal, and *Homer v. Ashford*, 3 Bing. 326, is quoted as expository of

the reason of it, in these words: "The law will not permit any one to restrain a person from doing what his own interests and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom, would be void." The court of errors then states: "And so far has this principle been carried that, even in cases in which the restraint sought to be imposed is only partial, it has been repeatedly held that such an agreement would be void unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other,"—citing *Horner v. Graves*, 7 Bing. 743. It will be noticed that this opinion recognizes the force of the old rule to make void any covenant of restraint excluding from a business without limit of space, and applies the test of reasonableness of the restraint only in case it is partial; that is, excluding from a limited territory. That this view has been accepted in our state is also shown by the expression used by Van Fleet, V. C., in *Herman v. Mandeville*, *ubi supra*: "The rule is, not that a limited restraint is good, but that it may be good. It is valid when the restraint is reasonable, and the restraint is reasonable when it imposes no shackle upon the one party which is not beneficial to the other."

Proceeding to consider the covenant in question in regard to its reasonableness, as to the extent of the space from which it excludes the defendants, I will first examine the covenant itself in the light of the evidence. The covenantors agree that they will not, nor will either of them, "engage in the business of the manufacture of pottery ware * * * within any state in the United States of America, or in the District of Columbia, except in the state of Nevada and the territory of Arizona," etc. The defendants contend that this restriction is unreasonable, because it extends in fact over the whole United States; that the mention of the two excepted places is a sham, inserted, not to leave a space within which the covenantors might pursue their business and the public receive the benefit of their labors, but simply to appear to do so, and thus avoid the condemnation of the law, which, had the covenant frankly expressed its operative effect and in terms excluded the covenantors from the whole United States, would have declared the covenant void as in general restraint of trade. There is some evidence as to the manner and purpose of inserting these exceptions. Richard C. Oliphant testified that Mr. Tapscott, who was the party of the second part in the covenant, said, touching these exceptions of Nevada and Arizona, "that pottery ware could not be made there, and it would avoid the legal

objection to the monopoly." Mr. Tapscott denies this. He testifies that he did not know where pottery ware could be made. He states that the form of the covenant was that which had been previously used by the New York Biscuit Company and Diamond Match Company consolidations, and that Nevada and Arizona were supposed to be distant from Trenton, and that they were chosen for the exceptions because they were "away from the territory in which they [the defendants] had sold their good will." Mr. Bayne, the president of the complainant company, though he was not proven to have made any such statement, denies that he did make it. But Bayne declares that the exceptions were "put there to comply with the law; to make assurance doubly sure on that point;" that the lawyers who drew the papers selected the territory; and that he and his associates would have given the defendants any other space, so long as they went far enough away. The statements of the complainant's own witnesses show that the exceptions were not made because of any purpose to save to the defendants an area anywhere in the whole country within which the public might have the benefit of their business. Nor is there any proof or pretense that within these excepted areas the covenantors ever had done, or hoped to do, or could do, the business referred to. The admitted objects of the covenantees in their selection were to avoid the disfavor of the law, and to force the covenantors as far away as possible. The evidence of Capt. Dahlgren, who is familiar with Nevada and Arizona, named as the areas excepted from the covenant, is full and without contradiction. He testifies that there are none of the essential requisites for pottery manufacturing in those localities. Neither clay, coal, nor other fuel, water, labor, nor even population, such as is required in the manufacture of pottery ware, can be obtained in either place. The interests of the public in retaining somewhere the benefits of the ability of the covenantors in the pursuit of their business would have been just as well secured, and the purposes of the covenantees no more effectually served, had the area of exception been named as, "except within the borders of Lake Michigan and Great Salt Lake"; for, on the proofs, the pursuit of the pottery business is no more impossible in these lakes than in Nevada and Arizona. I think the weight of the testimony indicates that these localities were chosen for the exceptions simply to appear to avoid the operation of the law which makes the covenant invalid if general as to space, and at the same time actually to prohibit the defendants from competing with the complainant anywhere in the United States. This is to observe the law to the eye, but to break it in the fact. The rule which permits the contract, though in restraint of trade, to be con-

sidered valid, when somewhere within the whole country there is left some space within which the covenantor may give the public the benefit of his services, is, in view of the testimony, shown to have been evaded by such exceptions, and the contract should be considered as if the exceptions were not inserted.

I am referred to the decision of the New York court of appeals in the case of *Match Co. v. Roeber*, 106 N. Y. 485, 13 N. E. 419, in which the court says as to a like exception: "We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines. We cannot say that the exception of Nevada and Montana was colorable merely." But the opinion in that case does not show that there was any evidence at all upon the point of the sham character of the exceptions. From its language I am led to believe that there was no proof showing the exceptions to have been made in bad faith, and wholly regardless of saving to the public the benefit of the covenantor's labors somewhere in the whole United States, and that the court was asked to assume this condition of impossible pursuit of the business within the excepted area to exist, without any evidence whatever to show its impossibility. I agree with the learned judge who delivered that opinion that, in the generality of cases where such covenants relate to a manufacturing business, the ultimate space from which the exclusion must not be absolute should, in this country, be the whole United States, in view of the constitutional powers of the general government to regulate commerce among the several states, and securing the absolute freedom of trade, and the privilege of universal and unrestrained migration to the inhabitants of the different states. See, also, *Althen v. Vreeland*. But I do not accept as forceful in this state his statement that the doctrine, declaring void contracts in restraint of trade which are general as to the territory of exclusion, is an arbitrary rule, which may be avoided by an equally arbitrary exception. This view was first hinted at by Vice Chancellor Wickens in *Allsopp v. Wheatcroft*, L. R. 15 Eq. 64, when he stated that Vice Chancellor James had in *Cloth Co. v. Lonsont*, ubi supra, thrown "some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area." In the *Rousillon Case*, Lord Justice Fry refers to this definition, and says: "Such a rule might always be evaded by a single exception. No exception can be said to be colorable to a rule of this description, because you can only judge whether an exception be colorable or not by the principle of the rule; and if the rule be really an artificial one, without principle, there is no criterion for saying whether the evasion is colorable or not." This rule, in its origin, was declared to be based upon the principle that it was

disadvantageous to the public welfare that a man should be permitted to bind himself by contract not to engage in business whereby he might earn his living, and thus be in danger of becoming a public charge, and of depriving the public of the benefit of the exercise of his skill and industry. In the long line of cases in which the rule has been applied, this principle has been frequently restated as the basis of the rule, and in this state the same reasons have been given for its enforcement. *Brewer v. Marshall*, 19 N. J. Eq. 547; *Mandeville v. Harman*, 42 N. J. Eq. 189, 7 Atl. 37; *Sternberg v. O'Brien*, 48 N. J. Eq. 372, 22 Atl. 348. Where the scope of the business restrained does not extend throughout the whole country, the question of the arbitrary character of the rule is not raised. Even where the expanse of the business is co-extensive with the whole country, it remains a question whether it is not the truer policy to hold the general covenant which restrains from following the business anywhere to be void, and thus save to the public the value of the skill and energy of the covenantor in pursuing his business, than to enforce it for the benefit of the covenantee in aid of the freedom of contract. The tendency of the modern English cases is, however, to support the latter view; but it has only been expressed in cases where the scope of the business under consideration was in fact co-extensive with the whole kingdom.

The complainant insists that, even if the exceptions of Nevada and Arizona are merely colorable, still the words of the covenant, "within any state of the United States, or within the District of Columbia, except the state of Nevada and the territory of Arizona," must be construed to mean, not the whole United States, but each separate state; in short, that the covenant as to the space of exclusion is divisible, and must be enforced in any one state in which it might be reasonable to enforce it, even if it would be unreasonable to enforce it in every other state. In a large number of English cases this distinction is accepted, and covenants naming two or more separate areas of exclusion have been enforced as to one, though the covenant was, as to the other space named, unreasonable in its restraint of the covenantor. In these cases the divisible areas are separate and distinct places, such as several different cities, and the contract on its face, as expressed by the parties themselves, specifically names them. The same principle has been recognized and enforced in New Jersey, where there are several distinct stipulations in a contract, some of which are illegal and others legal, and our courts have enforced the valid stipulations. *Stewart v. Railroad Co.*, 38 N. J. Law, 520; *Union Locomotive & Express Co. v. Erie R. Co.*, 35 N. J. Law, 245. In all these cases the several character of the valid stipulations, as distinct from the invalid ones, is apparent in the contract as expressed by

the parties themselves, so that the court is not called upon to give construction to ambiguous phrasing, and perhaps impose upon the contractors a stipulation to which they would not have agreed.

In the case in hand, the space referred to (considering the exceptions to be pretentious as above stated) is one contiguous area, constituting as an entirety the whole United States, which is of itself a unit. The exclusion from business within any state of the whole United States is necessarily exclusion in all of the United States, as the sum of all the parts must constitute the whole. The reference to the territory of Arizona as an exception shows that all the other territories were deemed to be included within the reference to the United States. The parties by their covenant made by one side, and accepted by the other, made this agreement as to the whole United States, and I do not think the court should, when disputes between them have arisen, thrust the element of divisibility into the contract when the parties themselves did not put it there. There appears on the face of the covenant in the statement of the area of exclusion, when read in the light of the evidence, a clear purpose to prohibit the covenantors from the following of their business anywhere in the United States, and this court should be no readier to find the element of divisibility in the covenant than was the English court of common pleas in *Horner v. Graves*, 7 Bing. 735, where the covenant restrained from practicing dentistry within 100 miles of the town of York, and was held void because the area of exclusion was unreasonable. This area was contiguous, and might have been considered divisible into each mile of the 100 miles around York, in the same sense as the covenant under consideration is divisible into the several states of the United States. Though the case was thoroughly argued, such a point does not seem to have occurred to either the counsel or the court.

In *Althen v. Vreeland*, ubi supra, there was a covenant not to engage in a business, similar to that sold, within 1,000 miles of Newark, N. J., the place in which the business was located, and Vice Chancellor Emery refused to select out of the 1,000 miles radius the state of New Jersey because a restriction to the extent of the state would be reasonable.

I understand the rule upon this question of divisibility to be that the court will take the covenant as the parties made it. If it is expressed to exclude from several separate and distinct places, as to some of which the exclusion is reasonable, while as to others it is not, the court will consider the covenant divisible, and enforce it within the reasonable area. In my judgment, the court should not select from a contiguous area, which is in itself unreasonable, such a place within that area as would, if it had been distinctly named, have been deemed to be a reasonable extent of ex-

clusion, declare the covenant divisible, and enforce it in the selected space.

I have heretofore considered the objection to the covenant in question with relation to its validity when its operation excludes the covenantors from engaging in their business anywhere in the United States. Under the law as laid down by the courts of this state, such a covenant is in general restraint of trade, and for this reason void.

But considering the covenant touching the area of exclusion, in the light of the evidence, from the narrower point of view of its reasonableness as a protection to the covenantee in the enjoyment of the subject-matter of the sale, I am brought to the same conclusion. The business sold consisted, at the time of the sale, of a pottery, producing sanitary ware, plumbers' ware, druggists' supplies, and crockery ware; in short, a general line of goods in that trade. The covenantors had been carrying on this business for a number of years (Richard C. Oliphant testifies that for 12 years he had the oversight of it), their factory being located at Trenton, N. J., where all their product was made. The business as to its manufacturing element was necessarily local. The area of territory over which the product of their factory was disposed of, at the time when the business was sold, is shown by the undisputed proofs to have been within a limit substantially defined by the Mississippi on the west, with some business in Washington and Richmond and Louisville, but none south of those points. It thus appears that the Delaware Pottery consisted of a business whose manufactory was located at Trenton, and whose sales were practically limited to the Eastern, Middle, and nearer Western states, and not extending over the states west of the Mississippi, those of the Pacific slope, or those of the South, except parts of Virginia and Kentucky. This factory and business constituted the subject-matter of the sale, and it was in respect to this that the parties covenanted. If the covenant was good, because not too wide to protect the covenantee, it was as good the day it was made,—as applicable to the business as it then existed. If it was bad because imposing upon the covenantors a wider exclusion than the covenantee fairly needed to enable him to enjoy the thing sold, it was bad when made, because it then hampered the covenantor to a degree not necessary to protect the covenantee. The covenant, if void when made, could not become valid because of any subsequent happening. The reasonableness of the covenant (and therefore its validity) must be tested by ascertaining whether in its terms it was, when it was made, wider than was necessary to protect the covenantee in the enjoyment of the thing sold.

While it is true that no rigid limit can be declared within which the restraint would be reasonable, and outside of which it would be unnecessary, yet there may be a restraint so wide in its area of exclusion as to leave no

question open that it is excessive. Looking at this covenant as made, and without criticism of the exceptions, it excluded the covenantors from pursuing the business, not only within the area within which it was conducted when sold, but also from the whole United States, except the two places, Nevada and Arizona. All that was needed to protect the covenantee in the enjoyment of the thing sold was to exclude the covenantors from competing with the purchaser within the area where the business was done; but in fact the exclusion, as expressed, would shut out the covenantors from the pursuit of the business over whole groups of states where the Delaware Pottery had never done any business, and where, therefore, there could be no competition with the purchaser in carrying on the business bought. This space, from which the covenant thus unnecessarily excludes the covenantors, far exceeds in area the territory within which the business was done which was to be protected by the covenant, considering this territory with the utmost liberality, with relation to the widest area that either vendor or vendee of the business sold could reasonably have contemplated as the area of the business and the covenantors' exclusion from competition. In stating this view, I consider, however, only the territory within which the Delaware Pottery had done business at and before the time of the sale, and not the territory over which the complainant (which is an aggregation of the Delaware and several other potteries) afterwards extended its business.

The complainant, however, insists that the reasonableness of the covenant is to be tested by considering, as the territorial extent of the business to be protected by the covenant, not that area within which its business was done by the Delaware Pottery at the time of the sale, but the much greater area within which business was done by the complainant, the Trenton Potteries Company, at the time when the bill in this cause was filed. The complainant argues that there is no rule by which the covenantor should be "limited to the exact location of the business at the time of the sale." "Every man who goes into business expects to extend his operations, and here the thing that we were entitled to have under the covenant was that we would not be met with the competition of these sellers in the use of the thing sold to us,—the natural, ordinary, accepted use." The proof shows, in point of fact, that since the sale took place the Trenton Potteries Company (the aggregation of the five potteries) has so extended its sales as to make a market of the entire United States and Canada, and the complainant claims that it is no more than reasonable for their proper protection that the covenantors should be precluded from competing with it in prosecuting its business of the whole five potteries anywhere within the United States. I understand the rule to be that, when a covenant is given against competition

with an existing business, the area of exclusion from competition, in its relation to the territorial extent of the business, is what the courts regard in testing the reasonableness of the covenant. This was the course observed in *Horner v. Graves*, ubi supra; *Ward v. Byrne*, 5 Mees. & W. 555 et seq.; *Mallan v. May*, 11 Mees. & W. 666; *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59; and other cases. In *Ellerman v. Chicago Junction Co.*, 49 N. J. Eq. 256, 23 Atl. 287, it was expressly declared that the validity of the restrictions is to be governed by their reasonableness at the time of making the contract. So in *Cook v. Johnson*, 47 Conn. 175, it was held that a covenant in restraint of trade, which was reasonable when made, could not be affected in its operation by subsequent circumstances. The same doctrine was declared in *Rannie v. Irvine*, 7 Man. & G. 976. Vice Chancellor Emery, in *Althen v. Vreeland*, tested the reasonableness of the covenant by the relation of the restriction to the extent of the territory over which the business was done at the time of the sale. I think this view accords with correct principles. It is the business as it existed in the area over which it fairly extends at the time of the sale that the vendors convey and in respect to which they covenant. If the possibility of unlimited subsequent expansion were to be considered as a justification for a covenant unlimited as to space, then every covenant, attending a conveyance of a manufacturing business making sales of its products, must be supported, if the business has, at the time it is sought to be enforced, grown to be as wide as the covenant; and this will be true, no matter how limited the extent of the business may have been at the time of the sale or how extended it may have become afterwards. The covenantors may thus be shut out from the pursuit of the business anywhere, by circumstances in which they have no part and regarding which they did not contract.

Suppose one of the biscuit bakeries which now compose the New York Biscuit Company baked its biscuits and sold them, before and at the time the combination was formed, wholly in New York City; its owners might lawfully have covenanted not to carry on a like business in New York City, where their business was done at the time of the sale, because there would remain to them the rest of the country, in which they could still carry on their trade and give the public the benefit of their labors, and the covenantee would be protected in the enjoyment of what he purchased. But suppose the owners of one of these biscuit bakeries, on selling to the company, had covenanted not to engage in the business anywhere in the United States, except in Maine and New Hampshire; could such a covenant be held to afford no more than a reasonable protection to a covenantee who bought a business limited only to New York City? And is it any answer to say that the area which must be considered in testing the reasonableness of the covenant is not the

protection of what the biscuit company bought from the covenants, but the added extent which the business had acquired by the aggregation of purchases from a number of other parties?

The extent of the territory over which the business of the Delaware Pottery was carried on at the time of the sale had been defined by the previous experience of the vendors to be limited to an area east of the Mississippi and north of Washington, Richmond, and Louisville. So far as the evidence shows, the business sold had not, at the time of the sale, any inherent capacity for further extension over the whole territory of the United States. It had been carried on for many years, and its utmost limits were those above indicated. What is sought by the present suit is to expand the covenant given to protect the purchaser of the Delaware Pottery from competition by the vendors in the business done by that pottery into a covenant to protect the vendee of that one and four other potteries in the business which it had purchased from them all. The greatly wider scope of the business of the complainant which now exists has come by reason of the additional elements of increased capital, combination with other associates in trade, and control of production, price-making, distribution, and sales, incidental to this association of the several other potteries. These advantages did not attend the business of the Delaware Pottery as it was sold, and in respect to these the defendants did not covenant or receive any consideration, and there cannot be imputed to them an engagement to protect the complainants in the enjoyment of these benefits which came from other sources than the covenants. Nor can the community, by this strained application of the rule protecting the covenantee, be deprived of the services of the covenants in localities outside of the scope of the business they sold, as it existed at the time it was sold. This would be forcing a test of the validity of the covenant by its reasonableness as a protection, not only of the thing sold, but also of the subject-matter of four other sales by other parties than the covenants, and an increase and expansion resulting from this aggregation and several years' prosecution of its business.

It is plain that the covenant, even accepting the exceptions as genuine and made in good faith, was far wider in the area of its exclusion of the covenants from the pursuit of their business than was in any way necessary to protect the covenantee in the enjoyment of the thing sold. Such an exclusion was an unreasonable deprivation of the right of the community to have the benefit of the skill and industry of the defendants in the pursuit of their business, and makes the covenant void as against public policy. The case of *Alpaugh v. Wood*, 53 N. J. Law, 638, 23 Atl. 261, is referred to by the complainant as laying down a criterion for ascertaining what is a true reasonableness in the interpretation of the contract. In that case the defendants had contracted to "take

the entire charge of the manufacturing department of a pottery including the decorating department," and give their time and skill to the management of the business. The suit was brought because of alleged failure to exercise the proper skill and care in performing the contract. It was shown that at and before the contract the factory had produced only common grades of ware; that soon after the defendants took charge they sought to make higher grades of goods and to decorate them. In this they spoiled the goods. At the close of the plaintiff's case, he was nonsuited on the ground that the contract related only to the common grades which had been manufactured prior to and at the time of the contract. On error the judgment was reversed. The court of errors declared it was reasonable to assume that, in making an arrangement to last over three years for the superintendence of an enterprise, the parties contemplated the introduction of improvements, etc.; that the opposite assumption would be unreasonable. It is insisted the court of errors has thus established a measure of reasonableness whereby the covenant in the case now under consideration must be held to be only reasonable, if it be tested by the protection which the covenantee may need in the enjoyment, not only of that which the covenants sold, but of what the covenantee bought of other parties, because every man who goes into business may be expected to extend his operations, etc. The case cited does not aid the determination of that now under consideration. The terms of the contract expressly provided for the taking charge of a decorating department, and the defendants having, in recognition of that obligation, undertaken its performance and failed, and suit being brought because of their failure, it was quite within their contract to hold that the defendants reasonably contemplated the introduction of such improvements in making decorative ware and its incidents as were then or might thereafter be in common use in similar establishments. In the case in hand the covenant must be held to have related to the thing sold, and nothing in it indicates any consideration by the defendants for the protection of anything else than the Delaware Pottery business, which they sold.

Mr. Tapscott, who secured the contracts for the complainant, obviously had, at an early period in the transactions, a clear conception of the advantages of a covenant which might restrict the vendors, not only from competing with the business which they sold, but also from engaging in business in competition with the other potteries which Tapscott was then in the act of buying. The covenant against competition in the option taken January 23, 1891, from the Crescent Pottery Company, one of the five in the combination now known as "Trenton Potteries Company," the complainant, prohibited the manufacture of pottery ware "now made by the five potteries

of which this is one." It will be perceived that at the very opening stage of the transactions, in January, 1891, this contract with the Crescent Company attempted to secure to the covenantee, by express agreement, the same liberality of protection which it is now argued must be imputed as a reasonable construction to the defendants' covenant, which makes no mention of this greater exclusion, for the defendants in selling the Delaware Pottery never referred to the productions of the other potteries in the proposed combination. In my judgment, if they had, in consideration of their sale of their own Delaware Pottery, in express terms covenanted not to compete with the vendee in the business done by the five potteries, of which the Delaware was one, the covenant would not have been enforceable, because not necessary to protect the vendee in the enjoyment of the Delaware Pottery, the thing which the vendor sold.

The third ground on which the defendants resist the enforcement of this covenant is that it is so wide in point of time as to exclude them in fact from engaging in business during the whole period of their lives, which in effect is a perpetual exclusion, and is unreasonable and against public policy, etc. On this question of the reasonableness of the durations of a restraint, it has been held in England as to some covenants that, if they are in other respects unobjectionable, the mere fact that they restrain the defendant during his life is not so unreasonable a duration that the covenant will be held void. This has been so held as to a druggist clerk's covenant with his employer not to engage in that business in a certain town. *Hitchcock v. Coker*, 6 Adol. & E. 453; *Hastings v. Whitley*, 2 Exch. 611. In *Elves v. Crofts*, 10 C. B. 241, a butcher's agreement with his vendee of the lease of the shop, not to carry on the trade, was held good, even after the expiration of the term, and after the covenantee ceased to carry on the business. So a surgeon with his partner. *Atkyns v. Kinnier*, 4 Exch. 776. In this state, however, an injunction was refused in *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37, on a contract by an assistant to a physician not to engage in practice of medicine in Newark "at any time hereafter," on the ground that the good will of a physician's practice was dependent upon the personal skill of the physician, and would die with him; that, however the law might be in England, in New Jersey a property right in such a good will had never been recognized. This question of the unreasonableness of a covenant on the element of its duration becomes of no significance when it is held, as in this case, to be objectionable because in general restraint of trade as to the area from which it excludes the covenantor. The same result attends a finding that the covenant, though in partial restraint of trade, is wider in the space of exclusion than is reasonably necessary to protect the covenantee. For each of these rea-

sons the covenant under consideration is against public policy and void. A limitation in point of time in such a covenant, however reasonable in itself, cannot save it from the objection that it is against public policy. The principle is very tersely stated in a note to *Hunlocke v. Blacklowe*, 2 Saund. 156b: "The principle on which contracts in restraint of trade, partial in point of space, have been supported, has not been applied to restraints general in point of space, but partial in point of time; for that which the law does not allow is not to be tolerated because it is to last for a short time only." The prohibition which prevents the covenantor from practicing his trade anywhere deprives the public of his services entirely during that period. The partial restrictions which are supported are those which leave a portion of the public to receive the services of the covenantor, but where the contract is for a general restraint, though for a limited time, the whole of the public is deprived of his services during the period in question. So, when the exclusion reaches over an area not necessary for the enjoyment by the covenantee of the thing sold, the public is to this extent uselessly deprived of the benefit of the covenantor's skill and labor, and this the law does not tolerate even for a short time. The limitation of time in this covenant is therefore of no aid to the complainants.

I have found the covenant to be void because of its too extended area of exclusion. I do not deem it necessary to consider its reasonableness upon the point of its duration.

The defendants raise a further point of objection to the granting of an injunction to enforce this covenant upon the ground that the scheme which has combined these five potteries under one management, as the Trenton Potteries, contemplated for its principal object the control of the production, distribution, and sale of sanitary pottery ware, admitted in the complainant's prospectus to be a necessity of life; that the covenant now sought to be enforced was taken as one of like character with four others, obtained at the same time, in aid of the common object, to preclude competition in the production of sanitary ware. The covenants affected three-fourths of the production of sanitary ware in the whole country, and secured to the complainant company a dominance in the trade which, if the covenants of restraint were enforced, would have enabled them substantially to monopolize the production and sale of one of the necessities of life. The evidence shows that, at the time the negotiations opened for the purchase of the potteries now forming the complainant company, those potteries, and others which were engaged in the production of sanitary ware, were members of an association which was called the "American Sanitary Potters' Association." This association controlled the prices at which these goods were put upon the market. Mr. Hancock, who received the conveyance of the Delaware Pottery real estate, as trustee to convey it to the

complainant company, and is its vice president, testifies that there were eight members of that association in July, 1892, when the complainant secured the combination of five of them. In determining the action of the association, each pottery in the association had one vote, and the vote of the majority controlled the action of the whole. He further states that, on acquiring control of five of the eight members of the association, the combined company preserved the individuality of each of the potteries which it bought, so that the combination, the Trenton Potteries Company, had five votes in the association instead of one. Mr. Tapscott, in promoting the combination, sought to bring in all of the members, but, failing in that, he secured the five, forming a majority of the association. He was very anxious to secure those potteries which produced much sanitary ware, and indifferent to those which made but little. His action in forming the combination began when he had made a certainty that he could secure a majority of the members of the Sanitary Ware Association, and each step in completing the combination was taken simultaneously with the whole five potteries. The covenant sought to be enforced in this case, though separate and independent in itself, and applicable only to the Delaware Pottery, and framed to preclude the defendants from engaging in the business, was accompanied by other covenants imposing a like restraint upon the vendors of each of the other four sanitary potteries. The slight variances in these covenants indicate the plan. That taken from the Crescent precludes production of pottery ware "now made by the five potteries of which this is one." That taken from the Equitable prohibited the vendors from engaging in the manufacture of sanitary ware. The formation of a company controlling, as nearly as possible, the whole sanitary ware production, was evidently within the contemplation of the parties, and was carried into effect by the steps above recited. The sets of questions asked, and the successive and simultaneous agreements, and the explanatory testimony, clearly show this. The circular inviting stock subscriptions also shows it, and indicates that the possession of this control of sanitary ware production, and the power to exclude almost all of the previous makers from the trade, were esteemed by those offering the stock of the combined company for sale to be a most important quality in appreciating the value of that stock. They announced that the five companies manufactured and sold 75 per cent. of the entire output of the sanitary plumbing ware made in this country; that these goods were "of absolute necessity to the community"; and that those who went out of the business did so under contract not to engage in any competing business. That the scheme contemplated the control of the sanitary ware production is further shown by the incident of the subsequent purchase of the stock in the Brewer Pottery Company. This company was producing sanitary ware. Mr. Bayne states that the

proposition to purchase its stock was not favorably considered until he was impressed by the fact that "it was necessary for the protection of our interest in the East to have some stock in the West." Others of the owners of the stock in the Trenton Potteries Company joined Mr. Bayne in purchasing a bare majority of the stock of this outside sanitary ware pottery. The Trenton gentlemen who thus joined in this purchase had all of them covenanted not to engage in the pottery business, but Mr. Bayne explains that "the action was taken for the protection of the Trenton Potteries Company." Mr. Hancock also explains that this purchase was made to protect the prices then prevailing in the combination, referring to the Sanitary Potters' Association. \$250,000 was spent for this purpose. Although the ownership of this stock was in the individuals who made the purchase, the whole of the stock bought was put in the name of Mr. Morse, of the banking firm of A. M. Kidder & Co., who were financing the Trenton Potteries, with absolute authority to control the concern, for the protection of the interests of the associated potteries of the Trenton Potteries Company. The final effect of this purchase was that the Trenton Potteries Company, and its financial supporters, were enabled to dictate the production and prices of much the greater part of the sanitary ware then made in this country. This control was at that time not only over the production and prices of the sanitary ware made in the potteries which the complainant had acquired and combined in the Trenton Potteries Company, but at the time the combination was made the complainant had contrived and was able, under the arrangement retaining its five votes of the eight in the American Sanitary Potters' Association, by its majority vote, to control the prices of the sanitary ware produced by the other members of that association whose potteries it had not purchased. All that was needed to perfect its dominion over that trade was the enforcement of the covenants securing the combination against competition from those whose potteries it had bought, and it was well fortified to maintain its power to dictate the terms upon which the community would be permitted to obtain what the controllers of its production declared was "an absolute necessity."

The complainant insists that in the acquisition by the complainant of the five potteries "the purchases were distinct and separate; they were made in pursuance of no combination or executory contract;" and that the question is therefore presented whether a "purchase of several out of a great number of plants engaged in one industry is objectionable to the law." These contentions are, in this phase of the case, to be considered from the point of view which the protection of the interests of the public may require the court to take. So far as the purchases of the five potteries were concerned in their relation to each other, they were, indeed, distinct, but their association was much more

than a simple aggregation of separate purchases, each executed and complete in itself. Looking at the transactions in their broader relations to the interests of the public; the testimony shows a scheme, single and complete in itself, based upon an expectation of obtaining by a combination of the five sanitary ware potteries, and the acquiring of their majority power in the Sanitary Potters' Association, and the enforcement of the covenants against competition, the control of the production and price of an article of merchandise which had become an article of necessity in public use. The steps towards perfecting this plan were stopped or retarded by every interference with the furtherance of the design, and went on to completion only when its object appeared to have been certainly attained. All of these incidents, the purchase of the five potteries, the control of the American Sanitary Potters' Association, and the exclusion of the vendors of the five potteries from competition, were component parts of the scheme whereby the control of the marketing of sanitary pottery ware was to be secured; and this, too, not as a means of successful competition with rivals in the trade, but to enable the complainant to dictate to the public the prices which must be paid.

It is contended with much ingenuity by the complainant that there cannot be a monopoly where there is a mere succession or aggregation of purchases; that this result always attends every acquirement of property by which one buys the stock and business of another engaged in the same trade; that the party making such purchases has the right to fix the production and the prices of his own goods as he pleases, after, as much as before, the acquirement of his competitor's business. The complainant, however, did not stop at this point, either in the design or in the execution of the scheme which resulted in its formation. By securing the voting power of the five potteries in the Potters' Association, it sought, and for a time, at least, secured, the means of imposing the acceptance of the prices which it fixed, not only on the sales of sanitary ware which the five potteries produced, but also on the sanitary ware produced by the potteries of the other three members of that association, which the complainant had not purchased. Here was a control obtained and exercised by the complainant over the production and prices of sanitary ware manufactured by separate and independent owners, enabling the complainant to raise the prices of this merchandise as its interests might suggest. This condition of things existed for nearly, if not quite, a year after the complainant company was formed. It is impossible to read the frank testimony of Mr. Hancock, the vice president of the complainant company, without accepting the conclusion that the large expenditure of \$250,000 by those interested in the complainant company, in securing the control of the Brewer Sanitary Ware Pottery at Tiffin, Ohio, was made

to preserve the power over prices which it was believed had been already secured, but which the Brewer Company threatened to destroy. Speaking of the relations of the Brewer Company and the complainant, after this purchase of the Brewer Company's stock, he says the purchase of the majority of the stock of the Brewer Company was made at the suggestion of Mr. Tapscott, Mr. Bayne, and the New York parties; that it was bought for \$250,000 by Mr. Hancock and others, and put under the absolute control of Mr. Morse, of the banking firm, without any definition of the character of his holding, the owners trusting to luck, but having confidence the bankers would carry out the design of the buyers, which was that this pottery should be kept under control of the purchasers who were the directors and managers of the Trenton Potteries Company. Mr. Hancock says they made this purchase to protect the prices then prevailing in the combination of which the Brewer Company was not a member, and thus to protect the money-making power of the complainant company, which controlled the combination. It is not surprising that the expected result followed, and that Mr. Hancock should testify, regarding the complainant company and the Brewer Company, "Their prices are similar now in the open market." The purchase of the Brewer Pottery is a clear indication of the original object, the control of the market.

It is of no significance that some time after complainant had secured this position, from which it could dictate prices to the public, the Sanitary Ware Potters' Association was broken up, and the scheme in this particular failed. The validity or invalidity of the contract did not depend upon the success or failure of the plan to secure a monopoly of the market. If 't was against public policy when it was entered upon, it was tainted and non-enforceable in the courts ever after. Even if the scheme were beneficial in its results, it would not be validated. Where a combination which is against public policy, which has obtained control of prices, has in fact reduced them, it is yet invalid, for the reduction may be necessary to crush competition, and the combination still retain power to raise them at its discretion. *Richardson v. Buhl*, 77 Mich. 660, 43 N. W. 1102. Nor is it any avoidance that it improved the quality of the goods. *State v. Standard Oil Co.* (Ohio Sup.) 30 N. E. 279. Nor that the titles to all of the properties which are joined to accomplish the control of prices do not stand in the names of the parties who are active in the movement. *Stockton v. Railroad Co.*, 50 N. J. Eq. 82, 24 Atl. 964. Nor is it necessary that the illegal combination shall have obtained possession of the whole or nearly all of the particular trade. The control of 50 per cent. of the coal fields, and the expectation of the co-operation of the remainder of the producers to effect a change in the price of the output, was held to indi-

cate a purpose to monopolize the trade. Page 84, 50 N. J. Eq., and page 976, 24 Atl.

In the case in hand the complainant proclaimed in its prospectus that by its ownership of the five potteries it had the control of three-fourths of the production of sanitary ware. On securing this control it had kept their separate and majority vote in the Potters' Association, and thus obtained power to dictate the prices at which the other unbought potteries should sell their sanitary ware, and, finding this dominance threatened by the activity of the Brewer Pottery, its owners indicated their continued purpose to maintain its power by the purchase of the majority of the Brewer Company stock, and their deposit of it with the bankers who financed the complainant, with authority over it so absolute that not even an acknowledgment in writing was taken to show what the bankers were to do with it. Since that time the prices of the Brewer Pottery and those of the complainant company have been similar. The power of the complainant over the marketing of sanitary ware immediately on taking the covenants against competition must practically have dominated that business, if it could enforce these covenants, and thus keep the vendors of the five potteries out of the trade.

These covenants against competition were all taken at substantially the same time in support of the position of the complainant. By the one now sought to be enforced, the defendants agreed not to "engage in the business of manufacturing pottery ware" for a period of 50 years from this date (July 6, 1892). The expressed terms show the covenant to be executory, for, if it be valid, it may be enforced against any breach which any covenantor may make within 50 years of its date. This very suit is brought to enforce it by restraining the defendants from further breach of its terms. It is plainly yet executory. Like covenants are outstanding against all the others vendors of the potteries now owned by the complainant. When they were obtained, these covenants, if enforced, would shut out from the business the larger part of those who were carrying on the trade as proprietors. The question is presented, should this court aid, by the use of its process, in the enforcement of covenants arranged as part of a scheme to obtain control over the production and prices of a class of merchandise necessary to the comfort of the community? Contracts of this character may not be illegal in the sense that they are criminal or were prohibited, and yet they may not be enforceable in the courts. As was admirably expressed by Lord Bowen in the court of appeals in *Steamship Co. v. McGregor*, 23 Q. B. Div. 619: "The law does not prohibit the making of such contracts. It merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a distinct shelter to the public." The case before him was an action for damages for conspiracy to prevent trade and for an injunction against wrongful

acts. The complainant was a stranger to an agreement which was attacked on the ground that it tended to create a monopoly and was obnoxious to the freedom of trade. The proceeding sought to restrain the defendants from further action under it, because its operation resulted in loss to the complainant. Lord Bowen declared that no action ever laid at common law against any individual or individuals for entering into a contract, merely because it was in restraint of trade. *Id.* p. 619. As neither malice nor any act in itself unlawful was shown, but only the urgency of a bitter competition in the strife for trade, the judgment that there could be no recovery was affirmed.

The question for determination is quite different where one of the parties to the contract tending to create a monopoly in trade seeks to enforce it, as in the present case. There are acts which a man may agree not to do, and which he may legally refrain from doing, but which he cannot so bind himself not to do that the courts will oblige him to abstain. In the class above indicated are all agreements in general restraint of trade,—those where the abstention tends to create a monopoly or to oppress the public. No court would, by its decree, compel a man, for the benefit of the public, to work at his trade or practice his profession, or carry on his business in competition with his rivals. He may, if he likes, agree not to do, and may refrain from doing, any of these things, no matter how disadvantageous to the community his omission may be; but, if it be sought to restrain him by enforcing his agreement in the courts, the question whether the agreement when it was made was against public policy will be considered. And this view, involving the protection of the interests of the public, will be taken, even if not suggested by the parties. *Richardson v. Buhl*, *supra*. The transactions which attended upon and resulted in the combination of the five sanitary ware potteries, and the formation of the complainant, show the object of the parties to be to secure power to control the production and dictate the prices of goods of that class; and not only of those made by the complainant, but also by the members of the Sanitary Potters' Association. The covenants to suppress competition, one of which is sought to be enforced, were part of the same scheme, and, indeed, vitally necessary to its success. They were not, from the point of view of their effect upon the public, subsidiary and incidental to each several purchase, but were all simultaneously sought for, obtained, and used as a means to reach the desired common end,—the domination of the trade,—and their usefulness in accomplishing this result was exploited in the prospectus of the complainant as a means of increasing the demand for its capital stock. The prayer for their enforcement is, in my view, an asking that the court shall aid in carrying into effect a scheme which, in all its parts, tended to secure to the complainant company such an undue control of the market-

ing of a necessity of life as is against public policy. I will advise a decree that the complainant's bill be dismissed, with costs.

(185 Pa. St. 273)

CALLAGHAN v. CALLAGHAN et al.

(Supreme Court of Pennsylvania. April 4, 1898.)

ACTION ON NOTE — SET-OFF — AFFIDAVIT OF DEFENSE.

Statement in affidavit of defense, in action on note, alleging that plaintiff's husband is the owner of the note, that the action is prosecuted for his benefit, and that he is indebted to defendant in a certain sum, the nature of which indebtedness is shown, which sum defendant claims to be entitled to set-off, is sufficient to allow the set-off.

Appeal from court of common pleas, Philadelphia county.

Action by Elizabeth Callaghan against Sarah E. Callaghan and others, executors of George Callaghan, deceased. From judgment for plaintiff for want of a sufficient affidavit of defense, defendants appeal. Reversed.

A. Lewis Smith, for appellants. Wm. E. Tolan, for appellee.

McCOLLUM, J. It seems to be conceded by the parties to this suit that the compromise of their differences was annulled by noncompliance with its terms, and that the only question to be considered on this appeal is whether the supplemental affidavit of defense was sufficient to prevent judgment. The suit is on a note of which George Callaghan, now deceased, was the maker, and in which the plaintiff appears to be the payee. The plaintiff alleges in her statement of claim that she is entitled to the amount of the note, with interest from April 1, 1891, less \$470.66, indorsed thereon May 25, 1893. The defendants aver, in their supplemental affidavit, that the plaintiff is not now, and never was, the real owner of the note; that her husband, Robert Callaghan, is the actual and beneficial owner of the same; and that the suit upon it is really "prosecuted for his use." They also declare in this connection that they expect to be able to prove this averment on the trial of the case. It is further averred by the defendants that Robert Callaghan is indebted to the estate they represent in the sum of \$2,303.55, with interest thereon from the 17th of August, 1891, which sum they claim they are entitled to set off against the indebtedness of the estate on the note in suit. The nature and origin of Robert Callaghan's indebtedness to the estate, the consideration of his assumption of it, and the agreement relating to its sufficiency, appear in the affidavit, and need not be repeated here. It may also be stated in this connection that the defendants aver that the credit of \$470.66, already referred to, was the balance of a temporary loan made by them to Robert Callaghan, and that the plaintiff, by his direction and with their consent, indorsed the same on the note, "without the payment by him to

her of any part thereof." This averment was doubtless intended as the statement of a circumstance corroborative of the defendants' claim that the plaintiff's husband was the owner of the note. The averments in the affidavit of defense must be accepted, on this appeal, as true, and they are clearly sufficient if established by competent evidence to allow a set-off against the note of the indebtedness of Robert Callaghan to the estate. Judgment reversed, and procedendo awarded.

(185 Pa. St. 305)

HOTTENSTEIN v. HAVERLY.

(Supreme Court of Pennsylvania. April 4, 1898.)

JUDGMENT — SATISFACTION — VACATING JUDGMENT.

On the hearing of a rule to show cause why satisfaction of the judgment should not be entered, conflicting evidence on the question of payment was offered. *Held*, that it was in the discretion of the court, instead of discharging the rule and entertaining an application to open the judgment, to order the judgment opened, and cause the issue of payment to be submitted to a jury.

Appeal from court of common pleas, Sullivan county.

Action by W. J. Hottenstein against A. C. Haverly. A judgment was rendered in favor of the plaintiff, and thereafter a rule to show cause why satisfaction thereof should not be entered was granted; and, on a hearing thereof, it was ordered that the judgment be opened, and an issue formed to ascertain whether it had been paid. Judgment for defendant, and plaintiff appeals. Affirmed.

J. G. Scouten, for plaintiff. E. J. Mullen, for appellee.

STERRETT, C. J. This proceeding was commenced by defendant's petition to the court below, setting forth certain facts, and praying for a rule on the plaintiff to show cause why the judgment therein specified should not be satisfied. The rule, as prayed for, was granted, and the matter was so proceeded in, by taking testimony, etc., that on January 14, 1896, the court made the following order: "After consideration of the evidence, it is ordered that the above judgment, No. 87, September term, 1892, be opened, and the defendant is allowed to come in and defend. And an issue is formed, wherein W. J. Hottenstein shall be plaintiff, and A. C. Haverly defendant, to ascertain whether said judgment has been paid or not." In due course, this issue came on for trial by jury; and in May, 1896, a verdict in favor of the defendant was rendered, and afterwards judgment was entered thereon for costs.

The first three specifications allege error in granting the issue, and in not discharging the rule to show cause why the judgment should not be marked satisfied of record, etc. While it would perhaps have been more reg-

ular to have discharged that rule, and entertained an application to open the judgment, etc., the court, having all the evidence before it, was not bound to pursue that course. In its discretion, it acted upon the evidence adduced by the parties, and made the order above quoted. In this there was no error that would justify a reversal of the judgment and vacation of the order awarding the issue.

The remaining specifications, 4 to 7, inclusive, complain of the rulings of the learned trial judge therein referred to. It is unnecessary to consider these specifications in detail. We find nothing in the record that would justify us in sustaining either of them. The issue, under the evidence, involved questions of fact, which were clearly for the consideration of the jury, and were submitted to them in an impartial and fully adequate charge, of which the plaintiff in the issue has no just reason to complain.

The defendant's contention was that, while there was an execution out for the sale of his real estate on a venditione exponas, he presented a petition to the court, and obtained a stay of that writ, and that "during the pendency of that stay an arrangement was made with the plaintiff, by which the stay was to be discharged, and, in consideration of that, the plaintiff in that suit was to accept the farm upon which the levy had been made, that the farm was to be sold, and that plaintiff was to accept, in full consideration of the judgment, the amount that he would realize from the sale of that farm"; and, on the part of the defendant, that arrangement was fully carried out. The evidence in support of this contention was quite sufficient to carry the case to the jury on the controlling questions in the case, and, by their verdict, they found the facts in defendant's favor. Judgment affirmed.

(185 Pa. St. 302)

WILLIAMS v. TOZER et al.

(Supreme Court of Pennsylvania. April 4, 1898.)

TRUSTEES—BINDING TRUST ESTATE.

An estate which is not interested in the transaction in which a judgment bond is given, and has received no benefit therefrom, cannot be made liable for judgment on the bond by its trustee becoming a surety on the bond.

Appeal from court of common pleas, Bradford county.

Judgment was entered for James H. Williams, now to the use of the P. R. Mitchell Company, against A. R. Tozer and Ralph Tozer, trustee, on a judgment bond executed by defendants, and conditioned to hold plaintiff harmless from the payment of any debts of the firm of Williams & Tozer, composed of plaintiff and defendant A. R. Tozer, the latter having bought the interest of the former. Ralph Tozer was trustee under the will of his deceased wife, Sarah To-

zer; and A. R. Tozer, their son, was the principal cestui que trust, the estate, however, to go to certain relatives in case he died without issue. Rule to enjoin sale of property of the trust estate to satisfy the judgment, granted on petition of Ralph Tozer, was made absolute, and plaintiff appeals. Affirmed.

Rodney A. Mercur, for appellant. E. Overton and H. F. Maynard, for appellees.

PER CURIAM. Notwithstanding the able and ingenious argument of appellant's counsel, we are not convinced that the learned court erred in making absolute the rule theretofore "granted so far as it enjoins the sheriff from selling any property of or belonging to the estate of Sarah Tozer, deceased." That estate, represented by Ralph Tozer, trustee (one of the parties to the bond on which the judgment was entered by virtue of the warrant of attorney contained therein), was neither interested in the transaction in which the judgment bond was given, nor received any benefit therefrom. As trustee or otherwise, Ralph Tozer had no authority, express or implied, to bind the estate, or subject the property or assets thereof to execution in favor of the plaintiff. The authorities relied on by appellant are inapplicable to the facts of this case. Decree affirmed, and appeal dismissed, at appellant's costs.

(185 Pa. St. 332)

In re DU PLAINE'S ESTATE.

(Supreme Court of Pennsylvania. April 4, 1898.)

JOINT TRUSTS—RIGHTS OF CESTUIS QUE TRUSTENT.

Where property is devised in trust, half the income to be paid to testatrix's son, and half to her daughter, for life, with cross remainders from one to the other, as to the principal, in case either died without issue, or disposition of his or her share, there is a joint trust, so that a mortgage taken from the trustee by the son, to protect his share, inures to the benefit of both.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Susan E. Du Plaine, deceased, Helen A. C. Childs, daughter of deceased, petitioned for a decree that she be entitled, equally with Benoni C. Du Plaine, her brother, to the benefit of a mortgage taken by him from the trustee under the will of deceased. Decree for petitioner. Respondent appeals. Affirmed.

The opinion of the court below is as follows (FERGUSON, J.):

"The petitioner and respondent are brother and sister. Their mother by her will gave all the rest, residue, and remainder of her estate to a trustee in trust to manage the same, and collect and receive the rents, issues, and profits thereof, and 'pay in semiannual installments one full one-half part of net rents, income, interest, dividends, and profits unto my son, Be-

noni C. Du Plaine, for and during all the term of his natural life,' etc. And the 'said trustee shall pay the remaining one-half part of the said net rents, interest, income, dividends, and profits, in semiannual installments, unto my said daughter, Helen Augusta C. Childs, for and during the full term of her natural life,' etc. In the case of the death of either of the said life tenants, the principal was to go to their children, with, however, a power of disposition otherwise by will; and, in default of children or a will, then cross remainders from one to the other. The brother had accidentally learned that the trustee was in an embarrassed condition, financially, and went to him, and insisted upon a settlement for his one-half of the principal sum which was in his hands as trustee, and under pressure of threatened arrest, etc., received from him a mortgage upon some real estate for exactly one-half of the trust estate. The brother for several years concealed all knowledge of the insolvent condition of the trustee from his sister, and also the fact that he had tried to protect himself by securing this mortgage. This he now claims he holds for his own benefit alone, and that his sister has no interest therein. Such are, briefly stated, the facts.

'It is hard to find language sufficiently strong to condemn the conduct of a brother who would thus try to secure himself and leave his sister in the lurch, and, after he supposed he was himself secure, not to give her the knowledge by which she might have been able to secure herself, also; but the case is not to be decided upon any sentimental considerations, but upon the law as applicable to the facts as they are presented. It will be observed that the trust is a joint one, and although the trustee, in an account filed, divided the fund in half, and stated that he held one half for one, and the other half for the other, of the cestus que trustent, there was no distribution so decreed; and in fact there could not be any separation of this fund, under the will of the testatrix, until one or the other of the cestus que trustent died, when other interests might intervene. The mother gave all her residuary estate to this trustee, to pay one-half of the income to the son, and one-half of the income to the daughter. She did not give one-half of the principal, to be held for each, but it all is to be held jointly in trust for both. In *Aubert's Appeal*, 119 Pa. St. 52, 12 Atl. 810, and in *Willen's Appeal*, 105 Pa. St. 121, the supreme court laid down the law that, where an estate is so given for two persons, it is to remain intact until the time for distribution arrives, because 'We cannot say,' to use their language, 'that a moiety of the income of the whole may not be more valuable to the surviving life tenant than the whole of the income of a moiety.' The time for the distribution of this fund has not arrived, and therefore there can be no distribution or division of it; and in case of a devastavit, as has here happened, anything that the vigilance of either of the cestus que trustent, or any one else,

has rescued from the wreck, must inure to the benefit of both of them. It has been settled that where there is a community of interest there is a community of duty; each of those interested must be faithful to himself, and equally as well to all the others interested. He can secure no advantage over the others because he has found out something they do not know, or because perhaps he is in a better position to protect himself than are they. The rule of law as stated in *Keech v. Sandford*, 1 White & T. Lead. Cas. Eq. (4th Am. Ed.) 64, has been followed in numerous cases in this state: 'Whenever one person is placed in such relations to another, by the act or consent of that other, or by the act of a third person, or by the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated.' This doctrine was enforced in *Weaver v. Wible*, 25 Pa. St. 270, the syllabus of which is as follows; 'When several persons have a joint or common interest in an estate, one cannot purchase an incumbrance or an outstanding title, and set it up against the rest, for the purpose of depriving them of their interests.' Chief Justice Lewis, in delivering the opinion, said: 'Community of interest produces community of duty. * * * A conveyance to one of several tenants in common, or a deed to one of two devisees of the same land, shall inure to the benefit of all who came in under the same title, and are holding jointly or in common. * * * Where several persons have a joint or common interest in an estate, it is not to be tolerated that one shall purchase an incumbrance or outstanding title, and set it up against the rest, for the purpose of depriving them of their interests. Chancellor Kent, with great truth, remarked that such a proceeding would be repugnant to a sense of refined and accurate justice, and would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties created. It is the duty of all to deal candidly and benevolently with each other, and to cause no harm to their joint interests.' To the same purpose, see *Lloyd v. Lynch*, 28 Pa. St. 419; *Gibson v. Winslow*, 46 Pa. St. 380; *Kennedy v. Borie*, 166 Pa. St. 360, 31 Atl. 98; *McCutcheon v. Smith*, 173 Pa. St. 101, 33 Atl. 881; *Powell v. Lantzky*, 173 Pa. St. 543, 34 Atl. 450. The fact, which was so urgently pressed at the argument, that it was not proven that any portion of these trust funds went into the particular property upon which the mortgage was given, can make no difference. Whether they did or not is immaterial. The only claim the respondent had upon the trustee was as a cestus que trust under this will. He was not a creditor in any other way. When this mortgage was given to him, the consideration passing was that the trustee owed this trust-estate money. Therefore anything that he received upon that account must, in

law, equity, morals, and common decency, be held by him in trust for his sister as well as himself. The petition in this case is granted."

B. F. Fisher, for appellant. William C. Hannis, for appellee.

PER CURIAM. There is no substantial error in the findings of fact in this case, and on the facts thus established the decree complained of is free from error. The questions involved were well considered and correctly decided by the orphans' court, and on its opinion the decree is affirmed, and appeal dismissed, at appellant's costs.

(133 Pa. St. 353)

HENSZEY et al. v. GROSS et al.

(Supreme Court of Pennsylvania. April 4, 1898.)

DESCENT AND DISTRIBUTION—HALF BLOOD.

Real estate which one has inherited from his father does not, on his death, descend to his half-brother by another father; Act April 8, 1833, § 6, which provides that real estate of intestate dying without issue, brothers or sisters of full blood, or father or mother, shall, subject to any life estate given by the act, descend to brothers and sisters of the half blood of intestate, being subject to section 9, declaring that no person not of the blood of the relative from whom real estate descended to intestate shall "in any of the cases before mentioned" inherit the same, but it, subject to any life estate given by the act, shall pass to such persons as would be entitled had the persons not of the blood of the ancestor never existed.

Appeal from court of common pleas, Philadelphia county.

Action by George C. Henszey and others, trustees, against Annie Gross and others. Judgment for plaintiffs. Defendant William F. Parker appeals. Affirmed.

The case stated and a section of the act governing the same are as follows:

"It is hereby agreed by the plaintiffs and defendants in the above-entitled suit that the following facts be submitted as a case stated, for the opinion of the court: John S. Moore, the younger, was seised, at and immediately before his death, of an estate in fee simple, in the land and buildings described in the above action, to wit, the premises west side of Front street, sixty-five feet one inch north of Fairmount avenue, containing twenty-five feet more or less in front, and extending of that width westward two hundred feet more or less, where it widens to fifty feet more or less, and extending thence westward, in width fifty feet more or less, twenty feet more or less, to a three-feet wide alley leading from Onas street to Fairmount avenue. That the title to said real estate was acquired by the said John S. Moore, the younger, as follows: Thomas Cadwalader et al., trustees, etc., by deed dated April 2, 1834, in Deed Book A M, No. 44, page 701, granted and conveyed the said premises to the said John Moore in fee. The said John Moore died April 19, 1841, leaving him sur-

viving a widow, Margaret Moore, and lawful issue, two children only, viz. John S. Moore, the elder, born December 1, 1814, and Margaret Ann Moore, born May 11, 1822, and having first made and published his last will and testament dated December 19, 1840, and proved in this county April 27, 1841, and recorded in Will Book No. 14, page 581, whereby he devised the income of his estate to his wife, Margaret Moore, and their two children in equal third parts during the life of his wife, and 'from and immediately after her decease I give and devise all my real estate, whatsoever and wheresoever, unto my said two children, John S. Moore and Margaret Ann Moore, their heirs and assigns, forever, in equal parts as tenants in common'; and appointed his said son and widow as his executors, to whom letters testamentary were granted. The said Margaret Moore, widow of John Moore, died on the 29th day of April, 1877. That the said John S. Moore, the elder, was intermarried with Elizabeth E. Snow, on September 10, 1847, and by her had one son, John S. Moore, the younger, born the 4th day of July, 1848. That the said John S. Moore, the elder, was divorced from his wife, Elizabeth E. Moore, by decree of the court of common pleas in and for the county of Philadelphia, dated March 20, 1852, of December term, 1851, No. 32, in which the wife was the libellant, and the husband the respondent. That the said Elizabeth E. Moore afterwards intermarried with William H. Parker, and had issue one son, William F. Parker, who is now of full age. That the said John S. Moore, the elder, died January 30, 1869, intestate, unmarried, and leaving surviving him an only child, the said John S. Moore, the younger, born of his wife, Elizabeth E. Moore, from whom he was divorced prior to his death. That at the time of the death of the said John S. Moore, the elder, he was seised in fee of an undivided moiety or half part in the premises above described, which became vested in his son John S. Moore, the younger, under the intestate law of this state, the other moiety or half part thereof being vested in the sister of John S. Moore, the elder, Margaret Ann Henszey, formerly Margaret Ann Moore. That upon proceedings in partition in the orphans' court for the county of Philadelphia, of June term, 1878, No. 87, of the real estate of John Moore, deceased, between the said Margaret Ann Henszey and the said John S. Moore, the younger, the premises above described were allotted and assigned in severalty to John S. Moore, the younger, his heirs and assigns. That, being so seised of an estate in fee simple in said premises, the said John S. Moore, the younger, died on the 29th day of June 1893, intestate, unmarried, and without issue, leaving him surviving his mother, the said Elizabeth E. Parker, who acquired an estate for life therein under the intestate law of this state, a half-brother, the said William F. Parker, and one aunt, the said Margaret Ann

Henszey, formerly Margaret Ann Moore, who was the only sister of John S. Moore, the elder, the said Margaret Ann Moore and John S. Moore, the elder, being the lawful issue of John Moore and Margaret, his wife. That the said Margaret A. Henszey died on the 5th day of July, 1894, a widow, having first made her will dated the 24th day of April, 1894, duly proved July 10, 1894, and registered in the office of the register of wills of this county, in Will Book 173, page 154, etc., wherein and whereby she devised all her real estate and personal to George C. Henszey and Leonardo S. Clark, their heirs and assigns, in trust, as therein provided, and to whom letters testamentary thereon were granted. That the said Elizabeth E. Parker died on the 12th day of January, 1897, and the said William F. Parker claims to be in possession of the said premises, through the tenants thereof, as heir at law of John S. Moore, the younger, and entitled to the rents thereof. If the court shall be of opinion, on the foregoing facts, that the said real estate descended to the said William F. Parker, under the intestate law of Pennsylvania, upon the death of the said John S. Moore, the younger, subject to a life estate therein in favor of the said Elizabeth E. Parker, now deceased, then judgment to be entered for the defendants; but if the court shall be of the opinion that the said real estate descended to the said Margaret Ann Henszey under the intestate law of Pennsylvania upon the death of said John S. Moore, the younger, subject to a life estate therein in favor of the said Elizabeth E. Parker, now deceased, then judgment to be entered for the plaintiffs, with right to either party to take an appeal to the supreme court."

Act April 8, 1833, § 6 (Purd. Dig. p. 931, pl. 23), is as follows: "In default of issue, and brothers and sisters of the whole blood and their descendants, and also of father and mother, competent by this act to take an estate of inheritance therein, the real estate of such intestate, subject to the life estates hereinbefore given, if any, shall descend to and be vested in the brothers and sisters of the half blood of the intestate, and their issue, in like manner, respectively, as is hereinbefore provided for the case of brothers and sisters of the whole blood and their issue."

Walter E. Rex, for appellant. Walter E. Brand and William C. Hannis, for appellees.

PER CURIAM. All the facts upon which this contention depends are fully set forth in the case stated for the opinion of the court below. On those facts it was rightly held that upon the death of John S. Moore, the younger, the real estate in question descended under our intestate law to and vested in Margaret Henszey, subject to a life estate therein in favor of Elizabeth E. Parker, now deceased, and accordingly judgment in favor of the plaintiffs was rightly entered. Any doubt that might otherwise exist as to the

proper construction of the act is dispelled by the comprehensive and emphatic language of the ninth section, which declares "that no person who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall in any of the cases before mentioned, take any estate of inheritance therein, but such real estate subject to such life estates as may be in existence by virtue of this act, shall pass to and vest in such other persons as would be entitled by this act, if the persons not of the blood of such ancestor or other relation had never existed, or were dead at the decease of the intestate." Laws 1832-33, p. 318. In express terms, this provision applies to each and all "of the cases before mentioned" in the act. We find no error in the judgment, and it is therefore affirmed.

(185 Pa. St. 337)

STOCKHAM et al. v. STOCKHAM et al.

(Supreme Court of Pennsylvania. April 4, 1898.)

PARTITION—SUBMISSION OF BILL AND ANSWER—ADMISSIONS—INFERENCES.

Where case is submitted on bill and answer, the allegation of the answer that it would be highly inequitable and prejudicial to defendants and all parties to enforce partition as prayed for in the bill is but an inference, and not admitted as true.

Appeal from court of common pleas, Philadelphia county.

Suit by William R. Stockham and others against George Stockham and others. The case was submitted on bill and answer. Decree for plaintiffs. Defendants appeal. Affirmed.

The abstracts of bill and answer, the decree, and argument of defendants are as follows:

Abstract of bill: "This is a proceeding in equity, in partition. George Stockham, late of Philadelphia, died October 9, 1885, leaving a house and lot, No. 2808 East Norris street, in said city, by his last will, in trust for his daughter Margaret Irene Stockham, the rents, issues, and profits to be applied to her support, and at her death to become part of her residuary estate, and to be 'divided in the same manner and in the same proportions as the residuary estate.' By said will, certain legacies were left to his children and grandchildren, parties hereto, and the residuary estate was directed 'to be divided pro rata among them, according to the amount of the pecuniary legacies herein given.' The executors and trustees, in the year 1891, filed their account, and upon their petition were discharged by the orphans' court for Philadelphia county, and the real estate, title insurance, and trust company substituted as trustees for said Margaret Irene Stockham. Margaret Irene Stockham died on or about February 14, 1892. Four of the grandchild-

dren filed a bill in equity setting forth the above facts, and stated that no partition of the said real estate had been made, and praying, among other things, that partition of the real estate may be made and decreed, and that the shares of the respective parties plaintiffs and defendants be set out to them in severalty, or that the property shall be sold, etc. The bill was amended by striking out the name of George E. Stockham, as one of the plaintiffs, and making him a defendant."

Abstract of answer: "The defendants answered that the facts set forth in the bill were true, and that they are entitled to seventy-six (76) per cent. of the entire interest in the premises; that by virtue of an ordinance of councils of the city of Philadelphia, approved April 3, 1894, East Norris street, aforesaid, in front of said premises, was vacated and stricken from the plan of streets of the said city; that thereby the value of the said premises has been greatly depreciated, and the said property is now unsalable. The defendants suggest, as the property cannot be divided, it would be highly inequitable and prejudicial to the interest of the defendants and the interests of all parties interested to enforce partition or distribution as prayed for. Defendants further suggested that by virtue of the will of the said George Stockham, deceased, 'the said trustees, or the survivor, shall have power, should they or he deem it advisable, to sell said house to any purchaser or purchasers, free and discharged from this trust, and without liability on the part of such purchaser or purchasers to see to the application of the purchase money.' They further suggested that the trustees had not been discharged, and should have been made party to this proceeding, and prayed that the bill be dismissed," etc.

Decree: "And now, October 6, 1897, the cause coming on to be heard upon bill and answer filed, and it appearing that the facts set forth in the bill are admitted to be true by the answer, and the further facts set forth in the answer being insufficient objection in law to the relief prayed for by the bill, it is ordered and decreed that partition be had and made of the real estate described in the bill by and between the parties in interest."

Argument of defendants: "This case was presented to the court below on bill and answer. Therefore all facts contained in the answer were admitted to be true. Among the facts admitted is the very material one that 'it would be highly inequitable, and very prejudicial to their [the defendants'] interests, and to the interests of all parties interested, to enforce partition or distribution of the property aforesaid, as prayed for in the said bill of complaint.' The vacation of the street, while on paper only, has greatly depreciated the value of the property, and has made it practically unsalable. At the same time, it

is submitted that as councils may change their intentions before this (paper) vacation is made absolute, by actual closing of the street to public use, the parties owning the property have no remedy for the damages sustained, and no action can be commenced against the city until after the street is actually closed. Parties seeking equity must do equity, hence this great injustice should not be forced upon the appellants, especially at the instance of such a small holding; the complainants having less than a quarter interest in the property."

Samuel P. Hanson, for appellants. J. Henry McIntyre, for appellees.

PER CURIAM. We find no error in the decree from which this appeal was taken. There is nothing in the contention of the appellants that requires discussion. Decree affirmed, and appeal dismissed, at appellants' costs.

(185 Pa. St. 340)

McGRANIGHAN et al. v. McGRANIGHAN et al.

(Supreme Court of Pennsylvania. April 4, 1898.)

TENANTS IN COMMON — PURCHASE OF COMMON PROPERTY.

Purchase of common property by part of the tenants in common, at sheriff's sale thereof to satisfy liens, will be held to be for the benefit of all, the purchasers having been able to raise by mortgage enough to pay the liens, and having had this in mind while leading the others, poor and inexperienced in business, to understand that only those having money could save their shares.

Appeal from court of common pleas, Philadelphia county.

Suit by Daniel McGranighan and others against James F. McGranighan and others. Decree for plaintiffs. Defendants James F. and Michael S. McGranighan appeal. Affirmed.

The opinion of the court, including findings, and the decree, are as follows:

Facts: "The court finds the following facts: First. On April 24, 1864, Michael McGranighan took title to the premises described in the first paragraph of the bill, subject to a yearly ground rent of \$36, payable to Richard J. Dobbins, his heirs and assigns, in equal half-yearly payments, on the 1st day of the months of March and September in each year, redeemable on the payment of the principal sum of \$600. Second. The said Michael thereupon entered into possession of said premises, and about the year 1868 built a second house, at the corner of 54th and Wyalusing avenue, on said lot. Into this second house he removed with his family, leasing thereafter the first house to his eldest son, Daniel, one of the plaintiffs, at the rent of ten dollars per month. Third. On October 2, 1888, the said Michael died intestate, seised in fee of the said premises, subject to the ground rent as aforesaid,

leaving to survive him his widow, Ann, and seven sons, as follows: Daniel, Hugh, Charles, Patrick, John, James F., and Michael S.,—to which said sons said premises descended and vested as tenants in common in fee, subject to the dower right of their mother. Fourth. In the month of December, 1888, Charles died intestate, seised of his undivided one-seventh interest in said premises, leaving to survive him his widow, Julia, and five children, as follows: Annie, Catharine, Charles, Henry, and Frank, all of whom are minors, without guardian. Fifth. Ann, widow of Michael, the elder, continued to live in the corner house until her death, which took place on April 30, 1892, and Daniel has continued to live in the other house. Sixth. Daniel paid the rent on his house to his mother during her lifetime, except for the last two months, when he was unable by reason of sickness to raise the money. Seventh. The widow, Ann, at the time of her death, owed five half-yearly installments of ground rent, amounting in all to \$90. Eighth. Suit was brought for the arrears of ground rent, judgment obtained, and execution issued; and on August 1, 1892, the premises in question were sold by the sheriff to James F. McGranighan and Michael McGranighan, the younger, for the sum of \$600; and on September 19, 1892, the said sheriff delivered his deed to said vendees, subject to the ground rent. Ninth. On the same day, September 19, 1892, the owners of the ground rent, by deed, granted and extinguished the same to the said James and Michael, in consideration of \$600. Tenth. On the same day, September 19, 1892, the said James and Michael mortgaged the said premises for \$1,600 to the St. Agatha's Building and Loan Association, the mortgage money, as recited in said indenture of mortgage being advanced to pay the consideration to the sheriff for said premises and the consideration for the extinguishment of the ground rent. In point of fact, only \$1,200 were applied for these purposes, \$195 were used to pay doctor's bill and funeral expenses of the mother, and \$205 appear to be unaccounted for. Eleventh. The said James and Michael, claiming the ownership in fee of said premises, instituted proceedings before a magistrate against Daniel, under the act of June 16, 1836, which proceedings have been removed to this court, being the same proceedings which the bill seeks to enjoin. Twelfth. That the said James F. and Michael S. have collected and are collecting rent for the corner house. Thirteenth. That the premises in question have a value of \$400 and upward above the amount of the aforesaid mortgage.

"The vital question in the case is whether James and Michael acquired the ownership in fee. If they did, the proceedings sought to be enjoined are entirely correct, and the bill must be dismissed. If they did not, they hold merely as trustees for all concerned,

and partition should be ordered and an account stated. The law of Pennsylvania was clearly laid down by Mr. Chief Justice Lewis in *Weaver v. Wible*, 25 Pa. St. 270, 272: 'Where several persons have a joint or common interest in an estate, it is not to be tolerated that one shall purchase an incumbance or an outstanding title, and set it up against the rest, for the purpose of depriving them of their interests. * * * All that can be demanded is contribution from each to the expense of any purchase which releases the common interest from embarrassment.' This principle was restated by the supreme court in the late case of *Powell v. Lantzy*, 173 Pa. St. 543, 549, 34 Atl. 450.

"The defendants deny the plaintiffs' right because they say that: (1) The sheriff's bill for sale was put up on the house in which Daniel lived, and he was going in and out, and must have seen it. (2) Before the sheriff's sale, John (one of the defendants) said to Daniel and Hugh: 'Before I will see it go to sheriff's sale, I will put up my share with any one of you.' Hugh says: 'I don't want to have a damned thing to do with it. I don't want a dollar out of it. I have my own house and a building association, and it is as much as I can attend to.' Michael said to Dan: 'There is a lot of bills against it.' He says: 'Well, I have no money to straighten them.' Michael says: 'Well, somebody will have to straighten them. A stranger will own it. Now, I am in a building association. Before a stranger will own it, I will bid on it; but, if you don't wish that, why here is my book. Give me what money I have paid on my book. You go down, and I would as lieve you would own it.' He says: 'No; I am very glad, Mike, that you are able to buy it. I would not like to see it go out of the name. I would like to see you have it, and I am glad to see that you are able to buy it.' (3) Everybody knew of the sheriff's sale. (4) Michael paid \$50 at sheriff's sale, \$25 his own, and \$25 his brother James'. They borrowed \$1,600 on their shares from the building association, which was applied as follows:

Purchase money	\$ 600 00
Principal of ground rent	600 00
Dr. Whiteside's bill for the mother..	85 00
Funeral and tombstone for the mother	110 00
	<hr/>
	\$1,395 00

"What became of the other \$205' did not appear.

"These points made by Michael were substantially reiterated by James, his narrative, however, varying somewhat in the details. The plaintiffs' testimony, on the other hand, differed materially on some of these matters: (1) Daniel admits that he knew of the sheriff's bill, but says that he was confined to his bed. (2) Daniel describes the interview before the sheriff's sale as follows: Hugh asked them (the defendants) to put it in the hands of a trust company, or to the orphans'

court; that he was willing to pay his share of what would be against it, and, of course, I acquiesced in what he said, in everything he said, right by his shoulder, and he said: 'If there is a dollar coming to us, we want it, and, if there is \$10 in debt, we offer to pay it.' Daniel denied that any amount of money necessary to be raised was named. He denied that the brother offered his building association book, or that it was declined, or that he said that he would have nothing to do with it.

"Assuming for argument's sake that the defendants' statements on these controverted points are exactly correct, it is difficult to see how they help the defendants' cause. The plaintiffs were not men of much education or knowledge of business affairs. Daniel is a gardener, and Hugh was a fireman, who since the filing of the bill died in the performance of his duty. They were not men of means, but plain laboring men, with families to support. They had no money to pay the arrears of rent and other liens, and they had not sufficient business knowledge to know how to save their imperilled interests without a considerable outlay. The third party plaintiff were the widow and five minor children of a deceased brother, very poor, and, of course, ignorant of business affairs. What did these co-tenants defendant do under the circumstances? According to their own account, they utterly ignored the widow and minor children, and put prominently before the other two plaintiffs the necessity of raising what was to them a considerable amount of money, and all their statements rested on the assumption that some one with money would have to take up the matter, and that the interests of those without money were doomed to be sacrificed. If, in so acting, they dealt in good faith, and honestly gave their co-tenants the best thought they had on the subject, a question of some difficulty might be presented. We have, however, been unable to avoid the conclusion that, at the time when the defendants puzzled two of the plaintiffs with the apparently insoluble difficulties of the situation, they had in their minds a method whereby all rights could have been saved with very little trouble, the method which in point of fact they promptly adopted. To us it seems that their bearing towards all the plaintiffs was, to use the language of Chancellor Kent in the somewhat analogous case of *Van Horne v. Fonda*, 5 Johns. Ch. 388, 407, 'repugnant to a sense of refined and accurate justice; * * * immoral because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim which the relationship of the parties as joint devisees created. * * * The parties had equal concern, which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest.' The plaintiffs are therefore entitled to the re-

lief prayed for. And now, January 2, 1897, the prothonotary will notify the parties or their counsel of the filing of this report and opinion, and, if no exceptions are filed thereto within twenty days, a decree will be entered, according to the foregoing opinion."

Decree: "And now, February 24, 1897, no exceptions having been filed to the findings of fact and law in this case within twenty days from the filing thereof in accordance with the report and opinion and on motion of David H. Stone, Esq., solicitor for plaintiffs, it is ordered, adjudged, and decreed that the defendants James F. McGranighan and Michael S. McGranighan hold the title to the premises described in said bill, acquired by them by purchase at sheriff's sale thereof on August 1, 1892, as trustees for all the parties plaintiff and defendant as of the shares and interests therein as the same were held by them or the persons through whom they claim immediately prior to said sheriff's sale, subject, as respects the said James F. McGranighan and Michael S. McGranighan, to the payment of a certain mortgage debt of sixteen hundred dollars, secured upon said premises by indenture of mortgage given by said defendants to the St. Agatha's Building and Loan Association, dated the twenty-first day of September, 1892, recorded at Philadelphia. in Mortgage Book T. G., No. 211, page 275, etc., and as respects the shares and interests of the other parties to twelve hundred dollars of said mortgage debt. And it is further ordered and decreed that an injunction issue to the said defendants James F. McGranighan and Michael S. McGranighan, perpetually restraining them from further maintaining their action against plaintiff Daniel McGranighan for the recovery of said premises as of the term and number of this bill, and from commencing and maintaining any other action for the recovery of possession thereof in their own right based upon their said purchases at said sheriff's sale. And it is further adjudged and decreed that the said James F. McGranighan and Michael S. McGranighan account to the said plaintiffs for the rents received by them for said premises, or any part thereof. And it is further ordered, adjudged, and decreed that partition or division of said premises be had and made among all of said parties according to the acts of assembly and the course and practice in equity, and the shares of said parties set out to them in severalty; and Walter George Smith, Esq., is hereby appointed master to state said account, and to make said partition, and, in case the said premises cannot be divided or parted among said parties without injury to or spoiling the whole, to value the same or convenient purparts thereof, and to report his doings to this court for confirmation and further order."

Chapman & Chapman, for appellants. P. J. McManus and David H. Stone, for appellees.

PER CURIAM. We are not convinced that the learned court below erred in any of its findings of fact referred to in the second specification, or in its omission to find as complained of in the third and fourth specifications. It is not our purpose, nor is it necessary, to discuss here the evidence on which the court below based its findings. It is sufficient to say there was testimony to justify them. So far as they are relevant, they must therefore be accepted as true; and, on the facts thus established, we are not satisfied there was any error either in the conclusion complained of in the fifth specification or in the decree recited in the first specification. Finding nothing in the record to justify us in sustaining either of the specifications of error, they are all overruled, the decree affirmed, and appeal dismissed, at appellants' costs.

(185 Pa. St. 315)

In re HOFFMAN'S ESTATE.

(Supreme Court of Pennsylvania. April 4, 1898.)

ADMINISTRATOR—ACCOUNTING—REAL ESTATE.

Decree will not be reversed for error, if any, in requiring an administrator, as such, to account for the realty, as well as the personalty, where it was understood between him, the heirs, and widow that he was managing the real estate, not as their agent, but as administrator, and he in his account made certain charges and claimed certain credits with respect to the real estate; he being merely prevented by such an accounting from interposing the statute of limitations as to certain items, which he could do if an independent proceeding for such matters was required.

Appeal from orphans' court, Lycoming county.

In the matter of the estate of John S. Hoffman, deceased. From the decree of the orphans' court overruling exceptions to the report of the auditor passing on exceptions to the administration and distributive account of George D. Hoffman, administrator, said administrator appeals. Affirmed.

The opinion of the court below is as follows (METZGER, J.):

"A number of exceptions have been filed by the administrator to the report of the auditor in this case. The first exception we regard as an important one, involving, as it does, the question whether the administrator should account in the orphans' court for the rents, issues, and profits of the farm. There can be no doubt that, as a general rule, the administrator is not chargeable in his account as administrator with anything but the personalty. Upon the death of the intestate the real estate goes to the heirs, and the administrator has no power over it except in the manner pointed out by the act of assembly, when such real estate is wanted for the payment of debts. As said in *McCoy v. Scott*, 2 Rawle, 222: 'The real fund is not absolutely, but sub modo, assets in his hands.' That case decides that 'the administrator who collects the rents and profits of the realty of the

intestate holds them as trustee for the heirs, and not for the creditors. Until the right of the heirs is divested by a sale by the administrator under an order of the orphans' court, or by execution, the right of the heirs to the land is as absolute as that of their ancestor.' There can be no doubt, under the decisions in Pennsylvania, that the administrator cannot be compelled against his will to account in the orphans' court for the rents, issues, and profits of the real estate received by him, as they do not belong to the estate, but to the heirs, and they alone are interested therein. When, therefore, the administrator takes possession of the realty, and undertakes to manage it, he must be held to do so as the agent of the heirs, who alone can call upon him in such case for an account. This they could not do in the orphans' court, but would have to resort to the court of common pleas, which is the proper forum in which to account in such case. This is expressly ruled in the case of *Appeal of Fross*, 105 Pa. St. 259: 'An administrator is not properly chargeable with the rents of his intestate's realty. If he takes charge of the realty, and collects the rents therefor, he acts merely as agent for the heirs; nor does he bind himself as administrator by assuming to act in that capacity. His liability as administrator, and that of his sureties, is limited to the matters appertaining to his office.' The same principle is decided in *Appeal of Walker*, 116 Pa. St. 419, 9 Atl. 654. In that case it was contended that the accountants had not in fact charged themselves with all the rents, issues, and profits which they had actually received; and Justice Clark, in delivering the opinion of the court, on page 430, 116 Pa. St., and page 660, 9 Atl., says: 'As the realty, as well as the personalty, was to be equally divided among the testator's children, and the creditors have all been paid, it would be just and fair enough, perhaps, if the parties were willing, to allow the rents and profits received, and the taxes and insurance and repairs expended, to be adjusted in the account; but it was contended on the part of the appellees that the accountants had not in fact charged themselves with all the rents which they had actually received. As the accountants were not legally bound to charge themselves with any of these rents, it was, of course, futile and useless to enter into a contest of the account respecting the rents alleged to have been omitted. The only practicable method of procedure, therefore, was to turn the parties over to a forum which had proper jurisdiction of the subject-matter in dispute, and in which their respective rights might be ascertained and properly adjudicated.' These cases lay down the general rule. It does not follow that there are no cases in which the facts are such as to make them an exception to the rule laid down.

"It is contended in the case now before us that it was expressly agreed by and between

the heirs and the administrator that the latter should take charge of the realty and manage it. The evidence shows such an agreement between the parties, and, though there was no express agreement to account, the administrator clearly understood that it was his duty in his administrative capacity to look after and manage the said real estate. We think there is sufficient evidence to warrant us in finding that it was the understanding of all the parties that the administrator should take charge of and manage the real estate, and that it was to be treated as the estate of the decedent and accounted for as such. There was an express agreement, so far as the proceeds of the timber sold to Smithgall and Weaver was concerned, that it should be passed upon by the auditor in stating the distribution account between the heirs and the widow.

"It is further contended by the widow and heirs that the administrator, having taken charge of the real estate by their consent, and having managed it in his capacity as administrator, receiving, as administrator, the rents, issues, and profits thereof, and paying the taxes, insurance, labor, etc., on the farm, in the same capacity, as shown by his checks given as administrator, and in some instances paying the same out of the estate's fund, and not out of the rents and profits of the farm, and having in his account filed as administrator claimed credit for expenses connected with the farm, such as taxes, insurance, and farm expenses, and also claimed, as shown by the evidence, for his services in looking after and managing the farm, in all of which the widow and heirs acquiesced, that he is now estopped from denying his liability to account in the orphans' court for his management of the realty. It is a fair inference from the evidence in this case that it was understood between the widow and the heirs and the administrator that he was managing the real estate, not as their agent, but as administrator, in the same manner as he had charge of and managed the personal estate. It is evident, too, from the fact of his making certain charges and claiming certain credits with respect to the real estate, that he was under the impression that he had the right to settle this account in the orphans' court, the same as he settled his account of the personal property. It would seem, also, from the exceptions filed by the widow and heirs to his account, that they were under the same impression, for they complained by their exceptions that he did not charge himself with all the proceeds of the farm. We hear of no objection, such as is now filed to the auditor's report, until the audit had progressed for some time, and until a number of the items with which the administrator would be chargeable would be barred by the statute of limitations if the parties were now turned over to another forum to begin proceedings anew. In short, the administrator has been guilty of such conduct in the

management of the estate, including the realty, and in the filing of his account, as to induce the widow and heirs to desist from resorting to any other tribunal for the adjustment of the accounts between him and them until the statute of limitations has intervened to bar a number of items in the account.

"If we are now to determine that the widow and heirs must resort to any other tribunal to recover what is due them from the administrator for the receipts of the farm, we leave them without remedy for a considerable amount to which they would have been legally entitled but for the delay, which was wholly caused by the conduct of the administrator. We are aware that, as a general rule, the want of jurisdiction can be taken advantage of at any stage of the proceedings; also that, where a court has not jurisdiction of the subject-matter, jurisdiction cannot be given it by consent; but we think we do not violate this principle if we now determine that, by reason of the agreement between the parties, the continued acts of the administrator, acquiesced in, as they were, by the other parties interested, and in view of the fact that he himself invoked the jurisdiction of the orphans' court in the first instance, thus causing by his acts and conduct large expense and loss, and making ineffectual by reason of the delay any other remedy which the parties might have had to have their rights adjusted in the proper tribunal, he is estopped from now alleging want of jurisdiction in the orphans' court. What harm can result from holding him to liability in this proceeding? All the parties to be affected have acquiesced in all that has been done until the administrator found he had made a mistake in invoking the jurisdiction of the orphans' court, because he discovered that when both sides of the account were presented before the auditor there would be some balance due the widow and heirs which he was unable to wipe out by his expense account. So far as he was concerned he settled his account, including his account of the real estate, in the orphans' court, and it would seem to us to be enabling him to perpetuate a fraud on the other parties, if, at this late day, he were now permitted to have his own act in said court set aside, for no other purpose, it seems to us, than to enable him to get rid of accounting for some period of time for the proceeds of the farm. We are therefore of opinion that under the peculiar facts in this case the administrator is estopped from now raising the question of the jurisdiction of the orphans' court. We are also of opinion that where, as in this case, all the parties interested permit the real estate to be treated as assets of the estate, there is nothing to prevent the orphans' court from assuming jurisdiction of the account of the administrator with respect to such realty, especially where he himself has invoked the jurisdiction of said court.

"It has been held in Massachusetts and some other states that where there is an understanding or agreement that the administrator shall take the rents and account for them for the

benefit of the estate, in such a case the administrator would account in the probate court for such rents with the general assets, according to such agreement, but not necessarily by force of any requirement of the statute. Such is said to be a somewhat common practice. 7 Am. & Eng. Enc. Law, p. 278, note; *Stearns v. Stearns*, 1 Pick. 158, 159. In the last case it was contended that the administrators had no right to enter on real estate of their intestates, and were not by law chargeable with the rent or income in the administration account; but the court held them liable to account in that case, holding that the consent of all parties might be presumed because the administrators had voluntarily credited the rents in their first account, and the other heirs made no objection excepting as to the amount which should be credited; and the administrators continuing afterwards to occupy the land, without notice to the other heirs of any change, the latter had a right to consider they were still holding on the same terms and would be chargeable in the same manner as before. See, also, *Kimball v. Sumner*, 62 Me. 310.

"As to the other exceptions on the part of the administrator, saving the ninth, we do not think they can be sustained. We think there was evidence to warrant the auditor in all his findings of fact, and that there was evidence to warrant the disposition he made of the various items. So far as the household expenses are concerned, which the administrator claims to have paid, we think there was no evidence warranting the auditor to find any agreement for the payment of those expenses, without which he clearly could not recover them. We think, however, the auditor should have allowed something more than he did for the services of the administrator. Since we hold him chargeable with the rents, issues, and profits of the real estate, it would not, in our judgment, be too much to allow him \$300 in addition to the compensation allowed him by the auditor, as we do not think he was guilty of such fraud or misconduct as should deprive him of all compensation. The exceptions on the part of the widow and heirs are also dismissed."

G. B. M. Metzger, T. M. B. Hicks, and W. H. Spencer, for appellant. William D. Crocker, for appellees.

PER CURIAM. We are not convinced that the special facts and circumstances of this case did not justify the court below in departing from the ordinary rule, and in disposing of it as shown by the record. A careful consideration of the evidence has satisfied us that the appellant has not been unjustly prejudiced by the action of the court below, and his conduct, as found by the learned president of that court, was not such as should induce us, on any technical ground, to relieve him from the consequences of a decree of which he at least has no just reason to complain. Decree affirmed, and appeal dismissed, at appellant's costs.

(185 Pa. St. 283)

COMEGYS et al. v. RUSSELL et al.

(Supreme Court of Pennsylvania. April 4, 1893.)

APPEAL—CONFLICTING EVIDENCE.

Finding on conflicting evidence is conclusive.

Appeal from court of common pleas, Lackawanna county.

Ejectment by H. C. Comegys and others against A. B. Russell and others for certain coal beds. Judgment for plaintiffs. Said defendant Russell appeals. Affirmed.

H. M. Hannah and S. B. Price, for appellant. E. H. Shurtleff, Everett Warren, and C. Comegys, for appellees.

PER CURIAM. When this case was here before, it was said: "As against Davenport, the plaintiffs may have a good cause of action; but as against Russell, on the evidence as presented in this record, no ground for recovery appears." *Comegys v. Russell*, 175 Pa. St. 166, 173, 34 Atl. 657, 659. On this last trial the testimony was somewhat different. There was some evidence from which the jury might find that no royalties were due to support the forfeiture of the lease and the re-entry when made. There was also evidence that the plaintiffs expended time and money on the property upon the faith of the alleged declarations of the defendant that no royalties were due or demandable. This evidence was necessarily for the jury, and their finding adversely to the defendant disposes of the case.

The jury were instructed by the learned trial judge that, if the plaintiffs were entitled to recover, it must be by virtue of the lease signed January 14, 1892, and not upon the strength of any other lease or paper; and thereupon he submitted to them the question whether or not the notice of acceptance of the lease referred to that instrument. There was considerable evidence on that question, and it was necessarily and properly submitted to the jury for their consideration. There is nothing else in the case that requires special notice. Neither of the specifications of error is sustained. Judgment affirmed.

(185 Pa. St. 279)

TARRENCE et al. v. REUTHER.

(Supreme Court of Pennsylvania. April 4, 1893.)

WILL—POWER OF SALE—ADMINISTRATOR DE BONIS NON.

Under a will giving testator's property to his wife for life, and, after her death, what might be remaining to his brothers and sisters, "the shares to be paid" his sisters to be free of any control of their husbands, and authorizing his executor to sell or dispose of his real estate whenever and however it may be thought best, on death of his wife, his sole executrix,

without having exercised the power, the administrator d. b. n. c. t. a. may sell the real estate.

Appeal from court of common pleas, Montgomery county.

Case stated between Andora E. Tarrence and another, executors of Anna Evans, deceased, and Montgomery Evans, administrator d. b. n. c. t. a. of Josiah W. Evans, deceased, plaintiffs, and Henry C. Reuther, defendant. Judgment for plaintiffs. Defendant appeals. Affirmed.

The case stated, with will of Josiah W. Evans, and the opinion of the court below, are as follows:

Case Stated.

"And now, August 10, 1897, it is hereby agreed by and between the parties to the above-stated action that the following case be stated for the opinion of the court, in the nature of a special verdict: Josiah W. Evans died, in the borough of Norristown, on April —, 1855, leaving a last will and testament, duly proved before the register of wills of Montgomery county on April 25, 1855, when letters testamentary thereon were granted to his widow, Anna Evans. A copy of said will is annexed hereto, and made part hereof. The said Josiah W. Evans died seised, inter alia, of and in an undivided moiety or half interest in two brick messuages and lot of land in the city of Philadelphia (being premises Nos. 635 and 637 North Twelfth street), situate on the east side of Twelfth street, eighty-six feet eleven inches south of Wallace street, containing in front on Twelfth street thirty-four feet, and extending in depth on the north line eighty-three feet two and three-eighths inches, and on the south line eighty-two feet eight and three-quarter inches, bounded on the east by a three feet wide alley; being the moiety of the premises conveyed to said decedent by deed of Mary Pepper et al. to Josiah W. Evans and Owen B. Evans, dated March 9, 1850, and recorded in Philadelphia in Deed Book G. W. C., No. 39, page 387, etc. The said premises remained unsold at the decease of his executrix, Anna Evans, executrix of Josiah W. Evans, deceased, died on June 30, A. D. 1885, leaving a last will and testament, dated July 6, A. D. 1886, and duly proved before the register of wills of Montgomery county on July 8, A. D. 1895, when letters testamentary thereon were granted to Andora E. Tarrence and Montgomery Evans. A copy of this will is attached hereto, and made part hereof. In the distribution of the estate of Josiah W. Evans, after the decease of his widow, the executors of Anna Evans and Andora E. Tarrence, her sole residuary legatee and devisee, waived and relinquished all rights which Anna Evans had under the terms of his will in the corpus of his estate in favor of the collateral heirs mentioned therein, and all the property other than the real estate

above mentioned was distributed among such collaterals. The brothers and sisters of Josiah W. Evans are all deceased, and their descendants are numerous and widely scattered, and many of them are minors. At the audit of his estate, all the heirs who appeared requested the plaintiffs to take all necessary steps, including letters c. t. a. upon his estate, for the sale and conversion of said real estate into money for purposes of distribution. On April 23, A. D. 1897, the register of wills of Montgomery county granted to Montgomery Evans letters of administration de bonis non cum testamento annexo upon the estate of Josiah W. Evans, deceased. On May 25, 1897, the plaintiffs exposed said real estate to public auction in Philadelphia, and the defendant purchased the same for four thousand dollars (\$4,000), paid one hundred dollars (\$100) down, and signed the conditions whereby he agreed to pay the balance of the purchase money on delivery of deed, within fifteen days from date of purchase.

"The plaintiffs have tendered to the defendant a properly executed deed for the premises in question, and demanded the payment of the balance of the purchase money. The defendant has declined to accept the same, claiming that a deed by the executors of Anna Evans, deceased, and by the administrator c. t. a. of Josiah W. Evans, deceased, will not convey a good and valid title to him. The proceeds of said real estate when sold, less expenses, are to be distributed among the collateral heirs of Josiah W. Evans, deceased, whether or not, under the terms of his will, title thereto was vested absolutely in Anna Evans. If the court be of opinion that the plaintiffs have power to convey to defendant a good and legal title for said premises, then judgment to be entered in their favor, and against the defendant, for the sum of thirty-nine hundred dollars, to be paid by him upon delivery by plaintiffs of a deed for the real estate mentioned; but, if not, then judgment to be entered for the defendant. Both parties reserve the right of appeal to the supreme court."

WILL.

"The subscriber, Josiah W. Evans, of the borough of Norristown and county of Montgomery, being of sound mind and in good health, but knowing the uncertainty of life, and from the symptoms I have had for several years past, I may die suddenly, I make and publish this as and for my last will and testament, in the manner following, to wit: First. I direct my body to be decently interred in a manner corresponding with my situation in life, in such place as my friends may see proper, and that suitable grave-stones be furnished and erected, at the expense of my estate. Second. I direct all my just debts (which are but few) and funeral expenses be paid by my executor, here-

after named. Third. I give and bequeath unto my nephew Josiah, son of my brother Thomas, five hundred dollars, within one year after my decease, and the further sum of five hundred dollars within six months after the death of my wife. Fourth. I give and bequeath unto my nephew Josiah Evans Isett the sum of five hundred dollars on his arrival at twenty-one years, and also my old silver watch. Fifth. I give and bequeath unto my beloved wife, Anna, all my estate, real and personal, subject to payment of debts and the bequests aforesaid, for and during the term of her natural life, to hold and enjoy the same as fully, to all intents and purposes, as I could have done when living; and, after her decease, I give and bequeath [what may be remaining] in equal shares to my brothers and sisters, their heirs and assigns. The shares to be paid to my sisters is to be their absolute property. Their husbands shall not have any right to receive or control over it, or any part thereof. Sixth. I hereby authorize and empower my hereinafter named executor to sell or dispose of my real estate, either at public or private sale, whenever and however it may be thought best, and execute and deliver good and sufficient deed or deeds to the purchaser or purchasers for the same, to be of the same force and effect as done in my lifetime. Seventh. I hereby nominate, constitute, and appoint my dear wife, Anna, executor of this my last will and testament, giving her full and ample power to carry the same into effect, and request that she may use and enjoy said estate during her life, so as to live easy and comfortable, and enjoy herself as much as she can while living. And I further request that she nominate some suitable person as a friend and adviser to assist in carrying out the requirements of this will, provided she should think it necessary to do so. Witness my hand and seal, the twentieth day of April, in the year of our Lord one thousand eight hundred and fifty-four. J. W. Evans. [Seal.]

"Note. My signature and handwriting can be proved by several members of the bar, and by others.

"This is a codicil to be added to and taken as part of the last will and testament of me, Josiah W. Evans, which bears date the twentieth day of April, A. D. 1854, as follows, viz.: That in lieu and instead of the devise and bequest contained and set forth in my said will to my sister Elizabeth, intermarried with Jonas Reifsynder, I hereby devise and bequeath unto Jared Evans, trustee, for my said sister Elizabeth, the sum of two thousand dollars, to be invested in the purchase of real estate as a home for her, or on bond & mortgage at interest, or part in each, as to him shall seem best; the same to be for the sole and separate use of my said sister, Elizabeth, during her life, and after her death the said sum of two thousand dollars to be equally divided among her children.

Witness my hand and seal, the second day of April, A. D. 1855. J. W. Evans. [Seal.]"

Opinion.

"The will of Josiah W. Evans provides for the payment of his debts, gives some cash bequests to certain nephews, and then directs as follows: 'I give and bequeath unto my beloved wife, Anna, all my estate, real and personal, subject to payment of debts and the bequests aforesaid, for and during the term of her natural life, to hold and enjoy the same as fully, to all intents and purposes, as I could have done when living, and, after her decease, I give and bequeath [what may be remaining] in equal shares to my brothers and sisters, their heirs and assigns. The shares to be paid to my sisters is to be their absolute property. Their husbands shall not have any right to receive or control over it or any part thereof. I hereby authorize and empower my hereinafter named executor to sell and dispose of my real estate either at public or private sale, whenever and however it may be thought best, and execute and deliver good and sufficient deed or deeds to the purchaser or purchasers for the same, to be of the same force and effect as done in my lifetime. I hereby nominate, constitute, and appoint my dear wife, Anna, executor of this my last will and testament, giving her full and ample power to carry the same into effect, and request that she may use and enjoy said estate during her life so as to live easy and comfortable, and enjoy herself as much as she can while living.' The testator died, seised of and in an undivided moiety in two brick houses and lots of ground situate in the city of Philadelphia. These properties remained unsold at the death of Anna Evans, the widow and executrix of the testator. The widow, Anna Evans, by her will, gave her executors full power to sell any or all of her real estate. Her executors and Andora E. Tarrence, her sole residuary legatee and devisee, waived and relinquished all rights which their testatrix had under the terms of the will of Josiah W. Evans in the corpus of his estate. Montgomery Evans was made administrator d. b. n. c. t. a. of Josiah W. Evans. Mr. Evans, as such administrator, united with the executors of Anna Evans in the sale of the real estate above named, situate in Philadelphia.

"Will their deed convey a good title to the defendant Henry O. Reuther, the purchaser? Whether Anna Evans took a fee in said real estate under her husband's will is doubtful (*Gross v. Strominger*, 178 Pa. St. 64, 35 Atl. 852); but it is not necessary to determine her title, for we are fully satisfied that the administrator d. b. n. c. t. a. of Josiah W. Evans has full power and authority to convey a good title to the defendant. The power of sale was given to the executor virtute officii, and such power, when absolute, passes to the administrator d. b. n. c. t. a. The

will says: 'I authorize and empower my hereinafter named executor to sell or dispose of my real estate, either at public or private sale, whenever and however it may be thought best.' When and how the sale is to be made the executor shall determine. The discretion is not limited to Anna Evans nor to her as widow. The executor is given full power 'to carry the will into effect.' A sale is necessary—First, to execute the will; and, secondly, there is such a blending of real and personal estate as to clearly show an intent to create a fund out of both real and personal estate, and to bequeath the same as money. This is further shown by the direction 'to pay the shares to the sisters.' It is evident that the testator intended 'what may be remaining' should pass to his brothers and sisters as money. Under the very terms of the will, there is a necessary conversion of the real estate. *Darlington v. Darlington*, 160 Pa. St. 65, 28 Atl. 503; *Hunt's Appeal*, 105 Pa. St. 141. The facts in our case are so similar to those found in *Potts v. Breneman* (Pa. Sup.) 37 Atl. 1002, that the adjudication in that case can leave no doubt as to the power of sale in the administrator d. b. n. c. t. a. of Josiah W. Evans. If there is any difference, it is in the clearer interest on the part of Josiah W. Evans that the executor shall convert his real estate, and pay the proceeds in money to the legatees, the brothers and sisters. And now, September 20, 1897, judgment is entered in favor of the plaintiffs, and against the defendant, on the case stated, for the sum of thirty-nine hundred dollars, to be paid by the defendant Henry C. Reuther upon the delivery of a deed to him by the plaintiffs for the real estate described in the case stated."

N. H. Larzelere and M. M. Gibson, for appellant. Montgomery Evans and Louis M. Childs, for appellees.

PER CURIAM. This appeal is from the judgment of the court below in favor of the plaintiffs on the case stated. The only error assigned is the entry of judgment against the defendant. Our consideration of the facts on which the judgment is predicated, all of which are embodied in the case stated, has satisfied us that there is no error in the conclusion reached by the court below. There is nothing in the questions involved that requires discussion. Judgment affirmed.

(125 Pa. St. 250)

MURPHY et al. v. ORNE et al.

(Supreme Court of Pennsylvania. April 4, 1898.)

BUILDING CONTRACT—DELAY IN WORK—PROVINCE OF ARCHITECT.

Provision in a building contract that changes may be directed by the owner, and, in case of any such addition, such further time

shall be allowed for the completion of said work as the architect shall decide to be reasonable, and that if any question arise during progress of the work, or in settlement of accounts, it is to be referred to the architect, whose decision shall be binding on both parties, does not invest the architect, to the exclusion of the court, with authority to determine the questions what delay there was in completing the work, and whether it was caused by acts and orders of the owner, or was attributable to the contractor, in which latter case the contract required a certain amount for each day of delay to be paid the owner as damages.

Appeal from court of common pleas, Allegheny county.

Action by James A. Murphy and another, doing business as Murphy & Hamilton, against Herto S. Orne and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

The second and fifth clauses of the contract are as follows: "(2) It shall be lawful for the said party of the first part at all times to direct, in writing, any additions to or deviations from the plans and specifications aforesaid, without in any other respect or particular varying this agreement or impairing the forces thereof; and in case of any such addition or deviation, as directed in writing, such further time shall be allowed for the completion of said work as said architect shall decide to be reasonable; and such sums of money shall be added to or subtracted from the amount of the consideration hereinafter agreed to be paid as the said architect shall judge the increase or diminution in the amount of work and materials thereby occasioned to be fairly worth. And it is expressly agreed that no extras or alterations or additions of any kind shall be recognized, allowed, or paid for by said party of the first part, nor shall said first party be held liable for the same, unless the same have been expressly ordered and directed, and payments for the same expressly agreed for, in writing, by the party of the first part, or the architect aforesaid, and in case anything is shown upon the plans hereto annexed, and not particularly specified in the specification hereto annexed, or in case anything is specified, and not shown upon said plans, which is necessary to complete the work of building, the same must be done at the cost of the party of the second part, notwithstanding said omission, and in no case shall any additional payments be allowed for the same. And it is mutually agreed that the architect shall have the right to direct such changes in construction as in his judgment shall become necessary or desirable during the progress of the work, provided that the same shall involve no additional expense, and provided, also, that, in case any such change shall make the work less expensive than that required by the original plans and specifications, a proportional deduction shall be made from the contract price hereinafter agreed to be paid." "(5) If any question should arise during the progress of the work, or in the settlement of

accounts touching the same, it is to be referred to the said architect, whose decision shall be binding upon both parties."

William R. Blair, for appellants. J. S. & E. G. Ferguson, for appellees.

MCCOLLUM, J. The contract between the parties to this litigation was executed on the 9th of August, 1894, and it called for the erection and completion of the building provided for therein on the 1st of January, 1895. It contained a stipulation to the effect that for each day subsequent to the last-mentioned date, and before the completion of the building, there should be deducted from the contract price \$25. The plaintiffs' contention is that the building was finished in accordance with the contract early in May, 1895, while the defendants contend that it was not completed until some time in June of that year. The character of the work done and materials furnished by the plaintiffs in and about the erection and construction of the building is not complained of. The material dispute between the parties relates to, and arises from, the failure of the plaintiffs to complete the building within the time stipulated in the contract. The plaintiffs allege that the delay in the completion of the building was attributable to several causes, the principal of which was the piling they did by direction of and under an independent agreement with the defendants' agent. The authority of the agent to direct the piling is not disputed. It was work not included in the contract, but which, on testing the ground on which the building was to be erected, was deemed by the architect and the owners essential to a substantial and safe foundation for it. The plaintiffs claimed and testified on the trial that the piling, together with the notice they had from the city that no obstructions would be allowed on the sidewalks or in the streets during the week of the Grand Army Encampment, postponed their work under their building contract with the defendants about two months. The most serious consequence of the delay thus caused was that they were unable to commence the brick work until the 9th of November, and to complete it until the 23d of March. It was outdoor work, and good weather was essential to the prompt performance of it. From the commencement to the completion of it the weather was unfavorable, and the men employed to carry it on were not able to work more than half the time because of the cold weather and the rain and snow storms to which they were exposed. The evidence shows that during the period in which the work was done the conditions were inconsistent with, and plainly opposed to, an earlier completion of it. In addition to the matters already mentioned there were minor causes of delay for which the plaintiffs were not responsible, and which need not be enumerated here. They were mainly based on changes in, or additions to, the original contract, and were ordered by the defendants or their agents. It

should be stated in this connection that the plaintiffs attributed some of the delays to the failure of the architect to prepare the drawings to work by as soon as he should have done, and that they were thereby hindered in the prosecution of the terra cotta and other work in which such drawings were necessary. The plaintiffs' showing of the causes of the delay in the completion of the building was not fully met or answered by the evidence presented by the defendants. They alleged, however, and introduced evidence to show, that the plaintiffs' claim as to the time of the completion of the building was incorrect. On this point there was a difference between the parties of a month or more. Remington testified that when he came to Pittsburg on the 9th of March, and for a few days after that time, he had no complaint to make as to the rapidity with which the work was progressing, but that before he left he thought "they were nursing it along." He also testified that he did not remember whether he agreed with Murphy at any time to give him the final certificate for the work, but that he was positive that Exhibit No. 3 was not in any sense such a certificate. He had no connection with or supervision of the work until March 9th. Howland testified that prior to January 1, 1895, he urged the plaintiffs to greater promptness in the construction of the building, and called their attention to the time specified in the contract for the completion of it. He also testified that he had submitted his claims under the contract to the architect. He does not appear to have taken any considerable part or interest in the work, or to have given the plaintiffs any instructions in regard to it, aside from what he said to them respecting the terra cotta. We may add that, besides the oral testimony introduced by the litigants, they appealed to and gave in evidence the correspondence between them in support of their respective claims. Upon the whole evidence in the case, the single question presented for the determination of the jury was whether the delay in the completion of the building was caused by the acts and orders of the defendants or their agents. If it was, the plaintiffs were entitled to the balance of the contract price. If it was not, and all or any part of the delay was attributable to the plaintiffs, there should be a deduction of \$25 for each day covered by or included in it. The question was submitted by the court in a charge that was impartial and free from error, and the jury found that the plaintiffs were not in default. We do not find in the admission of Exhibit No. 3 any warrant for a reversal of the judgment, nor any reasonable ground for the contention that the defendants were injured by it. The undisputed evidence was that it was not a final certificate, and the jury were plainly instructed that for any delay for which the plaintiffs were responsible there should be a deduction from the balance appearing thereon, in accordance with the terms of the contract. We cannot sustain the defendants' contention that the

dispute arising from the delay in completing the building must be determined by the architect, and not by the court and jury. It appears to be based on the second and fifth clauses of the contract, but we are not convinced that either of them includes or relates to the decision of the question involved in this suit. If it was the intention of the contracting parties to invest the architect with the authority now claimed for him, it should have been expressed in plain terms. All of the assignments are overruled. Judgment affirmed.

(185 Pa. St. 280)

MUSGRAVE v. MUSGRAVE.

(Supreme Court of Pennsylvania. April 4, 1898.)

DIVORCE—DESERTION.

A wife, after leaving her husband for a short time, on account of his mean remarks as to her capacity and disposition to perform her household duties, returned to his house, but was locked out of it by him, and sent to his farm house, with the remark that it was the only place he had for her, and that he would not stay there, and "you don't get into this house any more." *Held*, that she was then justified in leaving and remaining away till he signified to her, in good faith, his willingness to receive her in his house, and award her the treatment she was entitled to as his wife, and that it could not as matter of law be said that he had done this by writing her: "Madam: I hereby notify and desire you to return to my house, which you have wilfully and without cause deserted, and resume the performance of your duties as my wife. I offer you a comfortable house and maintenance and good treatment, and, if you neglect to comply with this request, I shall be obliged to take other steps."

Appeal from court of common pleas, Allegheny county.

Action by John K. Musgrave against Sarah Jane Musgrave. Judgment for defendant. Plaintiff appeals. Affirmed.

S. Schoyer, Jr., S. B. Schoyer, and William Kaufman, for appellant. J. McF. Carpenter, for appellee.

MCCOLLUM, J. The appellant instituted this proceeding to obtain a divorce from his wife, on the ground, as he alleged, that she had wilfully and maliciously, and without reasonable cause, deserted him, and persisted in such desertion for a period of more than six months prior to the commencement of his suit. The appellee denied the charge, and demanded a trial by jury. The controlling question of fact presented by the issue thus made was whether there was a causeless, wilful, and malicious desertion of the husband by the wife. The jury found from the evidence in the case that there was not such a desertion of him by her as was charged in his petition, and, on their verdict in her favor, the judgment appealed from was entered.

The parties were married on the 9th of September, 1891, and have not lived together since the 20th of September, 1893. Very soon after their marriage, it became apparent that

their domestic relations were unpleasant, and that the husband's profane denunciations of the alleged extravagance and inefficiency of his wife in the performance of her household duties might terminate in their mutual estrangement, if not in their permanent separation. It is to his credit, however, and it is frankly conceded by his wife, that he never struck her or threatened her with personal violence. Her brief visit to the World's Fair at Chicago, in June, 1893, in company with her brother, and at her own expense, appears to have greatly displeased him; and this, together with some minor matters relating to supplies for the family, led him, soon after her return, to say to her, "I will do the providing in the house; I see you don't want to work, and you have no right in my house at all, except to sit in a chair," to which she replied, "If that's all the rights I'm to have in your house, I won't stay in it." In accordance with her reply to his unkind and unwarranted assertion or statement of her position, and probably influenced somewhat by his previous treatment of her, she left his house, and did not return to it until the 20th of September, 1893. Her return was not solicited or desired by her husband. He saw her in the house, but he did not speak to her. The table was set for supper, and he ordered his housekeeper to clear it, saying, "We don't want no supper." When she went with her child from the house to the spring where the housekeeper had gone for a pail of water, her husband was in the house, and, when they returned to it, he was sitting on the porch, and the house was closed. He refused to allow her to enter it, although her own and the baby's wraps and her purse were in the bedroom, where she laid them on her arrival in the afternoon. Her account of the occurrences of that night, including her removal at a late hour to his farm house, a mile and a half away from his home, and her description of the accommodations provided for her there, cannot be reconciled with a purpose on his part to admit her to his dwelling, or to make suitable provision for her maintenance and comfort at the place to which he sent her or elsewhere. She distinctly testified that, before she was taken to the farm house, he said to her: "The only place I have for you now is my farm. That is your place now. You don't get into this house any more." And, when she asked him if he would go to the farm with her, he said: "I will see you get there, but I won't stay there." He followed her to the farm, and, shortly after she arrived there, he returned to the house from which he had a few hours before excluded her. His conduct, therefore, was in accord with and corroborative of the testimony of his wife relating to her removal to the farm. It is obvious that his house would have been opened to receive her if he desired or intended that she should have a home with him. It was opened to him and his employees the same

night, and shortly after she was sent to the farm. If one of his farm hands had closed the house, and carried the key to the farm, without authority or direction from him to do so, he could and undoubtedly would have sent MacGregor there for the key, instead of sending him there with his wife and child. That his employé and his niece were cognizant of his purpose to exclude her from his home is apparent. His niece stayed at Donald's house that night, and Mrs. Musgrave was refused admission to it solely upon the ground that its owner or lessee, who was Musgrave's employé, did not want to offend his employer.

No good reason appears for calling in question the sincerity and good faith of Mrs. Musgrave in returning to the home of her husband. But it was at once apparent from his conduct that she was not welcome there, and it is a fair inference from the evidence that he determined to close it against her when he could do so without forcibly expelling her from it. The opportunity to carry out this intention was presented on the day of her return, and he appears to have promptly availed himself of it. Neither his own nor Blunt's explanation of the closing of the house against her was convincing or satisfactory. The conduct of the appellant was notice to his wife of his determination to exclude her from his home, and it may fairly be considered as involving his consent to her leaving him, and establishing for herself a home elsewhere. Her departure with her child from the farm house the next morning was manifestly prompted by a belief, founded upon his reception and treatment of her the night before, that he desired to get rid of her; and, so prompted, it was at least excusable, and cannot be justly characterized as a willful, malicious, and causeless desertion. Having turned her away from his home when she had returned to it with the obvious purpose of resuming the position and duties of a wife therein, it devolved on him to signify to her, in good faith, his willingness to receive her in his home, and to award to her there the treatment she was entitled to as his wife, before he could construe her absence as such a desertion, or acquire by it a right to a divorce. Whether he signified to her, at any time after her departure from the farm house, a willingness to receive her as above stated, was a question to be determined by the jury. It was fairly submitted to them, and they decided against him. If they had sustained his contention on this branch of the case, their finding would have entitled him, under the instructions they received from the court, to the divorce he sought to obtain. That their finding against him on this point was warranted by the evidence admits of no doubt. He conceded in his cross-examination on the trial that he never said a word to her indicative of a desire on his part that she should return to his home, or of his willingness to receive her

there if she was inclined to do so. He had many opportunities for consultation with her on this subject, but he showed no disposition to improve them. It is true that he wrote to her under date of November 16, 1893, as follows: "Madam, I hereby notify you and desire you to return to my house, which you have willfully and without cause deserted, and resume the performance of your duties as my wife. I offer you a comfortable house and maintenance and good treatment, and if you neglect to comply with this request I shall be obliged to take other steps. Your husband, John K. Musgrave." He relied on this letter as constituting full performance of the duty imposed on him by his conduct on the return of his wife to his home on the 20th of September, 1893. It will be observed that the letter was more in the nature of a command than of an invitation; that it charged her with having willfully and without cause deserted his home; and that it might fairly be interpreted as containing an intimation of a purpose on his part to institute proceedings for a divorce if she neglected to comply with his request. It was, however, proper for the consideration of the jury, in connection with the oral evidence bearing upon the question to which it related. We think, upon due consideration of the assignments of error, that the appellant has no just cause to complain of the general charge, or of the answers to his first and third points. We therefore overrule all the assignments. Judgment affirmed.

(135 Pa. St. 369)

**CARGILL v. PHILADELPHIA TOWEL
SUPPLY & LAUNDRY CO., Limited.**

(Supreme Court of Pennsylvania. April 4,
1898.)

CASE FOR JURY—CONFLICTING EVIDENCE.

A case depending on questions of fact, as to which the evidence is conflicting, is properly left to the jury.

Appeal from court of common pleas, Philadelphia county.

Action by Katie Cargill, Jr., by her mother and next friend, Katie Cargill, Sr., against the Philadelphia Towel Supply & Laundry Company, Limited. Judgment for plaintiff. Defendant appeals. Affirmed.

William Grew and Alex. Simpson, Jr., for appellant. A. S. Ashbridge, Jr., for appellee.

STERRETT, C. J. This action of trespass, against the limited partnership association defendant, was brought to recover damages for personal injuries alleged to have been suffered by the plaintiff in consequence of certain negligent acts of omission and commission of the defendant, specified in the statement. Among other things, it is therein averred: That in May, 1895, the association defendant, then engaged in the laundry business, employed plaintiff "to shake out tow-

els." That a week thereafter she "was taken from the employment of shaking out towels, for which she had been hired, and put by defendant to work on a machine known as a 'mangle,' without having been given proper instructions how to work the said machine; and shortly after her employment on the said mangle her left hand was caught therein, and drawn by the hot rollers up to the elbow, and the hand and arm were crushed and burned so that the same were rendered useless forever." That said injuries were caused by the defendant's negligence in the following particulars: (1) In taking the plaintiff, who was then a minor, from the employment for which she was hired, and putting her to a more dangerous employment, without having given her proper instruction as to the danger of the new employment, or as to the manner in which she should work upon said machine. (2) Said machine was negligently maintained by defendant, in that the protection or guard which should have been in place to prevent plaintiff's hand from being drawn into said mangle had been suffered and permitted by defendant to be and remain away from its proper place. (3) Defendant took none of the ordinary and reasonable means to prevent the accident and injury to plaintiff while working on said machine. The statement then concludes with averments as to the character and extent of plaintiff's injury, the serious consequences that have resulted and are likely to result therefrom, etc. Each of the foregoing averments of negligence was denied by the defendant, and thus the issues of fact were formed.

It is not our purpose, nor is it necessary, to either summarize or review the somewhat voluminous testimony that was given on the trial. As to the general character and serious consequences of plaintiff's injury, there was practically no conflict of testimony. As to the alleged negligence of the defendant, etc., it is sufficient to say that the evidence on behalf of the plaintiff tended to sustain her averments, while that of the defendant tended to show the contrary. In brief, the evidence relating to the subjects of negligence, contributory negligence, etc., was more or less conflicting; and thus material questions of fact were presented, that were necessarily for the consideration of the jury. It is impossible to review the testimony without being forced to the conclusion that it involved disputed questions of fact, which the court was bound to submit to the jury for their determination; and that was done by the learned trial judge, in a clear and adequate charge, that was quite as favorable to the defendant as it should have been. The only complaint that defendant makes is that he refused to withdraw the case from the jury by instructing them that "under all the evidence the verdict must be for the defendant." Four of the five points for charge submitted by defendant, and affirmed by the learned

judge, are predicated of facts that were necessarily for the jury. In the first, they were instructed that "If the plaintiff went to work upon the mangle of the defendant, and continued at that labor, without objection upon her part, she took the risk attendant upon the work, and cannot recover unless it is proven that defendant was negligent in not providing proper machinery for the work, or that the machine was defective, or not in good working order." In the second, they were instructed that if the mangle upon which plaintiff was at work was defective, or not in proper working order, it must be shown affirmatively that the attention of the defendant company was called to that defect, and it refused or neglected to remedy it. In affirming the third point, the jury were instructed in the words thereof: "If the mangle in which the plaintiff was injured was reasonably safe, according to the usages, habits, and ordinary risks of the business in which defendant was engaged, the defendant is not liable for an accident occurring thereon, and the verdict must be for the defendant." As to the facts of which these instructions are predicated, there was considerable testimony, but it was more or less conflicting, and therefore for the exclusive consideration of the jury; and their verdict shows conclusively that the facts referred to were not found as claimed by the defendant. Without pursuing the inquiry further, it is very evident that the plaintiff's case depended on questions of fact, which the court was bound to submit to the jury. That was carefully and impartially done, and the result was that the controlling facts were determined in favor of the plaintiff. It follows from what has been said that the judgment entered on the verdict should not be disturbed. Judgment affirmed.

(186 Pa. St. 323)

SCHLAGER v. TEAL et al.

(Supreme Court of Pennsylvania. April 4, 1898.)

SURETIES—DISCHARGE.

Surety on a judgment note is not discharged by the debtor, without the knowledge of the surety, after maturity of the note, giving the creditor his individual note with subsequent renewals for the amount of the first, in response to a letter of the creditor stating that he had to raise some money; that he would have the debtor's note discounted if it were not overdue; that if the debtor would send him his note due in four months, with a good indorser, he would return the note he had, or the debtor could send him his note without an indorser, and he would continue to hold the note he had as collateral, with an agreement that, when either was paid, the other was to be surrendered; and that he could not use anything longer than four months' paper, but, when it came due, it could, if necessary, be renewed,—it being testified by the creditor that it was agreed between him and the debtor that the giving of the note for purpose of discount should not impair, but be collateral to, the judgment note, and that he never agreed to extend the time of payment of the judgment note.

Appeal from court of common pleas, Susquehanna county.

Action by A. J. Schlager against Edwin E. Teal and Charles Schlager. Judgment for plaintiff. The court refused to open the judgment except in part, and defendant Schlager appeals. Affirmed.

The opinion of the court below is as follows (Searle, J.):

"Rule to show cause why judgment should not be opened, and Charles Schlager, one of the defendants, let into a defense. This judgment was entered upon a sealed note containing confession of judgment, signed by Edwin Ernest Teal, Charles Schlager, and Charles Schlager, dated February 1, 1889, payable three years after date, given for \$5,000; upon it indorsements as follows: February 1, 1890, received on within \$300, interest for one year; February 1, 1891, received on within \$300, interest for one year; February 1, 1892, received on within \$300, interest for one year; February 1, 1893, received on within \$300, interest for one year; July 1, 1893, received on within \$125, interest to July 1, 1893. The judgment was entered September 24, 1896, upon a præcipe directing judgment to be entered for \$4,337.50, with interest from July 19, 1896.

"The evidence shows that the note upon which this judgment was entered was given by E. E. Teal in lieu of a note of same amount held by said A. J. Schlager, signed by said Teal, which was taken up; that Charles Schlager, a resident of Binghamton, N. Y., and Charles Schlager, a resident of Scranton, Pa., both signed said note as sureties; that, shortly after the giving of said note, Charles Schlager of Binghamton died; that the plaintiff, A. J. Schlager, is one of the executors of the will of the said Charles Schlager, who was his brother. February 18, 1887, said E. E. Teal and wife assigned to said A. J. Schlager two endowment policies on the life of said E. E. Teal, one for \$2,000, and one for \$3,000. The terms of said assignment were as follows: 'In trust, first, to pay himself any indebtedness to him from Edwin E. Teal, the insured, existing when the policy becomes a claim; and, secondly, to pay the remainder, if any, to the said Edwin E. Teal, his executors, administrators, or assigns, with full power to said trustee to surrender said policy to the said company, if said company consents thereto, for paid-up insurance,' etc. At the time these policies were assigned to said A. J. Schlager, he held the promissory note of said E. E. Teal, for which the note upon which this judgment was entered was given, and said policies were assigned by said Teal as collateral to said indebtedness. At the time said Charles Schlager of Binghamton and Charles Schlager of Scranton signed this note as sureties upon which this judgment was entered, they knew that these policies had been assigned to said A. J. Schlager as security for the in-

debtedness, and never consented to the appropriation by A. J. Schlager of the proceeds of the surrender of the same to the payment of other indebtedness of said Teal to said Schlager. In the spring of 1896, E. E. Teal being insolvent and being indebted to said A. J. Schlager to the amount of \$1,500 in excess of the indebtedness represented by the note upon which this judgment was entered, by an arrangement between said A. J. Schlager and said Teal, \$1,316 was obtained upon the policies from the insurance company, and applied upon this \$1,500 indebtedness, without the knowledge or consent of said sureties, and this indebtedness of said Teal to Schlager of \$1,500 having been contracted subsequent to the maturity of the note upon which judgment was entered. On the 28th of June, 1893, subsequent to the maturity of this judgment note, A. J. Schlager wrote to said Ernest E. Teal as follows: 'Dear Ernest: I ought to have written you before, but have been away from home, and so have not reached it. The facts of the case are that I have got to raise \$5,000 by the first of July. Would have your note to me for that amount discounted, except that I cannot, as it is overdue. Now, will you send me your note dated July 1st, due in four months, with a good indorser, and I will return the note that I have? Or you can send me your note without an indorser, and I will continue to hold the note that I have as collateral, with an agreement that, when either is paid, the other is to be surrendered. Make the note four months, with interest, as I cannot use longer paper, and, when it comes due, if necessary, it can be renewed. Please attend to this at once, so that I can get it in time. Yours, truly, [Signed] A. J. Schlager.' In answer to this proposition, E. E. Teal sent his promissory note for \$5,000, dated July 1, 1893, payable to the order of A. J. Schlager, at the Binghamton Trust Company, Binghamton, N. Y., four months after date. This note was indorsed by said A. J. Schlager, and discounted at the City National Bank of Susquehanna. This note was renewed from time to time by note of E. E. Teal for same amount, Teal paying the interest on same until November, 1895, when the last \$5,000 note was taken up by notes of Teal,—one \$4,000, due four months; one \$500, due ninety days; one \$500, due sixty days. The \$500 note due sixty days was paid by Teal. The other \$500 note, when due, was taken up by two notes of Teal each for \$250, one payable twenty-five days, the other thirty-five days. February 17, 1896, the \$250 note payable in twenty-five days was paid by Teal. The other \$250 note was renewed February 25th, and afterwards, together with the \$4,000 note, paid by A. J. Schlager. The \$750, represented by the \$500 note and the \$250 note, both having been paid by Teal, were deducted from the note upon which judgment was entered by the præcipe directing judgment to be entered for

\$4,337.50. The note upon which judgment is entered shows indorsements of interest to July 1, 1893. The præcipe directing judgment to be entered for \$4,337.50 would indicate not only a credit of the \$750 paid by these notes, but also a credit of interest to July 19, 1896, as paid by the payments of interest on this \$5,000 promissory note of Teal's, at its several renewals. There is no evidence that either of the securities had knowledge of the giving and renewals of these promissory notes by E. E. Teal to A. J. Schlager, and it must be taken as a fact that they had no knowledge of the same. A. J. Schlager testifies that 'it was distinctly agreed between Mr. Teal and myself that the giving of this bank note should not in any manner impair the judgment note, but that this should be collateral to the judgment note. I have never agreed to extend the time of payment of the judgment note in any manner, nor have I done anything that would prevent me from proceeding to collect said note at any time, had Charles Schlager requested or notified me to collect the money due on it.' Mr. Charles Schlager testifies that he had no knowledge of the giving of these promissory notes, or of any extension of time. Mr. E. E. Teal testifies in answer to question as follows, regarding giving of promissory note July 1, 1893: 'Q. The first promissory note of July, 1893; state whether that was given as an extension of the time of payment of note of February 1, 1889. A. It was given for that loan. Q. Well, it extended the time of payment, did it not? A. Yes, sir.' The learned counsel for defendants claims that the sureties upon this judgment note were released—First, by reason of the acceptance by plaintiff of the note of the principal, E. E. Teal, for the same amount, dated July 1, 1893, due in four months, the discounting of the same, and the subsequent renewals, taken in connection with the letter of plaintiff to Teal, dated June 28, 1893, and the testimony of E. E. Teal, as above; second, that plaintiff having received the assignment of the endowment policies upon the life of said Teal, as collateral to the indebtedness secured by the judgment note, and having afterwards received, on account of the same, \$1,316, the sureties are discharged pro tanto.

"Counsel for plaintiff claims that plaintiff never agreed to extend the time of the note upon which judgment was entered, and that he accepted the note of July 1, 1893, and its subsequent renewals, upon the express agreement that it should not in any manner impair the judgment note, but that it should be collateral to the judgment note; second, that the assignment of the endowment policies was, as expressed in written assignment upon the same, 'in trust to pay himself any indebtedness to him existing when the policy becomes a claim,' and that the plaintiff had a right to appropriate the avails of said policies to any debt of the assignor, Teal, and

that the sureties in this judgment note were not prejudiced thereby.

"In *Hagey v. Hill*, 75 Pa. St. 110, it was held that an extension of time by a valid agreement between the creditor and principal will, as a general rule, discharge the indorser, but that, if the agreement for delay expressly saves and reserves the right of the holder in the intermediate time against the indorser, it will not discharge the latter, and this when the agreement was made without the knowledge of the indorser. If the creditor gives time without reserving the right to pursue the indorsers, he discharges them. The agreement to pay usurious interest before a note becomes due, or the payment made subsequent to the maturity of a note, is not sufficient consideration for a contract to give further time, and will not discharge a surety. *Hartman v. Danner*, 74 Pa. St. 36. To discharge a surety, there must be an agreement to extend the time of payment which is enforceable against the plaintiff. *Shaffstall v. McDaniel*, 152 Pa. St. 598, 25 Atl. 576. E. E. Teal, the principal defendant, testifies in this case. Nowhere in his testimony is there any mention of an agreement on the part of the plaintiff to extend the time of payment of this note other than as set forth in the letter of plaintiff of June 28, 1893. In answer to a question by his counsel of whether the note of July 1, 1893, was given as an extension of time of payment of note of February 1, 1889, he replied, 'It was given for that loan.' And in answer to the question, 'Well, it extended the time of payment, did it not?' he replied, 'Yes, sir.' The plaintiff testifies, not only that there was no agreement to extend the time of payment, but also 'that it was distinctly agreed between Mr. Teal and myself that the giving of this bank note should not in any manner impair the judgment note.' Under the rules applicable to the weight of evidence necessary to open judgments, I do not think that there is sufficient evidence to authorize the opening of this judgment, upon the ground that Charles Schlager, the surety, has been discharged from liability by the giving of the promissory note and renewals thereof to A. J. Schlager by E. E. Teal, under the circumstances established by the evidence.

"As to the surrender of the endowment policies upon the life of E. E. Teal held by A. J. Schlager, while the written assignments show that they were to pay any indebtedness of Teal to Schlager existing when the policies became a claim, it is an undisputed fact that, when they were assigned to A. J. Schlager, the only indebtedness of Teal to Schlager was the \$5,000 for which this judgment note was subsequently given; that the sureties signed the note with knowledge that A. J. Schlager held these policies as collateral to the indebtedness of which they became sureties; and that they never consented to the appropriation of this collateral to the payment of other debts of the princ-

pal, Teal. They were entitled to have the money received upon the endowment policies applied upon the note for which they were sureties. Plaintiff admits that he received upon the endowment policies \$1,316, July 31, 1896. The sureties are therefore entitled to have this judgment opened as to this amount. It is therefore ordered that the judgment in this case be opened as to Charles Schlager, and he be let into a defense to the amount of \$1,316 and interest thereon from July 31, 1896, and that the rule to show cause be discharged as to the remainder of the judgment."

Edward N. Willard, Everett Warren, and Henry A. Knapp, for appellant. McCollum & Smith, for appellees.

PER CURIAM. This was a rule to show cause why the judgment in question should not be opened, and Charles Schlager, one of the defendants, let into a defense. After a careful consideration of the evidence presented by the parties, the learned judge of the court below "ordered that the judgment * * * be opened as to Charles Schlager, and he be let into a defense to the amount of \$1,316, and interest thereon from July 31, 1896, and that the rule to show cause be discharged as to the remainder of the judgment." From that decree, Charles Schlager appealed, and assigns as error the refusal of the court "to open the judgment in its entirety as to" him. The only question, therefore, is whether the appellant was entitled to further relief than that granted him by the above-recited order. Our consideration of the evidence has satisfied us that he was not. The conclusion embodied in the decree of the court below is correct; and the decree is accordingly affirmed, and appeal dismissed, at appellant's costs.

(186 Pa. St. 350)

In re HOWELL'S ESTATE.

Appeal of FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO.

(Supreme Court of Pennsylvania. April 4, 1898.)

WILLS—POWER OF APPOINTMENT.

A power of appointment conferred on testator is exercised by his will devising and bequeathing all his estate, both real and personal, "according to the intestate laws of the state"; Act June 4, 1879, declaring a general gift of the real or personal estate of a testator shall include any estate over which he has a power of appointment.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of William Howell, deceased. From the decree of the orphans' court dismissing exceptions to the adjudication of the auditing judge on the fourth account of the trustees under the will of said deceased, his surviving children and said trustees appeal. Affirmed.

The adjudication of the auditing judge is as follows: "William Howell, by his will, directed his trustees to divide his residuary estate into as many equal shares as he should have children, and issue of deceased children, living at his death (the issue standing in the place of the parent), and to pay the net income to each for life, and at their death, respectively, to pay the share of the one dying to such person or persons, and for such estates and purposes, as he or she should appoint by will; and, in default of such will, then in trust for the children and issue per stirpes of the one so dying. For the purpose of settlement of his estate, he authorized the trustees, in their capacity either of trustees or executors, to sell or let on ground rent all or any part of his real estate, except what was restricted, and to invest and apply the proceeds in the same manner as directed with regard to the estate from which the moneys were derived. The language of the testator was: 'All the residue of my estate * * * to divide into as many equal parts or shares as I have children living at the time of my decease, and the issue of any child or children then deceased, the issue of such deceased child representing one share, with power to hold the real estate in common, as hereinbefore provided, and the said several shares to dispose of as follows; that is to say, as respects each share represented by the issue of a deceased child to hold in trust for such issue, and their respective heirs, executors, or administrators in the same proportion as if the said issue had inherited the same from such child under the intestate laws of Pennsylvania, and, as respects the share represented by my living children, to hold the same in trust, to let, demise the real estate, and to invest and keep invested the personal estate in good mortgage security or in the purchase of well-secured ground rents, and to collect the rents, issues, and interest thereof, and to pay the net income to each of my children,' etc. The testator died April 20, 1889, leaving surviving seven children, Anna J. H. Hanson and William H. G. Howell (who were children by his first wife), and Kate A. McCreary, Isabel H. Gest, Ella Howell, Edgar C. Howell, and Charles B. Howell. Charles B. Howell, one of the children, died January 13, 1897, leaving a will worded thus: 'I, Charles B. Howell, do hereby make this, my last will and testament, devising and bequeathing all my estate, both real and personal, according to the intestate laws of the state of Pennsylvania, and appointing Samuel Y. Heebner, a director of the Market Street National Bank, and my beloved wife, Anna M. Keir Howell, my executors, with full powers.' He left surviving his said wife, but no issue. Whether the will of the son worked a valid execution of the power conferred by the original testator was the question which was submitted at the audit. It was conceded

that, as a preliminary to its exercise, no reference to the power was needed in the will; but it was argued that the donee, having given his property according to the intestate laws, excluded the property over which he had simply a power to appoint, because these laws affected only the property which was actually owned by the decedent himself. This argument cannot hold good in England, nor in those states of our Union where the property covered by a general power of appointment is so far assets of the donee's estate that the exercise of the power may be enforced in favor of creditors. But the act of June 4, 1879, explicitly declares that a general gift of the real or personal estate of a testator shall be construed to include any estate over which he has a power of appointment. When, therefore, the donee of the power devised and bequeathed his estate, he devised and bequeathed as well the estate covered by the power; and, when he gave this joint estate according to the intestate law, he gave it to those persons who, according to that law, would have taken his own estate, and who in this instance are his widow and collateral kindred. The fund embraced by the account, it was stated, consists in part of the proceeds of sale of realty sold under the power in the will of the father. All of the sales were effected during the lifetime of Charles B. Howell. The power of sale conferred by the will was a naked authority to sell for the convenience of settlement, but it did not contemplate (the auditing judge thinks) a conversion, for the reason that it was followed by a gift of the residue, of which the real estate was to be held in common by the issue of any deceased child, and the shares of living children were to be held in trust to demise and to collect and pay over the rents, etc. In *Ackroyd v. Smithson*, 1 Brown, Ch. 503, it was held that, in order to oust the heir, the mere intent to convert for the purposes of the will is not sufficient. There must be also the intent to give the product of the sale as personalty, at all events, and whether the purpose fails or not. These proceeds came to Charles as real estate, and on a second transmission would pass as personalty; but he had the right by his will to give them either as personal or real estate. He recognized them as real estate because they bore that character when he made the will in which he disposed of his real estate." "And now, June 26, 1897, the account of the trustees was referred back to the auditing judge, and on reconsideration it is determined that the fund for distribution is to be treated wholly as personalty, and that the share therein of Charles B. Howell passed under his will as personalty."

John M. Gest and John G. Johnson, for appellants. Horace M. Rumsey, for appellee.

PER CURIAM. The questions presented by this appeal were rightly decided, and for

reasons given by the learned auditing judge, whose conclusions were approved by the court in banc, the decree should not be disturbed. Decree affirmed, and appeal dismissed, at appellants' costs.

(185 Pa. St. 285)

STREITFELD v. SHOEMAKER et al.

(Supreme Court of Pennsylvania. April 4, 1898.)

NEGLECT—COLLISION OF TEAM AND PEDESTRIAN
—EVIDENCE.

The questions of negligence and contributory negligence are for the jury where a boy, on coming to a street, looked up and down it, and, seeing a team coming "some distance away," started across; and, when on the crossing, was struck by the team, before knowing of its proximity; there being conflicting evidence as to the speed of the team, and testimony that the driver paid no attention to the hallooing intended to prevent the accident, and did not check his speed at the crossing.

Appeal from court of common pleas, Philadelphia county.

Action by Henry Streitfeld, by his next friend and father, Adolph Streitfeld, against Robert Shoemaker and others, for injury to plaintiff by being run over by defendants' team. Motion to take off nonsuit was denied, and plaintiff appeals. Reversed.

William W. Ker, for appellant. J. Howard Gendell, for appellees.

MCCOLLUM, J. We think the learned court below erred in entering and refusing to take off the nonsuit in this case. The plaintiff, at the time of the occurrence on which the suit is based, was 13 years old, and going from his home to his school. When he came to Third street, he looked up and down it, to see if any wagons or cars were approaching, and he saw a wagon coming up the street, and "some distance away." He then started to cross the street, and while upon the crossing, and between the tracks of the street railway, he was run over by a team and heavy truck wagon of the defendants, in charge of their driver, and seriously injured. He testified on the trial that he did not know what struck him, and that after he was struck, and until he was picked up by a policeman, he was unconscious. The attention of several persons was drawn to the occurrence by the hallooing obviously intended to prevent it. Two persons saw the plaintiff when he was struck by the horses, and others saw him after he was struck by them, and when his leg was crushed by the wagon. There was some discrepancy in the evidence relating to the speed of the horses. Mullen said that the wagon was not going fast or slow when he saw it. Higgins said: "The horses were jogging along. They were not exactly trotting. They were going pretty good." Croft, when asked whether the wagon was going fast or slow, said, "It was going pretty fast;" and, to the question whether the horses were going fast when the

boy was struck, he replied, "The horses were going along at very good speed." It is undisputed that the horses were not stopped until the wagon reached the north crossing.

The foregoing summary fairly presents, we think, the evidence on which the court held that the plaintiff was negligent, and the defendants' driver was not. In so holding, the court evidently assumed that the driver exercised proper care in approaching and passing over the crossing, and that "it is negligence for any one to cross in front of a moving vehicle of any kind." This assumption, however, ignored material facts shown by the evidence. The plaintiff was not a trespasser on the crossing. On approaching it, he looked up and down the street to see whether there was anything to interfere with his passage over it. The wagon that he saw coming up the street was "some distance away." He manifestly supposed he could safely cross the street, and he had reached the center of it when he was run over. The bare fact that he was run over was not conclusive proof of negligence. The evidence did not present a case in which a boy darted suddenly in front of a moving vehicle, or was injured in crossing the street between the crossings provided for pedestrians. It is a case which closely resembles *Schmidt v. McGill*, 120 Pa. St. 405, 14 Atl. 383. In that case, as in this, the driver paid no attention to the hallooing intended to prevent the occurrence which was the subject of the suit. He did not check the speed of his team at the crossing, and the plaintiff did not know of its proximity until struck by the pole of his wagon. Both parties to the occurrence had the right of way, and both were required to use care. It was said by Judge Biddle in his charge to the jury in the case above cited that "there is no obligation on the part of persons driving along the public streets to haul up their horses, and stop at every crossing. Nor must people look in every possible direction for vehicles approaching, and cipher out how long it will take them to arrive at the crossing. Each must exercise reasonable and ordinary care. Of course, more caution must be used at crossings than at other parts of the highway, for that is where the stones are placed to cross. The obligation is mutual." This is a clear and sensible statement of the obligation of persons driving along the streets, and of pedestrians in passing over the crossings provided for their accommodation. The former are not required to stop at every crossing, nor the latter to refrain from passing over it on seeing a team approaching at an ordinary gait a square away; but each must exercise the care which the circumstances obviously demand. In the case at bar there was not a scintilla of evidence showing any obstruction to the driver's view of the crossing, or of the plaintiff, after he started to cross the street upon it. It was the duty of the driver, upon approaching the crossing, to notice whether any person or persons were in the way of his passage over it, and the omis-

sion to do so would constitute a want of ordinary care. If he discharged his duty in this particular, would he not have seen the plaintiff on the crossing near to or between the tracks of the railway on which he was driving? If, having seen the plaintiff there, he made no effort to avoid the occurrence, when it was practicable to do so, he disregarded an equally plain duty.

We think the court was not warranted by the evidence in holding that there was no negligence on the part of the driver, and that the occurrence in question was attributable to the negligence of the plaintiff. The questions of negligence were fairly raised by the evidence, and it was the province of the jury to decide them. Whether the driver, in approaching and passing over the crossing, exercised the care required by the circumstances, is a question arising from the evidence, and not determinable by the court; and, in view of the evidence and the age of the plaintiff, the question of his negligence was clearly for the jury. The assignment of error is sustained, and the judgment is reversed, with a procedendo.

(185 Pa. St. 359)

In re RUDY'S ESTATE.

Appeal of HUDSON.

(Supreme Court of Pennsylvania. April 4, 1898.)

WILLS—CONSTRUCTION—CONVERSION—RIGHTS OF LIFE TENANT.

1. Under a will giving to testator's wife, for life, the income of his estate, and authorizing the executors at her death to sell the realty, and divide the proceeds between testator's two children, S. and G., "if they be living, or the issue of such of them as may then be deceased," G. having died before testator, unmarried, and S. having died before testator's widow, leaving a husband and two sons, one of whom also died during the life tenancy, leaving a widow, there is no conversion, the purpose thereof (a division between testator's two children) having failed; so that the lapsed shares devolve in their original character, the real estate to the sole heir, the remaining grandson, subject to the life estates of the father and the brother's widow.

2. A life tenant in an undivided fourth of realty has not such interest as will entitle him to a sale, and a division of the proceeds.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Henry Rudy, deceased. From a decree dismissing the petition of Samuel M. Hudson, praying for a sale of the real estate of deceased, and a division of the proceeds, he appeals. Affirmed.

The opinion of the court below is as follows:

"The testator gave to his wife the income for life of his residuary estate, and at her death he authorized and empowered his executors to sell the residuary realty, and to divide the proceeds of its sale equally between his two children, Sarah K. and George

W. Rudy, 'if they be living, or the issue of such of them as may then be deceased.' He died in 1878. George W. died in testator's lifetime, unmarried and without issue. The widow died November 30, 1895. Sarah K. died before the widow, but after the testator, leaving her husband and two sons to survive her. One of the sons died during the life tenancy, leaving a widow. The husband of Sarah petitioned for an order of sale of the realty, and a division of the proceeds. Had he an interest in the estate, and, if he had, was it an interest which qualified him to ask for the sale? This question involves the preliminary inquiry as to the character of the estates given to the children. Were they vested or contingent interests? The word 'if,' in the language of the gift, 'if they be living,' undoubtedly imports a contingency; yet the context may show that the contingency was not a condition precedent to the vesting, but a condition subsequent, which would operate merely to defeat an already vested estate. Thus, in *Andrew v. Andrew*, 1 Ch. Div. 410, A. devised land to T. for life, and from and after his death to his eldest son, if he should have attained the age of twenty-one, and, in default of T.'s having a son, then over T. died, leaving one son, a minor. It was held that 'from and after' meant an immediate gift at the death of the life tenant, and that the son took a vested estate in fee, subject to be divested by his death while a minor. In *Alexander v. Alexander*, 16 C. B. 59, however, where the gift was to A., the son, for life, and from and after his decease to A.'s second son, on his attaining twenty-one, and, in default of there being a second son, then over, the decision was that the remainder to A.'s second son, who died in his minority, was contingent. In Pennsylvania the rule is well established that, where the persons who are to take must be living at a certain time, the gift is contingent, because until the time arrives the persons who will answer to that description cannot be ascertained. Hence a gift to 'such of his children as might then be living' (*McBride v. Smyth*, 54 Pa. St. 245), or to a child, for life, and after her death to 'all her children then living' (*Buzby's Appeal*, 61 Pa. St. 111; *Delbert's Appeal*, 83 Pa. St. 462), has been esteemed contingent. It is difficult—perhaps it is better to say impossible—to harmonize the latter cases with *Crawford v. Ford*, 7 Wkly. Notes Cas. 532, and *Laguerenne's Estate*, 12 Wkly. Notes Cas. 110, where the gift at the end of the life estate was to 'all my children who shall be then living, and the lawful issue of such as shall be dead,' or *Manderson v. Lukens*, 23 Pa. St. 31, to 'be equally divided among his children which should be then alive,' and *Womrath v. McCormick*, 51 Pa. St. 507, where the estate was to 'be divided into as many parts as testator should then have children living, and

be given to his living children, and the issue of those dead,' in all of which cases the estates were held to be vested. In this instance the scale vibrates about evenly.

'If, by the phrase 'if they be living,' a qualification is annexed to the person, without fulfilling which he will be ineligible to take, the gift is uncertain until the condition is met, and is necessarily contingent upon the fact of his living. If, however, it is used to mark the time when the estate shall vest in possession, so that the children are to take an estate descendible to their issue, which is to be enjoyed by the children at the death of the life tenant, or by the heirs of their body if they shall be dead, it carries a vested interest. This was the doctrine of *Richardson's Appeal* (Pa. Sup.) 6 Atl. 204, where the gift was, after the wife's death, to the children, by name, 'and, if any of my said children be deceased,' the share shall go to his issue. The assumption that the interests were vested is favorable to the petitioner. If they were contingent upon the survival of the life tenant, the only party who by possibility would take was the surviving grandchild. The scheme of the will was to work a conversion. The stock and fixtures in trade of the testator were ordered to be sold, and their proceeds, together with the proceeds of sale of two specified houses, were directed to be applied to the payment of his debts, and finally the moneys from the sale of the remaining real estate were to be divided among his children. The lapsed share of George, if it was personalty, vested, as to one-third, in testator's widow, and as to the balance in Sarah, as testator's next of kin, and at her death in her two sons. When one of them died, the widow of the son was entitled to one-half, and the father to one-half absolutely. But the intention to effect a sale was auxiliary to another and paramount intention,—to effect a convenient transmission of testator's property to the devisees. The one intent affected the means, and the other the end; and if, for any reason, the means were useless towards attaining the end, the lesser intent should be discarded. The purpose of a sale, and therefore of a conversion, was that the estate might be divided. If there was no necessity for a division, the purpose fell, and the estate remained unconverted. In the famous argument of Mr. Scott, afterwards Lord Eldon, which was adopted by the chancellor in *Ackroyd v. Smithson*, 1 Brown, Ch. 503, it was shown that, in order to oust the heir, there must be, not only an intention to convert the real estate for the purposes of the will, but also to give the product of the sale as personalty, at all events, and whether the purpose takes effect or not. In that case the testator ordered his real and personal estate to be sold, and he gave the net proceeds to legatees, two of whom died in his lifetime. The lapsed shares, so far as

they consisted of personalty, went to the next of kin, and, so far as they were constituted of realty, went to the heirs at law. This doctrine that real estate directed to be converted in order to subserve a purpose will be treated as personalty for that purpose, but will remain unchanged as to all beyond what that purpose requires, was upheld in *King v. King*, 13 R. 1. 501, and *Craig v. Leslie*, 3 Wheat. 581; and those cases were followed by this court in *Worsley's Estate*, 36 Wkly. Notes Cas. 247. Where the purposes of the conversion have totally failed the property will devolve according to its original character. Blsp. Eq. § 315. This retention of the quality of an estate which the testator intended to transmute into another and different quality may work a radical change in the interests of his beneficiaries. But that consideration can have no weight when we reflect that what has happened was outside of his contemplation altogether. He supposed that more than one person would share the residue, or he would not have ordered the sale and division of that residue. How can we, with any show of propriety, speculate upon what, if he had foreseen the actual event, he would or would not have done, either by way of preferring the heir, on the one hand, or the next of kin, on the other? The share which is in controversy lapsed by operation of law. Its disposition cannot be referred to the intention of the testator, because he had no intention with regard to it. It must be determined by the law, to which his silence on the point has relegated it. The case, then, is simply this: At the death of George W. Rudy, his share vested in Sarah K. Rudy as sole heir of the testator; but, inasmuch as her estate did not vest in possession, living the life tenant, her husband could not at her death take as tenant by the curtesy. Her two sons succeeded to her estate, and, on the death of one of them, the survivor, subject to the life interests of the widow and father, took the lapsed share as heir, and the residue as sole devisee. The fee therefore centered in him as the one owner, and the direction to divide fell, because it is impossible to sever what is indivisible. The petitioner as life tenant in one-fourth of the realty, has certainly not such an interest as will entitle him to a sale."

George D. Hay, Allen H. Gangewer, and Gilbert & Atkinson, for appellant. B. Gordon Bromley and J. Percy Keating, for appellees Real-Estate Title-Insurance & Trust Co. and Wilbur F. Hudson.

PER CURIAM. We find no error in the decree from which this appeal was taken. The questions involved were fully considered and correctly disposed of by the court below; and for reasons given in its opinion the decree is affirmed, and appeal dismissed, at appellant's costs.

(97 N. H. 341)

MEAD et al. v. WELCH et al.

WELCH et al. v. MEAD et al.

(Supreme Court of New Hampshire. Merrimack. March 17, 1893.)

CONTRACT—RESCISSION—RESTORATION OF BENEFITS.

Employés who had performed services under a contract which they were induced to make by fraud might rescind the contract, and recover the reasonable value of their services, without restoring a sum advanced to them on the contract, where such sum was less than the reasonable value of the services performed.

Exceptions from Merrimack county.

Assumpsit by Mead, Mason & Co. against Charles Welch and John Welch for breach of contract and for the recovery of \$50 paid thereunder, and by Charles Welch and John Welch against Mead, Mason & Co. to recover \$254.25 as the reasonable value for services rendered. Verdict for Charles Welch and John Welch in both cases. Mead, Mason & Co. except. Judgment on the verdicts.

The first action is founded upon a breach of a written contract by which the defendants agreed to render certain services for the plaintiffs, and for the recovery of \$50 paid thereunder. Plea, the general issue, with a brief statement that the defendants were induced to make the contract through the fraud of the plaintiffs, by which they were relieved from performing their part of it. The plaintiffs in the second action seek to recover the reasonable value of their services, claimed to be \$254.25. By agreement the actions were tried together. It appeared on the trial that before the defendants in the first suit abandoned the contract the plaintiffs paid or advanced to them \$50, which they have not returned or offered to return. For this reason the plaintiffs in the first action asked for an instruction to the jury that the brief statement, if found to be true, would constitute no defense, and that they return a verdict for them in the second. These requests were denied, and Mead and others excepted. The jury were instructed that, if they found the acceptance of the \$50 was a waiver, they should return a verdict for Mead and others. The \$50 was credited on the specification in the second action. There were verdicts for Welch and others in both actions.

Harry G. Sargent, for Mead and others. Albin & Martin, for Welch and others.

PER CURIAM.¹ With reference to the second suit the jury found that the plaintiffs were induced to perform services for the defendants under a special contract, through the fraud of the latter; that upon its dis-

¹ See footnote 36 Atl. 607.

covery they abandoned the contract, retaining the \$50 which the defendants had paid them; and that the plaintiffs' labor was reasonably worth to the defendants more than \$50. Under such circumstances, it is not apparent what useful purpose would have been promoted if the plaintiffs had returned the money received before bringing their suit. They found their present right of action, not on the special contract for their services, but on an implied contract, under which they are entitled to recover what their services are reasonably worth, less any payments they may have received on account of their labor. *Elliot v. Heath* 14 N. H. 131; *Horn v. Batchelder*, 41 N. H. 86; *Smith v. Newcastle*, 48 N. H. 70, 74; *Blodgett v. Mills Co.*, 52 N. H. 215; *Wood v. Garland*, 58 N. H. 154; *Spiller v. Cass*, 58 N. H. 489. They were not obliged to return money received from the defendants under the special contract, which they are entitled to retain under the implied contract. *Wisswall v. Harriman*, 62 N. H. 871. The rule as to a return of property received under a rescinded contract merely requires a plaintiff to do what equitably he ought to do; and in many cases, in which equity requires a return of property received, the purpose is fully accomplished by returning it at the trial, or depositing it with the clerk subject to the order of court before trial. If the property is money or papers, the latter course may often be most conformable to justice. If the opposite party seasonably objects to a trial until such deposit is made, the question will often be raised under circumstances most favorable to that just and ample remedy which is a party's right. An order can be made imposing conditions and providing for all contingencies. *Shaw v. Abbott*, 61 N. H. 254; *Fletcher v. Chamberlin*, 61 N. H. 438, 495, 496; *Owen v. Weston*, 63 N. H. 590, 602, 4 Atl. 801. It necessarily follows that orders may be made before trial that will put the parties on a footing of legal right, without impairing the cause of action or unjustly defeating the action on a point not affecting the merits.

It is not necessary to consider how far the doctrine of returning property has been modified by the view that parties are entitled to the best inventible procedure. In many cases the return is a matter affecting the remedy only. In the present case, if justice required the plaintiffs to return what they had received before trial, it might be difficult, under the prevailing view of remedial law, to resist a motion that they deposit it with the clerk before trial, subject to the order of the court. But the verdict shows that justice did not require such a deposit. As the exceptions in both cases present the same question, there is no ground for disturbing the verdicts. Judgment on the verdicts.

BLODGETT, J., did not sit. The others concurred.

(67 N. H. 334)

JONES et al. v. MARTIN.

(Supreme Court of New Hampshire. Merrimack. March 17, 1893.)

DECEDENTS' ESTATES — SETTLEMENT — APPEAL FROM COMMISSIONERS.

1. Gen. Laws, c. 207, § 7, empowering the court to grant leave of appeal from the decree of the probate court, when such appeal has been prevented by accident or mistake, does not permit appeal to be made from decisions of commissioners of insolvent estates, for like reasons.

2. The fact that the report of a commissioner upon an insolvent decedent's estate was not returned until long after the time limited in his commission does not change the method of settling the estate.

Petition by W. H. Jones & Co. against N. E. Martin, administrator of the estate of Moses R. Hillsgrove, deceased, for leave to appeal from the disallowance of the plaintiffs' claim against the defendant's intestate, and from the acceptance of the commissioner's report by the judge of probate. The plaintiffs offer to prove that the commissioner was appointed June 14, 1887, and by his commission he was to make his report within six months; that he filed his report May 18, 1891; that by accident and mistake the plaintiffs were prevented from taking an appeal therefrom until September 18, 1891, when they filed an appeal. This appeal was dismissed because it was not seasonably taken. The court also dismissed the petition, subject to exception, ruling that it had no power to grant the relief desired. Petitioners except. Exceptions overruled.

Leach & Stevens, for plaintiffs. Harry G. Sargent, for defendant.

PER CURIAM.¹ In *Hilton v. Wiggin*, 46 N. H. 120, it was held, under section 7, c. 170, Rev. St., which is practically identical with the statute now in force (Gen. Laws, c. 207, § 7), that the law empowering the court to grant leave to appeal from the decree of the probate court, when such appeal has been prevented by mistake, accident, or misfortune, does not apply to the decisions of commissioners upon insolvent estates. Upon the authority of that case the plaintiffs' exception must be overruled. *Parsons v. Parsons* (N. H.) 29 Atl. 451. The fact that the commissioner's report was not returned until long after the time limited in his commission did not have the effect of changing the method of settling the estate. The estate is still to be settled according to the insolvent course. Whether a bill in equity can be maintained under the statute (Gen. Laws, c. 198, § 22), upon the facts of this case, is a question we have not considered. It is not expedient to consider this petition as a bill in equity, or to consider the question whether, if a bill can be maintained, it

¹ See footnote 36 Atl. 607.

can be added to the petition by an amendment. Exceptions overruled.

ALLEN, J., did not sit. The others concurred.

(39 N. H. 304)

HAVEN v. HAVEN.

(Supreme Court of New Hampshire. Rockingham. March 11, 1898.)

ADMINISTRATOR DE BONIS NON—APPOINTMENT—PRESUMPTIONS.

1. Where ancestral portraits are bequeathed to certain male descendants as tenants in common, which portraits were not inventoried, or mentioned in the executors' final account, administration de bonis non will not be granted at the suit of one of such tenants, as such administrator would not be entitled to possession as against the tenants, and hence could accomplish nothing.

2. Where chattels are specifically bequeathed and the estate is settled without mention thereof in the account, after nearly 50 years, during which time they have been in possession of the legatees, the assent of the executors to such possession must be presumed.

Exceptions from Rockingham county.

Petition by John Haven against George Haven for appointment of an administrator de bonis non for the estate of Ann Haven, deceased. From a decree dismissing the petition, plaintiff appeals. Affirmed.

Facts found by the court: Ann Haven, the widow of John, died leaving a will, which was duly probated February 21, 1849, and contained the following provision: "It is also my will that the portraits of my late husband and of myself, which were painted by Stuart, shall remain in the mansion house—the use of which was bequeathed to me by my late husband during my life—so long as any of my lineal descendants shall occupy the same, and, when said house shall cease to be occupied by any of my said descendants, I give said portraits to such of my four sons as shall then be alive, and, if none of them shall then survive, I give said portraits to the male descendants of my said sons." The executors of the will settled their account, November 12, 1850. The portraits were not mentioned in the inventory or the account. There is no occasion for further administration, unless the rights of parties in these portraits furnish the occasion. The "mansion house" named in the will is in Portsmouth, was built by John in 1800, and was occupied by him and Ann until his death, and then by Ann until her death. George W. Haven, a son of Ann, occupied the house from the time of her death until August, 1895, when he died. He owned the house at the time of his death, and devised it and the residue of his estate to his widow for life, and to his son, George Haven (the defendant), and his heirs, at her decease. The widow still lives in the house. The defendant was born there, and lived with his parents until about 10 years ago,

since which time he has resided in Boston, but owns no real estate there. He is unmarried. He has visited his mother oftener than once a month since his father's death. He keeps a key to the house, has private papers, books, clothing, and other personal property in it, generally occupies the same room when there, has his washing done there, and sees that the taxes on the house are paid. He has no intention of disposing of his interest in the property; and if he should become disabled, or should abandon his profession, he would probably return to the mansion house to reside. The portraits hang, and since Ann's death have hung, in the parlor of the house. They have a value outside of family considerations, because they were painted by Gilbert Stuart. Ann's four sons are all dead, George W. being the last to die. Their only male descendants are the plaintiff, the defendant, and George G. Haven, of New York. The plaintiff resides in New York, has visited Portsmouth almost yearly, and has frequently seen the portraits, but never made any claim to them until after George W.'s death. There was no direct evidence, one way or the other, as to when he first learned of the provisions of Ann's will. Subject to the plaintiff's exception, it was ordered that the decree of the probate court be affirmed.

Samuel W. Emery and William H. Rollins, for plaintiff. J. S. H. Frink and Sigourney Butler, for defendant.

BLODGETT, J. The rights of parties in the portraits furnish no occasion for further administration of Ann's estate. The only parties having such rights are the plaintiff, the defendant, and George G. Haven, who are tenants in common of the portraits; and nothing can be plainer in legal decision than the proposition that, if an administrator were to be appointed, he could not, as against the tenants, accomplish anything. He would not be entitled even to the possession of the portraits, and, if he should obtain it, the owners could maintain against him detinue, replevin, or trover. See *Twombly v. Baker*, Smith (N. H.) 123; *Doe v. Guy*, 3 East, 120; *Andrews v. Hunneman*, 6 Pick. 126, 129; *Hall v. Burgess*, 5 Gray, 12; *Colwell v. Alger*, Id. 67, 69. The law never does a useless thing. Administrators will be appointed only when there is occasion for their appointment.

To the objection that in a specific devise of chattels the assent of the executor is necessary to enable the legatee rightfully to obtain possession, and that in this case no assent is either found or appears, it need only be said that, if the assent of Ann's executors was necessary, it may now be presumed to have been given, after nearly 50 years of such possession by the legatees; but, in addition to this, the executors must be deemed to have so assented by settling the estate without meddling with the portraits. Gray

v. Willis, 2 P. Wms. 531, 532. If the question whether the defendant is an occupant of the mansion house, within the intent and meaning of the testatrix as expressed in her will, may properly be regarded as one of law, its decision is, for present purposes, unnecessary and immaterial. If he is such an occupant, he is, of course, entitled to the possession of the portraits by the express terms of the will; and, if he is not such an occupant, he is none the less entitled to their possession by virtue of his rights as one of the tenants in common. Exceptions overruled.

CHASE, J., did not sit. The others concurred.

(69 N. H. 206)

MERRILL et al. v. CURTIS et al.

(Supreme Court of New Hampshire. Rockingham. March 11, 1898.)

WILLS—CONSTRUCTION.

Where testator directed that, after the decease of his wife and children, his estate should be divided equally between the latter's children and the legal representative of any then deceased, the representatives of each of his (testator's) children to have an equal share, on the happening of the contingency, the division is to be into as many equal parts as there were children of the testator who left children then surviving, the children of each of such testator's children to have one of the parts.

Bill by Merrill and others, trustees of the will of Jeremiah L. Robinson, against Mrs. Curtis and others, devisees. Case discharged.

Bill in equity praying for direction in the execution of a trust. Jeremiah L. Robinson, late of Exeter, deceased, left a will containing the following provision: "It is my will, and I do hereby order and direct, that the remaining three-fourths part of all my estate shall be held by the said trustees, and all the rents, interest, and income thereof during the lifetime of my wife shall be divided by them, semiannually, equally between my wife and my children, and the legal representatives of such of them as may have deceased; and after the decease of my wife shall be divided by them, semiannually, equally between my children and the legal representatives of such of them as may have deceased so long as any one of my children shall be living; and, when all my children are dead, then all my estate shall be divided by said trustees equally between their children and the legal representatives of such of them as may have deceased, giving to the representatives of each of my children an equal share." The plaintiffs are the trustees under this provision. The widow and the four children of the testator are dead. The defendant Curtis is the only child of one of these children; the four defendants Brewers are the only children of another; and the testator's other two children left no child or issue of any child surviving them. The ques-

tion is whether the defendant Curtis is entitled to one-half or one-fifth of the trust estate.

Eastman, Young & O'Neill, for plaintiffs. Streeter, Walker & Hollis and Niles & Johnson, for defendant Curtis. John S. H. Frink, for defendants Brewers.

CHASE, J. After the death of the widow and all the children of the testator, the trust fund was to be divided between the children's children, and the legal representatives of such as may have died, giving to the representatives of each child of the testator an equal share. The children of a deceased child of the testator are the "representatives" of the child, within the meaning of the word as here used. The intention is clearly expressed. Upon the happening of the contingency, the division is to be into as many equal parts as there were children of the testator who left children then surviving, and the children of each one of such children of the testator are entitled to one of the parts. As only two of the testator's children left children surviving them, the division should be into two parts, of which Mrs. Curtis, as the sole representative of one child, is entitled to one, and the four Brewer children, as representatives of the other child, together, are entitled to the other. Case discharged. All concurred.

(69 N. H. 216)

STATE v. CARVER.

(Supreme Court of New Hampshire. Strafford. March 11, 1898.)

COMPOUNDING MISDEMEANOR—DEFENSES.

1. The compounding of a public misdemeanor is an indictable offense at common law.
2. It is not necessary to constitute the offense of compounding a misdemeanor that an offense was committed by the person from whom the money was received.
3. Ignorance of the law is no defense to compounding a misdemeanor.

Exceptions from Strafford county.

Fred E. Carver was convicted of compounding a public misdemeanor, and brings exceptions. Exceptions overruled.

Indictment, charging that the defendant, on the 2d day of September, 1897, at, etc., "with force and arms, under color and pretense that one Frank E. Fernald had committed an offense against the statutes of this state relating to the sale of spirituous liquors, in this: that the said Frank E. Fernald had before that time, to wit, on the twenty-ninth day of March, eighteen hundred and ninety-seven, not being an agent of any town for the purpose of selling spirit, sold to one whose name he would not reveal one quart of spirituous liquor, contrary to the form of the statutes in such case made and provided, unlawfully and for the sake of wicked gain, and without the order and consent of the attorney general of said state, did make composition with the said Frank E. Fernald, and exact and take of him the

sum of thirty dollars for forbearing to prosecute for said supposed offense, to the great hindrance of public justice, and against the peace and dignity of the state." Verdict, guilty. The defendant moved to quash the indictment, because it described the offense for which he made composition with said Fernald as a "supposed offense." Motion overruled, and the defendant excepted. It appeared from the evidence for the state that on August 31, 1897, the defendant went to Fernald, and informed him that he had a case against him for the illegal sale of liquor; that the defendant read the law to Fernald, and told him, if he would settle, it would save him a good many dollars, that for \$30 he would destroy the evidence, which was a bottle of liquor, that he would prosecute unless the \$30 was paid, and the fine would be \$50 and the costs, \$25; that subsequently Fernald paid him \$30, as demanded; and that thereupon the defendant turned the liquor in the sink, gave Fernald the bottle, and wrote and delivered to him a paper as follows: "Milton, N. H., Sept. 2, 1897. This is to certify that I promise to withdraw all further action against Frank E. Fernald for illegal sale of liquor March 29, 1897. F. E. Carver." The defendant offered no evidence. His counsel admitted the facts to be substantially as claimed by the state, and said the defense was that the defendant had no intention of violating the law. The court ruled that if the defendant knew what he was doing, and did what he intended to do, it was immaterial what his opinion was as to the legal effect of what he was doing, and it would be no defense that he did not know he was violating the law. To this ruling the defendant excepted.

William F. Nason, for the State. Edgerly & Mathews and Felker & Gunnison, for defendant.

BLODGETT, J. Whatever diversity of opinion there may justly be as to the policy of the liquor laws of this state, it cannot be doubted that their violation is a grave misdemeanor against public justice, nor that its compromise with the offender by a private individual is both pernicious and illegal. "Misdemeanors are either mala in se, or penal at common law, and such as are mala prohibita, or penal by statute. Those mala in se are such as mischievously affect the person or property of another, or outrage decency, disturb the peace, injure public morals, or are breaches of public duty." 4 Am. & Eng. Enc. Law, 654. There being in this state no statute prohibiting the composition of misdemeanors, and the body of the common law and the English statutes in amendment of it, so far as they were applicable to our institutions and the circumstances of the country, having been in force here upon the organization of the provincial government, and continued in force by the

constitution, so far as they are not repugnant to that instrument, until altered or repealed by the legislature (*State v. Rollins*, 8 N. H. 550; *State v. Albee*, 61 N. H. 427), the first inquiry is whether such composition was an indictable offense at common law. While decisions upon this precise point are lacking, the language of the books is general that the taking of money or other reward to suppress a criminal prosecution, or the evidence necessary to support it, was an indictable offense at common law; and, although the English cases may not all be reconcilable with this view, it would seem that when the offense compounded was one against public justice, and dangerous to society, it was indictable, while those having largely the nature of private injuries, or of very low grade, were not indictable. See *Johnson v. Ogilby*, 3 P. Wms. 277; *Fallowes v. Taylor*, 7 Term R. 475; *Collins v. Blantern*, 2 Wils. 341, 348, 349; *Rex v. Stone*, 4 Car. & P. 379; *Keir v. Leeman*, 6 Q. B. 308, 316-322; s. c., on error, 9 Q. B. 371, 395; *Rex v. Crisp*, 1 Barn. & Ald. 282; *Edgcombe v. Rodd*, 5 East, 295, 303; *Rex v. Southerton*, 6 East, 126; *Beeley v. Wingfield*, 11 East, 46, 48; *Baker v. Townsend*, 7 Taunt. 422, 426; *Bushel v. Barrett*, Ryan & M. 434; *Rex v. Lawley*, 2 Strange, 904; *Steph. Cr. Law*, 67; 3 Wat. Archb. Cr. Pl. & Prac. 623-10, 623-11; 1 Russ. Crimes, 133; 1 Chit. Cr. Law (3d Am. Ed.) 4; 1 Bish. Cr. Law (2d Ed.) §§ 502, 503; *Desty, Cr. Law*, § 10b; 4 Wend. Bl. Comm. 136, and note 18. In this restricted sense, we are of opinion that the taking of money or other reward or promise of reward, to forbear or stifle a criminal prosecution for a misdemeanor, was an indictable offense by the common law, the same as it unquestionably was for a felony (*Partridge v. Hood*, 120 Mass. 403, 405, 406, 407); and that it has always been so understood and received here, as well as in other jurisdictions (*Plumer v. Smith*, 5 N. H. 553, 554; *Hinds v. Chamberlin*, 6 N. H. 229; *Severance v. Kimball*, 8 N. H. 386, 387; *Town of Hinesburgh v. Sumner*, 9 Vt. 23, 26; *Badger v. Williams*, 1 D. Chip. 137-139; *State v. Keyes*, 8 Vt. 57, 65; *State v. Carpenter*, 20 Vt. 9; *Com. v. Pease*, 16 Mass. 91; *Jones v. Rice*, 18 Pick. 440; *Partridge v. Hood*, supra; *State v. Doud* 7 Conn. 384, 386). Certainly, there is no ground to contend that the offense is any less pernicious and reprehensible under our form of government than under that of the mother country, or that as a part of the common law it was inapplicable to our institutions and circumstances at the time of the organization of our provincial government, or in any manner repugnant to the constitution, or to our present institutions and circumstances. Indeed, the absence of any statute upon the subject of the composition of misdemeanors sufficiently shows the general understanding in this state, for it cannot reasonably be supposed that so infamous an offense would

have been permitted to go unpunished for want of statutory enactment, unless it had been understood generally that under our common law none was necessary. But not only did the defendant, in consideration of a reward, compound a public misdemeanor, and suppress and destroy the material evidence necessary to support it; he also defrauded the revenue by depriving the public of that portion of the pecuniary penalty to which they are entitled for a violation of the liquor laws; and this of itself is a sufficient ground on which to sustain an indictment at common law. *Rex v. Southerton*, 6 East, 126; 1 Russ. Crimes, *134.

In view of these conclusions, it is unnecessary to examine the question argued by counsel, as to whether or not the case falls within the statute of 18 Eliz. c. 5 (made perpetual by 27 Eliz. c. 10, and amended as to punishment by 56 Geo. III. c. 138), by which it was enacted that if any person, "by colour or pretence of process, or without process upon colour or pretence of any matter of offence against any penal law, make any composition, or take any money, reward or promise of reward," without the order or consent of some court, "he shall stand two hours in the pillory, be forever disabled to sue on any popular or penal statute, and shall forfeit ten pounds."

The motion to quash the indictment because it describes the offense for which composition was made as a "supposed offense," was properly denied. "The bargain and acceptance of the reward makes the crime." *State v. Duhammel*, 2 Har. (Del.) 532, 533. And in such a case "the party may be convicted, though no offense liable to a penalty has been committed by the person from whom the reward is taken." *Reg. v. Best*, 2 Moody, Crown Cas. 124, 38 E. C. L. 368; *Rex v. Gotley*, Russ. & R. 84; *People v. Buckland*, 13 Wend. 592; 1 Russ. Crimes, 133, 134; 3 Archb. Cr. Pl. & Prac. 623-11.

The ruling that "if the defendant knew what he was doing, and did what he intended to do, it was immaterial what his opinion was as to the legal effect of what he was doing, and it would be no defense that he did not know he was violating the law," was manifestly correct. "A man's moral perceptions may be so perverted as to imagine an act to be right and legal which the law justly pronounces wrong and illegal; but he is not therefore to escape from the consequences of it." *Bump, Fraud. Conv.* (2d Ed.) 24. "Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law." *Reynolds v. U. S.*, 98 U. S. 145. And "in no case can one enter a court of justice to which he has been summoned in either a civil or criminal proceeding, with the sole and naked defense that, when he did the act complained of, he did not know of the existence of the law which he violated." 1 Bish. Cr. Law, § 238. It is elementary, as

well as indispensable to the orderly administration of justice, that every man is presumed to know the laws of the country in which he dwells, and also to intend the necessary and legitimate consequences of what he knowingly does. If there are cases in which the application of these presumptions might operate harshly, the admitted facts amply demonstrate that this case is not such a one. Exceptions overruled.

CLARK, J., did not sit. The others concurred.

(60 N. H. 667)

STATE v. GALE

(Supreme Court of New Hampshire. Strafford. March 11, 1898.)

CRIMINAL LAW—EXCEPTIONS TO INSTRUCTIONS.

An exception to the instructions, given in a case after the verdict was returned, is too late to be available on appeal under the fifty-fourth rule of the Rules for Regulating the Practice at Law (56 N. H. 590).

Exceptions from Strafford county.

Betsey J. Gale was convicted of keeping her shop open on the Lord's day, and she excepts. Exceptions overruled.

Complaint, under Pub. St. c. 271, § 5, for keeping a shop open on the Lord's day for the reception of company. The defendant requested instructions to the jury, which were not given. After the verdict was returned, the defendant excepted in general terms.

William F. Nason, for the State. William S. Pierce, for defendant.

CHASE, J. The defendant's exception was taken too late. Fifty-Fourth Rule of Court, 56 N. H. 590; *Paine v. Railway Co.*, 58 N. H. 611, 615. Exception overruled.

CLARK, J., did not sit. The others concurred.

(60 N. H. 236)

CONWAY SAV. BANK v. DOW et al.

(Supreme Court of New Hampshire. Carroll. March 11, 1898.)

PREMATURE ACTION ON NOTE.

1. An action on a note stipulating for payment "on demand, with interest, after six months, giving said bank [the payee] the right of collecting the whole or any part of this note, at their own discretion, or of extending from time to time, by reception of interest in advance, or otherwise, the payment of the whole or any part," brought before the time to which the note had been extended, is not premature.

2. A stipulation in a note payable on demand, with interest, after six months, and giving the payee the "right of collecting the whole or any part of this note, at their own discretion, or of extending from time to time, by reception of interest in advance, or otherwise, the payment of the whole or any part thereof, without affecting our liability to pay the same," does not bind the sureties thereon to extensions of the

time of payment by the principal and payee beyond the statutory limitations from the date of the note.

Exceptions from Carroll county.

Action by the Conway Savings Bank against Hiram H. Dow as maker of a note, and Frank A. Mudgett and another as sureties thereon. There was a judgment for plaintiff, and defendants except. Exception overruled as to the maker, but sustained as to the sureties.

Assumpsit on a promissory note for \$2,500, as follows: "Conway Savings Bank. For value received, we jointly and severally promise to pay the Conway Savings Bank, or order, twenty-five hundred dollars, on demand, with interest, after six months, giving said bank the right of collecting the whole or any part of this note, at their own discretion, or of extending from time to time, by reception of interest in advance, or otherwise, the payment of the whole or any part thereof, without affecting our liability to pay the same. Hiram H. Dow. Frank A. Mudgett. S. C. Hill. Conway, N. H., Nov. 21, 1887." Date of writ, December 9, 1896. Facts found by the court: The defendants Mudgett and Hill pleaded the general issue, with a brief statement of the statute of limitations. The money was loaned to Dow, the first signer of the note; and the other two signers were sureties, and known to the bank to be sureties at the time the note was given. Interest was paid in advance, and the note extended from time to time, up to January 1, 1897. All payments of interest or on principal were made by Dow. The defendants moved for a nonsuit, on the ground that the suit was brought before the time to which the note had last been extended. Motion denied, and the defendants excepted. There was no evidence of any promise by Mudgett or Hill, after the date of the note, to pay the same, but the plaintiff relies upon the form of the note to relieve it from the operation of the statute of limitations. The defendant Hill was a brother-in-law of Dow, and a trustee of the bank until within three years, and kept track of the note, and knew about the payments made upon it; and on June 12, 1890, he carried a payment of \$50 from Dow to the bank.

J. C. L. Wood and E. A. & O. B. Hibbard, for plaintiffs. Worcester, Gafney & Snow and J. B. Nash, for defendants.

BLODGETT, J. The motion for a nonsuit on the ground that the action was prematurely brought was properly denied. The note was on demand. *Bank v. Woodward*, 5 N. H. 99, 104; *Crosby v. Wyatt*, 10 N. H. 318, 323; *Shaw v. Shaw*, 43 N. H. 170, 171. By its terms the plaintiffs were empowered to collect it, in whole or in part, at their discretion, and no binding agreement extending the time of its payment beyond the date of the writ is found or appears. *Bailey v.*

Adams, 10 N. H. 162, 164; *Fowler v. Brooks*, 13 N. H. 240, 243, 247; *Hoyt v. French*, 24 N. H. 198, 203.

As against the sureties, the cause of action was long since barred. "Actions of trespass to the person and actions for defamatory words may be brought within two years, and all other personal actions within six years, after the cause of action accrued, and not afterward." Pub. St. c. 217, § 3. The plaintiffs' reliance upon the agreement embodied in the note to relieve it from the operation of the statute is without legal support. In the language of an analogous case: "That agreement could not have been intended for an indefinite extension from time to time, indefinitely, so that the creditors and principal maker could, at their pleasure, always keep the sureties liable, and forever prevent their enforcing payment against the principal, or using the statute of limitations as a defense. Such a construction of the agreement in the note, with such consequences, cannot be adopted without a clearly-expressed intention to that effect in the agreement itself." *Bank v. Chick*, 64 N. H. 410, 411, 13 Atl. 872. And we are clearly of opinion that no such intention appears therein. In its absence, upon the construction most favorable to the plaintiffs, the agreement must be taken and construed to have been entered into by the sureties in view of, and subject to, the statutory limitation of actions of this kind; and as the sureties have made no promise to pay the note, or, so far as appears, otherwise acknowledged their liability and willingness to pay it, within six years next before the commencement of the plaintiffs' action, they are in no wise estopped by the agreement, or by the reported facts, to make the defense set up in their plea and brief statement. *Holt v. Gage*, 60 N. H. 536, 541, 542; *Gage v. Dudley*, 64 N. H. 271, 9 Atl. 786; *Lang v. Gage*, 65 N. H. 173, 175, 18 Atl. 795. Exception overruled. Judgment for the sureties.

CLARK, J., did not sit. The others concurred.

(69 N. H. 269)

AMOSKEAG MFG. CO. v. SHIRLEY et al.
(Supreme Court of New Hampshire. Hillsboro. March 11, 1898.)

CONTRACT — CONSTRUCTION — INJUNCTION — WHEN PROPER.

1. A contract between plaintiff company and defendants authorized the former to maintain flashboards two feet in height on top of a dam the year round. Finding these did not furnish enough water during the dry season, a second contract was made, authorizing three feet in height nine months of the year, in addition to "the flashboards which said * * * company has heretofore had the right to maintain on said dam, such flashboards not to be renewed, replaced, or repaired during the months of March, April, and May of each year." *Held*, that the latter clause authorized the replacing of such two-foot boards as had been washed

away or otherwise destroyed by other two-foot boards during the three months mentioned.

2. An injunction will be granted where an insolvent defendant has committed, and threatens to further commit, wrongful acts resulting in damage to plaintiff.

Bill by the Amoskeag Manufacturing Company against Quincy Shirley and others for an injunction to restrain defendants from removing the flashboards from plaintiff's dam across the Merrimack river at Manchester.

David Cross and Burnham, Brown & Warren, for plaintiff. D. A. Taggart and Oliver E. Branch, for defendants.

BLODGETT, J. This case lies within narrow limits, and the question to be decided is, in our view, remarkably free from doubt. January 11, 1875, the defendants, in consideration of \$3,525, conveyed to the plaintiff the right and privilege "to build, erect, complete, and maintain its stone dam to the height it is now constructed across Merrimack river on or near Amoskeag Falls, so called, in Manchester, and the right to place flashboards thereon to any height above the top of said present stone dam, not exceeding two feet, such flashboards to be not exceeding one inch and a half in thickness, supported against iron pins not exceeding one and one-half inches in diameter, standing in holes drilled in the dam not nearer than four feet from each other; and the right and privilege to raise the water of said river, and to flow a certain tract of land situate in Hooksett," described in the deed, "and all other real estate by said John and Susan W. Shirley owned, situated on or near said river, or on any branch thereof, or on any brook flowing into said river, at their pleasure, by means of said dam and flashboards thereon as aforesaid." It goes quite without the saying that under this deed it is unquestionably the right of the plaintiff to maintain flashboards two feet in width upon the dam during the entire year, if it so elect. Possessed of this right, and finding it would be an advantage to it to increase the height of the flashboards to three feet during the dry months of the year, the plaintiff some time in 1886 sent to the defendants and other riparian owners above the dam a circular letter, stating that it would be an advantage to the company to obtain the right to increase the height of the flashboards maintained on their stone dam at Manchester to three feet during June, July, August, September, October, November, December, January, and February, but that for the months of March, April, and May the right they then had to maintain two feet of flashboards was amply sufficient; and that the company was willing to pay for the additional foot the sum of five dollars per running rod of river bank between Manchester and Hooksett on all that part of the bank which they had not already the right to flow indefinitely. This offer was accepted by the defendants, and on December 23, 1887, in consideration of \$1,000, they conveyed to the plaintiff, by deed duly executed, "the right and

privilege to put and maintain upon its stone dam, as now constructed, * * * flashboards of the width and height of three feet above the top of said dam, being one foot in width and height above and in addition to the flashboards which said Amoskeag Manufacturing Company has heretofore had the right to maintain on said dam, such flashboards not to be renewed, replaced, or repaired during the months of March, April, and May in each year." The issue between the parties arises upon the construction of this deed; that is to say, the plaintiff claims the right under its first deed to place flashboards upon the dam during the aforesaid three months two feet in width, in case any have been carried away by water or otherwise, while the defendants claim the plaintiff cannot lawfully place upon the dam or renew any flashboards whatever during said months; or, in other words, that the plaintiff, by acquiring the right, at an expense of \$1,000, to maintain three-foot flashboards for nine months of the year, surrendered and lost the right, for which it had paid \$3,525, to maintain two-foot flashboards for the entire year. The bare statement of this issue renders it almost superfluous to say that the defendants' claim cannot be sustained. There was no exchange of rights between the parties by the second deed. Its obvious purpose was to give the plaintiff an additional right, and no other effect can be given to it consistently with elementary rules of construction. In fact, substantially the only ground for the defendants' contention having the semblance of a reason is the extremely hypercritical one that the flashboards referred to by the word "such" are the two-foot boards, because they are the ones next immediately preceding. Concede this to be so, according to strict grammatical rules, and it can have but little significance or weight. The intention of the parties, actual and expressed, to the contrary, does not admit of reasonable doubt, when the whole deed is construed together, as it must be, and still less when the competent extrinsic evidence appearing in the case is considered, as it properly may be. In the interpretation of deeds and other written instruments, courts are bound to effectuate the intention of the parties, if it can be done consistently with the rules of law; and in this case no rule has been or can be found which prevents the carrying of that intention into effect. Even the grammatical rule invoked by the defendants does not afford a plausible pretext for a different conclusion, for, while it is true that relative words are generally to be referred to the next antecedent, yet if the subject-matter, or the obvious intent of the parties, requires a different construction, such reference may be made as will effectuate the intent. *Osgood v. Hutchins*, 6 N. H. 374. It appearing that the defendants are insolvent, and unable to respond in damages, and that they have once unlawfully removed the flashboards on the plaintiff's dam, and threaten and intend to repeat such unlawful act, to the serious injury and damage of the plaintiff and others, equity will afford

relief by interposing its restraining power. *Steam Mills v. Hickey*, 59 N. H. 241, 242, and authorities cited. Injunction granted.

CHASE and PARSONS, JJ., did not sit. The others concurred.

(69 N. H. 271)

ALLEN v. BOSTON & M. R. CO.

(Supreme Court of New Hampshire. Hillsboro. March 11, 1898.)

MASTER AND SERVANT—RAILROADS—ASSUMPTION OF RISK.

An experienced brakeman, having been assigned to a freight train for the purpose of learning the road, was informed of low overhead bridges, and cautioned to look out for them. He had stooped twice, while switching, to avoid collision with the bridge which finally knocked him off. He claimed that the company was negligent in not having a telltale near the bridge over the track on which he was switching. The bridge was a large white structure, and the day was bright. He ascended the car near where a telltale would ordinarily be. *Held*, that he assumed the risk.

Exceptions from Hillsboro county.

Action by Benjamin M. Allen against Boston & Maine Railroad Company for damages sustained by a collision with an overhead bridge on defendant's road, in Massachusetts, while employed as brakeman. Verdict for defendant. Plaintiff brings exception. Overruled.

George B. French and Burnham, Brown & Warren, for plaintiff. Oliver E. Branch, Charles H. Burns, and William H. Sawyer, for defendant.

CHASE, J. The Massachusetts decisions upon the question before the court are the same, in effect, as those of this state, namely, that a servant assumes the perils incident to his service of which he is informed or which ordinary care would disclose to him. *Lovejoy v. Railroad Corp.*, 125 Mass. 79, 82; *Goodnow v. Emery Mills*, 146 Mass. 261, 267, 15 N. E. 576; *Scanlon v. Railroad Co.*, 147 Mass. 484, 487, 18 N. E. 209; *Myers v. Iron Co.*, 150 Mass. 125, 134, 22 N. E. 631; *Lothrop v. Railroad Co.*, 150 Mass. 423, 424, 23 N. E. 227; *Gleason v. Railroad Co.*, 159 Mass. 68, 34 N. E. 79; *Goldthwait v. Railway Co.*, 160 Mass. 554, 36 N. E. 486; *Goodes v. Railroad Co.*, 162 Mass. 287, 38 N. E. 500; *Fifield v. Railroad Co.*, 42 N. H. 225, 240; *Henderson v. Williams*, 66 N. H. 405, 23 N. E. 365; *Hardy v. Railroad Co.* (N. H.; not yet reported). It is therefore unnecessary to consider whether the case is governed by the law of that state or of this.

The plaintiff was a servant of the defendant. He was 28 years old, and had no physical disability. He had worked upon railroads four years or more,—one year in a yard assisting in making up trains, and the rest of the time as a brakeman upon freight trains. He was familiar with the dangers

incident to such service, including that arising from the existence of low bridges upon the road. He understood the office of bridge guards or telltales. In the course of his experience he had frequently been warned of his nearness to a dangerous bridge by such devices. He supposed low bridges generally had guards near them. July 22, 1895, he was assigned to a local freight train running between Nashua and Boston for the purpose of learning the road, with a view of becoming a brakeman on that line. He had never worked there before. He was told that there were low bridges upon the road, and that he must look out for them. The road has two tracks, the westerly one being used by trains passing from Nashua to Boston, and the easterly one by trains passing in the opposite direction. Near the South Wilmington station, in Massachusetts, there is a highway bridge 16 feet wide, resting upon abutments 25 feet apart and 15 feet 5 inches above the track. It is painted white, and there is nothing to obstruct its view from one approaching it on the railroad from either direction. The only tracks under the bridge are the main tracks. A track extending from one main track to the other starts in a southerly direction at a point 239 feet southerly of the bridge. There is a side track on the easterly side of the line, which is connected with the easterly main track a short distance southerly of the same point. There is a suitable telltale over the westerly main track, 99 feet northerly of the northerly side of the bridge, and a like telltale over the easterly main track at the same distance from the south side of the bridge. There is no telltale over the westerly track on the south side, or over the easterly track on the north side. The plaintiff did nothing on the first day at this place that specially directed his attention to these facts. On the trip towards Boston the second day the train was divided near the northerly side of the bridge for the purpose of taking some cars into the train that were standing on the side track. Several of the rear cars were left on the westerly track, some extending under the bridge. The locomotive, with three to five cars attached, went to a point southerly of the cross-over track, backed over that track onto the easterly main track, went southerly on the latter track to a point near the southerly end of the string of cars standing on the side track, and pushed those cars out on to the easterly main track by placing a stake between the southerly end of the most southerly one and the northerly end of the most northerly car attached to the locomotive, and backing. Sufficient momentum was thus given to the cars to send them to a point 50 to 150 feet northerly of the bridge. A part of the cars attached to the locomotive were then thrown onto the side track by a flying switch, and were left there. The plaintiff assisted about this work, and in doing so passed under the bridge twice, standing on

the top of a freight car, once from north to south on the westerly track, and once in the opposite direction on the easterly track, and stooped each time to avoid a collision with the bridge. In a statement made October 17, 1895, he said: "This bridge was so low that I had to stoop very low in going down. Had I been on a beef car, I should have got onto another car or got down between the cars. I should not feel safe on top of a beef car going under this bridge, even if I was lying down." After putting the cars on the side track, the locomotive, with one or more cars attached, backed up on the easterly track to get the cars that had been taken from the side track. The plaintiff walked up, and when the cars came together made the hitch between them and gave the engineer the signal to go ahead. He testified that when he gave the signal he would naturally be looking towards the engineer. He further testified that he did not see the bridge then or when he passed under it. As the train started, he climbed upon one of the cars between which he had made the hitch, and while walking towards the rear end was hit by the bridge and injured. All this took place near 1 o'clock in the afternoon of a sunshiny day.

The only fault the plaintiff attributes to the defendant is the omission to maintain a telltale over the easterly track on the northerly side of the bridge, and the question is whether his injury can be fairly assigned to that circumstance. He had acquired knowledge of the existence of the bridge, and of its dangerous character, within a few minutes of the time he was hit by it. In the words of his counsel, "So far as the bridge itself was concerned, he was ignorant of no fact material to his safety." He had learned from his previous experience the danger incident to the service of a brakeman from such a structure. When he climbed upon the car he knew that he was near the bridge. He testified, on direct examination, that the head end of this string of cars was a couple of cars' length above the bridge, and upon cross-examination that it was two or three cars' length above,—as much as 50 feet, and he couldn't say whether it was as much as 60 feet. He had passed under the bridge a moment before. It was a large white structure that stood out prominently above the road. A person passing under it or facing it could not fail to see it unless he closed his eyes. Assuming that the plaintiff supposed there was a telltale over the easterly track on the north side of the bridge, he must have known that it would furnish him no protection if he was between it and the bridge. He ascended the car so near the place where the telltale would ordinarily be that it was his duty to use his eyesight to ascertain whether he was inside or outside its location. *Hardy v. Railroad Co.* (N. H.; not yet reported).

The duty was more imperative because of

the fact that he was "learning the road," and this was his first experience at that place. If he had been familiar with the surrounding objects, he might have learned of his position in relation to the bridge from them, but, as it was, he was obliged to rely upon seeing the telltale or the bridge for this purpose. His attention was not diverted by the sudden interposition of any unforeseen occurrence or condition. He was performing a service with which he was familiar, in the ordinary way. The fact that he was working on a road with which he had no acquaintance would naturally excite mental alertness. If he had looked for a telltale, he would necessarily have learned that there was none. It follows that if, in fact, he did not know that there was none, it was because he did not do his duty,—because he did not exercise ordinary care under the circumstances. As was said in *Goldthwaite v. Railway Co.*, 160 Mass. 554, 36 N. E. 486: "If it be assumed in favor of the plaintiff that he had no actual knowledge of the danger, yet its character and the circumstances bearing upon the question were, upon the undisputed evidence, such as to show that he ought to have known and appreciated it." See, also, *Bell v. Railroad Co.*, 168 Mass. 443, 47 N. E. 118. The only conclusion fairly deducible from the facts is that the plaintiff's injury was due to a peril incident to his service, of which, it must be presumed under the circumstances, he was informed, namely, the peril incident to being upon the top of freight cars about to pass under a low bridge not guarded by a telltale. Exception overruled.

PARSONS, J., did not sit. The others concurred.

(87 N. H. 399)

DAVIS v. GEORGE et al.

(Supreme Court of New Hampshire. Grafton. March 17, 1893.)

LANDLORD AND TENANT—IMPLIED COVENANTS—DESTRUCTION OF PREMISES—LIABILITY FOR RENT—LIABILITY FOR FURNITURE DESTROYED—SURRENDER.

1. The letting of a furnished house for a term of years raises no implied covenant that it is suitable for the purposes of the lessee's occupation.

2. A provision in a clause relieving the lessee from his agreement to restore the leased premises at the end of the term if destroyed by inevitable accident does not relieve him from the payment of rent upon the happening of that event.

3. Under a lease relieving the lessee from his agreement to restore the premises at the end of his term, if destroyed by inevitable accident, he is not relieved from accounting for furniture leased with the realty, for which he agreed to return furniture of equal value at the end of his term, although destroyed by inevitable accident.

4. The surrender of the leased premises and their acceptance by the lessor are a sufficient defense to a claim for rent accruing thereafter.

Action of debt by John L. Davis against Isaac K. George and others. Case discharged.

Debt, for rent of an hotel building, and for \$1,137.50 for furniture and supplies. Plea, the general issue, with a brief statement, which the plaintiff moves to reject. From this statement and the admissions of the parties, the following facts appear: November 2, 1885, the plaintiff leased to the defendants the hotel, with all the furniture therein belonging to the lessor, except a few specified articles, for the term of five years from November 1, 1885, upon an annual rental of \$700, payable in equal quarterly payments. The defendants covenanted that they would quit and deliver up the premises to the plaintiff at the end of the term in as good order and condition, reasonable use and wearing thereof or inevitable accident excepted, as the same are in or may be put into by the lessor; that they would not make or suffer any waste thereof, or assign or underlet the premises without the lessor's consent; that the lessor might enter to view the premises, make improvements thereon, and to expel the lessees if they failed to pay the rent. Under an agreement executed at the same time, the plaintiff turned over to the defendants the furniture in the hotel, appraised at \$1,137.50, the parties stipulating therein that, "at the expiration of a lease of even date made by the parties of said house and the furniture therein, said George & Co. are to turn back to said Davis furniture and supplies of the value of said \$1,137.50, at the valuation of the same appraisers or others mutually agreed upon by the parties, such articles so appraised back to be suitable for hotel purposes. * * * The lease referred to and this agreement are to be considered and construed together, as parts of one contract." There was no special stipulation in this agreement about a return of the furniture in case it was destroyed by fire. The hotel, with its contents, was wholly destroyed by fire on the 14th day of November, 1886. The defendants paid the first year's rent and \$175 for the next quarter's rent in advance. In their brief statement, the defendants claim that there was an implied agreement that the hotel was inhabitable and suitable for the purposes for which it was leased, when in fact, from the date of the lease to the time of the fire, it was uninhabitable and unsuitable for those purposes, on account of defective sewerage, and on account of the defective construction of the chimneys and flues, in consequence of which the fire occurred; that, by the terms of the lease, they were excused from the performance of their covenants, because the premises were destroyed by inevitable accident; that, for the same reason, they were not obliged to perform their agreement about replacing the furniture; and that, before the rent claimed by the plaintiff became due, they surrendered

to him the entire estate they had in the premises, and he accepted the same.

Bingham, Mitchell & Batchellor and Smith & Sloane, for plaintiff. Bingham & Bingham and Irving W. Drew, for defendants.

PER CURIAM.¹ In a lease of land there is ordinarily no implied covenant or condition that the premises are suitable for the purposes of the lessee's occupation. *Elliott v. Aiken*, 45 N. H. 36; *Scott v. Simons*, 64 N. H. 426; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, Id. 242; *Libbey v. Telford*, 48 Me. 318; *Monk v. Cooper*, 2 Ld. Raym. 1477; *Belfour v. Weston*, 1 Term R. 310; *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147; *Doyle v. Railway Co.*, 147 U. S. 429, 13 Sup. Ct. 333; *Edwards v. Railroad Co.*, 98 N. Y. 246. It is the duty of the court in such a case, as in case of other contracts, to ascertain the intention of the parties from competent evidence. When A. "leases" or "lets" his house to B. for a term of years, there is no difficulty in finding that he intends to warrant that he has the legal right or title which he assumes to convey, and that B. shall have the right to the occupancy of the house during the term. *Hart v. Windsor*, 12 Mees. & W. 66, 85. To find, in addition, that A. binds himself by an agreement that the premises shall be fit, convenient, or suitable for the particular occupancy which B. desires, would require further evidence than is furnished by the technical terms of the lease. If the lessee examines the property, it cannot be presumed that the parties intended he should rely upon the lessor's judgment as to the suitability of the premises for his business or habitation. The reasonableness of the doctrine expressed by the maxim, "Caveat emptor," would preclude such an inference. His mistake in deciding that question does not raise an implied covenant on the part of the landlord that his decision was correct. *Cleves v. Willoughby*, 7 Hill, 83, 86; *Edwards v. Railroad Co.*, 98 N. Y. 246; *Bowe v. Hunking*, 135 Mass. 380. Whatever a landlord's liability may be for fraud or deceit in regard to the condition of leased premises (*Scott v. Simons*, supra; *Minor v. Sharon*, 112 Mass. 477; *Bowe v. Hunking*, supra), the brief statement does not raise that question, and it is unnecessary to consider it. The defendants do not seek to charge the plaintiff for fraudulently inducing them to accept the lease. It is not claimed that the plaintiff knew that the hotel was not fit for occupation at the date of the lease, or that he was willfully ignorant of its unsuitable condition, or that the defendants did not examine the premises with reference to its adaptation to hotel purposes. The sole contention of the defendants is that, in a lease of a furnished house, there is an implied covenant or condition that it is reasonably fit for the lessee's intended occupa-

¹ See footnote 36 Atl. 607.

tion. If the house is unfurnished, it is admitted that such an inference would not be supported by sufficient evidence. A broad distinction in this regard is suggested between a lease of a furnished and a lease of an unfurnished house, which, on principle, is not apparent. If the landlord knows that the tenant proposes to occupy the house for a term of years as a place for the accommodation of the travelling public, why should the fact that the landlord also leases to him the furniture in the house imply an additional agreement on his part that the house is suitable for hotel purposes or for habitation? Want of repair and structural defects in the house do not depend upon the furnishings; and there is no more reason why a landlord should bind himself by a warranty against such imperfections in a lease of a furnished house than there is in a lease of an unfurnished house. To hold that such a warranty is implied in the one case, and not in the other, would introduce an arbitrary distinction, not based on any apparent practical reason, and not within the contemplation of the parties to such contracts.

A few cases, however, may seem to support to some extent the defendants' contention. In *Smith v. Marrable*, 11 Mees. & W. 5, the language of Parke, B., sustains the broad position that in a lease of a house, whether furnished or not, there is an implied covenant or condition that it is habitable. He cites and relies upon two cases,—*Edwards v. Etherington*, Ryan & M. 268, and *Collins v. Barrow*, 1 Moody & R. 112; but subsequently, in *Hart v. Windsor*, 12 Mees. & W. 66, 86, he repudiates those cases, saying, "We all concur in the opinion that they are not law;" and, since that decision, they have been treated as overruled cases. *Sutton v. Temple*, 12 Mees. & W. 52; *Surplice v. Farnsworth*, 8 Scott, N. R. 307, 316. In *Smith v. Marrable*, Lord Abinger said he required no authorities to hold that "a man who rents a ready-furnished house does so under the implied condition or obligation—call it what you will—that the house is in a fit state to be inhabited"; but in *Sutton v. Temple*, supra, he said that *Smith v. Marrable* was a case of a "contract of a mixed nature, for the letting of a house and furniture at Brighton, and every one knows that the furniture upon such occasions forms the greater part of the value which the party renting it gives for the house and contents." * * * Where the party has had an opportunity of personally inspecting a ready-furnished house by himself or his agent before entering on the occupation of it, perhaps the objection would not arise; but, if a person take a ready furnished house upon the faith of its being suitably furnished, surely the owner is under an obligation to let it in a habitable state." In the same case, Parke, B., said that *Smith v. Marrable* "resembles the case of a ready-furnished room in an hotel, which is hired on the understanding that it shall be reasonably

fit for immediate habitation. In such case the bargain is not so much for the house as the furniture." In *Hart v. Windsor*, supra, *Smith v. Marrable* was further distinguished on the ground that it was a case of a "ready-furnished house for a temporary residence at a watering place." In *Chester v. Powell*, 52 Law T. (N. S.) 722, it is said that that case "is only an authority for the proposition that in taking furnished apartments at the seaside, or for temporary occupation only, there is an implied warranty that they must be fit for occupation." In *Mechelen v. Wallace*, 7 Adol. & E. 54, note, cited by the defendants, there was an express agreement that the leased house was to be in a suitable condition for the lessee's use.

In this country the broad doctrine that there is an implied covenant in a lease of a furnished house for a term of years that it is habitable, for which *Smith v. Marrable* has been cited as a leading authority (1 Wood, Landl. & Ten. 128; 1 Tayl. Landl. & Ten. § 383), has received little, if any, sanction. If it has not been denied, it has been so far modified and limited as not to be applicable to this case. In *Dutton v. Gerrish*, 9 Cush. 89, there was a lease of a furnished warehouse, which it was claimed the lessor impliedly warranted was reasonably fit for occupancy. But in the opinion the court say: "It is not described as hired or intended for any specific purpose, or for any particular kind or branch of business; and though it was known that the plaintiffs were dealers in dry goods, and would probably use the warehouse in that business, yet that is not expressed in the written agreement; and it would have been quite within the right of the lessees to use the estate for any other branch of business, or for a manufactory or dwelling house. It therefore does not come within the authority of cases wherein furnished rooms in a lodging house are let for a parlor, bedroom, and the like, for a particular season of the year, in which a warranty may be implied that the rooms are properly furnished and suitably fitted for such particular use. *Smith v. Marrable*, 11 Mees. & W. 5. But the authority of these cases has been much shaken, if not wholly overruled, so far as it applies to real estate, by the subsequent cases. *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, Id. 68." See, also, *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126; *McGlashan v. Tallmadge*, 37 Barb. 315; *Doyle v. Railroad Co.*, 147 U. S. 429, 13 Sup. Ct. 333; *Edwards v. Railroad Co.*, 96 N. Y. 246; *Howard v. Doolittle*, 3 Duer, 464; *Naumberg v. Young*, 44 N. J. Law, 332; *Scott v. Simons*, 54 N. H. 426; *Chadwick v. Woodward*, 13 Abb. N. C. 441, 450. The case of *Smith v. Marrable*, therefore, when properly understood, simply holds that it is a good defense to an action for rent of a furnished house at a watering place let to the tenant for a few weeks, without his personal inspection, that, at the date of the lease, it was so infested with vermin as to render it impossible for him to occupy it with reasonable comfort, and that

he moved out after a few days' occupation. To this extent it was followed as an authority in *Wilson v. Finch-Hatton*, 2 Exch. Div. 336. The case of *Potter v. Truitt*, 3 Har. (Del.) 331, is based upon the overruled case of *Edwards v. Etherington*, supra, and contains no discussion of other authorities, while *White v. Montgomery*, 58 Ga. 204, and *Perrett v. Dupré*, 3 Rob. (La.) 52, are based upon statutory provisions.

But whatever the result might be in the case of a lease of furnished rooms, not examined by the lessee, for an immediate temporary occupancy of a few days or weeks, *Smith v. Marrable* is not an authority for the defendants in this case. The lease the defendants accepted from the plaintiff was for a term of five years, and contained no reference to the purposes for which they proposed to occupy the premises. There is nothing in the case indicating that they relied upon any representation of the plaintiff in regard to the habitable condition of the premises, or that they did not themselves examine them. Their knowledge of their adaptability for the purposes of their occupancy was presumably more accurate and satisfactory to them than the plaintiff's would have been, in the absence of an express agreement upon that subject. It also appears from the brief statement that their occupancy of the hotel covered a period of more than 12 months, which shows that the condition of the premises was not such as to render them uninhabitable and useless for hotel purposes, within the meaning of the cases they rely upon. A holding in this case that there is an implied warranty of suitability would be not only unsupported by authority, but would make it necessary to disregard the almost unbroken line of cases which have established the rule that such a covenant cannot be implied from an agreement to lease real estate. If this finding of the parties' intention in some instances results in great hardship and loss to the tenant, against which he might have protected himself by apt provisions in the contract, the legislature alone may relieve future tenants from such consequences. *Phillips v. Stevens*, 16 Mass. 238; *Hallett v. Wylie*, 3 Johns. 44, 46.

The claim that the defendants are not liable for the rent of the premises, because they were destroyed by inevitable accident, cannot be sustained. They agreed to restore the premises at the end of the term in as good order and condition—reasonable use and wearing thereof or inevitable accident excepted—as the same are in or may be put into by the lessor, and not to make or suffer any waste. Under this provision of the lease, the destruction of the hotel by inevitable accident did not relieve the defendants from their obligation to pay the rent. It was not agreed that such an event should amount to a termination of the lease during the term.

It is also contended that, as the furniture was destroyed by fire, they are relieved from their obligation to return it, or to account

to the plaintiff for the value of the furniture leased to them. The lease and the supplementary agreement by the express terms of the latter are to be considered as parts of one contract. The lease covers the hotel property with all the furniture therein belonging to the lessor, except a few articles. The defendants' contract to quit and deliver up "the premises" at the end of the term may refer to the realty only, or to the realty and personalty. By the supplementary agreement, the plaintiff turns over to the defendants furniture of a stated value, and at the expiration of the lease the defendants were to turn back to the plaintiff furniture of the same value, at the valuation of the same appraisers or others agreed upon. No allowance was to be made for depreciation by use. The personal property returned was to be worth as much as the personal property leased. The natural inference is that the provision for inevitable accident in the lease related to the realty merely, and not to the personalty. No construction can relieve the defendants from their express contract to return furniture of the stipulated value.

The allegation of a surrender of the lease by the defendants, and its acceptance by the plaintiff, is the statement of a sufficient defense to the claim for rent. But the fact that the defendants left the premises because the house was burned would not be a defense. The plaintiff's acceptance of the attempted surrender is material. This is the only part of the brief statement that, if proved, would relieve the defendants from their agreement to pay the agreed rental. Case discharged.

CHASE, J., did not sit. The others concurred.

(69 N. H. 264)

GAGNON v. DANA et al.

(Supreme Court of New Hampshire. Hillsboro. March 11, 1898.)

GRATUITOUS BAILOR — LIABILITIES — MASTER AND SERVANT — NONSUIT.

1. A gratuitous tender of a chattel is not liable for an injury to the servant of the borrower from defects therein not known to the lender, even though he ought to have known of them.

2. The question whether a bailment was gratuitous or for hire is material, in deciding the liability of the bailor for injuries received by the bailee's servant from the defective condition of the subject of the bailment.

3. Where a person lends his servant to another for a particular employment, the servant is to be regarded as the servant of the borrower, while acting for him in that employment.

4. Where a motion for nonsuit, made after plaintiff had rested, on the ground of the insufficiency of his evidence, was erroneously denied, and defendant then introduced his evidence, supplying such deficiency, a verdict for plaintiff will not be set aside.

5. Where a fatal defect in plaintiff's proof had been supplied by defendant's proof, a motion to direct a verdict on account of such defect at the close of the case was properly denied.

Exceptions from Hillsboro county.

Action by Frank Gagnon against Dana & Provost. There was a judgment for plaintiff, and defendants excepted. Verdict set aside.

Case, for personal injuries resulting from the fall of a staging at the Sacred Heart Hospital, in Manchester, occasioned by the breaking of an unsound and decayed bracket. Verdict for the plaintiff. The plaintiff is a carpenter of many years' experience, and fully understood all the duties and risks incident to that employment, one of which is the putting up of wall brackets to support the staging on which he is to work. The work on the hospital was done by one Bradley, the owner of the property, who employed one Gay to superintend the work, hire and pay the men, and buy the materials. In the performance of these duties, Gay went to the defendants, and engaged St. Lawrence, their superintendent, and all the other men in their employ, one of whom was the plaintiff, under an arrangement by which the defendants were to receive the same wages as the men were then receiving, and 25 cents a day additional for each man furnished by them; and the men went to work on the hospital accordingly. The defendants were not employed on the building, and had nothing to do with it, aside from the letting of their men. By Gay's direction, St. Lawrence acted as foreman of all the men on the job, and kept their time, and reported the same to Gay, who kept the pay roll, paid the men directly hired by him, and also paid the defendants in a lump sum for the men furnished by them. Not having a sufficient number of wall brackets for stagings, Gay subsequently borrowed of the defendants about 90 of their brackets, which were used by the men on the job. These brackets were loaned to Gay gratuitously, and merely as an accommodation to him, and the loan had nothing to do with the original contract of hiring the defendants' men. The staging on which the accident happened was built by the plaintiff and one Dana, a fellow workman. It was about 14 feet from the ground, and in front of a bay window. The brackets were placed on the building at each side of the window, and a plank about a foot wide, 2 inches thick, and 14 feet long made the staging. The plank touched the window, and was on the outside part of the bracket, within 6 inches of the end of it. While Dana and the plaintiff were on the plank, one of the brackets broke at a point just outside the brace, and the plaintiff fell to the ground, stunned and seriously injured. He testified that the staging looked all right. Several witnesses for the plaintiff testified that they heard the defendant Dana say soon after the accident that he knew some of the brackets were old and unsound, and that he told St. Lawrence to pick them out, and not to use them. This was denied by Dana and

by St. Lawrence, and Dana further testified that he knew of no unsoundness in the brackets when they were loaned. At the close of the plaintiff's evidence a motion for a nonsuit was denied, subject to exception. At the close of the evidence in the case the motion was renewed by the defendants, who also moved that a verdict be directed for them. The motions were denied. Among other things, the court instructed the jury that a master is not liable unless he knew, or ought to have known, of the defect that caused the injury to his servant; that if the defendants knew, or ought to have known, that the bracket was unsafe, they would be liable; and that it was not material whether anything was paid for the use of the bracket, or not,—to all which the defendants excepted. They also asked for the following, among other, instructions, and excepted to the refusal to give them: "(1) When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him. (2) At the time of the accident the plaintiff was performing work for Denis M. Bradley, under the control and direction of his superintendent, Alpheus Gay. At that time he was not under the control and direction of Dana & Provost, and for the purposes of this case he was not their servant. (3) The fact that the plaintiff received his wages from Dana & Provost is immaterial. The plaintiff being the servant of Bradley, it became the duty of Bradley to furnish suitable brackets and appliances to work with. (4) A lender of anything is not liable to the borrower on account of its unsafe condition, unless the lender at the time of the loan had actual knowledge of the defect. (5) If the plaintiff used this bracket in a way for which it was not intended to be used, or in a way for which Dana & Provost would not expect it to be used, he cannot recover. (6) If the plaintiff could have discovered about this bracket all that Dana & Provost could have discovered by inspection, he cannot recover."

Burnham, Brown & Warren and Isaac W. Smith, for plaintiff. F. M. Topliff, D. A. Taggart, and R. E. Walker, for defendants.

BLODGETT, J. The brackets having been loaned by the defendants for the use of the borrower, without any reward or compensation to be received by them from him, their only duty in respect of defects was to inform him of any of which they were aware, and which might make the use of the loan perilous to him or to his servants, one of whom was the plaintiff. "The ground of this obligation is that, when a person lends, he ought to confer a benefit, and not to do a mischief." Shlr. Lead. Cas. 43, 44, and authorities generally. But the obligation of a mere lender goes no further than

this, and he cannot, therefore, be made liable for not communicating anything which he did not in fact know, whether he ought to have known it or not. *MacCarthy v. Young*, 6 Hurl. & N. 329; *Blakemore v. Railway Co.*, 8 El. & Bl. 1035, 1050, 1051; *Shear. & R. Neg.* (3d Ed.) § 197, note; 2 Pars. Cont. (5th Ed.) 109; 1 Add. Cont. 361; 2 Wait, Act. & Def. 268; *Schouler, Bailm.* § 79; *Story, Bailm.* § 275. Resting upon such authority, and being so consonant to reason and justice that it cannot but be the law, the rule thus enunciated necessarily renders erroneous the reiterated instruction to the jury that the defendants might be liable for the plaintiff's injury "if they knew, or ought to have known, that the brackets furnished were unsafe and unsuitable for use on the building." While a gratuitous lender "must be taken to lend for the purpose of a beneficial use by the borrower," and is rightfully "responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which, directly, the borrower is injured" (*Blakemore v. Railway Co.*, supra, per *Coleridge, J.*), it would be the greatest injustice as well as extending the law beyond any recognized principle, to subject him to liability for defects of which he is not aware; and especially in a case like this, where the defect complained of was apparently as open to ascertainment by the plaintiff as it could possibly have been to the defendants. The instruction that "it is not material whether anything was paid for the use of the brackets, or not," was no less erroneous upon the question of the defendants' liability. While in many respects the duties and liabilities of the parties are materially different in the case of a gratuitous bailment and one for hire, it is enough for the present purpose to observe that while in the former the benefit is exclusively to the bailee, and therefore the liability of the bailor for defects in the thing loaned extends only to those which are known to him and not communicated to the bailee, in the latter, the bailment being for the mutual benefit of both alike, the bailor's obligation is, and of right ought to be, correspondingly enlarged; and it is therefore his duty to deliver the thing hired in a proper condition to be used as contemplated by the parties, and for failure to do so he is justly liable for the damage directly resulting to the bailee or his servants from its unsafe condition. This distinction is fundamental, and of universal recognition. The relation of master and servant not existing between the plaintiff and the defendants at the time of his injury, their request to have the jury specifically so instructed should have been granted. The duties and obligations of a master to his servant in respect of tools and appliances for performing the labor for which he is engaged differ widely from those of a gratuitous lender to the borrower, and a radically different rule obtains in the one case than in the other. The defendants' additional requests, making actual knowledge of the defect the test of their liability,

should have been given, not only because the law is so, but because, under the instructions which were given, the jury might well have found that the defendants did not know of the defect, and still have found them chargeable with it, on the ground that they ought to have known it. In view of the errors to which attention has been called, it is deemed unnecessary to go further, and specifically consider other exceptions relating to the instructions given and refused; but we think it should be added that, owing to the misapprehension by the court of the obligations of the defendants to the plaintiff, and of the legal relation between them, the instructions generally were not such as the case required.

The defendants can take nothing by their exceptions to the denial of their motions for a nonsuit, and to direct a verdict in their favor. If, at the time the plaintiff rested, he had not adduced competent evidence to sustain a verdict in his favor (as to which no intelligent opinion can be expressed without additional facts), it is now immaterial, because the defendants, instead of resting their case upon their exception to the denial of their motion for a nonsuit, went on with the trial, and introduced their evidence, and the deficiency, if any, of the plaintiff's evidence, was supplied by one side or the other before the case went to the jury, inasmuch as it is found that at some stage of the trial there was testimony from numerous witnesses to and against the defendants' knowledge of the bracket's defective and unsound condition, so that, when all the proof was in the case, there was no ground of exception for the reason of its insufficiency to sustain a verdict for the plaintiff; and, this being so, it is wholly indifferent by which party the proof was introduced. *Fletcher v. Thompson*, 55 N. H. 308, 309, and authorities cited; *Oakes v. Thornton*, 28 N. H. 44, 47, per *Woods, J.* And this testimony also rendered the renewal of the motion at the close of the evidence unseasonable (*Brown v. Insurance Co.*, 59 N. H. 298, 307), and precluded the granting of the motion to direct a verdict for the defendants (*Shepardson v. Perkins*, 58 N. H. 355). The result is that the defendants' exceptions on this branch of the case are overruled, and their other exceptions, hereinbefore considered, sustained. Verdict set aside.

CLARK, J., did not sit. The others concurred.

(86 Md. 532)

CHAPPELL v. CHAPPELL (six cases).

(Court of Appeals of Maryland. Jan. 4, 1898.)

DIVORCE SUIT—APPEALABLE ORDERS—JURISDICTION—EXCEPTIONS—STAY—REMOVAL OF CAUSES.

1. Orders to pay alimony and counsel fees are orders to pay money, from which Code, art. 5, § 25, authorizes an appeal.

2. The jurisdiction of the circuit court to make orders in a case after appeals therein have been dismissed by the court of appeals is not

ousted by the pendency in the latter court of a motion for reargument of said appeals.

3. Appellant, by an *ex parte* affidavit, appended to a written exception, cannot, under chancery practice, avail himself of the statements in the exception as evidence.

4. Code, art. 5, § 28, providing, "In case a party intends, on appeal from the final decree or order, * * * to dispute any previous order, and desires to stay the operation of such order, he shall state his intention to dispute the same, in writing, to be filed with the clerk, and shall give bond * * * to indemnify the other party from all loss and injury * * * by reason of the staying of the operation of such order," has no application to an order for payment of counsel fees and temporary alimony in a divorce suit, of which equity had no jurisdiction when the act containing such provision was passed.

5. A divorce suit, notwithstanding auxiliary proceedings for alimony and counsel fees, cannot be removed to a federal court; Act Cong. March 3, 1887, allowing removal only when the matter in dispute exceeds the sum or value of \$2,000.

6. The filing of a cross bill does not make plaintiff a defendant, for purposes of removal, which Act Cong. March 3, 1887, allows only on application of a defendant.

Appeal from circuit court, Baltimore county.

Bill by Thomas C. Chappell against Mary Ball Chappell for divorce. From adverse orders, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, PAGE, and BOYD, JJ.

Thos. C. Chappell, in pro. per. David Stewart, Redmond O. Stewart, and Frederick I. Duncan, for appellee.

McSHERRY, C. J. This record brings up six appeals. The previous appeals between the same parties were disposed of during the October term of 1895, but no final decree has yet been reached in the cause. The record now before us contains a mass of utterly useless matter, repeated over and over again. The whole proceeding on the part of the appellant is so unusual, inartificial, tangled, and confused as to lead to the irresistible inference that his object is purely vexation and delay,—an effort to prevent, or to postpone as long as possible, a decision on the merits, by the interposition of frivolous objections in every form that he can devise. He is conducting his own case, and he has excepted, demurred, and filed numerous motions covering the same ground; and he has done all this, apparently, with a view to protract a litigation between him and his wife that reflects the utmost discredit upon himself. If his dilatory, idle, and unparalleled proceedings were to receive the sanction of any court, that court would be exposed to the severest criticism, for those proceedings are a reproach to the administration of justice. His numerous exceptions, demurrers, and motions simply trifle with the patience and the toleration of the court. They are without precedent in equity pleading, and have no tendency whatever to aid in the ultimate determination of the issue really involved. A mixture of incoherent argu-

ments, irrelevant statements, citations of authorities, and quotations from statutes, both federal and state, they certainly present the most remarkable productions ever brought to the notice of this court; and most probably no other tribunal has ever been called on to unravel or interpret their like before. As an end must be put to this utterly unjustifiable trifling with the machinery of justice, we proceed to dispose of these six appeals without further comment on the character of the procedure.

A brief statement of pertinent facts now will avoid the necessity of repetition later on: On March 13, 1895, the appellant filed a bill of complaint in the circuit court for Baltimore county against his wife, the appellee, wherein he prayed for a decree divorcing the parties a vinculo matrimonii, and also for a decree of nullity of the marriage. The charges of the bill need not be repeated. On the former appeals we took occasion to characterize them as "vindictive and vituperative to a remarkable degree." The bill prayed for an order of publication against the defendant, who was alleged to be a nonresident of the state of Maryland. On April 3d the appellee appeared voluntarily to the proceeding, and filed a petition asking that an order be passed requiring the appellant, her husband, to pay her alimony pending the suit, and also a reasonable counsel fee. Upon this petition there was an order nisi passed, directing the appellant to pay to the appellee the sum of \$100 per month, in advance, as alimony, during the continuance of the contest, \$500 for the expenses of the suit, and \$1,000 for counsel fees. The petition was answered on April 16th. Pending action on this petition and the answer thereto, Mrs. Chappell obtained on May 8, 1895, leave to file a cross bill; and on that day she filed her answer to the bill of complaint, and in the answer she incorporated the cross bill, wherein she prayed for a divorce a mensa et thoro. On the 25th of April Mr. Chappell filed a motion asking leave to dismiss his bill of complaint, and this motion was set for hearing on May 11th. The motion was resisted on various grounds, and on June 15th leave was granted the plaintiff to dismiss his bill upon paying the costs, and the further sum of \$250 for counsel fees. On July 26th the order nisi of April 3d, awarding \$1,000 counsel fees, \$500 suit money, and \$100 per month alimony, was made final, unless Mr. Chappell should, on or before August 10th, dismiss his bill for divorce, and pay the taxed costs and the \$250 for counsel fees, as provided in the order of June 15th. The taxed costs were paid, but the counsel fees were not, and the bill was not dismissed. From these various orders appeals were taken to this court, and, after argument, were dismissed on January 8, 1896. Thereupon writs of error were sued out, and under them the record was transmitted to the supreme court. Upon motion there made, these were, on February 15, 1897, also dis-

missed. On January 16, 1896, 10 days after the appeals just referred to had been dismissed by this court, an order was passed by the circuit court for Baltimore county making the orders of April 3 and July 28, 1895, liens on Mr. Chappell's property, and further directing him to satisfy the arrearages of alimony, amounting to \$1,000, the \$500 suit money, and the \$1,000 for counsel fees, within 10 days after service of a copy of the order upon him or his solicitor. On July 23d Mr. Chappell filed what he styles exceptions to this order, and an appeal to this court from the order itself. On the day following he filed other exceptions to the same order. These exceptions are, to say the least, most remarkable. They insist that the circuit court had no jurisdiction to pass the order of January 16th, because—First, though this court had dismissed his former appeals, he had made a motion for a reargument, the pendency of which motion rendered any action by the court below "ultra vires," as he styles it, and deprived the lower court of authority to take any action until the motion for a reargument had been disposed of; and because, secondly, at the time he (Chappell) filed the bill against his wife for a divorce there was pending between the same parties a suit for nullity of the marriage, in the United States circuit court for the district of Massachusetts; and because, thirdly, both he and his wife were nonresidents of Maryland, and not within the jurisdiction of the court. On the same day he entered another appeal from the order of January 16th. There is not a particle of evidence to support or sustain the averments of fact upon which reliance is placed in these exceptions; but the order of January 16th, though not a final decree determining the ultimate issue to be decided, is an order directing money to be paid, and is therefore within the terms of section 25 of article 5 of the Code. There can be no doubt whatever that a court of equity has power to allow alimony to a wife pending a suit for divorce; nor can its authority to require the husband to pay her counsel fees and the costs of the proceeding be disputed. These are not now open questions in Maryland. The amount allowed is regulated by the circumstances of each case, and is usually said to vest in the chancellor's sound discretion. But it by no means follows that this discretion is never open to review. So far from this being so, it has been held on appeal from the final decree that the amount allowed for alimony may be curtailed. *Ricketts v. Ricketts*, 4 Gill, 106. And where an allowance was refused upon an application made to the lower court after final decree, and after the record had been transmitted to this court on an appeal from the final decree, it was held that an appeal would lie from such refusal. *Rohrback v. Rohrback*, 75 Md. 317, 23 Atl. 610. It is not perceived how, if an appeal will lie from an order refusing to allow alimony, none can be en-

tertained from an improvident order making such an allowance. In the case of *Hayward v. Hayward*, 26 Atl. 357, the appeals were dismissed because there had been no final action on nisi orders requiring the husband to show cause why counsel fees and alimony pending the suit should not be allowed. The appeals were really taken from nisi orders. In disposing of the cases it was said: "Until the circuit court finally acts upon the application for counsel fees and alimony, there is nothing from which an appeal can be taken." Because there was no final action, the appeals were dismissed, but they were not dismissed because no appeal could have been entertained had the nisi orders been made absolute. Certainly an order to pay alimony and an order to pay counsel fees are orders to pay money, and from an order to pay money (other than an order to pay money to a receiver) section 25 of article 5 of the Code, in express terms, allows an appeal. It cannot be successfully contended that an order for the payment of alimony or for the payment of counsel fees in divorce proceedings forms an exception to the broad language of the statute. The explicit terms of the statute negative such a contention. There is an exception named in the section, and but one exception, and that is an order for the payment of money to a receiver. From such an order no appeal will lie. This one exception of necessity excludes the introduction of any other by mere interpretation. No better reason can be suggested for excluding from the terms of the Code an order requiring alimony and counsel fees to be paid than for the exclusion of any other or different order for the payment of money, nor can any valid reason be named why such orders should be irreviewable that would not with equal force apply to many others. While the wife, generally speaking, undoubtedly has the right to be maintained, and to be furnished with the aid of counsel, by the husband, and from his purse, during the litigation, still the amount of the allowance ought not to be solely committed to the discretion of the inferior court. An error against the husband in such an order might work as serious an injury to him as could possibly result to the wife from the brief delay incident to a review of the order on appeal. Prior to the passage of various statutes restricting the right of appeal in chancery proceedings, an appeal could be taken from any interlocutory decree or order. *Gover v. Hall*, 3 Har. & J. 43. By the act of 1830, c. 185, appeals were disallowed from all decrees other than those which were final, or in the nature of final decrees; but the act of 1841, c. 11 (which is incorporated in section 25 of article 5 of the Code), modified the act of 1830, and gave an immediate appeal from an order directing the payment of money, unless such payment was required to be made to a receiver. This provision has been the law of Maryland since 1841, and, while no appeal involving alimony

and counsel fees in divorce proceedings has arisen under it, there can be no good reason assigned for excluding from the right of appeal specifically given from orders for the payment of money such orders as direct the payment of alimony and counsel fees in a cause like this. The grounds upon which the propriety of the order of January 16, 1896, is assailed, are untenable. The pendency of the motion for a reargument of the previous appeals did not oust the jurisdiction of the circuit court for Baltimore county. *Rohrback v. Rohrback*, *supra*. There is not a particle of evidence adduced to show that the parties in the cause were nonresidents—much less, that they were not citizens—of the state when the order was passed. In the bill of complaint filed by Mr. Chappell, he asserts that he is a resident of Baltimore county, and to this bill he made affirmation. While an original proceeding to recover alimony will not be entertained by the courts of this state if both parties are nonresidents (*Keerl v. Keerl*, 34 Md. 21), this proceeding is not such a case. The appellant, by an *ex parte* affidavit appended to a written exception taken to the order of January 16th, cannot, under our chancery practice, avail himself of the statements in the exception as evidence. Even if this were a case where the doctrine of *Keerl v. Keerl* would be applicable, evidence should have been produced in the regular way to support the averments of nonresidence. This has not been done, and cannot now be permitted. The jurisdiction of the lower court was invoked by Chappell in the first instance, and he has adduced no evidence tending to prove the existence of a state of facts which would deprive the circuit court of the right to proceed to a final decree in the cause. The same remark applies to each and all of the other averments of his exceptions filed January 23d and 24th. There is not a shred of evidence to sustain them, and there is consequently nothing in the record to indicate either that the circuit court had no jurisdiction to pass the order of January 16th, or that in passing it there was any error, either of fact or of law. So far, then, as the appeals relate to this order,—the first and the second appeals,—the order is affirmed, and cannot again be questioned. The former appeals from the prior orders were dismissed because those orders were then conditional. They were in the alternative, and not final.

After the order of January the 16th had been appealed from, an attachment for contempt was issued against Mr. Chappell, but was returned non est. Then an execution was issued to enforce the payment of the alimony, suit money, and counsel fees; and a levy thereunder was made on the appellant's property, which was advertised for sale by the sheriff. On February 27, 1897, another petition was filed by the appellee, praying for an allowance of additional counsel fees for services rendered by her counsel

in the court of appeals and in the supreme court, and a nisi order dated the same day was signed. On the 9th of March the appellant filed objections to this order, and in those objections he goes over the same ground which he had relied on in his exceptions of January 24th to the order of January 16th; and in addition he relied on the rather novel defense that he ought not to be required to pay the counsel fees earned by his wife's solicitors in defending her against the serious charges that he himself preferred, because he had imprudently filed the original bill of March 13, 1895, against her. These objections contain various quotations from legal text-books, and references to adjudged cases. On the same day Chappell filed a demurrer to the petition of February 27th, and relied on some of the grounds set forth in the objections filed on the same day; and he further insisted that the proceeding was not a suit for divorce, but for nullity, though he himself had filed the bill that prayed in express terms for the passage of a decree divorcing the parties a vinculo matrimonii. On April 8th he filed a motion to quash the orders of January 16, 1896, and of February 27, 1897, and reiterated his reasons set forth in the objections filed March 9th. On the same day he filed a motion to quash the attachment for contempt, and the execution previously issued. On the 10th of April he filed a statement that he intended to dispute on appeal various orders, including those of January 16, 1896, and February 27, 1897; and, accompanying the statement, he filed an appeal bond, under section 28 of article 5 of the Code, claiming that the filing of the bond suspended the operation of all the antecedent orders requiring him to pay counsel fees, suit money, and alimony. On the 12th of April the court decided that section 28 of article 5 of the Code did not operate to stay the order of January 16, 1896, or any of the other orders passed to enforce it. On April 15th he filed an exception to this decision, and on the same day a motion to vacate it. On the same day he filed another long paper, called exceptions to all previous orders, including the one embodying the decision of April 12th. On April 24th he filed an equally long and rambling paper, called exceptions to the order of April 12th; and on the 24th he prayed an appeal from that order. On the same day he entered an appeal from an order of April 14th, though that order was only a nisi order, and was not made final until the 26th of the same month. As well as we can determine from this mass of incongruous matter, the question that is intended to be raised by the appeal from the order of April 12th is this: Does the filing of an appeal bond, under section 28 of article 5 of the Code, operate to suspend the execution or enforcement of an order requiring the payment of counsel fees, suit money, and alimony in a divorce case, until the passage of a final decree upon the

merits, and a review of that decree by this court on appeal? The section on which reliance is placed reads as follows: "In case a party intends, on an appeal from the final decree or order in the case, to dispute any previous order, and desires to stay the operation of such order, he shall state his intention to dispute the same, in writing, to be filed with the clerk, and shall give bond in such penalty as the court may prescribe, with surety to be approved by the court or the clerk, to indemnify the other party from all loss and injury which such party may sustain by reason of the staying of the operation of such order." This provision of the Code is taken from the act of 1830, c. 185, § 1, and obviously had no relation at the time of its adoption to proceedings for divorce in chancery, because it was not until the act of 1841, c. 262, was passed that courts of equity in Maryland acquired or possessed any jurisdiction to grant a divorce at all. *Brown v. Brown*, 5 Gill, 249. Originally the act of 1830 had, and could have had, no application to divorce proceedings; and from the nature of those proceedings, and the right which the wife has to be furnished by the husband with the means of conducting her case, it would seem to be quite clear that, if the scope which the appellant contends the twenty-eighth section of article 5 of the Code has been given to it, the very means which the law contemplates the wife shall have to conduct her case would practically be denied her, because under the section just transcribed the giving of a bond, and the filing of a notice that on appeal from the final decree an order for the payment of alimony and counsel fees would be contested, would tie up all allowances to the wife until after a final decree had been passed, and had been reviewed on appeal. This procedure would effectively preclude the wife from prosecuting or defending her cause, because it would absolutely deprive her, during the progress of the litigation, of the requisite money to support herself, and to defray the costs and expenses of the controversy. In many instances it might leave her utterly destitute of ability to contest or to refute the most serious charges against her. Manifestly, it was never the intention of the legislature to sanction such results, and we are unwilling to give to the statute a broader application than it had when adopted, especially when by stretching its original scope grave hardships and seriously inequitable consequences, amounting in some instances to a practical denial of justice, would inevitably follow. We think the court below was right in holding that the notice of an intention to dispute the order, and the bond given therewith, did not suspend the operation of the order of April 12th, or of any other antecedent or subsequent order. And we hold that these orders were not suspended, because they are not such orders as section 28

of article 5 of the Code includes. We shall therefore affirm the order complained of in the third appeal.

On April 14th the circuit court passed another order, directing Mr. Chappell to pay the sum of \$2,500 for 25 months' alimony, \$500 as suit money, and \$1,000 for counsel fees, under the orders previously signed, less such sum as might be credited as realized by the sale on April 12th under the execution already alluded to. This was followed by a variety of motions, exceptions, and demurrers, consisting chiefly of a repetition of those previously filed. There is no evidence adduced to support the averments of these papers, and what we have said in disposing of the first and second appeals applies to this one also. For the same reasons this order will be affirmed. We are at a loss to see the necessity for such continuous repetition of practically the same orders. Much of the useless matter now in the record could have been kept out, had there not been this needless multiplication of orders. Those which had been passed ought to have been enforced without reiterating them; and, if new ones were required for additional alimony and counsel fees, they should have been passed without reference to, and without incorporating, the prior ones.

On May 11th the court passed an order directing the \$600 additional counsel fees to be paid, and at the same time overruling all exceptions and demurrers previously filed; and Mr. Chappell was required to answer, plead, or demur to the cross bill within 30 days. From this order the fifth appeal was taken. Nothing has been shown, in any of the numerous papers filed, why this order was erroneous, and it will be affirmed.

The sixth and last appeal was taken from an order of July 17, 1897, refusing to transmit, on the application of the appellant, the record to the United States circuit court for the district of Maryland, for trial there. There was no error in passing this order. The federal courts have no jurisdiction in divorce cases. *Barber v. Barber*, 21 How. 582. It is not deemed necessary to review at length the several acts of congress relating to the removal of cases from the state to the federal courts. Various statutes, beginning with the judiciary act of September 24, 1789, have been adopted on this subject. The acts of July 27, 1866, March 2, 1867, March 3, 1875, and March 3, 1887, as reenacted August 13, 1888, all had reference to such removals. Some of the earlier of these have been repealed. We are concerned alone with the last, which reversed the tendency of the prior legislation, and greatly narrowed and restricted the right of removal. The act of 1867 for the first time gave the plaintiff a right to remove, but now the right is confined, under the act of 1887, to the defendant. The first section of this last-named act raised the jurisdictional limit prescribed for the United States circuit courts in ordi-

nary cases to an amount exceeding the sum or value of \$2,000, instead of \$500, as it had formerly been, and the second section designates the instances in which a cause pending in a state court may be removed to the federal courts. The third of these instances provides for such a removal when in any suit mentioned in the section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them; then either one or more of the defendants actually interested in that controversy may remove the suit. And it is under this provision that the removal was applied for in this case. By the express terms of the act of congress of 1837, as re-enacted in 1838, the removal can only be had upon the application of the defendant; and so the supreme court has decided. "Under the act of congress of March 3, 1837 (24 Stat. 552, c. 373), it is the defendant or defendants who are nonresidents of the state in which the action is pending who may remove the same into the circuit court of the United States for the proper district." *Martin v. Snyder*, 148 U. S. 663, 13 Sup. Ct. 706. And this can only be done when the matter in dispute exceeds the sum or value of \$2,000. In *re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141. No suit, however important it may be, can be removed, under this statute, unless it involves a right or claim capable of pecuniary estimation. *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148. And the amount in dispute must be determined from the declaration, petition, or bill of complaint. *Gordon v. Longest*, 16 Pet. 97. Now, the appellant does not come within the statute, in any particular. He is not the defendant in the suit or proceeding. He is the plaintiff, and the bill of complaint was filed by him, not to recover money or property, or other thing of value, but solely to procure a decree divorcing him from his wife. The auxiliary proceedings respecting alimony and counsel fees and costs, and growing out of the original suit, are not removable. *Bank v. Turnbull*, 16 Wall. 190; *Barrow v. Hunton*, 99 U. S. 80. Nor will such auxiliary proceedings convert the original bill into a proceeding involving a matter in dispute exceeding the sum or value of \$2,000. The bill of complaint does not, nor could it, pray for alimony, because it was filed by the husband against the wife. The recovery of alimony was no part of the relief prayed for. In fact, no recovery of money or value was sought at all, and it was consequently not a proceeding where any sum of money whatever was involved. The application for alimony and counsel fees grew out of the original proceeding, but were not the things sought to be recovered by it. They were purely incidental and auxiliary. But even had the bill been one where alimony could have been, and was, prayed for, that fact would not have authorized the removal of

the case. *Bowman v. Bowman*, 30 Fed. 849. The cross bill does not change the situation of the parties, or make Mr. Chappell, who, as plaintiff, filed the original bill, an actual defendant. A cross bill is generally considered as a defense, or as a proceeding to procure a complete determination of a matter already in litigation in the court. *Hooper v. Trust Co.*, 81 Md. 576, 32 Atl. 505; *Story*, Eq. Pl. § 399. It is not a new suit. *Cross v. De Valle*, 1 Wall. 5; *Pierce v. Chace*, 108 Mass. 260. As this is a case that cannot, under the act of congress, be removed to the United States circuit court, the mere filing of a motion for the removal did not operate to transfer the record. To accomplish a transfer, the suit must be one that can be removed, and the petition must show a right in the petitioner to demand a removal. *Crehore v. Railroad Co.*, 131 U. S. 240, 9 Sup. Ct. 692. There was no error committed in passing the order appealed from in the sixth case. All the orders appealed from will be, and hereby are, affirmed, with costs above and below; and the record is remanded to the court below, that the cause may proceed to a final decree upon its merits. Orders affirmed, with costs above and below, and cause remanded.

(1 Pen. 167)

VOSHELL v. CAVENDER.

(Superior Court of Delaware. Newcastle.
Dec. 16, 1897.)

EXECUTION—QUASHING RETURN—PETITION.

1. Return to execution may be attacked as false, and quashed on rule to show cause.
2. Application to quash return to execution being subsequent to the return term of the writ, the petition should deny notice at such term of the alleged falsity of the return.

Rule on petition of defendant, Thomas Cavender, to show cause why the sheriff's return to execution in favor of the use plaintiff, Mary E. Voshell, should not be quashed. Rule discharged.

The petition alleged: "That, on the 21st day of May, the plaintiffs in the above-entitled judgment caused a writ of fieri facias to be issued out of the superior court to William R. Flinn, sheriff of said county, to seize and take in execution the personal property, goods, and chattels of the said defendant, said writ being No. 10 to the September term, 1897, in which said writ the sheriff made the following return, 'Nulla bona,' and afterwards levied on lands and tenements as per description annexed, May 24, 1897. So answers William R. Flinn, sheriff, which return your petitioner respectfully represents was false and fraudulent, he, your petitioner, owning in his own right, at that time, goods and chattels approximating in value the sum of one thousand dollars. Your petitioner further sheweth that the sheriff aforesaid made no attempt to execute the said writ, but made the return aforesaid at the

instance and request of the said plaintiffs, their agents or attorneys, without making any inquiry as to whether said defendant owned at that time personal property out of which the debt in said writ could be partially or fully made. Your petitioner therefore respectfully sheweth that the said writ was not bona fide, but was a fraud upon your deponent. Therefore your petitioner prays a rule may be laid upon the plaintiffs in said writ, and upon the sheriff aforesaid, to show cause, if any they have, why the return aforesaid should not be quashed and stricken from the record."

Harry Emmons, for plaintiff. Peter L. Cooper, Jr., for defendant.

SPRUANCE, J. This is a rule to show cause why the sheriff's return to fl. fa. No. 10 to the September term, 1897, should not be quashed and stricken from the record. The return is "Nulla bona," and afterwards levied on lands and tenements as per description annexed. The inquisition was held on the 19th of October following, under a rule issued after the return of the fl. fa. The sworn petition of the defendants sets forth the grounds of his application, and we can consider no others.

The first question discussed in the argument was whether this court, under any circumstances, at any time had a right, upon a rule to show cause, to quash a sheriff's return to an execution. It was contended on the part of the plaintiff that this could not be done. Whatever may be the practice in England or elsewhere, it is perfectly well settled in this state that a false return of a sheriff to an execution may be quashed by the court. Under our practice, there could be no doubt that at the September term, the return term of the writ, it would have been competent for the defendant to have moved to quash the return, upon the ground that it was false or untrue, and that he had goods and chattels which were liable to be taken in execution. Under the statute, his land could not, without his consent, be taken in execution until his goods were exhausted. The September term was the proper time to make this application, and the delay in doing so until the November term is not justified or excused by anything before the court. The rule upon this subject is found in *Swiggett v. Kollock*, 3 Houst. 326, an action of ejectment tried in 1868, in which the defendant claimed title under a sheriff's deed.

The fl. fa. to the April term, 1851, was returned "Nulla bona," and levied on lands as per inquisition. Under a venditioni exponas to the April term, 1852, a part of the land was sold to the defendant, pursuant to which a deed was executed by the sheriff. On behalf of the plaintiff it was contended that the levy under the fl. fa. was void, because—First, it did not include all of the land of the defendant in the writ; and, second, that

the description of the land was too indefinite. As to the second objection, the description was held to be sufficient. As to the first objection, the court said that it came too late, and that "It might have been taken, at the return term of the levy, to wit, at the April term, 1851, and the inquisition and condemnation would have been set aside upon its being shown to the court that all the lands had not been levied upon; but, not having taken it then, it cannot be taken now, because it is a rule of this court that no objection to the inquisition can be taken after the return term of the fl. fa. and inquisition, except in the special case of want of notice." The petition of the defendant in this case does not deny notice or knowledge of the alleged false return at the September term, nor is there anything in the petition from which want of notice or knowledge can be inferred. Indeed, the petition is perfectly consistent with the hypothesis that the defendant did at the return term of the writ know all about the alleged false return, and purposely refrained from making objection at that term, so as to involve the plaintiff in further expense and irregularity. It is true that the law does not require the sheriff to give notice to the defendant of a return of nulla bona and levy on land; yet, if the return of nulla bona be false, it is the right of the defendant to have it set aside; but he cannot have this done unless he has knowledge of the false return. The defendant having failed in his petition to deny notice or knowledge at the September term of the alleged false return, we hold that his present application comes too late. Rule discharged.

(1 Pen. 177)

SMITH v. HOOPES et al.

(Superior Court of Delaware. Newcastle.
Jan. 3, 1898.)

LANDLORD AND TENANT—DISTRESS—SALE—DISTRIBUTION OF PROCEEDS—CLAIMS FOR WAGES.

1. A landlord distraining for rent is justified in seizing a sufficient amount to satisfy, not only the rent, but also all prior liens.

2. Under 16 Laws, c. 147, § 1 (Code 1893, p. 817), providing that debts due for labor are a first lien on all property of the employer, and shall be the first to be satisfied out of a sale of such property, whether made by an officer or otherwise, applies on the sale of goods distrained for rent.

Appeal from justice court.

Action by J. W. Hoopes & Sons against Harry R. Smith, garnishee. Judgment against the garnishee, and he appeals. Judgment for garnishee.

Hugh C. Browne, for appellant. John P. Nields, for appellees.

SPRUANCE, J. This is a case stated. The facts are substantially these: J. W. Hoopes & Sons, on August 4, 1896, recovered before a justice of the peace a judgment against Joseph E. Stewart for \$152.75, besides costs,

and execution was issued thereon on August 15, 1896, under which a levy was made on all the goods of said Stewart. On December 11, 1896, Henry R. Smith, as bailiff of John Cook, the landlord of Stewart, distrained the said goods for \$120, rent in arrear, being rent for less than one year. On December 22, 1896, the said Smith, being a constable, sold said goods under said distress for \$177.25. Before the said sale, Van Arsdalen and Hicken made affidavits setting forth that they were clerks employed by said Stewart, and that \$40, being one month's wages, was due Van Arsdalen, and that \$45, being one month's wages, was due to Hicken, which affidavits were placed in the hands of the said constable. It is agreed that these amounts were due to said employes for wages. On December 22, 1896, upon the sale of the goods of Stewart by Smith, the constable, and while said \$177.25, the proceeds of the said sale, were in his hands, an attachment was issued upon said judgment of Hoopes & Sons, and the said Smith was summoned as garnishee of Stewart. The plaintiffs refused to receive the answer of the garnishee, and a plea of nulla bona was entered, and judgment was rendered against the garnishee for the sum of \$46.95, being the balance of \$177.25, the proceeds of said sale after deducting the said sum of \$120 rent, and the sum of \$10.30 costs. From this judgment of \$46.95, said Smith, constable and garnishee, as aforesaid, appealed to this court.

It was contended on behalf of the plaintiff that the distraint in this case was excessive, and that there is a difference in this respect between the right of a landlord distraining for rent and the right of an officer levying under an execution. We think that there is no such difference. An officer having an execution in hand is not justified in making an excessive levy, nor is a landlord justified in making an excessive distraint; but what is an excessive levy or distraint depends upon circumstances, and, if in either case there are prior liens to be paid, the amount which may be properly seized is increased. In this case the distraint was not only not excessive, but was not sufficient for the payment of the rent. The only material question before us is whether wages of employes are entitled to priority over rent, under chapter 147, vol. 16, of the Laws of the State. Section 1 of this act provides as follows: "That from and after the passage of this act all debts or claims that may become due or growing due for labor or services rendered by any mechanic, laborer, clerk or other employé or any person or persons, chartered company or association employing laborers, clerks or mechanics in any manner whatsoever, shall be a first lien on all the real and personal property of such employer or employers, and shall be the first to be satisfied out of the proceeds of the sale of such property, whether made by an offi-

cer or an assignee of such employer or employers or otherwise." Then follow provisions limiting the lien to one month's wages, and the amount to \$50. The language of this statute, applied in its broadest sense, might be extremely dangerous, but a much more limited construction is sufficient for the purposes of this case. This sale was made by a public officer. The landlord may distrain personally or by his bailiff, but the sale of the goods distrained must be made by a public officer, namely, a sheriff or a constable. This sale comes within the express terms of the act. We have no doubt that, under the statute, claims for wages have priority over claims for rent. That being the case, the first application of the fund in the hands of the constable should be to the payment of the wages, amounting to \$85. Taking that from the \$177.25, the proceeds of the sale, there will not be enough to pay the \$120 rent, and there will be nothing in the hands of the constable applicable to any execution under the judgment of Hoopes & Sons. Judgment is therefore rendered in favor of Smith, the defendant below (appellant).

(1 Pen. 182)

MULLIN et al. v. BLUMENTHAL et al.

(Superior Court of Delaware. Newcastle.

Jan. 3, 1898.)

PLEADING — AMENDMENT — REMOVAL OF CAUSE.

Counsel for defendant stated to the court that he had a petition for removal to the United States circuit court, but that plaintiffs' attorney would appear presently with an amendment to the narr. Plaintiffs' attorney then appeared, and offered an amendment reducing his demand to \$1,950. *Held* that, no papers having been filed depriving the court of jurisdiction, it was proper to allow the amendment.

Action on the case by Alice Mullin and Thomas Mullin against F. Blumenthal & Co. for damages. On application for leave to amend. Allowed.

On January 3d, Mr. Saulsbury appeared in court on behalf of the defendant, with a petition upon which he stated he proposed to make an application to have the case removed to the United States circuit court for the district of Delaware, but stated to the court that, on coming to the court house, he had seen Mr. Biggs at the latter's office, and told him that he proposed to make the application for removal, and was informed by Mr. Biggs that he would prepare an amendment to his narr. which he proposed to ask leave of the court to file, and that Mr. Biggs was preparing said amendment when he left him.

The court declined to entertain the application of Mr. Saulsbury for removal until Mr. Biggs' arrival. Mr. Biggs then appeared in court, and asked leave to amend his narr., reducing the amount of damages claimed from \$5,000 to \$1,950.

Mr. Saulsbury objected to the amendment,

contending that he should first be permitted to make his application for removal; that, if Mr. Biggs was allowed to amend his narr., it would be depriving the defendant of the opportunity of making his application for removal, inasmuch as the jurisdiction of the United States circuit court was limited to cases involving \$2,000 and upward.

Mr. Biggs contended that if the plaintiffs were willing to reduce their claim from \$5,000 to \$1,850, and let the case remain in the superior court, they had a perfect right to do so; that he only learned a few moments before that an application was to be made for removal from the superior court, and that this was the first opportunity he had had of offering the amendment to his narr.; that the amendment could certainly be no hardship upon the defendant, and that it was the practice of the court having assumed jurisdiction to retain it; that the effect of a removal would be a further continuance of the case; and that the plaintiffs were entitled to general leave to amend, and therefore he asked the privilege of filing the amendment to the declaration.

John Biggs, for plaintiffs. Willard Saulsbury, for defendant.

LORE, C. J. This amendment ought to be allowed. This suit is brought in this court. The plaintiffs have a right to stay in this court if their amendment is allowed before the application for removal is filed. We must assume that you are dealing fairly. We will impugn no one's motives. We think we ought to allow the amendment to the narr. I should be very much disinclined to oust the jurisdiction of this court after the court has once properly assumed jurisdiction. We decline to make the order for removal now. Of course, after the amendment has been granted, the suit is not within the terms of the statute authorizing the removal of cases to the circuit court of the United States.

SPRUANCE, J. I think that that amendment ought to be allowed. Mr. Saulsbury comes in and tells the court that he wishes to file the papers for removal, at the same time telling the court that Mr. Biggs is in town, that he saw him a few minutes since, told Mr. Biggs that he proposed to file the application for removal, and that Mr. Biggs told him that he intended immediately to make an application for amendment to his narr. reducing the amount of damages claimed. Now, it happened that Mr. Saulsbury got here to the court first, but we did not allow Mr. Saulsbury to file his papers. There is no application for removal filed in this court. On the contrary, we thought it was but courteous in us to have Mr. Biggs in court, especially as Mr. Saulsbury had informed us that Mr. Biggs had advised him that the latter proposed to offer his amendment in this court. Now, Mr. Biggs comes

into court, and makes his application, and we grant it, as we have a perfect right to do. There has nothing happened which takes this case out of our jurisdiction; no papers have been filed; and it seems to me we are doing for Mr. Biggs no more than what is our plain duty to do. He offers his amendment, and we grant it; and, if anybody has anything to say as to any application for removal, we will now hear it.

(31 Me. 320)

YORK v. MURPHY et al.

(Supreme Judicial Court of Maine. Jan. 31, 1898.)

CHATTEL MORTGAGE — VALIDITY — EQUITY — ADEQUATE REMEDY AT LAW — AMENDMENT OF BILL.

1. Upon a bill in equity to annul a chattel mortgage, or to redeem the same if found valid, and heard on demurrer, it appeared that the mortgage had not been recorded, as required by law, in the town where the mortgagor resided. *Held*, that the mortgage was invalid as against the plaintiff, who had purchased the chattel of the mortgagor, and the mortgagees have no title thereunder.

2. The mortgagees had previously replevied the same chattel from a bailee of the plaintiff. *Held*, that the plaintiff has a perfect defense at law to the replevin suit, and has no need of relief in equity.

3. *Held*, further, if the plaintiff's defense to the replevin suit shall fail from facts not disclosed in her bill, inasmuch as foreclosure proceedings have been enjoined and security has been given therefor, she may hereafter be allowed to amend her bill as a bill to redeem upon payment of costs of this suit, and tender of mortgage debt, with interest and costs of foreclosure.

(Official.)

Exceptions from supreme judicial court, Aroostook county.

Action by Cynthia York against John Murphy and another. Bill dismissed on demurrer, and plaintiff excepts. Exceptions overruled, and bill retained for amendment.

The facts in this case, as set forth in the bill, filed August 7, 1896, are substantially as follows: The plaintiff bought a horse on May 16, 1896, of one Frank J. Stairs, then a resident of Washburn, Aroostook county; having been informed and believing that the horse was the property of said Stairs, and free from incumbrance. And thereupon she hired the horse out to one Fred O. York. The defendants, on May 28th following, replevied him from her lessee, York, under a writ returnable to the September term, 1896, Aroostook county, and which suit is still pending.

The defendants claim said horse under a mortgage to them from said Stairs to secure \$47.25, dated January 14, 1896. This mortgage was recorded in Caribou, the town in which the defendants lived, but was not recorded in Washburn, the town in which said Stairs, the mortgagor, resided at the time the mortgage was given.

The plaintiff further alleged that on June 10, 1896, following the replevin suit of May 28th, the defendants published a notice of

foreclosure of the mortgage in a newspaper printed in said Caribou, which notice was recorded in said Caribou, where the mortgage was recorded, on June 29, 1896, and that the right of redemption would expire, and the foreclosure become absolute, on August 10, 1896, if said mortgage was properly recorded.

She further alleged that, if she should pay to the defendants the amount of the mortgage, she would be without remedy to recover it back if it should be finally determined by the court that said mortgage was not properly recorded, and therefore not valid as against her, and that, if valid, the right of redemption would expire before any court would sit in which the question could be tried and determined; also, that she has no alternative but to pay said mortgage, whether void or valid, before said foreclosure becomes absolute, or to ask this court, sitting in equity, to suspend by order and injunction the foreclosure aforesaid, and to enjoin the prosecution of said replevin suit until the validity of said mortgage can be tried and determined under her suit in equity.

She further alleged that the mortgage, although not recorded in the town where the mortgagor lived at the time it was given, still is recorded in the town adjoining, where the mortgagees live; and that the existence of such mortgage, supported by such a record which said mortgagees then claimed to be in the town of said mortgagor's residence, as further supported by their replevin suit, constituted a serious cloud upon her title, which should be removed by the decree of this court.

Nevertheless, if this court, upon full hearing in equity, should hold said mortgage to be properly recorded, and valid as against her, she offers to pay the amount due on said mortgage; and, in this latter alternative, she brings this bill to redeem said mortgage. A preliminary injunction was issued August 8, 1896, a bond having been duly approved.

D. D. Stewart and F. M. York, for plaintiff.
W. P. Allen, for defendants.

HASKELL, J. Bill in equity to annul a chattel mortgage, and, if found valid, to redeem the same. The bill was dismissed on demurrer below, and the cause comes up on exceptions.

The bill charges that the mortgage was not recorded in the town where the mortgagor resided, and the demurrer admits the fact. Of course, as to this plaintiff, an innocent purchaser of the property, the mortgage is invalid, and the defendants, the mortgagees, have no title to the property thereunder; and, in their replevin suit against a bailee of the plaintiff, she has a perfect defense at law, and has no need of relief in equity. Act 1895, c. 39; *Bachelor v. Bean*, 76 Me. 517; *Milliken v. Dockray*, 80 Me. 82, 13 Atl. 127.

But if the plaintiff's defense to the replevin suit shall fail, from facts not disclosed in her bill, inasmuch as foreclosure proceedings have

been enjoined, and security has been given therefor, she may hereafter be allowed to amend her bill as a bill to redeem upon payment of costs of this suit, tender of mortgage debt, with interest, and costs of foreclosure.

Exceptions overruled. Bill retained for amendment.

(91 Me. 324)

SNOW v. ULMER.

(Supreme Judicial Court of Maine. Jan. 31, 1898.)

CHATTEL MORTGAGE—DESCRIPTION—DATE.

A mortgage of chattels, described as in a store, covers only such property as was in the store at the date of the mortgage, although the mortgage may be actually executed at a later day. The date given becomes a part of the description of the property.

(Official.)

Report from supreme judicial court, Knox county.

Action by Edward S. Snow against William N. Ulmer. Judgment for defendant.

O. E. & A. S. Littlefield, for plaintiff. W. H. Fogler and M. A. Rice, for defendant.

HASKELL, J. Trover against an attaching officer by a mortgagee, and the only question involved is whether the goods attached were covered by the mortgage.

Now, as said by plaintiff, a mortgage takes effect from the time of its delivery, regardless of its date. *Egery v. Woodward*, 56 Me. 45; *Jones v. Roberts*, 65 Me. 273. This mortgage was delivered after the goods had been deposited in the debtor's store, and before the attachment. But it is contended that the description of the property mortgaged did not include the goods attached. The mortgage was dated November 18th, and executed, delivered, and recorded November 19th, after the goods had reached the store that morning. They were not in the store November 18th, at the date of the mortgage, which describes the property: "All the stock, fixtures, and merchandise in the store No. 273 Main street, in said Rockland."

The record held out that only property in the store at the date of the mortgage was conveyed. The date became a part of the description of the property mortgaged, and it can make no difference that the mortgage was not executed until the next day, or the next week, or the next month, or the next year, when it may have actually been delivered and recorded. It would then only cover property described in it, and the description is of goods actually in the store at its date, not of goods afterwards put there, and its date was before the goods were put in. The doctrine of this opinion logically follows from our own cases, although neither one of them exactly fits the contention here raised. *Sawyer v. Long*, 86 Me. 541, 30 Atl. 111; *Stirk v. Hamilton*, 83 Me. 524, 22 Atl. 391; *Griffith v. Douglass*, 73 Me. 532; *Chapin v. Cram*, 40 Me. 564.

The case of *Partridge v. White*, 59 Me. 564, is substantially in point. It was there held that a mortgage of goods "now in my store" covered only goods then there,—inferentially at the date shown upon the face of the mortgage and the record thereof.

Judgment for defendant.

(91 Me. 253)

STATE v. ALLEN et al.

(Supreme Judicial Court of Maine. Jan. 22, 1898.)

PLEA IN ABATEMENT—VERIFICATION.

1. The rules of practice in our courts in reference to the necessity of verification to pleas of abatement are only an affirmance of the common-law doctrine, as modified by 4 & 5 Anne, c. 16, § 11 (in 1705), and which has become the common law of this state by adoption.

2. Such verification is necessary not only in civil actions, where a plea in abatement is filed, but in criminal proceedings also.

3. In a judgment upon a demurrer to a plea in abatement as an issue of law, not upon an issue of fact found upon such a plea, the entry must be that the respondent answer over.

(Official.)

Exceptions from superior court, Cumberland county.

Calvin W. Allen and another were indicted for crime. From a judgment adjudging a plea in abatement bad, defendants except. Overruled.

The material portions of the plea in abatement are as follows: "Because they say that Emery Rich, of the town of Standish, in said county of Cumberland, who served as a member of the grand jury impaneled at this term of this honorable court, and was present at the finding of said indictment, was never legally a member of said grand jury, in that no due and legal notice was given of the place of holding the meeting required to be held for the drawing of a grand juror for said term of court from said town of Standish; and this the said respondents are ready to verify."

Geo. Libby, Co. Atty., for the State. Chas. P. Mattocks, for defendants.

FOSTER, J. A plea in abatement was filed by the respondents therein setting forth that a member of the grand jury, who was present and served at the term of court at which the indictment was found, was never legally a member of the grand jury, in that no due and legal notice was given of the place of holding the meeting required to be held for the drawing of a grand juror for that term of court from the town of Standish.

To this plea a demurrer was filed by the county attorney for Cumberland county, and joined by the respondents. The court overruled the demurrer, and adjudged the plea bad, to which rulings exceptions were duly filed.

The only question for consideration is in reference to the sufficiency of the plea.

A rule of court in reference to practice in the superior court of Cumberland county, like that in the supreme court, provides that pleas in abatement, "if consisting of matter of fact not apparent on the face of the record, shall be verified by affidavit."

This plea sets forth facts which are "not apparent on the face of the record," and should therefore be verified by affidavit that the plea is true in substance and in fact. Such plea is bad if it has no verification, or a defective one. *Fogg v. Fogg*, 31 Me. 302; *Bellamy v. Oliver*, 65 Me. 108.

It is unnecessary to consider the other objections raised as to the sufficiency of the plea, if this one is fatal. We think it is.

But the defense claims that the rule to which we have referred applies only in civil actions, and not in criminal proceedings. But reason and authority are against this position.

The rules of practice in our courts in reference to the necessity of verification to pleas of abatement are but an affirmance of the common-law doctrine, as modified by 4 & 5 Anne, c. 16, § 11 (in 1705), and which has become the common law of this state and Massachusetts by adoption. *Monroe v. Luke*, 1 Metc. (Mass.) 459, 463.

At common law in England, where the defendant pleaded a foreign plea, he was obliged to make oath of the truth of the matter therein alleged, but not so in case of a plea to the jurisdiction or plea in abatement. But by 4 & 5 Anne, c. 16, § 11, it was enacted that "no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true." And this statute was held by the English court of king's bench to apply not only to civil, but to criminal, cases as well. *Rex v. Grainger*, 3 Burrows, 1617. In that case the plea was set aside for want of an affidavit to verify it. *Com. v. Sayres*, 9 Leigh, 722; *Archbold*, Pl. & Ev. "Abatement"; 1 Bish. Cr. Prac. 480, and notes; 1 Chit. Pl. 462; *Steph. Pl.* 87; 1 Whart. Cr. Law, Special Pleas, "Abatement." It was necessary that such affidavit or verification should state that the plea was true in "substance and fact," not merely that the plea is a true plea (2 *Strange*, 705); and if there was no affidavit, or it was defective in any particular, the plaintiff might treat the plea as a nullity, or move the court to set it aside (*Rex v. Grainger*, supra; *Richmond v. Tallmadge*, 16 Johns. 307; 1 *Tidd*, Prac. 588).

And such is the doctrine of our own court,—a survival of the old English rule as modified by St. 4 & 5 Anne. *Bellamy v. Oliver*, 65 Me. 108; *Fogg v. Fogg*, 31 Me. 302.

In *State v. Ward*, 64 Me. 545, and *State v. Flemming*, 66 Me. 142, both criminal proceedings, where pleas in abatement were filed, the proper verifications to the pleas

were there made, not only in compliance with the common law, but with the rule of court.

Judgment being upon demurrer to a plea in abatement as an issue of law, not upon issue of fact found upon such plea, the entry must be that the respondents answer over. *Baker v. Fales*, 16 Mass. 147, 157; *Whitford v. Flanders*, 14 N. H. 371; *Bouv. Dict. "Abatement."*

Exceptions overruled.

Respondents to answer over.

(51 Me. 264)

MORSMAN v. CITY OF ROCKLAND.

(Supreme Judicial Court of Maine. Jan. 22, 1898.)

DEFECTIVE HIGHWAY — PERSONAL INJURIES — PROXIMATE CAUSE — DAMAGES.

1. In an action to recover damages sustained in consequence of an injury received through a defect in a highway, the question whether the fright or misconduct of the horse which was driven by the plaintiff is such as to be regarded as the direct, proximate cause of the injury is to be determined by the extent of such misconduct.

2. It may in a remote degree bear upon, or even influence, though not in a legal sense be said to cause, it.

3. If a horse, well broken, and adapted to the road, while being properly driven suddenly shies or starts from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is in fact only momentarily not controlled.

4. And if, while thus momentarily shying or swerving from the direct course, he comes in contact with a defect in the highway, and an injury is thereby sustained, such conduct of the horse cannot be considered as the proximate cause of the accident, though it may be one of the agencies through which it was produced, and therefore a recovery may be had for such injury.

5. The plaintiff recovered in this case a verdict of \$700 for damages sustained by her through a defective highway in the city of Rockland,—the defect being the want of a sufficient railing,—and the circumstances under which the injury was received, on the 1st day of May, 1896, are set out in the following manner in her declaration: "And there was not on said 1st day of May, A. D. 1896, and had not been for a long time before, to wit, for one year before, any sufficient railing, nor in fact any railing whatever, or other protection for travelers, on and along said bank, or on and along the pond side of said highway where said bank was located. That said highway at said point was narrow, and teams meeting at that point to pass each other were forced very near said bank, and in case of any sudden starting of the horse of the traveler on the pond side of said highway at such passing was dangerously defective. That the said defendants had reasonable notice of all said defective condition, want of repair, and want of sufficient railing; the municipal officers and highway surveyors of said city of Rockland having had actual notice of same at least twenty-four hours before the plaintiff received the injuries hereinafter set forth, on the 1st day of May A. D. 1895. That the plaintiff on said 1st day of May, A. D. 1895, was traveling over and along said highway in a good, safe, and suitable wagon, drawn by a kind and well-broken horse, with a safe and suitable harness, driving said team herself in a careful and prudent manner, and the plaintiff

was then and there in the exercise of ordinary care. That, through said defect and want of repair and want of sufficient railing of said highway, the said team she was driving, while passing a loaded lime cask team, was precipitated over said bank into the water of said pond, and the plaintiff was thereby thrown upon the rocks and ground thereon with great force, wounding and bruising her breast, head, and neck, and other parts of her body, rendering her unconscious, and nearly drowning her, making her sick and lame for weeks, and from which she has not recovered," etc. *Held*, that the verdict should not be disturbed on account of excessive damages.

(Official.)

Action by Margaret A. Morsman against the city of Rockland for personal injuries. There was a verdict for plaintiff, and defendant moves for a new trial. Overruled.

J. H. & C. O. Montgomery, for plaintiff. S. T. Kimball, City Sol., for defendant.

FOSTER, J. Action to recover damages for an alleged injury to the plaintiff by reason of a defect in a highway in the city of Rockland.

The defect alleged was the absence of a sufficient railing along the easterly side of Chicawaukee Pond, along which the highway passes. The plaintiff in passing over this highway met a loaded lime cask team, and in passing the same her horse took fright at the barrels, and immediately backed over the bank; precipitating horse, carriage, and plaintiff into the pond, and inflicting the injuries of which she complains.

There was no railing on the side of the highway, and the distance from the easterly wheel rut to the edge of the bank was about 18 inches. The bank is nearly perpendicular, and about 4½ feet above the water, and then it drops off so that the bottom of the pond at that point is 8 feet below the surface of the road. In going over the bank into the pond the wagon was turned completely over, bottom side up, and the plaintiff beneath it in the water.

The defense set up was that the fright of the horse was the proximate cause of the injury; the plaintiff's contention, on the other hand, being that the want of a sufficient railing was the proximate cause, and the fright of the horse was but momentary, and not of sufficient duration to be entirely freed from the control of the driver, and therefore not such a contributing cause as to relieve the city from its responsibility occasioned by the defective condition of the highway.

We think the plaintiff's position is correct.

The law of causal connection in this class of cases has been so thoroughly considered by our court in the cases of *Spaulding v. Winslow*, 74 Me. 523; *Aldrich v. Gorham*, 77 Me. 237; *Perkins v. Fayette*, 68 Me. 152; *Moulton v. Sanford*, 51 Me. 127; *Clark v. Lebanon*, 63 Me. 393; *Cleveland v. City of Bangor*, 87 Me. 259, 32 Atl. 892; and *Carleton v. Inhabitants of Caribou*, 88 Me. 461, 34 Atl. 269,—that a reference to the decisions is all that is necessary. These authorities, as well as others of like na-

ture in Massachusetts, all agree that the contributory fault, to be sufficient to bar a recovery against a town or city for a defective highway, must be something more than a mere condition, agency, or occasion of it,—it must be one of the efficient and proximate causes of the accident.

This distinction is clearly drawn in *Spaulding v. Winslow*, supra, where Chief Justice Peters says: "Here, then, must be the proper distinction: If the hole, or the horse's fright at the hole, was the proximate cause of the injury, the plaintiff cannot recover. If it by chance became merely an agency through which another defect operated to produce the injury, then he can recover."

The same distinction is observed in *Aldrich v. Gorham*, supra, wherein it is said that if any other efficient, independent cause, for which the town is not responsible, contributes directly to produce such injury, then the town is not liable.

Whether the fright or misconduct of the horse is such as to be regarded as the direct, proximate cause of the injury, in this or in any given case, is to be determined by the extent of such misconduct. It may in a remote degree bear upon, or even influence, though not in a legal sense be said to cause, it. Consequently, by the decisions, not only of our own state, but of Massachusetts, it is the settled doctrine that if a horse, well broken and adapted to the road, while being properly driven suddenly shies or starts from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is in fact only momentarily not controlled; and if while thus momentarily shying or swerving from the direct course he comes in contact with a defect in the highway, and an injury is thereby sustained, such conduct of the horse could not be considered as the proximate cause of the accident, though it may be one of the agencies or mediums through which it was produced, and therefore a recovery may be had for such injury. *Aldrich v. Gorham*, supra; *Spaulding v. Winslow*, 74 Me. 534; *Titus v. Northbridge*, 97 Mass. 258; *Stone v. Hubbardston*, 100 Mass. 55; *Bemis v. Arlington*, 114 Mass. 508; *Wright v. Templeton*, 132 Mass. 50.

In this case the fright of the horse was sudden, the loss of control but momentary, the accident immediately following. In no just sense was the fright of the horse the proximate cause of the accident. It was merely an agency which induced, influenced, the accident,—a medium or inducement through which another and independent defect produced the injury. The efficient, proximate cause of the injury was the want of a sufficient railing at the place of the accident.

Nor do we think the verdict should be disturbed on account of the damages being excessive. The evidence is such as may well have warranted the jury in determining the amount of their verdict.

Motion overruled.

(31 Me. 268.)

FICKETT v. LISBON FALLS FIBRE CO.

(Supreme Judicial Court of Maine. Jan. 22, 1898.)

INJURY TO SERVANT — NEGLIGENCE — DEFECTIVE MACHINERY — ASSUMING RISK — PROXIMATE AND REMOTE CAUSE.

1. In an action brought by the servant against the master, for an injury received while employed in the service of the latter, if the plaintiff knew and appreciated the danger which was the cause of the injury, then he might be held to have voluntarily assumed the risk; but mere notice that there was some danger, without appreciating the risk, will not of itself preclude the plaintiff from recovering.

2. Disobedience of a rule, even if such rule is known and understood by the servant, must have contributed to the injury in order to preclude a plaintiff from recovering.

3. There must be a causal connection between the disobedience of the rule and the injury received.

4. In this case, the causal relation between the alleged contributory negligence of the plaintiff at the time of the accident, in the disobedience of this rule, assuming that he had knowledge of it, and the injury received, was a question of fact submitted to the jury under instructions to which no exceptions have been presented to the court.

5. This causal connection, and whether such disobedience to the rule contributed to produce the injury, were questions of fact for the jury under appropriate instructions, upon all the facts and circumstances of the case.

6. The contributory negligence of the injured party that will defeat a recovery must have contributed as a proximate cause of the injury.

7. If it operated only as a remote cause, or afforded only an opportunity or occasion for the injury, or a mere condition of it, it affords no bar to the plaintiff's action.

(Official.)

Action by John E. Fickett against the Lisbon Falls Fibre Company to recover for personal injuries. Verdict for plaintiff. Motion to set it aside. Overruled.

H. W. Oakes, for plaintiff. J. W. Symonds, D. W. Snow, and C. S. Cook, for defendant.

FOSTER, J. The plaintiff recovered a verdict of \$2,037.50 for personal injuries received by him while in the defendant's employment. The defendant asks this court, upon motion in the usual form, to set that verdict aside.

The plaintiff's duty was to enter the blow-pits, after the pulp was cooked and blown into these pits from the digesters, and there, by means of large hose, wash down the pulp. It was in one of these blowpits that the plaintiff received the injuries of which he complains.

In order to understand just how the plaintiff got hurt, it is necessary to state something of the process by which the pulp is manufactured.

The wood, which is cut into small chips, is placed in large digesters, where it is cooked in steam and sulphurous acid from 10 to 18 hours. After being cooked, the pulp is discharged or blown out by means of a valve near the bottom of the digester, through a pipe 7 inches in diameter and 22 feet in

length, known as the blowpipe, into the blow-pit. The pulp, mixed with hot water and acid, leaves the blowpipe with great force, and strikes an iron plate upon the side of the pit opposite the end of the pipe, and is thus broken up and distributed throughout and over all parts of the pit. After being discharged into this, the pulp remains until cool, about two hours being required for that purpose. Cold water is thrown upon the pulp as soon as discharged into the pit by means of sprinklers for the purpose of cooling and cleansing it of acid. After it is cooled sufficiently the pulp is washed, by the use of water, from the pit into the stuff chest below, where it remains until needed for the next process.

The blowpit in which the plaintiff was injured was a small room stoutly constructed of planks, but large enough to hold two cooks of pulp. There was an entrance door in the side of the pit opening from the room in which the digester was located. Along the inside of the pit was a plank walk, about 2 feet wide, resting on brackets about $4\frac{1}{2}$ feet from the floor of the pit, upon which the workmen stood while washing the pulp from the pit to the stuff chest. Upon and across this plank walk, and about seven feet to the right of the entrance door, was the iron blowpipe. Just beyond the blowpipe was a lever which was raised for the purpose of letting water into the pit, after the pulp had sufficiently cooled, to aid in washing it into the stuff chest.

Upon the morning the plaintiff was injured, a bolt in the valve near the bottom of the digester that furnished the pulp for the pit in question was broken, allowing a portion of the valve to drop on one side a very little, and the effect of this was to permit the escape of steam through the blowpipe into the blowpit under a pressure of 80 pounds to the inch, which pressure continued until it was reduced by shutting off the steam from the digester. This injury to the valve also allowed the hot acid to flow into the pit, and, as the evidence shows, a pool was formed under the end of the blowpipe.

The plaintiff claims that, having no knowledge of any injury to the valve, and as was his duty, he entered the blowpit in order to wash the pulp, and was proceeding along the plank walk to hoist the slide at the other end of it, and that when he reached the end of the blowpipe he was, by force of the steam escaping from it, blown off into the hot pulp and acid, and thereby received severe scalds and burns upon his legs and arms.

The defense sets up negligence on the part of the plaintiff, and asserts that he went into the pit after standing by the valve, on his way to the pit, and learning that there was trouble with it; that when he went into the pit he disobeyed one of the rules of the defendant company in not shoveling off the pulp from the walk before commencing his work of washing; and that he walked across

the plank into the pulp in the blowpit, then into the pool of acid, and so received his injuries.

But we do not feel, from a careful examination of all the evidence, that these contentions on the part of the defense are sustained. To be sure, there was more or less conflict in the evidence on these several positions, but we see no reason for saying the jury must have erred in deciding in favor of the plaintiff. From the plaintiff's statement it appears that on that morning he went to the mill about 7 o'clock, rang in his registry, inquired what room he should go into, and was told to go into No. 3; and then he went back, changed his clothes, took down the door to the blowpit, and went into it to do his work.

The evidence from the superintendent and another witness is that they were standing near the digester looking at the defective valve, when the plaintiff approached, and went into the pit. Without analyzing the testimony of the witnesses, we feel confident that the plaintiff had not, before entering the blowpit, received such notice of any defect in the valve as would lead him to suppose that there was any unusual danger to be encountered in the blowpit. He certainly did not appreciate it. The defense strenuously contends that he knew the valve was leaking, and that it was not safe to enter the blowpit. Had the plaintiff known and appreciated the danger, then he might be held to have voluntarily assumed the risk. But the mere notice that there was some danger, without appreciating the risk, will not of itself preclude the plaintiff from recovering. *Mundle v. Manufacturing Co.*, 86 Me. 400, 30 Atl. 16. It is not claimed that any word of warning was given to the plaintiff by those standing near the defective valve as he came up and passed by into the blowpit.

It is also urged that, in the disobedience of one of the rules of the company by the plaintiff, he cannot recover. The rule required that the plank walk inside the blow pit should be shoveled off, and the defense insists that had the plaintiff observed this rule, and stayed on the walk long enough to shovel it off, he would have avoided all danger. The plaintiff denies ever having any knowledge of this rule. But disobedience of a rule, even if such rule is known and understood, must have contributed to the injury in order to preclude a plaintiff from recovering. There must be a causal connection between the disobedience of the rule and the injury received. *Ford v. Railroad Co.*, 110 Mass. 240; *Whittaker v. Canal Co.*, 126 N. Y. 541, 551, 27 N. E. 1042. The causal relation between the alleged contributory negligence of the plaintiff at the time of the accident in the disobedience of this rule, even assuming that he had knowledge of it, and the injury received, was a question of fact submitted to the jury under instructions to which no exceptions have been presented to the court.

Assuming that the plaintiff had knowledge

of the rule, and that there was a disobedience of it, and that in a certain sense it contributed to produce the accident, still it was a question for the jury, under appropriate instructions upon all the facts and circumstances of the case, whether it contributed to the accident in a legal sense so as to bar the plaintiff's recovery. The contributory negligence of the injured party that will defeat a recovery must have contributed as a proximate cause of the injury. "If it operated as a remote cause, or afforded only an opportunity or occasion for the injury, or a mere condition of it, it is no bar to the plaintiff's action." *Pollard v. Railroad Co.*, 87 Me. 51, 32 Atl. 735.

With the uncertainty as to whether this rule was ever known to the plaintiff, and whether it had any causal relation between its disobedience, if known, and the injury, we are not inclined to say that the jury have erred in their decision upon this question.

The other point in defense, that the plaintiff walked over the plank walk into the pulp and pool of acid, and thus received his injuries through his own carelessness, was strongly controverted by the plaintiff; and with this conflicting evidence it became a question of fact peculiarly within the province of the jury to decide; and, as they have determined in favor of the plaintiff, we cannot say they erred.

The jury have found that there was negligence on the part of the defendant, either with respect to the nature of the apparatus or the care of it, or in a failure to give proper warning of danger to the plaintiff, which caused his injuries.

It is conceded that on the morning of the injury there was trouble with the valve of No. 8 digester, and that the attention of the general manager was called to its condition. Two bolts had become broken, and this produced a small opening in the valve against which was a pressure of 80 pounds to the square inch, allowing steam and acid to pour through the valve, thence through the 22 foot pipe into the blowpit, where the plaintiff was injured.

It is conceded that the plaintiff was burned by this hot acid and steam, which was forced through the break into the blowpit. Had the pit been in its ordinary condition, the plaintiff could not have been injured. The plaintiff contends that there was nothing unusual, to all appearances, when he entered the pit. But the defense claims that, with the rush of steam through the blowpipe with sufficient force to blow the plaintiff from the walk, there was sufficient to put him upon his guard, and that this fact is inconsistent with the plaintiff's statement that there was no unusual appearance on entering the pit. But here again the question of contributory negligence was one of pure fact for the jury. The evidence on these controverted points was more or less conflicting. The jury might well believe that the danger which the plain-

tiff encountered was known to the employer, and not to the plaintiff; that the general manager and vice principal, being present, and having knowledge of the defective condition of the valve, owed a duty to the plaintiff of informing him of the danger he was likely to encounter in going into the pit. However this may be, it is evident that the defective condition of the valve was the cause of the plaintiff's injuries. It is not necessary to go into details in relation to the evidence bearing upon the different contentions of the parties. It is sufficient to say that upon the whole evidence we think the verdict ought not to be disturbed.

The damages, while quite large, are not so out of proportion to the injuries received as to require any modification by this court. The injuries received were very severe, rendering the plaintiff a cripple for life.

Upon careful investigation of the whole evidence, notwithstanding the very able and analytical argument of the counsel for the defendant, we feel that the jury were not governed in their decision by any such degree of bias, passion, or prejudice as will warrant this court in setting their verdict aside.

Motion overruled.

(31 Me. 286)

FOYE v. TURNER.

(Supreme Judicial Court of Maine. Jan. 26, 1898.)

NEW TRIAL—NEWLY-DISCOVERED TESTIMONY.

In an action to recover for services alleged to have been performed for the defendant in administering treatment at the Ensor Institute for Liquor and Morphine Habits to 19 patients, at \$5 each, the plaintiff recovered a verdict.

The plaintiff and his wife had been in the employment of the company for some time prior to the alleged contract with the defendant, who was a physician employed also by the company.

A motion for a new trial, in addition to the usual grounds, was supported by newly-discovered evidence, and which might have had a material bearing in the case had it been adduced at the trial. *Held*, that a new trial be granted. It appearing, among other reasons, that, without fault of the defendant or his counsel, it was not discovered and produced at the trial.

(Official.)

Action by Joseph Foye against Benjamin M. Turner. Verdict for plaintiff. Defendant moves for a new trial. Granted.

The defendant claimed a new trial upon the following grounds, besides those stated in the opinion, and which are stated in his motion and based upon newly-discovered testimony:

"The defendant avers that since said trial, and by reason of the publicity caused thereby, he has discovered new and material facts tending to show the falsity of the plaintiff's testimony given in said trial, which he expects to prove by the witnesses hereinafter named, being advised by said witnesses that

they will so testify, and that said newly-discovered evidence is as follows:

"(1) He expects to prove by William H. Fisher, Esq., and by Melvin S. Holway, Esq., both of Augusta, in Kennebec county and state of Maine, that said Joseph Foye, in the month of December, A. D. 1895, having been duly summoned, appeared before said Holway, as a disclosure commissioner, and did then and there submit himself to an examination under oath concerning his estate and effects, under the provisions of chapter 137 of the Laws of 1887, as amended by chapter 313 of the Laws of 1893; and that in said examination and disclosure said Foye stated that there was nothing due to him from any person; and being particularly interrogated as to his services performed at the Kennebec Ensor Institute in Gardiner, and whether there was anything due him for said services, he declared there was nothing due him therefor, and that no one was indebted to him for said services.

"(2) He expects to prove by said Fisher and Holway that said Joseph Foye was again summoned and did appear before said Holway on the 18th day of September, A. D. 1896, to submit himself to examination under oath concerning his estate and effects, under the provisions of the law before referred to, and in his disclosure said Foye did again declare that there was nothing due and owed to him by any person; and he particularly denied that there was anything due him for his labor or services performed at the said Kennebec Ensor Institute at Gardiner, and that there was anything due him from this defendant. * * *

Jos. Williamson, Jr., and L. A. Burleigh, for plaintiff. A. C. Stilphen, for defendant.

FOSTER, J. This case was tried at the superior court for Kennebec county, and a verdict for \$98.80 rendered in favor of the plaintiff.

The suit was on account annexed to recover \$95 "for administering your treatment at the Ensor Institute for Liquor and Morphine Habits, at five dollars apiece, for the following persons." Then follows a list of names of 19 persons.

The plaintiff and his wife had been in the employment of the company for some time prior to the time of the alleged contract with the defendant, who was a physician employed by the company.

The defendant denies that any such promise as is set up by the plaintiff was ever made, and denies that he ever employed the plaintiff to administer "his treatment," or any treatment, to the persons named; and claims that whatever the plaintiff did in administering whatever treatment was administered to such persons was done by the plaintiff in performing only such duties as devolved on him by virtue of his employment by the company, and only the same du-

ties he had been performing for a long time prior to the date of the alleged special promise or contract on the part of this defendant. Defendant furthermore claims that any talk he made with plaintiff was only in the nature of a gratuity, or gift, not enforceable in law, and also that, in any event, the plaintiff can recover no such sum as he now has undertaken to sustain by this verdict; and, furthermore, that no promise was made to plaintiff, by way of gift or otherwise, to pay him anything except conditionally.

A careful examination of the evidence satisfies us that a new trial ought to be granted.

The motion, in addition to the usual grounds, is supported by newly-discovered evidence, and which might have had a material bearing in the case had it been adduced at the trial. It seems to be no fault of the defendant or his counsel that the same was not discovered and produced at the trial.

For these and other reasons, not necessary to be particularly stated, we believe that justice will be best subserved by granting another trial.

Motion sustained. New trial granted.

(91 Me. 292)

LANE v. CITY OF LEWISTON.

(Supreme Judicial Court of Maine. Jan. 25, 1898.)

DEFECTIVE STREET — NOTICE — ROAD MACHINE — CONTRIBUTORY NEGLIGENCE.

1. The plaintiff's horse became frightened at a road machine or steam roller, which was being propelled by steam in repairing a street under the direction of the street commissioner of the city of Lewiston, and the plaintiff sustained severe injury by being thrown from his carriage in consequence of the fright of his horse.

2. A city or town is bound by law to keep its streets and highways safe and convenient for travelers, and to accomplish this duty it has the right to use such instrumentalities as may be proper and necessary for that purpose.

3. There can be no liability on the part of a city or town for using the means necessary and proper for carrying out its duty in making streets or highways safe and convenient, when notice of such use has been brought home to the traveler before an injury has occurred in consequence of such use.

4. Such obstructions, while they may necessarily impede travel over the street to a greater or less extent, cannot constitute a defect, within the meaning of the statute, and neither can the legitimate and proper use of such appliances afford any ground for a recovery.

5. The notice of use which it is the duty of the city or town to give to the traveler is sufficient when the traveler sees and apprehends the danger in season to avoid it.

6. Such knowledge on the part of the traveler is notice to himself, for no one needs notice of what he already knows.

(Official.)

Report from supreme judicial court, Androscoggin county.

Action by George W. Lane against the city of Lewiston. Judgment for defendant.

This was an action on the case to recover damages for an injury to the plaintiff on June 18, 1896, while driving easterly along Pine

street, in the city of Lewiston, caused by the fright of his horse at a road machine being propelled by steam westerly along the street, under the direction of the street commissioner of the city of Lewiston, and being used in repairing the street. The plaintiff claimed that the evidence showed the machine, with its puffing, escaping steam and motion, frightened his horse, so that he ran away and threw the plaintiff upon the street and severely injured him. The plaintiff further claimed that it was customary to place a bar across the street at either end when the steam roller was being used, to prevent people from traveling along the street in proximity to the machine, and to warn them of the danger; and on this particular day nothing of the kind was done to stop travel on the street while the machine was being used, and that the street was left open, and the public had no notice until they were in the street, too late to turn back.

W. H. Newell and W. B. Skelton, for plaintiff. Harry Manser, City Sol., for defendant.

FOSTER, J. Action on the case to recover damages for an injury to the plaintiff while driving easterly along Pine street in the city of Lewiston, caused by the fright of his horse at a road machine, or steam roller, which was being propelled by steam westerly along the street under the direction of the street commissioner of the city of Lewiston.

The case comes before the court on report, and two questions only need be considered in determining the rights of the parties: First. Was the steam roller, under the circumstances, a defect for which the city is responsible in this action? Second. Was the plaintiff himself in the exercise of due care at the time the accident occurred?

Both of these questions, we think, must be answered in the negative.

The machine was in operation at the time for the purpose of repairing one side of the street, leaving the other side open and unobstructed for the passage of travelers upon it. This appliance is one of the most modern and useful in building and maintaining permanent and durable streets. The city is bound and obliged by law to keep its streets safe and convenient, and this is one of the instrumentalities obtained by the city at large expense for that very purpose. Certainly there can be no liability on the part of a city or town for using the means necessary and proper for carrying out its duty in this respect, where notice of such use has been brought home to the traveler before an injury has occurred in consequence of such use. Such obstructions, while they may necessarily impede travel over the street to a greater or less extent, cannot constitute a defect within the meaning of the statute, and neither can the legitimate and proper use of such appliances afford any ground for a recovery. To be of any use whatever, the machine must be operated, and the necessary noise and motion attendant upon its operation

cannot, in a legal sense, constitute a defect, especially where the traveler has reasonable notice of any danger that might be occasioned by reason of the same, but does not use due care to avoid it.

The doctrine here enunciated is supported by the decisions of our own court, and it is only necessary to refer to *Morton v. Frankfort*, 55 Me. 46, where the court say: "Towns are not liable for injuries occasioned by such obstructions as are necessarily erected on highways in order to repair them, provided reasonable measures are taken to notify travelers of their existence. Such obstructions are not in any proper sense defects. They are the necessary means to a lawful end,—means necessary to the performance of a duty imposed by law,—and, when reasonable notice of their existence is given, create no liabilities on the part of towns for injuries occasioned by them. To hold towns liable in such cases would be to impose a penalty, not on their negligence, but on the means necessary to the performance of a legal duty. The law, rightly administered, will lead to no such absurd results."

But it is contended that reasonable notice was not given, and that there were no fences or safeguards erected to prevent travelers passing upon the street and encountering such dangers.

The evidence shows that the plaintiff turned into Pine street from a cross street at least 100 feet below the point where the roller was stationed. It was in broad daylight, with nothing to obstruct his vision, and the roller was in plain sight, as he himself admits. He proceeded to pass up the street, approaching and passing the roller, and when he got "near the machine" his horse became frightened, ran up street, and against a tree, throwing the plaintiff out, and producing the injuries of which he complains. He was well acquainted with the nature of the roller, and had seen it in operation before the time when the accident occurred. It was his duty to have exercised due care, and without which, even though the defendant may have been at fault, he cannot recover. *Mosher v. Inhabitants of Smithfield*, 84 Me. 334, 24 Atl. 876; *Merrill v. North Yarmouth*, 78 Me. 200, 3 Atl. 575.

He saw the machine when at least 100 feet distant from it, and with his knowledge of its operations he saw fit to take his chances, and undertake to approach and pass it. The result was unfortunate, but the city cannot be held responsible for the injuries which he received. No notice was necessary when he saw and apprehended the danger in season to have avoided it. Such knowledge on his part was notice to himself. No one needs notice of what he already knows.

Suppose it is found necessary to repair a highway by removing a defective or unsafe bridge over a stream, and replacing it with a new structure; this duty is imposed upon the town,—they are obliged by law to do it. If a traveler approaches in broad daylight, and, with the knowledge that the bridge is removed, un-

dertakes to cross the chasm, he takes his chances, and if he sustains damages the town surely could not be held responsible. His knowledge of the danger is equivalent to prior notice on the part of the town.

But it is claimed in this case that when plaintiff turned into Pine street, and was within 100 feet of the roller, there was not sufficient opportunity for him to turn round, and hence he was obliged to proceed in the direction of the roller. The evidence does not satisfy us that he had not sufficient opportunity to change his direction of travel upon a street the width of that one. From a careful examination of the evidence, we are satisfied that, by the proper exercise of due care on his part, this accident might have been avoided; but having failed in that respect, and taken his chances, he must abide the result.

Judgment for defendant.

(91 Me. 309)

STATE v. ELA.

(Supreme Judicial Court of Maine. Jan. 26, 1898.)

PERJURY—INDICTMENT.

1. While the statute relating to indictments for perjury requires only the allegation of materiality, yet, if the recited testimony in an indictment for perjury is clearly not material, *held*, that the indictment will be bad.

2. When such an indictment alleges a thing to be material, and shows on its face that it is not material, *held*, that the allegation of materiality, although in the words of the statute, cannot save the indictment.

3. In an indictment for perjury, the common law requires that there must be some proceeding, matter, or thing to which the oath was taken; and such an indictment must set forth the issue in which an alleged false affidavit was made, as well as the character and the jurisdiction of the court or magistrate. *Held*, that an indictment for perjury is bad which fails to set forth the issue between the parties in which the affidavit was made, or does not show the materiality of the testimony.

4. The defendant was indicted for making a false affidavit, to the effect that he had made a careful search among his own papers, etc. The indictment contained no assignment of perjury of any part of the affidavit, but charged the whole to be false, and the whole to be material. *Held*, that it cannot all be false. If no search was made, then it is true that nothing was found. If search was made, and the papers were found, which the defendant denied, then the affidavit was true in part and false in part. *Held*, that the allegation of falsehood in its entirety is contradictory.

5. Several assignments may be made, and, if one is sustained by the proof, a conviction may follow; but each assignment must be specific.

6. The defendant was indicted for making a false affidavit, and the perjury assigned in one clause was as follows: "I cannot take a single step in making more definite account." The indictment further showed that the defendant was not a party to the proceeding, being the settlement of an account in probate, and therefore could not render an account. *Held*, that the indictment is bad. There is no allegation in this count from which the court can see its materiality to the issue, whatever it was, then pending.

(Official.)

Exceptions from supreme judicial court, Sagadahoc county.

Richard Ela was indicted for perjury, and, from a judgment overruling the demurrer to the indictment, he excepts. Sustained.

This was an indictment for perjury, containing three counts, found by the grand jury of this court sitting below at Bath, county of Sagadahoc, on the third Tuesday of August, A. D. 1896. The indictment is as follows:

"* * * That Richard Ela, of Cambridge, in the county of Middlesex and commonwealth of Massachusetts, on the first day of April, in the year of our Lord one thousand eight hundred and ninety, at Bath, in the said county of Sagadahoc, before William T. Hall, judge of the court of probate, within and for the said county of Sagadahoc, then and there having competent authority to administer oaths, appeared as a witness in a proceeding in which Alfred Ela and Lucia Ela were parties, then and there being heard before a tribunal of competent jurisdiction, to wit, said court of probate, and then and there committed the crime of perjury by testifying as follows:

"I (meaning the said Richard Ela) have made careful search among my own papers and those of Lucia Ela, and have been unable to find a single book or paper referring in the least to the matter, except the papers on file in the probate court here, and a paper: "Cambridge, Nov. 27, 1882. In consideration of one dollar to me in hand paid, I hereby release Lucia Ela, of Cambridge, from all claims, of every nature, which I have against her as guardian. Witness my hand and seal. Alfred Ela [Seal]."—and one other paper in two parts, preliminary to above. I (meaning the said Richard Ela) cannot take a single step (meaning any action whatsoever) in making more definite account,"—which said testimony was material to the issue then and there pending in said proceeding, and was untrue and false, as the said Richard Ela then and there well knew, against the peace of the said state and contrary to the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present that Richard Ela, of Cambridge, in the county of Middlesex and commonwealth of Massachusetts, on the first day of April, in the year of our Lord one thousand eight hundred and ninety, at Bath, in the said county of Sagadahoc, before William T. Hall, judge of the court of probate, within and for the said county of Sagadahoc, then and there having competent authority to administer oaths, appeared as a witness in a proceeding in which Alfred Ela and Lucia Ela were parties, then and there being heard before a tribunal of competent jurisdiction, to wit, said court of probate, and then and there committed the crime of perjury, by falsely, willfully, and

corruptly swearing, upon oath, then and there taken before the said judge then and there presiding, in the proceeding aforesaid, to the truth of the contents of a certain writing signed by the said Richard Ela, dated Bath, Maine, April first, A. D. 1890, and purporting to be an affidavit, which said writing was then and there used in said proceeding, and which said writing was as follows: 'Bath, Maine, April 1, 1890. I have made careful search among my own papers and those of Lucia Ela, and have been unable to find a single book or paper referring in the least to the matter except the papers on file in the probate court here, and a paper: "Cambridge, Nov. 27, 1882. In consideration of one dollar to me in hand paid, I hereby release Lucia Ela, of Cambridge, from all claims, of every nature, which I have against her as guardian. Witness my hand and seal. Alfred Ela [Seal.],"—and one other paper, in two parts, preliminary to above. I cannot take a single step in making more definite account. Richard Ela.'

"Wherein, in said writing, the statement: 'I have made careful search among my own papers and those of Lucia Ela, and have been unable to find a single book or paper referring in the least to the matter except the papers on file in the probate court here, and a paper: "Cambridge, Nov. 27, 1882. In consideration of one dollar to me in hand paid, I hereby release Lucia Ela, of Cambridge, from all claims, of every nature, which I have against her as guardian. Witness my hand and seal. Alfred Ela [Seal.],"—and one other paper, in two parts, preliminary to above,'—was material to the issue then and there pending in said proceeding, and was untrue and false, as the said Richard Ela then and there well knew, against the peace of the said state, and contrary to the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present that Richard Ela, of Cambridge, in the county of Middlesex and commonwealth of Massachusetts, on the first day of April, in the year of our Lord one thousand eight hundred and ninety, at Bath, in the said county of Sagadahoc, before William T. Hall, judge of the court of probate, within and for the said county of Sagadahoc, then and there having competent authority to administer oaths, appeared as a witness in a proceeding in which Alfred Ela and Lucia Ela were parties, then and there being heard before a tribunal of competent jurisdiction, to wit, said court of probate, and then and there committed the crime of perjury by falsely, willfully, and corruptly swearing, upon oath then and there taken before the said judge, then and there presiding in the proceeding aforesaid, to the truth of the contents of a certain writing signed by the said Richard Ela, dated Bath, Maine, April first, A. D. 1890, and purporting to be an affidavit, which said writing was then and there used in said

proceeding, and which said writing was as follows: 'Bath, Maine, April 1, 1890. I have made careful search among my own papers and those of Lucia Ela, and have been unable to find a single book or paper referring in the least to the matter except the papers on file in the probate court here, and a paper: "Cambridge, Nov. 27, 1882. In consideration of one dollar to me in hand paid, I hereby release Lucia Ela, of Cambridge, from all claims, of every nature, which I have against her as guardian. Witness my hand and seal. Alfred Ela [Seal.],"—and one other paper, in two parts, preliminary to above. I cannot take a single step in making more definite account. Richard Ela.'

"Wherein, in said writing, the statement, 'I cannot take a single step in making more definite account,' was material to the issue then and there pending in said proceeding, and was untrue and false, as the said Richard Ela then and there well knew, against the peace of the state," etc.

The defendant demurred to the indictment, and, the demurrer having been overruled, he was allowed his bill of exceptions, in which it was stipulated that he might plead over if the exceptions should be overruled.

Grant Rogers, Co. Atty., for the State.
Charles A. True, for defendant.

STROUT, J. This indictment contains three counts. The first charges oral perjury in testifying before the probate court. The other two charge perjury in swearing to the truth of a paper signed by the defendant. The first count follows substantially the form given in Rev. St. c. 122, § 4, which was held good in *State v. Corson*, 59 Me. 139. It charges that the testimony was material to the issue then pending. But the count alleges that the parties to this proceeding were Alfred Ela and Lucia Ela. The testimony complained of was that the defendant had made search among his own papers and those of Lucia Ela, and found no book or paper relating to the matter, except two mentioned. It does not appear how a search by a stranger for papers could be material to an issue between two other parties. Defendant was not a party to the proceeding in court. Why should he search for papers among his own or those of another party? Of what consequence could it possibly be to the litigant parties whether he searched or did not search, whether he found or did not find, papers desired by them? To constitute perjury, the testimony must be material to the issue. While the statute requires only the allegation of materiality, yet, if the recited testimony is clearly not material, the indictment defeats itself. It alleges a thing to be material, and shows on its face that it is not material. The allegation of materiality, though in the words of the statute, in such a case cannot save the indictment. This count is therefore bad.

The other two counts relate to an affidavit of defendant, and are drawn under Rev. St. c. 122, § 5. The form there provided has been held insufficient by this court in *State v. Mace*, 76 Me. 64. The remedial statute of 23 Geo. II. c. 11, has not been adopted in this state. *State v. Hanson*, 39 Me. 339.

These counts therefore must be sustained, if at all, at common law. By the common law, "there must be some proceeding, matter, or thing to which the oath was taken; and by the common law the indictment must set it forth, so as to exhibit its character and the jurisdiction of the court or magistrate." *State v. Hanson*, *supra*; *Com. v. Knight*, 12 Mass. 274.

It must also set forth enough of the issue between the parties to show the materiality of the testimony. *Com. v. Johns*, 6 Gray, 275; *People v. Fox*, 25 Mich. 492; *Com. v. Byron*, 14 Gray, 31; *Beecher v. Anderson*, 45 Mich. 552, 8 N. W. 539. See form of indictment at common law in 2 Archb. Cr. Prac. & Pl. p. 967. Nothing appears in either of these counts from which the court can see what the issue was from which to judge of the materiality of the affidavit.

The second count contains no assignment of perjury of any part of the affidavit, but charges the whole to be false, and the whole to be material. It cannot all be false. If no search was made, then it was true that nothing was found. If search was made, and papers were found, which the affiant denied, then the affidavit was true in part and false in part; but the allegation is of falsehood in its entirety, which is contradictory. It does not inform the defendant whether the alleged fact of search or of not finding is to be relied on. There should be an assignment of the perjury when part of the paper is or must be true, so that the defendant may be informed of the specific charge he is to answer. Several assignments may be made, and, if one is sustained by the proof, a conviction may follow, but each assignment must be specific.

It is stated in the affidavit that no book or paper was found "referring in the least to the matter," except those stated. Whether any paper referred to a particular matter was in the nature of opinion, and cannot be assigned as perjury. *Com. v. Brady*, 5 Gray, 78. To what matter reference was had does not appear in the affidavit, and is not alleged in the indictment. To be sustained, the indictment must negative the matter sworn to which is alleged to be false, by special averment. That averment should be as to such parts as the prosecutor can falsify, admitting the truth of the rest. 2 Archb. Cr. Prac. & Pl. p. 965, and note; 2 Whart. Prec. Ind. p. 577.

The third count, in addition to charging the falsity of the affidavit generally, assigns the perjury in one clause, "I cannot take a single step in making more definite account," and alleges its materiality and falsity. The phrase

may refer to an account being rendered or to be rendered to the probate court, in settling some estate. But the indictment shows that the defendant was not a party to the proceeding. He therefore could not render an account. He had no authority to do so. If he attempted it, the court would not be authorized to receive it. He was a stranger to the proceeding. The statement was literally true. It was immaterial to the issue between the parties whether this defendant could render an account, or furnish the data for one. It was not his duty to do either. If it referred to an accounting by himself to the parties or either of them, it was matter of opinion. *Com. v. Brady*, *supra*. There is no allegation in this count from which the court can see its materiality to the issue, whatever it was, then pending.

Exceptions sustained. Indictment quashed.

(31 Me. 316)

STERLING v. INHABITANTS OF CUMBERLAND COUNTY.

(Supreme Judicial Court of Maine. Jan. 29, 1898.)

OFFICER—ACTION FOR FEES—LIABILITY OF COUNTY
—ALLOWANCE BY COUNTY COMMISSIONERS
—SHERIFFS—COMPENSATION.

1. An officer whose fees are fixed by statute for the service of criminal process is not a creditor of the county, and has no right of action therefor.

2. The service of such person is in obedience to law, and there is no contract, express or implied, between him and the county.

3. It is the duty of the county commissioners to audit and allow such fees as are legal, and order them paid from the county treasury. The law gives no appeal from their decision, and the officer cannot create one by suit to recover his claim.

4. *Held*, that the compensation of sheriffs, and deputies acting under their directions, especially charged with the enforcement of the liquor law, under Rev. St. c. 27, § 60, is fixed by statute as follows, viz.: "A per diem of two dollars; travel, six cents per mile; and incidentals that are just and reasonable." There is no other fee or compensation for the service of a warrant, and therefore none can be allowed.

(Official.)

Report from superior court, Cumberland county.

Action by Seth Sterling against the inhabitants of Cumberland county. Plaintiff nonsuited.

This was an action of debt brought by the plaintiff to recover from the defendant county the statutory fee of 50 cents for the service of each search warrant enumerated in the plaintiff's declaration. The plaintiff was a regularly appointed and duly commissioned deputy sheriff for the county of Cumberland. All of said warrants were legally issued, directed to the plaintiff, and committed to him for service by the judge or recorder of the municipal court of the city of Portland,—a court having jurisdiction in criminal cases in said county. The plaintiff seasonably made service of each of said warrants, and of other similar war-

rants, and made immediate return thereof. Upon all warrants served the plaintiff returned memorandum of his fees, which in every case included 50 cents for the service of the warrant. Bills of cost were taxed by the court, including in each case 50 cents for service of the warrant, and duly certified as provided by statute. Upon all warrants served by the plaintiff where liquor was seized and the respondent arrested, and in all appealed cases, the fee for service of warrants, 50 cents each, was allowed and paid. Upon all warrants served by the plaintiff where liquor was seized and no arrests made, costs, including 50 cents for the service of each warrant, were taxed by the recorder of said municipal court, and certified to the county commissioners. In cases where no liquor was seized and no person arrested, costs were taxed on the original warrants, and the warrants themselves presented to the commissioners by the recorder. The county commissioners examined and corrected the bills of cost, including the fees of the plaintiff, and refused to order to be paid out of the county treasury the fee of 50 cents for the service of each of the warrants named in the plaintiff's declaration, viz. 503 warrants by him served where liquor was seized and no person arrested, and 857 warrants served by him where no liquor was seized and no person arrested.

Seth L. Larrabee, for plaintiff. Chas. A. True, for defendants.

HASKELL, J. Debt by a deputy sheriff to recover of the county fees for the service of liquor warrants disallowed by the county commissioners.

1. The action cannot be maintained. An officer whose fees are fixed by statute for the service of criminal process is not a creditor of the county, and has no right of action therefor. His fees are payable from the treasury only upon warrant of some judicial tribunal or auditing board empowered to audit and allow such fees, and order them paid from the treasury. If every officer, state witness, or juror could sue for and recover fees, regardless of control by the court, public business would be embarrassed, and confusion might ensue that would be intolerable. The service of such person is in obedience to law, and there is no contract, express or implied, between him and the county. *Clark v. Clark*, 62 Me. 255. In the case at bar the law required the plaintiff to return his fees to the municipal court of Portland, and, as the case there ended, that court, not being authorized to draw warrants upon the county treasurer, could only certify them to the county commissioners, whose duty it was to audit and allow such as were legal, and order them paid from the county treasury. The law gives no appeal from their decision, and the plaintiff cannot create one by suit to recover his claim. The most he could do would be to apply to the supreme judicial court, that has supervisory jurisdiction over all inferior

courts, for the correction of any erroneous action of the commissioners apart from the exercise of judgment and discretion.

2. The plaintiff was a deputy of the sheriff, especially charged with the enforcement of the liquor law under the act of 1872, now section 60, c. 27, Rev. St. That statute charges such officers with diligent and faithful inquiries into violations of law, and directs them to institute proceedings by "promptly entering a complaint before a magistrate and executing the warrants thereon issued or by furnishing the county attorney promptly and without delay with the names of alleged offenders and of the witnesses."

The statute further provides: "For services under this section, sheriffs and their deputies acting under their directions shall receive the same per diem compensation as for attendance on the supreme judicial court, and the same fees for travel as for the service of warrants in criminal cases, together with such incidental expenses as are just and proper, bills for which shall be audited by the county commissioners and paid from the county treasury."

Nothing can be plainer than that for all services under this statute the compensation fixed by it shall be in full satisfaction thereof. Now, what does the statute require? (1) Diligent inquiry into all violations of law. (2) The institution of proceedings against offenders by complaint to magistrates, and the execution of process granted by them. (3) Promptly informing county attorneys who offenders are, and giving them the names of witnesses. For doing this, what shall be the compensation? Two dollars a day, and six cents a mile for travel, and also incidental expenses that are just and proper; and the county commissioners are made the arbiters to determine the whole matter, and order payment from the treasury. These are all the fees allowable for such services. The legislature considered them adequate, and, when they are not, can provide compensation that is. All this plaintiff could tax is per diem, two dollars; travel, six cents a mile; and incidentals that are just and reasonable. There is no other fee or compensation for the service of a warrant, and therefore none can be allowed. After receiving all the compensation above provided, the plaintiff sues to recover \$680 for the service of warrants. On 503 warrants, liquor was seized, and no person arrested. On 857 warrants, no liquor was seized, and no person arrested. These fees should not have been taxed, and they were properly disallowed by the commissioners.

Plaintiff nonsuit.

(31 Me. 331)

LIBBY v. HALEY.

(Supreme Judicial Court of Maine. Feb. 1, 1896.)

SALE—RESCISSON—REASONABLE TIME—WAIVER—ESTOPPEL.

1. Where facts are clearly established, or are undisputed or admitted, a reasonable time within which an act should be done is a matter

of law, but under other conditions is a matter of fact for the jury; and so, also, is waiver. In the latter case, *held*, that it is not error to submit both questions to the jury, or for the court below to refuse to decide either one as matter of law.

2. The defendant sold on August 22d a horse to the plaintiff, with an alleged warranty of soundness. The plaintiff attempted a rescission, and sued for the purchase money, and claimed that he returned the horse for the purposes of rescission in a few days thereafter, and introduced testimony tending to prove the fact. The defendant said that the rescission was some two weeks after the sale, or not until September 8th, and introduced evidence tending to prove it. *Held*, that the court below properly instructed the jury that the rescission must be made within a reasonable time, and exceptions do not lie to a refusal to rule that September 8th was not within a reasonable time.

3. Estoppel raises an issue of law; but waiver, an issue of fact. Waiver is the voluntary surrender or abandonment of a right; but, if the conduct misleads and deceives, then the law declares an estoppel upon him who caused the mischief, and thereby misled and deceived the adverse party.

4. *Held*, that the defendant was not entitled to the following instruction to the jury: "That if the plaintiff, from September 8th, when the horse was tendered to the plaintiff and refused, continuously used the horse in his business, for driving and work, until the trial, he thereby waived his right to rescind the sale." This was a question for the jury, for waiver is a matter of fact.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

Action by Samuel M. Libby against Charles H. Haley. Verdict for plaintiff. Defendant excepts. Overruled.

R. W. Crockett, for plaintiff. W. H. Newell and W. B. Skelton, for defendant.

HASKELL, J. The defendant sold the plaintiff a horse, presumably with a warranty of soundness. For breach of this warranty the plaintiff attempted a rescission, and sues for the purchase money. The sale was August 22d. The plaintiff claimed that he returned the horse for the purposes of rescission in a few days thereafter, and introduced testimony tending to prove the fact. The defendant says that it was some two weeks,—not until September 8th,—and introduced evidence tending to prove it. The court below properly instructed the jury that the rescission must be made within a reasonable time, and refused to rule that September 8th was not within a reasonable time. To this refusal the defendant has excepted.

What is a reasonable time within which an act must be done may be a question of law. "Where the facts are clearly established, or are undisputed or admitted, reasonable time is a question of law. But where what is a reasonable time depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessary to be submitted to a jury before any judgment can be formed whether the time was or was not reasonable." *Hill v. Hobart*, 16 Me. 168.

In the case at bar, plaintiff and defendant

had several interviews between the sale and the rescission, September 8th; and plaintiff asserts that he informed defendant of the breach of warranty, and wanted to know "what he was going to do about it," and, receiving no satisfaction, tendered a return. Whether a return September 8th was seasonable would depend upon the intervening facts and circumstances, all of which are disputed, so that it could not be said, without settling the facts, whether the return was seasonable. The question was properly and carefully submitted to the jury, and defendant's exception to the refusal of the court to settle the matter as a question of law cannot be sustained.

The defendant also requested the court below to rule, in substance, that if plaintiff, from September 8th, when the horse was tendered to defendant and refused, to the trial, "continuously used the horse in his business for driving and work," he thereby waived his right to rescind the sale. The request was refused, and defendant took an exception. Here again was a question for the jury, for waiver is matter of fact. *Robinson v. Insurance Co.*, 90 Me. 385, 38 Atl. 320. No estoppel is claimed, which is matter of law. Sometimes the conduct of a party may show that he not only intended to, and did, waive his rights, but that the adverse party had been misled thereby, when the law raises an absolute bar to the repudiation of conduct that caused the mischief. This is estoppel, although it may contain all the elements of waiver. But the reverse may not be true; for a party may so conduct himself as to show an intention to waive his rights, when the adverse party has not been deceived or misled thereby, and no estoppel would arise, although a waiver may well be found. It seems to me that one difference between waiver and estoppel is that in the former the result was voluntary, while in the latter the conduct of the party may have been voluntary, but with intention not to lose any existing rights, yet, if such conduct mislead, then estoppel arises. One is the voluntary surrendering of a right. *Stewart v. Crosby*, 50 Me. 134; *Hoxie v. Insurance Co.*, 32 Conn. 21. And the other is the inhibition to assert it from mischief that it has caused. *Shaw v. Spencer*, 100 Mass. 395. The cases do not all recognize this distinction, and apply the doctrines of waiver and estoppel indiscriminately in furtherance of justice. If this distinction, however, be regarded, then it logically follows that waiver is a matter of fact for the jury, to say what did the conduct mean. What does it signify? Does it show a voluntary abandonment of some right? If yes, then the party has waived it, and cannot regain it. But if the conduct misleads, deceives, then the law visits the consequences upon him who has caused the mischief, and declares an estoppel.

In the case at bar, no estoppel arises, for no one has been deceived, and whether the plaintiff concluded to abandon his claim to a rescission of the sale depends upon the significance of his treatment and use of the property. If

he had so treated it as to show an intention to regard it as his own, as if he had used it for his own benefit, and to the injury of it, or so as to decrease its value, instead of merely keeping it, a waiver might be found. But if the keeping of property, like the ordinary use of a horse, that was no more than the good of the animal required, and merely reduced the expenses chargeable to the owner, then no injury to it would follow, and no intent to possess it as his own would appear, and no waiver should be found. All these considerations were proper for a jury, and the court below might well refuse to decide the question of waiver as one of law.

Exceptions overruled.

(91 Me. 289)

ATHERTON v. BRITISH AMERICA ASSUR. CO.

(Supreme Judicial Court of Maine. Jan. 25, 1898.)

INSURANCE—OWNERSHIP—INCREASE OF RISK—FRAUD.

1. A policy of insurance contained a provision that it should be void if the subject of insurance be a building on ground not owned by the insured in fee simple.

But the statute provides that erroneous descriptions of value or title by the insured shall not prevent a recovery upon the policy unless the jury find that the difference between the property as described and as it really existed contributed to the loss, or materially increased the risk, and that a breach of any of the terms of the policy by the insured does not affect the policy unless they "materially increase the risk."

In a suit upon the policy the question of enhanced risk is properly one for the jury, rather than the court.

2. Fraud and false swearing imply something more than some mistake of fact or honest misstatements on the part of the insured.

3. They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true.

(Official.)

Action by Catherine H. Atherton against the British America Assurance Company. Verdict for plaintiff. Motion by defendant for a new trial. Overruled.

Tascus Atwood, for plaintiff. H. W. Oakes, for defendant.

FOSTER, J. Action upon a policy of insurance against fire upon the plaintiff's one-story frame building and addition, a soda fountain and appurtenances thereto, and upon her stock in trade, consisting of tobacco, cigars, fruit, confectionery, etc.

The verdict was for \$291.85, and the case comes before the court on a motion to set the verdict aside, and four grounds are urged in support of the motion:

First. That, contrary to the conditions of the policy, the building insured was on ground not owned by the plaintiff.

Second. That fireworks were kept upon the premises.

Third. That the plaintiff was guilty of fraud and false swearing.

Fourth. That the fire was caused by the direction and procurement of the plaintiff.

It is true that the policy provides that it shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple. In this case the building was on leased land, and was not owned in fee simple by the plaintiff.

But the statute (Rev. St. c. 49, § 20) provides that erroneous descriptions of value or title by the insured shall not prevent a recovery upon the policy unless the jury find that the difference between the property as described and as it really existed contributed to the loss, or materially increased the risk, and that a breach of any of the terms of the policy by the insured does not affect the policy unless they "materially increase the risk."

In a suit upon the policy the question of enhanced risk is properly one for the jury, rather than the court. *Sweat v. Insurance Co.*, 79 Me. 109, 8 Atl. 457; *Gilman v. Insurance Co.*, 81 Me. 488, 496, 17 Atl. 544; *Bellatty v. Insurance Co.*, 61 Me. 414; *Rice v. Tower*, 1 Gray, 428, 430. In reference to the keeping of fireworks upon the premises, the evidence discloses that only a small amount was kept in a zinc-lined ice chest. The testimony was sufficient, we think, in warranting the jury in coming to the conclusion that the defendant failed in its burden of showing that this fact materially increased the risk.

Whether the plaintiff was guilty of fraud and false swearing was also a question addressed to the judgment of the jury, and by their verdict they have negatived that fact.

Fraud and false swearing imply something more than some mistake of fact or honest misstatements on the part of the assured. They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true. *Linscott v. Insurance Co.*, 88 Me. 497, 34 Atl. 406; *Dolloff v. Insurance Co.*, 82 Me. 266, 19 Atl. 396; *Clafin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. 507.

Nor do we think the verdict should be disturbed upon the ground, as claimed in defense, that the plaintiff procured the fire to be set.

The evidence was conflicting upon this point, and that relied upon by the defense came from two boys who certify that they set fire to the building, claiming they were hired to do so by the plaintiff. Both are confessed criminals. Their history is anything but good. One admits that at a previous trial he lied under oath. Their testimony is contradictory, inherently vicious, and, if believed, would show that the plaintiff hired two boys to burn a building, one of whom was a stranger to her, and that,

although she would want great care exercised, she proceeded to give them each three drinks of whisky, and left more for them. It is hard to believe that an intelligent jury could be justified in crediting such a story, coming from such a source. The jury saw not only the plaintiff upon the stand, but also the two boys, and heard their story. They repudiated the testimony of the boys, and gave credence to that of the plaintiff. The truth or falsity of the charge set up in defense was peculiarly for the consideration of the jury. We do not think their verdict should be disturbed.

Motion overruled.

(91 Me. 280)

WOOD et al. v. FINSON et al.

(Supreme Judicial Court of Maine. Jan. 24, 1898.)

ACTION ON CONTRACT—EVIDENCE—RELEVANCY—EXCEPTIONS.

1. Oftentimes when the issue is whether a particular contract was made between the parties, and the evidence is conflicting as to what the contract was, it is competent for a defendant to show the value or character of the property which he was to receive, as compared with that in the contract claimed by the opposite party, as tending to show the improbability of the contract as alleged by such party.

2. In this case, while the fact of whether there had been insurance effected on previous sales, or not, might not be conclusive as to what was done in this particular instance, it was admissible on the question of probability or improbability of the contract being as claimed by the plaintiff.

3. Testimony should not be excluded, as irrelevant, which has a tendency, however remote, to establish the probability or improbability of the fact in controversy.

4. A special finding by the jury may render objections to the admission of evidence unavailable, when the objections might otherwise be tenable.

5. Exceptions will not be sustained unless it is shown affirmatively that the excepting party has been aggrieved by the ruling complained of. See *Wood v. Finson*, 38 Atl. 911, 89 Me. 459. (Official.)

Exceptions from supreme judicial court, Hancock county.

Action by Walter A. Wood and another against Leroy Finson and another. Verdict for plaintiffs, and defendants except. Overruled.

This was an action of assumpsit brought by the plaintiffs, who were oil merchants in Boston, against the defendants, to recover the value of certain oil purchased of them during the years 1894 and 1895, all of which is admitted to have been paid for, except the item of October 4, 1894, for 20 barrels of kerosene oil, amounting to \$87.28.

The verdict was for the plaintiffs for the sum of \$95.50.

In addition to a general motion, the defendants took exceptions to the admission of testimony at the trial, and which are stated in the opinion of the court.

The justice presiding at the trial, in his charge to the jury, instructed them, *inter alia*, as follows:

"Now, in the first place, was there any agreement made between Carlow, or an agreement entered into, in the course of business transactions with the defendants, that insurance should be put upon all goods, which would include these particular goods? Well, you heard the testimony of the two defendants upon that point, and they say so. Now, if there was such an agreement, and it had not been canceled or superseded, then it would hold good. Then the question arises, what authority had Carlow to make such an arrangement? Well, if he was a general sales agent, he had a right to enter into contracts of sale, conditions of sale, arrangements about sale, including the delivery and shipment of goods. If he had no authority, it would not affect the defendants, unless they knew that he had none, because the presumption is that the party who has a right to solicit orders and make sales has a right to do whatever pertains to such things,—the right to make prices, the right to make conditions, the right to do whatever the owner could do, or might do, under the same circumstances. Now, it is not material to this case whether he informed the defendants that he had a right, or not, to make such arrangements, except just in this way: If they did not know that he had any such authority, or if the plaintiffs did not know that he made any such contracts or bargain as a part of the business or contracts with these defendants, that would not affect the defendants, but it might bear on the question whether he would be likely to make an arrangement which he had no express authority to make between him and his principal. Now, was there such an arrangement made? You will understand that it is immaterial whether the plaintiffs knew it, or not,—that their agent had overstepped his authority, if he did,—because the defendants would have the right to rely on such an arrangement made with such an agent under such circumstances. If you find there was such an understanding, and that it applied to future contracts the defendants were to make right along until some other arrangement was made, why, the plaintiffs would be bound by it, unless released by some other consideration.

"That is one defense set up by the defendants. Another is that they made an arrangement with Mr. Emery himself, by which they should be considered released from the obligation to pay for the twenty barrels that were lost. Now, in the first place, had Mr. Emery a right to make such a contract. As a part of the sale of the goods, had he a right to release this indebtedness for the lost goods?

"I feel that I must say to you, from the opinion of the court which has been rendered in this case (89 Me. 459, 38 Atl. 911),

that he had, if he was a general soliciting agent, because, whether he had authority to act or not, if the defendants had no notice that he had not such authority they would have a right to presume and assume that he had; that is, that in making a contract for the sale of goods, he could make the whole contract; he could enter into the bargain for the sale of the goods in consideration that this release was to inure for the benefit of the defendants.

"If the defense makes out its position on either question, the verdict must be for the defendants. If the plaintiffs should have insured, and the compensation for the property was thereby lost, the plaintiffs cannot recover. Or if you find there was no such insurance in this particular instance, on the theory that Mr. Emery is correct, then the plaintiffs would recover, unless the defense prevails on the second point, and that is the relinquishment of the claim for the continuing of the business."

In addition to instructions as to the general verdict, the presiding justice submitted to the jury two special questions, namely:

"Was there an understanding between the parties that all goods shipped by vessel by the plaintiffs to the defendants should be insured by the plaintiffs for the benefit of the defendants, not waived in this case?"

"Did, or not, the Mr. Emery, the plaintiffs' agent, agree to cancel the plaintiffs' claim for the lost goods on the consideration that the defendants would continue purchasing goods of the plaintiffs?"

Both these special questions were answered by the jury in the negative, and a general verdict was rendered for the plaintiffs.

To the ruling of the presiding justice admitting the testimony hereinbefore stated, the defendants seasonably excepted.

H. E. Hamlin, for plaintiffs. O. F. Fellows, for defendants.

FOSTER, J. Assumpsit by the plaintiffs, oil merchants in Boston, to recover of the defendants, traders in Bucksport, the value of 20 barrels of kerosene oil, to be delivered free on board vessel in Boston.

Plaintiffs made the sale through one Emery, a general traveling salesman and agent of theirs. The plaintiffs had previously employed one Carlow as their salesman and agent, who had repeatedly sold the defendants burning oil. Emery succeeded him, and made sale of the oil in suit.

The defense set up that the contract of sale called for insurance of the oil by the plaintiffs; instructions having been given, as the defendants claim, to Carlow, always to insure oil shipped to them by vessel, and that, from a failure to do so in reference to this order sold by Emery, the defendants lost its value, the oil having been lost at sea.

Numerous exceptions are taken to the admission of certain questions and answers in

relation to the authority of the two agents, and instructions received by them from the plaintiffs; also, in relation to sales previously made by Carlow, and whether or not insurance was placed on those.

It is claimed that this evidence in relation to other transactions was too remote, irrelevant, and therefore not admissible. We think it was admissible. Oftentimes, when the issue is whether a particular contract was made between the parties, and the evidence is conflicting as to what the contract was, it has been held competent for a defendant to show the value or character of the property which he was to receive as compared with that in the contract claimed by the other side, as tending to show the improbability of the contract being as alleged by the plaintiff. *Nickerson v. Gould*, 82 Me. 512, 20 Atl. 86; *Upton v. Winchester*, 106 Mass. 330; *Norris v. Spofford*, 127 Mass. 85; *Parker v. Coburn*, 10 Allen, 82. So evidence of a person's poverty and bad credit has been held admissible on the issue of whether goods were sold on the credit of such person or of a third party, as bearing on the improbability of the plaintiff's making the sale on his credit. *Lee v. Wheeler*, 11 Gray, 236. So, in this case, while the fact of whether there had been insurance effected on previous sales, or not, might not be conclusive as to what was done in this particular instance, it was admissible on the question of probability or improbability of the contract being as claimed by plaintiff. It was in accordance with this principle that the court, in *Trull v. True*, 33 Me. 367, held that "testimony cannot be excluded, as irrelevant, which would have a tendency, however remote, to establish the probability or improbability of the fact in controversy." See, also, *Tucker v. Peaslee*, 36 N. H. 167, 168; *Huntsman v. Nichols*, 116 Mass. 521, where it was held that, although the authenticity of the note in suit was the only issue, yet the business transactions between the parties had some bearing upon the probability of the indorsement having actually been made by the defendant, and were therefore admissible in evidence.

One of the principal points of contention by the defense was that there was a contract or understanding that all goods shipped by vessel by the plaintiffs to the defendants should be insured. The exceptions in part relate to the admission of evidence bearing upon the authority of the agents, and instructions to them from the plaintiffs.

But, even if the defendants' objections were tenable, the special findings of the jury have rendered them unavailing. The jury, upon special findings, have decided that there was no understanding between the parties that goods shipped by vessel to the defendants should be insured for the benefit of the defendants. If there was no such understanding, then whether the plaintiffs did or did not give authority to their agents

to enter into any such contract is of no consequence. The charge of the presiding judge was that if there was any such understanding,—“if the plaintiffs should have insured, and the compensation for the property was thereby lost,—the plaintiffs cannot recover.”

And, so far as the exceptions relate to the inadmissibility of any evidence coming from the plaintiffs as to Emery's having no authority to cancel the plaintiffs' claim for the lost goods in consideration of the defendants' continuing to purchase goods of the plaintiffs, the special finding of the jury has settled all objections upon that point, inasmuch as they have said that there was no such agreement. Hence authority, or lack of authority, became immaterial.

Therefore the exceptions cannot be sustained, because, to be sustained, it must be shown affirmatively that the excepting party has been aggrieved by the ruling complained of. *Bryant v. Railroad Co.*, 61 Me. 300; *State v. Pike*, 65 Me. 111; *Soule v. Winslow*, 66 Me. 447.

Exceptions and motion overruled.

(185 Pa. St. 232)

JACOB BOHEM & BROS. v. SEEL et al.
(Supreme Court of Pennsylvania. April 11, 1898.)

MECHANIC'S LIEN—AMENDMENT.

After time for filing lien has expired, it being defective on its face, in containing only a lumping charge, while filed by a subcontractor, amendment may be had to make it against S. and N., “owners,” so as to make plaintiff a contractor, instead of a subcontractor, it being alleged that N., named in the lien as contractor, and with whom plaintiff contracted, was in reality the owner, and put title in S. to defraud creditors.

Appeal from court of common pleas, Philadelphia county.

Jacob Bohem & Bros., incorporated, filed a mechanic's lien in which Ida F. Seel was named as owner, and James E. Norton as contractor. Rule to allow plaintiff to amend its lien, to read against said Seel and Norton, as “owners,” was discharged, and plaintiff appeals. Reversed.

Thomas R. Elcock, for appellant. Sheldon Potter and Leonl Melick, for appellees Ida F. Seel and Alexander McKenna.

MITCHELL, J. The lien was filed in time, but was defective on its face, in being filed by a subcontractor and containing only a lumping charge. Plaintiff, however, averring that John E. Norton, named in the lien as contractor, was in reality the owner, and the title was put by him in the name of Ida F. Seel as a device to defraud his creditors, moved to amend by striking off the word “contractor” after Norton's name, so that the lien should stand on the record as against Seel and Norton as “owners.” The court, however, discharged a rule to this effect, and made absolute a rule to strike off the lien. The

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amendment was asked after the six months in which a lien could have been filed, and we have therefore to consider whether it should have been allowed, under the act of June 10, 1879 (P. L. 122). We are of opinion that, so far as the parties now before us are concerned, the amendment was purely formal, and should have been allowed, as “conducive to justice and a fair trial upon the merits,” within that act. No new party is sought to be brought on the record. All were before the court already. The only change is in the capacity in which Norton is to be charged. He is named now as contractor, and plaintiff's contract is charged to have been made with him. If he was in fact the owner, as now averred, he has no equity to complain that his houses are made liable for the debt which he incurred in building them, and his apparent legal right to have them escape lien in a lump sum by a subcontractor is negatived by the fraudulent device resorted to in order to protect them from a lien to which, on the true facts, they would be subject. We regard the case as belonging to the class of *Ballman v. Heron*, 160 Pa. St. 377, 28 Atl. 914; *Id.*, 100 Pa. St. 510, 32 Atl. 594,—where it was held that one of several tenants in common may become contractor for the improvement of the joint property, and his part ownership will not prevent his waiver in good faith of the right of lien, both as to himself and his subcontractors; but “if the contract is not made in good faith, but for the purpose of misleading, and so defrauding, subcontractors and material men, it should be held invalid because of the fraud.” So, in the present case, if Norton was in fact the owner, his contract with plaintiff for a lump sum was valid and would sustain the lien. The plaintiff should be allowed to so amend his claim of record as to enable him to prove the facts, if they are as he avers. Of course, this amendment affects only the parties to the record now before us. If there are any intervening rights of terre-tenants or others, they will not be prejudiced by this decision, but will stand or fall upon their own merits. The order striking off the lien is reversed, the rule to amend reinstated and made absolute, and the record remitted for further proceedings.

(185 Pa. St. 411)

COLLUM et al. v. PENNSYLVANIA PAINT & OCHRE CO.

Appeal of LEHIGH VAL. TRUST & SAFE-DEPOSIT CO.

(Supreme Court of Pennsylvania. April 11, 1898.)

MECHANICS' LIENS—ADDITIONS AND ALTERATIONS—MORTGAGE—PRIORITY.

1. Where a mill is built for making paint under a process never before used, but, after being turned over to the owner and put in operation, it is found to be a failure, a mortgage put on it after it is so turned over takes precedence of lien for work in the nature of additions and

alterations thereafter made, and necessary to the production of paint under another process.

2. Act May 18, 1887 (P. L. p. 118), amending the mechanic's lien act of 1836, and providing a means for filing liens, being manifestly intended to apply to all liens for repairs, alterations, or additions in all parts of the state, supplements all previous legislation on the subject, including local laws.

Appeal from court of common pleas, Lehigh county.

In the action of Charles Collum and another, to use, etc., against the Pennsylvania Paint & Ochre Company, plaintiff had judgment, and on execution defendant's property was sold. From a decree reversing the award of commissioners to distribute the fund realized, the Lehigh Valley Trust & Safe-Deposit Company, assignee of Robert W. Wentz, appeals. Affirmed.

Charles R. James and James M. Deshler, for appellant. R. E. Wright, for appellee.

GREEN, J. The learned court below made the following finding, viz.: "The court finds, as a matter of fact, that the claim upon which the Wentz lien is based is for materials and work furnished and done in making additions to, and alterations of and in, the building in question, and not in the original construction." This finding brings the case within the decision of this court in *Thoma & Blandy's Estate*, 76 Pa. St. 30. The facts in the two cases are very similar in character, so much so that they require similar judicial treatment. In the *Thoma Case* the facts are thus stated in the syllabus: "A furnace on a new plan was built, its air and water pipes were laid, but the connections not made. The furnace was put into operation, worked for a time, and then blown out on account of a defect in its plan and construction. Money was then raised on a mortgage, by which all the mechanics' claims then due but one were paid. Other work was done, altering the construction, building new kilns, etc. Held that, under the circumstances of the case, the building was finished at the date of the mortgage, and the liens for work after that time were postponed to the mortgage." It is therefore very obvious that, if the finding of the court below in the present case is correct, the decision in the *Thoma Case* controls its determination. After a very careful examination of the testimony on the present record, we are thoroughly convinced that the finding of the court below on this important question is fully sustained by the evidence.

It is not necessary to repeat the testimony here in any great detail. The fund for distribution was the proceeds of one of five manufacturing plants belonging to the Pennsylvania Paint & Ochre Company, four of which were located in Berks county, and the remaining one, being the one now in question, was erected in the immediate vicinity of Allentown, in the county of Lehigh, and was known as the "Allentown Mill." This

mill was built on leased ground, near a barbed-wire mill, and its purpose was to evolve Venetian red paint out of the refuse acid which was discharged from the wire mill. The mill was built by William B. Shaffer, who was president of the paint and ochre company, and was turned over by him to the company, when completed, in pursuance of a contract between him and the company. This occurred in June, 1893. The mill was put in operation during that month by the company, and some goods were shipped as early as July 8, 1893. The formal transfer to the company was made on July 31, 1893, and on the next day the mortgage to secure the payment of \$35,000 of bonds by the company was made, and duly recorded on August 10, 1893. The auditor finds that the validity of this mortgage was not impeached, and upon its entry of record it became a lien upon the property in question. The plan of the mill contemplated the production of Venetian red by using the acid at the wire mill under a process never before used, without the use of a dryer before putting it in the roaster. It very soon appeared, however, that this could not be done, and then the plan of the mill was changed by the company deciding to erect a dryer, with other appliances, so as to produce brown and other colors of paint. In pursuance of this change in the plans, an additional building was put up on the north side of the mill; and the court below finds that the Wentz lien, the one in controversy, was filed for work and materials furnished by Wentz in making these additions and alterations, and that all this was done after the completion of the original building. Wentz had also furnished work and materials for the original building, and it was contended that the whole of his claim must be regarded as continuous, and therefore to be treated as a unit, ending only with the last items of his bill. The auditor took that view of the claim, but the court below did not sustain it, and held that the work and materials furnished after the completion of the building must be regarded as having been furnished for additions and alterations; and on this subject we think the evidence supports the finding of the court and not of the auditor.

In reference to this matter the learned court below, after reviewing the testimony of the various witnesses, says in the opinion: "It is plain that, after the mill had been started, it was found that it was a failure, and that those controlling it set about changing it. That change was the providing of appliances to dry the manufactured material, and to make paints other than Venetian red, along with that kind, and to increase the capacity of the establishment. To carry out this intention another building was necessary, and nine grinding machines, and connections between the new and what was there before, had to be made. These new appliances were additions and alterations,

visibly so, and to make them Wentz contracted and did what was done by him in October, 1893, and after that." We are very clear that this is the true interpretation of the testimony, and therefore we sustain the findings of the court on this subject.

Some question is raised in the argument for the appellant as to whether the act of May 18, 1887 (P. L. p. 118), amending the act of 1836, repeals the local act of May 26, 1871 (P. L. p. 1241), relating to liens on machinery on leased estates in the counties of Lehigh and Northampton. It is only necessary to say that the act of 1887 is manifestly intended to apply to all liens for repairs, alterations, or additions in all parts of the state, and therefore supplies all previous legislation on that subject. As there was no pretense that the requirements of this act were complied with in this case, it has no application. The assignments of error are all dismissed. The decree of the court below is affirmed, and the appeal is dismissed, at the cost of the appellant.

(185 Pa. St. 300)

WHITE et al. v. WOLF et al.

(Supreme Court of Pennsylvania. April 11, 1896.)

CONTRACT OF SALE—BREACH—RESCISSION.

Where plaintiffs contracted to sell defendant 1,000 dozen garments, shipments to commence 100 dozen between April 15th and 20th, and to continue 50 dozen weekly till order completed, and plaintiffs wrote, "We are obliged to have an extension until May 25th," and "therefore we request you to send us the extension for May 25th," and alleging as a reason for the request that they were "unable" to employ the necessary hands required for his work, he may refuse the extension, and, canceling the order for the threatened delay, cannot be held liable for damages; no offer to furnish within the agreed time being made.

Appeal from court of common pleas, Philadelphia county.

Action by S. White and another, trading as S. White & Co., against Harris Wolf and others, trading as Wolf & Co. Judgment for defendants. Plaintiffs appeal. Reversed.

George P. Rich and Henry C. Boyer, for appellants. Julius C. Levi, for appellees.

GREEN, J. The plaintiffs in this case were manufacturers of clothing in Philadelphia, and on the 13th of March, 1896, they made a contract with the defendants, doing business in Chicago, to make and deliver to them 1,000 dozen of pantaloons. The contract was in writing, signed by both parties, and contained the following stipulation: "Shipments of the above to commence 100 doz. Apr. 15th, to 20 by T. D. and to continue 50 doz. weekly until order is completed. Unless otherwise instructed by H. Wolf & Co." On March 27, 1896, the plaintiffs wrote to the defendant the following letter: "3 Bank Street, Philadelphia, 3/27th, 1896. J. Jerufsky, with H. Wolf & Co.—Dear Sir: Yours dated the 22d too hand your request will be

fulfilled we beg to say that we are obliged to have an extension until May 25, if convenient too do so sooner will do our utmost as we are unable to employ the necessary hands required for your work not only ourselves but all others are also short of hands on a/c of strikes; will try our best too ship you some the end of April; our friend Mr. Armitage will call on you to-morrow & he will explain too you how much trouble we have too obtain hands, therefore we request you to send us the extension for May 25 awaiting same we are S. White & Co." On April 1st the plaintiffs wrote the following letter: "3 Bank Street, Philadelphia, 4/1, 1896. Mr. Jerufsky, with H. Wolf & Co.—Dear Sir: Have seen Mr. Armitage since he returned from New York and he informed me that you would reply to my letter; please let me hear from you before we go on further with your order. Awaiting your prompt reply, we are, Respt. S. White & Co." In reply to these two letters the following letters were written by the representative of the defendants: "A. H. T. Chicago, N. Y., 4/2/96. Mess. S. White & Co., No. 3 Bank Street, Philadelphia, Pa.—Gentlemen: We referred your letter of 3/27 to our Chicago house and they will answer direct according; as I personally cannot make any alterations as per order placed with you. And we certainly expect same to be carried out as per contract unless our Chicago house instructs you otherwise. Respectfully yours, A. H. Torofsky." "A. H. T. Chicago, N. Y., 4/4/96. Messrs. S. White & Co., Philadelphia, Pa.: I received instructions from our Chicago house to-day as per your letter of the 27th ult. to cancel the entire pants order placed with you as the deliveries you mention do not prove satisfactory and it will be too late in the season for us. Please act according and oblige. Yours, respectfully, A. H. Torofsky." In addition to the foregoing the defendants wrote directly to the plaintiffs as follows. "April 13th, '96. Messrs. S. White & Co., 3 Bank St., Philadelphia, Pa.—Gentlemen: In reply to your communication of the 27th ult. addressed to our New York office, would say that we regret being compelled to insist upon your accepting our cancellation for order of March 18th. Your inability to complete the contract under agreed specified dates has greatly inconvenienced us, inasmuch as we were about to list the goods as a profitable item in our catalogue, and were compelled to leave them out on account of your inability to deliver. We do not now wish to be put to the further inconvenience of receiving a lot of merchandize that we can not sell because we could not advertise them. It was simply for the reason that our catalogue was about to go to press and we wanted the goods with in a specified time that we insisted upon a positive agreement as to delivery dates. We trust you will not blame us for not wishing to receive a lot of merchandize which is of no use to us and will not be delivered on time through no fault of our own. Yours, respectfully, H. Wolf & Company."

In the foregoing state of the testimony the learned court below charged the jury that "the defendants have without any authority or justification broken the contract, and subjected themselves to a liability for damages, and the only question open for you to determine upon the evidence will be the amount of damages." We find ourselves unable to agree to this view of the case, and for reasons which seem to us to be unanswerable. We think it quite clear that by the explicit terms of the contract the plaintiffs were bound to commence the deliveries of the goods by shipping 100 dozen of the pants during the period from April 15th to 20th. This was to be followed by further weekly shipments, immediately thereafter, of 50 dozen each until the whole quantity was delivered. It would have required all the time from April 15th to August 24th to have completed these deliveries. When, on March 27th, the plaintiffs wrote to the defendants, saying, "We are obliged to have an extension until May 25th," and "therefore we request you to send us the extension for May 25," and alleged as a reason for asking the extension that they were "unable to employ the necessary hands required for your work," they were not asserting any right under the contract, but were asking for a change in its terms, upon what might be a most vital matter to the defendants. If an extension to May 25th was granted the deliveries would not be completed until the latter part of September. How important this proposed change in the time of the delivery was to the defendants they subsequently expressed in their letter of April 13th to the plaintiffs. They there say: "Your inability to complete the contract under agreed specified dates has greatly inconvenienced us, inasmuch as we were about to list the goods as a profitable item in our catalogue, and were compelled to leave them out on account of your inability to deliver. We do not now wish to be put to the further inconvenience of receiving a lot of merchandize that we cannot sell because we could not advertise them. It was simply for the reason that our catalogue was about to go to press and we wanted the goods within a specified time that we insisted upon a positive agreement as to delivery dates. We trust you will not blame us for not wishing to receive a lot of merchandize which is of no use to us and that will not be delivered on time through no fault of our own." It seems to us that the foregoing is a very satisfactory explanation of the defendants' refusal to accede to the plaintiffs' request to a change of the contract as to the time of delivery. They were under no obligation to consent to the change. They had a right to stand on their contract, and, if the plaintiffs failed to commence their deliveries according to the contract, they had a perfect right to refuse to receive them. In point of fact, the plaintiffs did not deliver, nor did they offer to deliver, the goods at the time fixed by the contract. We know of no

reason why the defendants should be held liable in damages for declining to agree to the proposed change in the contract. Unless they were in technical legal default for refusing to make the change, there could be no such liability. But it is very clear to us that they were in no default for declining to agree to the change, and surely they could not be held to be in default for giving notice that they would not so agree. They had a right to take the plaintiffs at their word when they said they were obliged to have an extension, and gave as a reason that they were unable to employ the necessary hands. The reply of the defendants was promptly made, and it was emphatic. Being made on April 4th, it was 1 month and 21 days before the time to which the change was requested to be made. It is difficult to understand how the plaintiffs could have suffered any damage when the notice of refusal to make the change was given at so early a period. But, whether damage was sustained or not, it was not through any fault of the defendants, and they cannot in fairness be held responsible. We think the learned court below unwittingly fell into error in holding that, before the defendants could decline to agree to the proposed change in the contract, the letter of the plaintiffs must have contained also the statement of the plaintiffs that, unless the extension was granted, they could not comply with the order, and would not attempt to do it. We do not understand that there is any such rule of law and we are not referred to any authority for such a proposition, nor have we been able to find any. There is no question of technical cancellation requiring the consent of both parties involved in the case. In using the word "cancel" in their letter of April 4th, and the word "cancellation" in their letter of April 13th, the defendants were merely expressing their refusal to consent to the proposed change, and their decision not to be further bound by the contract; and that, as we have seen, they had a right to do. Entertaining these views, we are obliged to sustain the assignments of error. Judgment reversed, and judgment now entered for the defendants, with costs.

(1 Pen. 170)

CHANDLER v. DUNCAN et al.
(Superior Court of Delaware. Newcastle. Dec. 17, 1897.)

PLEADING—STATUTE OF LIMITATIONS.

Where defendant pleads limitations as a bar to plaintiff's claim, and plaintiff relies on a new promise to remove the bar, it is unnecessary to plead specially such new promise in order to avail himself of its benefit.

Action by Mary E. Chandler against Henry B. Duncan and another, as administrators of the estate of Richard B. Duncan, deceased. Rule to show cause why an award of referees should not be set aside. Rule discharged, and report confirmed.

The following bill of particulars was filed by plaintiff:

Wilmington, Del., April 1, 1897.

Estate of Richard B. Duncan, Dr., to Mary E. Chandler.

For care and attendance of Richard B. Duncan for five years previous to his death, at \$20.00 per week	\$5,200 00
Three weeks' board, February 16 to March 9, 1897, at \$6.00....	18 00
Rent of room, March 9 to March 23, 1897, at \$3.00.....	6 00
Probate	15
	<u>\$5,224 15</u>

The case came on to trial before referees upon the following pleas: "(1) Non assumpsit. (2) And for a further plea in this behalf the said defendants, by leave of the court here for this purpose first had and obtained, say that the said plaintiff ought not to have or maintain her aforesaid action thereof against them, because they say that the said supposed causes of action in the declaration filed in this cause mentioned (if any such there were or still are) did not, nor did any or either of them, accrue to the said plaintiff at any time within three years next before the commencement of this suit, in manner and form as the said plaintiff has above thereof complained against them, the said defendants; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain her aforesaid action thereof against them," etc. "And the said plaintiff, as to the plea of the said defendants by them first above pleaded, and whereof they have put themselves upon the country, doth the like. And the said plaintiff, as to the said plea of the said defendants by them secondly above pleaded saith that she, by reason of anything in the said plea alleged, ought not to be barred from having or maintaining her aforesaid action thereof against them, the said defendants, because she saith that the said several causes of action in the declaration mentioned did accrue to her, the said plaintiff, within three years next before the commencement of this action, in manner and form as the said plaintiff hath above complained against the said defendants, to wit, at Newcastle county, aforesaid, and this the said plaintiff prays may be inquired of by the country," etc. "And the said defendants, as to the replication of the said plaintiff by her secondly above pleaded, and whereof she has put herself upon the country, do the like."

Exceptions: "(1) That it appeared as a fact from competent evidence at the hearing of this cause before the referees that said Richard B. Duncan died on the 9th day of March, A. D. 1897, notwithstanding which fact, and against the objection of said defendants at said hearing, the said referees admitted and received in evidence the testimony of witnesses tending to prove care and attendance of Richard B. Duncan by the plaintiff performed and bestowed prior to the 9th day of March, 1894. (2) That against the contentions and objections of

said defendants the said referees awarded and returned in this cause that the plaintiff recover in this action from the defendants for the care and attention of said Richard B. Duncan, rendered and bestowed by her for two years prior to said 9th day of March, A. D. 1894. (3) That it appeared as a fact from competent evidence at the hearing in this cause before the referees that said Richard B. Duncan died on the 9th day of March, A. D. 1897, notwithstanding which the said referees awarded and returned that the said plaintiff recover from the defendants for her care and attention of the said Richard B. Duncan for the entire five years next immediately preceding said 9th day of March, A. D. 1897, the sum of thirty-six hundred and sixty-four dollars, and that said referees arrived at the said amount of their award by allowing the said plaintiff the sum of fourteen dollars for each and every week of the said five years next immediately preceding said 9th day of March, A. D. 1897, and adding thereto two items in her bill of particulars, both of which were admitted to be due; the one being eighteen dollars for three weeks' board, and the other six dollars for two weeks' rent of rooms. (4) That said referees awarded and returned that the plaintiff recover from the defendants in this action, against the objection of the defendants, for care and attention of said Richard B. Duncan, rendered and bestowed by her prior to the 9th day of March, A. D. 1894, and the sum of fourteen hundred and fifty-six dollars was awarded said plaintiff by said referees for such service and care rendered by her prior to said 9th day of March, A. D. 1894. (5) That under the law, the bill of particulars and pleadings in this cause, the award by the referees made in this cause that the plaintiff recover from the defendants in this action for any service rendered by her prior to said 9th day of March, A. D. 1894, is not warranted. Therefore, for the errors and mistakes aforesaid, the defendants pray the court here that the return of said referees may not be confirmed."

The following agreement of counsel as to facts was filed December 17, 1897, the date of the hearing on the rule: "It is agreed by and between William S. Hilles, attorney for plaintiff, and Walter H. Hayes, attorney for the defendants, that the above-stated case was heard before Thomas B. Smith, John P. Doughten, and James S. Dobb, as referees, on the 9th and 10th days of December, A. D. 1897; that the facts set forth in the defendants' exceptions filed in this case, Nos. 1, 2, 3, and 4, are true; that at said hearing an offer was made on behalf of the plaintiff to prove by competent testimony that repeatedly during the five years immediately preceding his death, which occurred March 9, 1897, Richard B. Duncan promised to pay the plaintiff for her care and attention of and to him, and admitted his liability for care and attention previously given by plaintiff to him, and promised to pay therefor, and the said promises and admissions continued until within a month or six weeks be-

fore the death of the said Richard B. Duncan; that the referees admitted this testimony against the objections of the defendants' counsel; that it was further proved during all of said period of five years that the said Richard B. Duncan paid to the said plaintiff for board the sum of six dollars per week, with the exception of the last three weeks of his life."

William S. Hilles, for plaintiff. Walter H. Hayes, for defendants.

SPRUANCE, J. This is an action of assumpsit, commenced April 5, 1897, against the administrators of Richard B. Duncan, who died March 9, 1897, to recover for services rendered to the deceased more than three years before the commencement of the action. The second plea of the defendants is the statute of limitations, which is drawn out, and denies that the cause of action accrued at any time within three years next before the commencement of the action. To this there is a general replication, also drawn out, which avers that the cause of action did accrue within three years next before the commencement of the action. On this replication the defendants join issue. At the trial before referees they, against the objection of the defendants, received testimony of services rendered prior to three years before the death of Duncan, and of acknowledgments by Duncan at sundry times during five years immediately before his death of his liability for such services, and of promises by him during the same period to pay for the same; such admissions and promises continuing until a few weeks before his death. On behalf of the defendants it is contended that under the general traverse to the plea of statute of limitations testimony was not admissible as to any admissions or promises in relation to services performed more than three years before the commencement of the action, and that such testimony could only have been received under a special replication setting forth the new promise. The law applicable to this subject was fully discussed and settled by the court of errors and appeals in 1883 in *Newlin v. Duncan*, 1 Har. (Del.) 204. It was there held that an acknowledgment of a subsisting demand, or any recognition of an existing debt, is evidence of a promise to pay it; that the ground on which the statute operates is that after a certain time it is presumed that the debt is discharged, but that an acknowledgment of the debt rebuts that presumption, and the plaintiff recovers, not on the ground of having a new right of action, but that the statute does not apply to bar the old one; that a new promise revives the old debt, but does not create a new one. This the court declared had been the law and practice in this state from time immemorial, notwithstanding the then later decisions in England showing fluctuation and confusion upon the subject. The court of errors and appeals, in

1858, in *Robinson v. Burton*, 1 Houst. 540, say: "It was decided by the court in *Newlin v. Duncan*, in conformity with the uniform decisions and practice, that an acknowledgment of a debt as a subsisting demand will take it out of the act of limitations without an express promise to pay it. There has been no vacillation in the courts on this principle, but some conflict in its application to the facts in each case." Whether it be an acknowledgment of a subsisting or existing debt and of an obligation to pay it,—from which a promise to pay may be implied,—or an express promise to pay, the rule is the same. In neither case is the plaintiff required to reply specially the acknowledgment or new promise. If he recovers, it is on the old promise, and not on the new. Lord Ellenborough remarked that, if this was an entirely new question, and the pleadings were to be made strictly logical, a replication of the new promise might be required; but he thought the practice had in his day been too long otherwise to change it. Surely, in view of the decision and practice in the courts of this state, it would be most unwise for us to adopt the rule insisted on by the defendants. We are of the opinion that under the pleadings in this case the testimony objected to by the defendants was properly admitted by the referees, and therefore the rule is discharged, and the report of the referees confirmed.

(1 Pen. 142)

THOMAS v. ADAMS EXP. CO.

(Superior Court of Delaware. Newcastle. Dec. 11, 1897.)

DEFAULT JUDGMENT—APPLICATION TO REMOVE.

1. The provisions of Rev. Code, p. 776, c. 102, requiring an application to remove a default judgment to be made at or before the next term after such judgment is entered, refers to the next term of the court to be held in the same county.

2. Where the court in one county has assumed jurisdiction and reduces a claim to judgment, all proceedings in relation thereto must be determined in that county, and courts of another county have no jurisdiction under Const. art. 4, § 19, providing that jurisdiction of each of the courts "shall be co-extensive with the state."

Rule by the Adams Express Company against Hiram M. Thomas to show cause why a default judgment should not be opened. Rule discharged.

A rule was issued (SPRUANCE, J., dissenting) at this term to show cause why a judgment entered by default in Kent county against the defendant company should not be opened, and the defendant permitted to appear.

Arley B. Magee, for the rule. John D. Hawkins, opposed.

LORE, C. J. The court have considered this matter. I have been looking at it with some degree of interest since the application was made and the rule granted. Judge

SPRUANCE was clearly of the opinion when the application was made that we ought not to grant the rule. The majority of the court thought the rule ought to be granted, and that the parties ought at least to have a hearing, because there has been some confusion, which grew out of what appeared to be some divergence of views among the court in *Knight v. Ferris*, 6 *Houst.* 316, where it has been claimed that some members of the court entertained the view (although it does not formally appear from the adjudication) that it was the same court, sitting in different counties. The whole question there turned upon its being a local action; yet indirectly it involved that question as well. I know that Chief Justice Comegys had very liberal views about the right of the superior court, and as to its being the same court, sitting in the different counties. The majority of this court therefore desired to hear argument upon this matter, or at least not to turn the parties out without a hearing.

After consideration of the matter, we think that this rule should be discharged. This is a suit brought in Kent county. Judgment was had by default, and the amount ascertained by a jury. Now it is a judgment of a court sitting in Kent county. Then it is exclusively a matter that is in that county, and which in no way relates to Newcastle county. While sitting in Kent county, we may issue process or any other thing into any other part of the state, in order to bring any person or thing before the court necessary to a proper adjudication. But, when we have assumed jurisdiction and proceeded to judgment in that county, we think all subsequent proceedings should be taken there. While this statute does say that "if the defendant shall, at or before the next term after such judgment, by affidavit deny notice or knowledge of such suit before the judgment was rendered, and shall allege that there is a just or legal defense to the action, or some part thereof, such judgment shall be taken off and he shall be permitted to appear" (*Rev. Code*, p. 776, c. 102, § 3), and while that seems to contemplate that the judgment shall be taken off at any time before the next term of court, it does not say it shall be taken off by the court sitting in either of the other counties. It merely gives him until the first day of the next term of court in that county to take it off, and it can only be taken off by the court itself.

The defendant is not deprived of his remedy. He may go into equity, and restrain, perhaps, on the ground that he has possibly no other remedy, until he could be heard before the court. That, however, is not for us to determine here. We think that, this being a judgment of the court of Kent county, all proceedings in relation to it must be initiated and prosecuted in that court. That was practically the view of the chancellor in the case of *Knight v. Ferris*, and his

seems to have been the only decision delivered in that case, with the exception of Judge Wootten's, which does not touch the point raised in this case. The bar generally will remember that as being a very hotly contested case. In his opinion the chancellor says: "The superior court may therefore be said to be, in fact, for most purposes, a county court. The reason why the statute (*Rev. Code*, c. 91) provides for the sessions of the courts in each of the counties was doubtless twofold: First, public convenience; and, secondly, because many subjects of adjudication, or rather things in respect to which adjudication in the courts might be necessary, were necessarily local in their character, and all contention in the courts in respect to such matters must necessarily be local, and be determined in the county in which the controversy for determination arose." While that does not cover expressly the point, it indicates most clearly that where a matter is determined and ascertained in the court, so as to become local to that court, and a judgment of that court, the court in another county ought not to interfere with it. Whether or not the courts in the several counties are entirely independent courts—as if one were here and the other in England, for instance—is questionable. I am not prepared to go to that extent, inasmuch as it is the superior court of the state of Delaware, sitting in each county, for such county, by express provisions of constitution and law. But I am prepared to say that when the court in one county has assumed jurisdiction, and reduced the claim to judgment, then all proceedings in relation to that matter must be initiated and determined in that county. We therefore order the rule discharged.

SPRUANCE, J. (concurring). This is a subject of some importance. The fact that a majority of the court thought proper to grant this rule would seem to indicate that there was some doubt upon the subject. I thought that the rule ought not to be granted because there was not a *prima facie* case shown by the papers filed. There seems to be an idea in the minds of some that the jurisdiction of the courts in the several counties under the new constitution is different from what it was under the old constitution. I think a very slight examination will satisfy any candid mind that this is a mistake; for the provisions of both instruments, respecting all subjects bearing upon this question, are substantially the same. If that be so, it cannot be said that there is nothing in the practice of the courts against this application. During the 65 years the old constitution was in force, there never was, so far as is known, an application to a court in one county to set aside a judgment of a court in another county. In such a case the absence of precedent is precedent; and, if the conditions be the same under the new constitution, the silent

concurrence of the bench and bar under the old constitution should not be lightly disregarded. Is there any difference in the power of the courts, so far as this subject is concerned, under the new constitution and the old? It has been claimed that, under the new constitution, the courts are more blended than under the old. This contention is made under the following clause of section 5, art. 4, of the new constitution: "The chief justice and the four associate judges shall compose the superior court, the court of general sessions and the court of oyer and terminer, as hereinafter prescribed." The old constitution, after naming the courts of the state, provides, by section 2 of article 6, as follows: "To compose the said courts there shall be five judges in the state. One of them shall be chancellor. * * * The other four shall compose the superior court, the court of oyer and terminer, and the court of general sessions of the peace and jail delivery, as hereinafter prescribed." Under the old constitution, no more than three of the four judges could sit together in the superior court; and, under the new constitution, no more than three of the five judges can sit together in the superior court. The old constitution designated those of the four judges who should sit in the respective counties. The new constitution (section 5, art. 4) provides that "the said five judges shall designate those of their number who shall hold the said courts in the several counties." When, under the new constitution, a court is held by the judges designated by the five judges, it is as independent of control by other courts as was a court held by the judges designated by the old constitution.

It was insisted in this argument that the provisions of section 19 of article 4 of the present constitution justifies this application, viz.: "The jurisdiction of each of the aforesaid courts shall be co-extensive with the state. Process may be issued out of each court, in either county, into every county." But it will be observed that this is precisely the language of section 11 of article 6 of the old constitution, and that the interpretation of it now claimed was never before made. This application to set aside a judgment of the superior court of Kent county, rendered at the last October term, is made under section 3, c. 102, p. 775, Rev. Code, which requires that the application be made "at or before the next term after such judgment." It is contended that this means that the application must, or at least may, be made at the next term of the superior court, wherever held. If this construction be true, the application cannot be made at the April term, which will be the next term of the court in Kent county after the rendition of the judgment, as there will have intervened several terms of the superior court in the other counties, viz. the November and February terms in Newcastle, and the April term in Sussex. It is therefore clear that "the next term,"

in the statute, means the next term of the court in the county where the judgment was rendered. The same is true of section 1 of the same chapter, which provides that a writ for the commencement of an action shall be returnable "on the first day of the term next thereafter." This, of course, means the next term of the court in the county out of which the writ issues; otherwise, writs issued out of the court in Kent after the beginning of the October term would be returnable to the November term in Newcastle. If the question here raised were not settled, as it is, by the constitution and statute law, considerations of county would be sufficient to justify this court in refusing to attempt to open a judgment of the superior court in another county. It is a well-recognized rule of the courts, in the absence of express provisions of law to the contrary, that the court which first assumes jurisdiction of a subject retains it to the end. The greatest inconvenience and confusion would ensue if the superior court in the respective counties should undertake to exercise appellate or supervisory powers over the superior courts in the other counties. If the power exists to set aside a judgment in such a case as this, there is no limit to the exercise of the power. Under the constitution and laws of this state, there is no such power. Over the judgments and determinations of the superior courts in the several counties, the constitution and laws of this state give supervisory power to the supreme court alone, except in cases within the jurisdiction of the court of chancery. Rule discharged.

(20 N. H. 279)

BEARD v. HENNIKER et al.

(Supreme Court of New Hampshire. Hillsboro. March 11, 1898.)

HIGHWAYS—PETITION—AMENDMENT—AUTHORITY.

A petition alleged that plaintiff was aggrieved by the laying out of a highway, and the assessment of damages therefor, and prayed that the laying out be reversed, or that just damages be awarded. The answer also prayed that the laying out might be reversed. *Held*, that the court had authority to allow an amendment to the petition, striking out the averment of a grievance by the laying out, and the corresponding prayer.

Exceptions from Hillsboro county.

Appeal by Eva M. Beard from the laying out of a highway by the towns of Henniker and Hillsboro. Appellant was allowed to amend her petition, to which appellees excepted. Overruled.

The petition alleges that the plaintiff is aggrieved by the laying out and by the assessment of damages, and prays that the laying out may be reversed, or, in default thereof, that just damages may be awarded to her. The defendants' answer admits the substantial allegations of the petition, alleges that the public good does not require the highway, and prays that the laying out may be reversed. Subject

to the defendants' exception, the plaintiff was allowed to amend the petition by striking out the averment of a grievance by the laying out and the corresponding prayer.

Burnham, Brown & Warren, for plaintiff.
Oliver E. Branch and Samuel W. Holman, for defendants.

CHASE, J. The court had authority to permit the amendment to be made. Pub. St. c. 222, § 8; *Osgood v. Green*, 30 N. H. 210; *Sawyer v. Keene*, 47 N. H. 173. No question affecting the exercise of the authority is reserved. Exception overruled.

CARPENTER, C. J., did not sit. The others concurred.

(69 N. H. 233)

STARKEY v. KINGSLEY.

(Supreme Court of New Hampshire. Cheshire.
March 11, 1893.)

WILLS—DECREE IN PROBATE—RES JUDICATA.

Laws Mass. 1895, c. 134, § 1, provides that, whenever, by the provisions of a will, a legacy is to be distributed among the heirs or next of kin of any person, the probate court, on the application of any person interested, after such notice as it may prescribe, may order distribution to be made to such individual or individuals as seem, according to such will, entitled thereto, and such order of distribution shall protect the executor or administrator as fully as an order of distribution in an intestate estate. A probate court of that state, on petition of an heir of testator, after notice, as prescribed by such court, "to the heirs at law, next of kin, and all other persons interested in the estate," by publication and by mailing to all who were known, decreed, in accordance with the terms of the will, that the balance in the executor's hands should be distributed, in equal shares, among 10 persons named in such decree as the testator's legal heirs. Plaintiff, who resided in Connecticut, and was not known to be an heir, and had no knowledge of such will or of such proceedings until after such distribution had been effected, brought suit, as an heir of testator, against defendant, to recover the one-eleventh of the sum so received by him. *Held*, that such decree was conclusively binding on plaintiff, as to the matters directly in issue in such proceeding, and could not be attacked in such action, as it was *res judicata* of defendant's title.

Assumpsit by Myra E. Starkey against Austin N. Kingsley. Heard on agreed facts. Case discharged.

Daniel P. Kingsley, of Springfield, Hampden county, Mass., died October 23, 1886, leaving a will, which was duly proved in that county, and by which he gave to the executor a portion of his estate, in trust, to be paid, under certain circumstances, to his legal heirs. July 3, 1895, the circumstances having occurred, and the executor's account having been settled, the probate court for the county, upon the petition of an heir, decreed that the balance in the executor's hands should be distributed in equal shares among the 10 persons named in the decree; it appearing that they were entitled thereto. Notice of the hearing upon the petition was

given, in accordance with the order of the court, "to the heirs at law, next of kin, and all other persons interested in the estate," by publishing the citation once a week for three successive weeks in a Springfield newspaper, and by mailing a copy of it to all who were known. The plaintiff claims to be an heir, and entitled to the same share of the fund as each of the other heirs. She resided in Connecticut, and had no knowledge of the will or any of the proceedings in the probate court relating to the estate until after the decree of distribution had been made and complied with. No copy of the citation was mailed to her, because it was not known that she was, or claimed to be, an heir. The sum decreed to the defendant was \$2,000, and was paid October 5, 1895. The plaintiff demanded of him the one-eleventh of this sum March 1, 1896, and seeks to recover it in this action. The laws of Massachusetts relating to the questions to be considered are a part of the case.

Clarke C. Fitts and John T. Abbott, for plaintiff. Batchelder & Faulkner, for defendant.

CHASE, J. The \$2,000 in the defendant's possession was paid to him in satisfaction of a decree of a Massachusetts probate court. The plaintiff's case is based on the supposition that this decree was erroneous. She proposed to show that she was an heir of the testator, making 11 heirs, instead of 10, and, consequently, that the defendant was entitled to only \$1,818.18, and so has \$181.82 in his possession, which in equity and good conscience belongs to her. The question is whether the law will permit her to attack the decree in this way. The Massachusetts act of March 10, 1895 (chapter 134), gave the probate court jurisdiction of the subject-matter. The first section is as follows: "Whenever, by the provisions of a will, a legacy is to be distributed in whole or in part among the heirs or next of kin of any person, * * * the probate court, on the application of any person interested, after such notice as it may order, may order distribution to be made to such individual or individuals as according to the will seem to be entitled to the legacy, and such order of distribution shall protect the executor or administrator obeying the same as fully as an order of distribution in an intestate estate." The object of the proceeding thus provided is to establish the title to the fund in the possession of an executor or administrator, as against all the world. Its nature is that of a proceeding in rem. *Shores v. Hooper*, 153 Mass. 228, 232, 26 N. E. 846. In such proceedings it is not always possible to give personal notice to all interested parties. The existence of an interest, or the names and residences of persons supposed to have an interest, are sometimes unknown, and cannot be ascertained. But the interest itself is a guaranty that the person having it will probably learn

of the proceedings if public notice of their pendency is given. Hence, the law generally regards notice by publication as sufficient, in respect to such parties, even if it fails to reach them in fact. *Bonnemort v. Gill*, 167 Mass. 338-340, 45 N. E. 768. In this case the citation was broad enough in terms to include the plaintiff, and service was made in accordance with the requirement of the statute, and in the only way practicable under the circumstances. In contemplation of the law, she had notice of the pendency of the proceeding, and an opportunity to appear in it and defend her rights. Although she did not appear, the decree conclusively binds her in respect to the matters that were directly in issue in the proceeding. *Loring v. Steineman*, 1 Metc. (Mass.) 204; *Parcher v. Bussell*, 11 Cush. 107; *Crippen v. Dexter*, 13 Gray, 330; *Pierce v. Prescott*, 128 Mass. 140, 142; *McKim v. Doane*, 137 Mass. 195; *Shores v. Hooper*, 153 Mass. 228, 232, 26 N. E. 946; *Merrill v. Harris*, 26 N. H. 142; *Simmons v. Goodell*, 63 N. H. 459. "The immediate, direct, and sole purpose of the judgment was to ascertain and determine who were the persons entitled to a distributive share." *Pierce v. Prescott*, 128 Mass. 142. This could not be done without ascertaining who the testator's legal heirs were. The decree established the fact that they were the 10 persons named in it, and that the defendant, being one of them, was entitled to \$2,000 as his share of the fund. His title to that sum is res adjudicata, and the plaintiff cannot attack it in this action. *Van Fleet, Coll. Attack*, § 17. If there is any proceeding of which the plaintiff can now avail herself to show that the decree is erroneous, it is a direct proceeding for its reformation, instituted before the Massachusetts courts. *Metcalf v. Gilmore*, 59 N. H. 417, 436. There should be judgment for the defendant. Case discharged. All concur.

(67 N. H. 569)

FISHER v. CARPENTER et al.

SAME v. CARPENTER.

(Supreme Court of New Hampshire. Grafton. March 16, 1894.)

TRESPASS — QUESTIONS OF LAW — EXCEPTION TO WEIGHT OF EVIDENCE — LIMITATION OF COSTS — INJUNCTION — REMEDY AT LAW.

1. An exception to the weight of evidence presents no question of law.

2. Under Pub. St. c. 229, § 3, providing that, in all actions in the supreme court, costs may be limited as the court may deem just, it was not erroneous to limit plaintiff's costs, in trespass, to the amount of his damages.

3. There was nothing to justify the issuing of an injunction in an ordinary case of trespass, for which the remedy at law was full and adequate.

Trespass q. c. by Horace N. Fisher against Frank O. Carpenter and another, and bill in equity by plaintiff against defendant Carpenter for an injunction. There were findings in favor of plaintiff, and the question of costs

was reserved, and the disposition of the bill in equity left for the court at the law term. Case discharged.

The first case is trespass q. c. for breaking and entering the plaintiff's close in Woodstock, and the second is a bill in equity to restrain the defendant from continuing the trespasses complained of in the first case and from constructing a roadway over the plaintiff's close. Trial by the court. The court found, on evidence which is given at considerable length in the reserved case, that a line between the parties, which was formerly a range line, had by agreement been shifted from the true position of the range line, and that another divisional line between them had likewise been shifted by agreement from its former position; each agreement being shown by the maintenance of fences, and by occupation and acquiescence for a long time, but not by any direct evidence. According to these findings, the place of the alleged trespasses was on the plaintiff's land. The court accordingly found for the plaintiff in the action of trespass, assessed his damages at 10 cents, and limited his costs to 10 cents, but, at the plaintiff's request, reserved the question of discretion as to the limitation of costs, provided the court at the law term will consider it. The temporary injunction in the bill in equity was dissolved, and the disposition of the case left for the court at the law term, with a finding as to the threatened damage which is quoted in the opinion.

Burleigh & Adams, for plaintiff. E. A. & C. B. Hibbard, for defendants.

BLODGETT, J. In the suit for trespass, it cannot be properly said, as matter of law, that, upon the facts and evidence as reported, it was not competent for the trial justice to find both an agreed range line and an agreed divisional line between the parties. There was clearly evidence which might warrant the findings, and no question of law is presented by an exception to its weight.

The limitation of the plaintiff's costs to the amount of his damages (10 cents) was not erroneous. "In this state it is within the discretion of the court to limit the costs of the prevailing party, or to refuse to allow any costs to him, except in cases where the statutes have specially provided otherwise." *Smith v. Boynton*, 44 N. H. 529, 530, and authorities cited. There is no statute applicable to this case which so provides. On the contrary, there is a statute which expressly provides that "in all actions or petitions in the supreme court, costs * * * may be limited * * * as the court may deem just." Pub. St. c. 229, § 3.

The bill in equity is dismissed. Nothing appears to justify the issuing of an injunction. The finding is that, "if the defendant's roadway should be completed as proposed, the damage to the plaintiff for the few feet it would occupy on his extreme southeast corner would be insignificant, and the picturesque features of his premises would not be marred thereby, as

alleged in the bill, but, on the contrary, would rather be enhanced." At most, only a case of ordinary trespass is presented, for which there is a full and adequate remedy at law. *Hunter v. Carroll*, 64 N. H. 572, 15 Atl. 17; *Perkins v. Foye*, 60 N. H. 496; *Morgan v. Palmer*, 48 N. H. 336, 338.

Case discharged.

SMITH, J., did not sit. The others concurred.

(68 N. H. 89)

TOWN OF MONROE v. CONNECTICUT RIVER LUMBER CO. et al.

(Supreme Court of New Hampshire. Grafton. July 27, 1894.)

TOWNS — HIGHWAYS — OBSTRUCTION — DAMAGES — NEGLIGENCE — UNSAFE DAM — APPEAL — OBJECTIONS — HARMLESS ERROR — TRIAL — ARGUMENT — INSTRUCTIONS.

1. Towns may sue for the destruction or obstruction of highways in their limits.

2. The question of misjoinder of defendants will not be considered where the verdict was rendered against one only.

3. Where a written statement made by defendant's witness had no bearing on the case except as it tended to impeach the witness, defendant is not harmed by plaintiffs reading such portions thereof as were consistent with the witness' testimony.

4. Where a written statement made by a witness is inconsistent with his testimony, the opposing counsel may argue that the former is true and the latter false.

5. An objection to remarks of counsel will not be considered where there is no finding that they were made, and no exception on the subject was allowed.

6. A town compelled to build a new road because of defendants' negligence may recover the additional expense in the cost of maintaining the new road over the old one.

7. The negligent acts of each of several co-defendants, performed independently of each other, are admissible where the combined and concurrent effect of them all caused the injury sued for.

8. A purchaser of an unsafe dam, who fails to make it safe, and to so maintain it as not unnecessarily to endanger life or property, is liable for injuries caused thereby.

9. An erroneous instruction is harmless where it appears from the instructions as a whole that the jury could not have been misled thereby.

10. An instruction to a nonexpert jury to consider what they would have done had they been placed in the situation of certain experts who did the negligent acts causing the injury sued for is not erroneous as charging that nonexperts might measure the degree of care to be exercised, where other parts of the charge made it clear that the knowledge of the experts was to be considered in determining their situation.

Exceptions from Grafton county.

Action by the town of Monroe against the Connecticut River Lumber Company and others. Verdict against the Connecticut River Lumber Company, and it brings exceptions. Overruled.

The declaration alleges, in substance, that the defendants Van Dyke and McFarland, in June, 1884, negligently repaired, and in part rebuilt, a dam owned by them on the Connecticut river; that Van Dyke sold his interest to the Connecticut River Lumber Compa-

ny in 1885, but has since been the president and general manager of the company, and as such has had the control, management, and supervision of the dam, and that it has ever since been negligently kept and maintained by the defendants; that in May, 1888, the company negligently ran a large number of logs over the dam, Van Dyke directing and controlling the business; that by the negligence of the company and Van Dyke a large jam of logs formed upon and above the dam; that, in consequence of the jam, and of the negligent construction and maintenance of the dam, it gave way, and allowed the water and logs to escape, causing a washout of highways in the plaintiff town, compelling the town to repair some and to build new ones in place of others, the new ones being necessarily in less favorable locations, and so more expensive to maintain than those they replaced. The defendants demurred, because "there are no allegations of any joint act causing damage, nor of any separate act causing damage, but the allegation is of separate acts at different times, participated in by part of the defendants, which caused the damage, in conjunction with other separate acts committed by other defendants"; and because "the plaintiffs have no legal interest in the highways sufficient to authorize them to maintain a suit." The demurrer was overruled, and the defendants excepted. Trial by jury. Verdict for Van Dyke and McFarland and against the Connecticut River Lumber Company.

The plaintiffs claimed, and introduced evidence tending to show, that Van Dyke owned the dam for several years prior to February 17, 1886, when he conveyed it to the company; that McFarland had a right, since June, 1883, to a part of the water; that Van Dyke (during his ownership) and McFarland at different times, and independently of each other, repaired and rebuilt portions of the dam; that the work was negligently done; that the company, after the purchase from Van Dyke, were engaged in running logs down the river; that by their negligence a jam was formed in May, 1888, which brought an additional strain on the dam, and that they knowingly maintained the dam in an unsafe condition; that the dam gave way on account of its insufficiency to withstand the strain; that the washout was caused by the combined and concurrent negligence of all the defendants, and, in the absence of such negligence by any one of them, would not have happened. The jury were instructed that, if they found these claims sustained by the evidence, the plaintiffs were entitled to a verdict against all the defendants, and the defendants excepted. The company excepted to evidence of the separate negligence of Van Dyke and of McFarland in repairing and rebuilding the dam, and also to evidence of their own negligence in the management of their logs, not participated in by all the defendants. At the close of the evidence, the defendants moved that a verdict

be directed in their favor, which was refused, and they excepted. The court ruled that Van Dyke, on the facts shown (but not here stated) as to his connection with the running of the logs, was not personally liable for any negligence therein. On the cross-examination of E. C. Waite, a witness for the defendants, the court ruled that the plaintiffs' counsel might read such parts of a previous statement in writing, made by the witness, as he desired to question the witness upon, and such parts only, and the defendants excepted. Counsel thereupon read the entire statement, some of which was not inconsistent with the testimony of the witness on the stand, and questioned the witness upon parts of it, to which the defendants excepted. In his argument to the jury the plaintiffs' counsel was permitted to argue that the facts were as stated by Waite in his previous statement, and that his testimony on the stand was false, to which the defendants excepted. During the argument for the plaintiffs, one of the defendants' counsel stepped to the bench, and desired an exception noted to what had just been said. The attention of the presiding justice had been diverted from the argument, so that he had not noticed the language complained of. On his requesting that the reporter's notes of the language be obtained, the defendants' counsel, after inquiry, reported that no minute of the language had been taken, and presented a writing as follows: "The Connecticut River Lumber Company desire an exception to that part of the argument referring to the education of George Van Dyke and the company about destroying dams, bridges, and property along the banks of the river." This exception was not called to the attention of the plaintiffs' counsel, and he had no knowledge of it till after the trial was over. Subject to the defendants' exception to the substance of the matter called for, and not to the qualification of the witness, F. H. Cross, one of the plaintiffs' selectmen in 1888, and their agent during that year in the business of reconstructing the roads, was allowed to give his estimate of the additional expense of maintaining a new road built by the plaintiffs in place of a road that had been washed out, over and above the expense of maintaining the old road, and also to give his opinion what part of certain expense incurred by the town was unnecessary. One Hadlock, a witness for the plaintiffs, was also allowed to testify that the banks are steeper on each side of the new road than of the old, as bearing on the extra expense of maintaining the new road. It appeared that, during the time from the repairing and rebuilding of the dam to its giving way, many citizens of the plaintiff town, including some of the selectmen, had often been in plain sight of the dam, and the company offered to show that after their purchase in 1886 they never received any notice from the selectmen or other officers of the town, or from any source, that the dam was unsafe. The evidence was excluded, and the

company excepted. The jury were instructed that the company were not liable for maintaining the dam in the condition in which it was when they bought it, unless they knew, or by ordinary care would have learned, that it might be subjected, by freshets and otherwise, to the strain brought to bear upon it at the time it gave way, and was insufficient to withstand such strain, and that the company were not liable unless, but for their negligence, the washout would not have occurred. An exception to the instructions to the jury is sufficiently stated in the opinion. Numerous other exceptions were taken, but need not be stated, as they were not insisted upon in argument, and were not considered by the court.

James W. Remick, Bingham, Mitchell & Batchellor, and John M. Mitchell, for plaintiffs. Bingham & Bingham, Drew, Jordan & Buckley, and Smith & Sloane, for defendants.

BLODGETT, J. The demurrer was rightly overruled. It is useless at this day, and in this jurisdiction, to discuss the proposition that towns have not such an interest in the highways within their limits as to enable them to maintain an action upon the case for their destruction or obstruction; and the verdict holding one of the defendants liable and acquitting the others renders it equally useless to discuss the question of misjoinder. The jury having been properly instructed that the previous statements of the witness Waite could be considered by them only as bearing upon his credibility, the defendants could not have been prejudiced by the reading of such portions of the statements as were not inconsistent with his testimony on the stand; and so, under the universal rule of procedure in such cases, no reason is furnished for disturbing the verdict. Nor is any reason for disturbing it furnished by the exception to the argument of the plaintiffs' counsel to the jury that the statements were true, and the testimony false. Nobody can reasonably doubt the legitimacy of such an argument.

There is no finding in the case that the alleged improper argument of the plaintiffs' counsel in reference to the education of the defendants "about destroying dams, bridges, and property along the banks of the river" was in fact made, nor is any exception allowed on this subject; consequently there is nothing which can now be considered.

The testimony of Cross and of Hadlock as to the additional expense in the cost of maintaining the new road over the old one was competent. It was one of the elements of damage in the case. *Town of Troy v. Cheshire R. Co.*, 23 N. H. 83, 98.

Evidence against the defendants individually was properly admitted under the declaration, which alleges separate acts of negligence against each of them, by the combined and concurrent effect of which it is claimed the injury happened; nor did the introduction of

such evidence against one of the defendants legally constitute an election by the plaintiffs to proceed against him alone for his individual wrong. The plaintiffs' case was made up of parts, and embraced many separate and several acts, each of which is alleged to have contributed to the injury; and it was the plaintiffs' right to have all of these acts weighed by the jury, who could place the responsibility of the defendants where they might deem it rightfully to belong.

The defendants' offer to show that after they bought the mill and the dam, in 1886, they never received any notice from the selectmen or other officers of Monroe, or from any source, that the dam was unsafe and insufficient, was properly excluded. No such notice was necessary. Whatever may have been the condition of the dam before its purchase by the defendants, they then became bound to keep it in a reasonably safe condition. As its owner and occupant, it was a duty cast upon the defendants by the law to so use and maintain the dam as not unnecessarily to endanger the safety or property of others; and, if they neglected this duty, the law renders them liable for the consequences.

On the question whether the defendants, in the driving and management of their logs, exercised ordinary care, the jury were instructed (among other things) that they might properly consider what they would or would not have done had they been placed in the defendants' situation; and to this the defendants excepted. In support of this exception it is contended that, as the subject of driving and managing logs in the river is one calling for expert knowledge, and was so treated at the trial, the jury of nonexperts could not properly consider what they would or would not have done under the circumstances. In other words, the contention of the defendants is that the ordinary layman cannot legally measure the degree of care to be exercised in a business requiring expert knowledge by his own judgment as to what he would or would not have done in that business,—he having no knowledge or skill in regard to it,—and that, in effect, the instruction to the jury was precisely the contrary. We do not so understand it. But if the instruction, taken abstractly, may be justly subject to the criticism made upon it by the defendants, all grounds of criticism are removed when it is construed, as it fairly must be, in connection with the other instructions on the same subject, which were as follows: "There is no absolute test fixed by law by which the measure of care required in a particular case can be determined. The only standard is to be found in the carefully considered, dispassionate judgment of the jury in view of all the circumstances of the case. The question always is, what would a person of average prudence do under like circumstances? If such a person, placed in exactly the same situation as the party whose conduct is in question, possessed of the same knowledge as he had of all the surrounding facts and circumstances, including the danger of resultant

injury and the means of avoiding it, would or might have done as such person did, he is free from fault, and not responsible for any accident or injury that may happen. * * *

Did the lumber company, their officers, agents, and servants (because, being a corporation, they could act only by or through their officers, agents, and servants), exercise ordinary care in running their logs, and permitting them to accumulate in the jam and elsewhere in the yard, or in failing to remove them prior to the washout? On this question you will consider the position of the logs, the number of them, the extent of the jam, what effect, if any, the logs had, the means of preventing their accumulation, the stage of the water, the currents of the river; in short, all the considerations urged upon you by counsel upon both sides, and all the evidence in the case. And on this question, as upon the like question in the case of Van Dyke and McFarland, you will be likely to, and properly may, consider what you would or would not have done had you been placed in their situation. If you find that they did exercise ordinary care; that persons of average prudence placed in their situation, possessed of their knowledge and means of knowledge of the proper management and driving of logs, their effect upon the dam, and of all the other circumstances, would or might have done as they did, both in permitting the logs to accumulate and in failing to remove them,—you will return a verdict for the lumber company. If you find that they did not exercise ordinary care in thus allowing the logs to accumulate or in failing to remove them, and that they contributed to the washout, your verdict will be for the plaintiffs." In the light of these instructions, construed as a whole in the same connected way in which they were given, it is more than morally certain that the jury were not misled by the particular instruction complained of; and, if they were not, even though the instruction was erroneous, no ground is presented for reversing their judgment. But this is not all. Fairly construed, the instruction was not erroneous. It is not to be doubted that the jury might, upon all the evidence and arguments before them, properly consider what they would or would not have done had they been placed in the defendants' situation; and such only was the instruction.

The numerous other exceptions appearing in the case, but not insisted upon at the argument, need not be considered. Exceptions overruled.

CARPENTER, J., did not sit. The others concurred.

(68 N. H. 206)

AYERS v. BOSTON & M. R. R.
(Supreme Court of New Hampshire. Merrimack. March 15, 1895.)

RAILROADS—INJURIES TO LICENSEE.

1. Defendant's train was being loaded with milk cans, and started without any signal, injuring plaintiff, who was putting the cans on board. Defendant requested an instruction that

"the danger from placing the milk cans on the moving train was an obvious one, and was voluntarily assumed by the plaintiff." *Held* properly refused.

2. An instruction that "the plaintiff's attempt to place the milk cans upon the car while the car was moving, the plaintiff knowing said car to be moving, was negligence on the part of the plaintiff," *held* properly refused.

Exceptions from Merrimack county.

Action by Augustian R. Ayers against Boston & Maine Railroad for personal injuries. Judgment for plaintiff. Defendants except. Exceptions overruled.

The plaintiff shipped milk daily from the defendants' station at North Boscawen, for six months before the accident. It was the duty of those shipping milk to deliver it upon a platform provided for the purpose, and to hand the cans from the platform into the car. The brakeman of the train was accustomed to help load the milk, and, after it was loaded, to give the conductor a signal for him to start the train. December 30, 1892, the plaintiff, assisted by other milk shippers and the brakeman, was loading milk, and, when all but five cans were loaded, the train started, without any signal from the brakeman, and without notice or warning to the plaintiff. The plaintiff hurriedly took up three of the cans, walked along the platform beside the car, which he perceived to be moving, tried to put them into the car, and was injured. The defendants' motion for a nonsuit, at the close of the plaintiff's evidence, and their motion for the ordering of a verdict in their favor, at the close of the evidence, were denied, and they excepted. The defendants claimed contributory negligence, and asked for the following instructions: "The danger from placing the milk cans on the moving train was an obvious one, and was voluntarily assumed by the plaintiff, and therefore he cannot recover." "The plaintiff's attempt to place the milk cans upon the car while the car was moving, the plaintiff knowing said car to be moving, was negligence on the part of the plaintiff, which caused the accident, and the plaintiff cannot recover." The requests were denied, and the defendants excepted.

Sargent & Hollis, for plaintiff. J. W. Fellows and E. B. S. Sanborn, for defendants.

BLODGETT, J. It would serve no useful purpose to comment upon evidence such as appears in this case. The defendants' motions and requests were properly denied. *Lyman v. Railroad Co.*, 66 N. H. 200, 204, 20 Atl. 976; *Foss v. Railroad Co.*, 66 N. H. 256, 260, 21 Atl. 222; *Felch v. Railroad Co.*, 66 N. H. 318, 320, 322, 323, 29 Atl. 557; *Boothby v. Railway Co.*, 66 N. H. 342, 34 Atl. 157; *Walker v. Railroad Co.*, 64 N. H. 415, 13 Atl. 649; *Paine v. Railway Co.*, 63 N. H. 623, 3 Atl. 634; *Merrill v. Express Co.*, 62 N. H. 514; *Nutter v. Railroad Co.*, 60 N. H. 483-485; *Tuttle v. Farmington*, 58 N. H. 13, 14; *Griffin v. Auburn*, Id. 121, 124; *Paine*

v. Railway Co., Id. 611; *Gilman v. Noyes*, 57 N. H. 627; *Sleeper v. Sandown*, 52 N. H. 244; *Railroad Co. v. Foster*, 51 N. H. 490, 493; *Page v. Parker*, 43 N. H. 363; *Palmer v. Portsmouth*, Id. 285. Exceptions overruled.

WALLACE, J., did not sit. The others concurred.

(61 N. J. L. 502)

STATE (HAMBLET, Prosecutor) v. MAYOR, ETC., OF ASBURY PARK.

(Supreme Court of New Jersey. April 2, 1898.)

CERTIORARI—VALIDITY OF CITY ORDINANCE.

The validity of an ordinance of a city of this state imposing a license fee for revenue will not be adjudicated upon a writ of certiorari brought by a nonresident prosecutor against whom no action has been instituted.

(Syllabus by the Court.)

Certiorari by Bayard Hamblet against the mayor and council of Asbury Park to review an ordinance. Writ dismissed.

Argued February term, 1898, before GARRISON and LIPPINCOTT, JJ.

E. A. S. Man, for prosecutor. I. O. Kennedy, for defendants.

GARRISON, J. The prosecutor of this writ is a citizen of the state of New York, who resides in the city of New York, where his father has a grocery business, in connection with which the prosecutor for some years past has been soliciting orders in Asbury Park, in this state. This writ is brought to set aside an ordinance of the city of Asbury Park by which, under legislative authority, a license fee is imposed upon a variety of vocations for revenue. One of the callings thus taxed is that of "soliciting agent to others than the keepers of shops and stores."

The affidavits upon which this writ was allowed are not before us, but the prosecutor has, by proofs taken under the writ, made the case upon which he rests his right to annul the municipal act in question. His right rests upon two facts: One that the city clerk of Asbury Park handed to the prosecutor a copy of the ordinance, and said that, if he sold goods without a license, he would be liable to its penalties; the other that the father of the prosecutor received by mail a copy of the ordinance, upon which was stamped the figure of a hand pointing to the section about soliciting orders. The question is whether the apprehension arising from these circumstances gives to the prosecutor a right to attack the ordinance in advance of any action taken against him for the enforcement of its penalties.

To place the matter upon the footing most favorable to the prosecutor, it may be assumed that the fee in question cannot lawfully be imposed upon a resident of a sister state, in view of the decision of the federal supreme court. *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592.

The establishment of this doctrine in its application to the ordinance before us carries with it the corollary that the ordinance must, if possible, receive a construction that will make it applicable to citizens of this state only. It is only by assuming that violence will be done to this fundamental doctrine that the prosecutor can apprehend injury from the enactment in question. Whether such a construction will be put upon it by the municipality can be known only by the institution of proceedings against the prosecutor; whether a like construction will be placed on it by the judicial tribunal in which the action is heard can be known only by a conviction and judgment for the penalty prescribed by the ordinance.

Such a conviction alone can furnish evidence that the ordinance affects the prosecutor, and thus present in concrete form, and as to the particular vocation, the issue now sought to be raised as a moot question involving the fate of the entire taxing scheme.

The remedy by certiorari to annul this ordinance is not, in my opinion, open to the prosecutor in advance of any action taken against him, under its provisions.

In reaching this conclusion I am aware that the opposite view receives countenance from some, and confirmation from other, cases decided in this court. A review, however, of our domestic law of certiorari from the time when we departed from the rule of English practice will show that, after some vacillation, the correct rule was finally declared by our court of last resort in the case of *Pennsylvania R. Co. v. Jersey City*, 47 N. J. Law, 286.

In that case the railroad sought upon certiorari, and before conviction or suit, to set aside a city ordinance that exposed it (under one view of the law) to a penalty if it obstructed certain streets for a period longer than three minutes. In denying the availability of certiorari to such a state of affairs, Beasley, C. J., said that, upon the assumption that the ordinance was illegal as to the prosecutor, "such a vice would not render it generally, but only specially, inefficacious; that is, the court would not vacate the entire ordinance, but merely refuse to put it in effect in that part of it that was thus unreasonable. If the complaint of the plaintiff in error [prosecutor] be well founded therein, the remedy is to object to the validity of the ordinance in the penal suit for the obstruction of the streets referred to, and in that mode place before the court the limited question whether the ordinance be not a nullity in respect to that particular locality." A more recent decision to the same effect is *Rahway Gaslight Co. v. City of Rahway*, 58 N. J. Law, 510, 34 Atl. 3.

The case of *Pennsylvania R. Co. v. Jersey City* must be taken to supplant the prior cases in this court that held to the contrary, viz. *Staates v. Borough of Washington*, 44 N.

J. Law, 606; *Id.*, 45 N. J. Law, 319,—the second of which rested wholly upon the authority of the first, while the first rested upon the supposed authority of four cases that do not, in fact, afford support for the departure in practice. The earliest of these is *New Jersey R. & Transp. Co. v. Jersey City*, 29 N. J. Law, 170, in which the question was not raised or mentioned in the opinion of the court, but is made the basis of a dissent by Mr. Justice Van Dyke. Two other cases are *Danforth v. City of Paterson*, 34 N. J. Law, 163, and *Gregory v. Jersey City*, *Id.* 390, in each of which the question could not have arisen, for the reason that the prosecutor was a taxpayer objecting to the unlawful increase of his burden by the purchase of a market site and wharf.

The remaining case—*Montgomery v. Trenton*—holds explicitly the contrary rule. The cases of *Staates v. Washington* were without foundation or authority at the time of their decision, and were overruled by the case of *Pennsylvania R. Co. v. Jersey City*, above cited. After that decision, however, the supreme court again applied the overruled doctrine in the case of *Morgan v. Orange*, 50 N. J. Law, 389, 13 Atl. 240, without noticing that the decision of the court of errors had intervened and settled the rule conclusively. In accordance with the doctrine thus decided the writ in the present case is dismissed.

(61 N. J. L. 438)

STATE v. PARKS.

(Supreme Court of New Jersey. April 1, 1898.)

DISORDERLY HOUSE—INDICTMENT.

1. The fact that an indictment against several defendants for keeping a disorderly house charged them with keeping it "for 'his' own lucre and gain," instead of "their" own lucre and gain, affords no ground for quashing the indictment, when the making of gain was not necessary to render the practices carried on in the house illegal.

2. The caption of an indictment need not contain the name of the person indicted.

(Syllabus by the Court.)

Charles Parks was indicted for keeping a disorderly house, and moves to quash the indictment. Motion denied.

Argued February term, 1898, before COLLINS and DIXON, JJ.

F. W. Ward and Edmund Wilson, for defendant. Mr. Heisley, Prosecutor of the Pleas, for the State.

DIXON, J. The defendant, having been indicted with others for keeping a disorderly house, moves to quash the indictment, because it charges the defendants with keeping the house "for 'his' own lucre and gain," instead of "their" own lucre and gain. It seems to be superfluous to charge that a disorderly house is kept for gain, unless the making of gain be necessary to render the practices carried on in the house illegal. If a person, for amusement only, keeps a house as a public

resort for practices injurious to public morals or destructive of public quiet, he is indictable. *State v. Williams*, 30 N. J. Law, 102. Hence this whole clause may be rejected as meaningless, and still an indictable offense will be alleged. Besides, the fault pointed out is merely one in grammar, which does not obscure the meaning; and such an error will not vitiate an indictment. 10 Am. & Eng. Enc. Law, 548.

Another reason assigned for quashing the indictment is that the caption does not contain the name of this defendant. But, if it otherwise identifies the indictment as one duly found and presented, that is sufficient. *State v. Jones*, 9 N. J. Law, 357. No question is raised about its containing the proper averments for this purpose. The motion to quash must be denied. Let the indictment be remitted to the Monmouth quarter sessions for trial.

(61 N. J. L. 422)

**In re ELECTION OF DIRECTORS OF
CEDAR GROVE CEMETERY CO.**

(Supreme Court of New Jersey. March 28, 1898.)

CORPORATIONS — ELECTION OF DIRECTORS — EVIDENCE.

1. If, at the time and place appointed for an election of directors, the stockholders of a corporation assemble in two bodies, and cast their ballots at separate polls, the court, in ascertaining the result of the election under the corporation act, may consider the ballots cast at both polls.

2. Under the statute, the books of the corporation constitute the only evidence as to who are the stockholders entitled to vote at an election of directors.

(Syllabus by the Court.)

Application by John F. Byrns and others to establish their election to the office of cemetery directors of the Cedar Grove Cemetery Company. Judgment for petitioners.

Argued February term, 1898, before COL- LINS and DIXON, JJ.

L. M. Garrison, for petitioners. F. A. Rex, for respondents.

DIXON, J. This is a controversy over the election of directors of the Cedar Grove Cemetery Company held April 5, 1897. The rival parties are called the "Byrns Faction" and the "Fowler Faction." The present application is made under section 42 of the corporation act (P. L. 1896, p. 277); and the court is asked to establish the election of the persons chosen to be directors by the Byrns faction. At the time and place regularly appointed for the election of directors, a number of persons assembled in the office of the company in Gloucester City, and organized by choosing a chairman, a secretary, and three tellers. Simultaneously, persons assembled just outside of the office, also organized by selecting a chairman, secretary, and three tellers. Policemen then cleared the room, and permitted the officers chosen by the outside assemblage to take possession

of it, and proceed with an election. The officers selected within the room proceeded to hold an election just outside. So far as appears, stockholders entitled to vote for directors might have cast their ballots at either polling place. At the election held within the office, the persons favored by the Fowler faction were unanimously chosen; and, at the election held outside, those favored by the Byrns faction were unanimously chosen. Under these circumstances, we think that justice requires us to consider all the votes cast at either place, in determining who were legally elected. Such a course is within the design of the statute under which this proceeding was taken. *In re Election of Directors of St. Lawrence Steamboat Co.*, 44 N. J. Law, 529.

According to the thirty-third section of the statute, the books of the company constitute the only evidence as to who are the stockholders entitled to vote at an election of directors. The testimony shows that before 1896 the company had no book purporting to contain the names of its stockholders, except that from its "cash ledger" the names of some of them might be gathered. But in 1896 the secretary of the company, under the direction of the board of directors, prepared a stock book, collecting his information from not only the cash ledger, but also whatever other sources seemed available. We see no reason for denying to this book the evidential force prescribed by the statute. Testing the election by this criterion, the candidates of the Byrns faction received a majority of the ballots cast by legal votes at either polls. The same result is reached if, discarding the books, we ascertain who were legal voters from the testimony adduced in the pending controversy. Our conclusion is that John F. Byrns, William Tucker, and Walter F. Joslin were legally elected directors of the Cedar Grove Cemetery Company at the annual meeting of the stockholders held on April 5, 1897, and judgment may therefore be entered establishing their election. Should any further relief be desired, application therefor may be made on due notice.

(61 N. J. L. 506)

**STATE (WEST JERSEY & S. R. CO., Prose-
cutor) v. OCEAN CITY R. CO.**

(Supreme Court of New Jersey. April 2, 1898.)

**CONDEMNATION PROCEEDINGS — APPOINTMENT OF
COMMISSIONERS.**

1. In proceedings to condemn lands under the general railroad law, the justice of the supreme court is vested with an express power, coupled with such implied authority only as is necessary for its execution. When the application and notice conform to the statute, the appointment of commissioners is a matter of course.

2. The judicial officer must decide whether there is *prima facie* a compliance with the statute. Beyond this he has no jurisdiction over the parties or the subject.

(Syllabus by the Court.)

Certiorari by the West Jersey & Seashore Railroad Company against the Ocean City

Railroad Company to review an order appointing commissioners. Writ dismissed.

Argued February term, 1898, before GARRISON and LIPPINCOTT, JJ.

J. H. Gaskill, for prosecutor. R. H. McCarter, for defendant.

GARRISON, J. This certiorari brings up the order made by a justice of this court appointing commissioners to assess the damages to be paid to the prosecutor for crossing and taking certain of its lands.

The proceeding is under the general railroad law (2 Gen. St. p. 2641). It was objected on the part of the landowner, the West Jersey & Seashore Railroad Company, that the appointment should not be made, because the land described in the notice was a public highway, along which no lawful authority to construct a railroad existed; also, because the applicant had no municipal authority to occupy longitudinally the said highway, and that no effort had been made to purchase the land or rights of the prosecutor.

This last point was not borne out by the proofs, and is not made a contention in the brief of counsel. The other objections rest upon a misconception of the effect of the proceeding, and of the extent of the jurisdiction involved. The proceeding at its completion simply names a sum of money as the equivalent of what the prosecutor will lose if the applicant takes what is described in his notice. It does not say that he may take it. It affirms nothing. It simply assesses damages for a hypothetical injury.

The entire subject appears to be settled by the reasoning of Beasley, C. J., in *Delaware, L. & W. R. Co. v. Hudson Tunnel R. Co.*, 38 N. J. Law, 17, and in the opinion of the court of errors in the same cause. *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, Id. 548. To the same effect are *National Ry. Co. v. Easton & A. R. Co.*, 36 N. J. Law, 181, and *Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co.*, 57 N. J. Law, 86, 30 Atl. 183.

The writ will be dismissed, with costs.

(61 N. J. L. 245)

JANSEN v. MAYOR, ETC., OF JERSEY CITY et al.

(Court of Errors and Appeals of New Jersey. March 17, 1898.)

INDEPENDENT CONTRACTOR—NEGLIGENCE—COMMON EMPLOYMENT—LIABILITY OF MASTER.

1. Where a contractor exercises an independent employment under his contract with a municipal corporation, such corporation is not responsible for the negligence of the contractor in the performance of the contract work.

2. In an action to recover damages for injury caused by the negligence of defendant's servant, the defense of common employment cannot prevail to exempt the defendant from liability, unless the injured person and the servant whose negligence caused the injury were not only engaged in a common employment, but were also in the service of the defendant as a common master.

(Syllabus by the Court.)

39 A.—65

Error to supreme court.

Action by Mynhardt Jansen against the mayor and aldermen of Jersey City and Richard English. From a judgment of non-suit, plaintiff brings error. Affirmed as to the city, and reversed as to the other defendant.

Flevel McGee, for plaintiff in error. Wm. P. Douglass, for defendant in error Jersey City. Corbin & Corbin, for defendant in error Richard English.

VAN SYCKEL, J. Jansen brought this suit to recover damages for injuries to his person, which he charged to the negligence of the defendants. In the year 1894 the city of Jersey City contracted for the erection of a new city hall. The city owned the land upon which the building was to be erected, and made a contract with the other defendant, Richard English, for the mason and iron work of the building according to the plans and specifications under the supervision of an architect named in the contract. The entire duty of the architect and the inspector for the city was to see that the work was done according to the contract. The carpenter work was let to one Kiernan, and the plumbing work to one Farrier. English subcontracted the iron work to the Fagan Iron Works. Jansen, the plaintiff, was employed by the Fagan Iron Works in the execution of their work upon the building, and while engaged in that service he was injured by the falling of a high wall which was being erected by English in the performance of his contract with the city. The trial judge nonsuited the plaintiff as to both defendants.

English, under his contract with the city, exercised an independent employment, and it is the well-settled law of this state that the city cannot be held responsible for the negligence of English in the performance of the work he engaged to do for the city. No right of action appeared as against the city. *Cuff v. Railroad Co.*, 35 N. J. Law, 17, 574. In respect to English, a different question is presented. Under the authority of *Wiggett v. Fox*, 11 Exch. 832, the trial judge ruled that the servants of the subcontractor were fellow servants with the servants of the contractor English. That case has in more than one instance been accepted as an authority to support that proposition, but a careful examination will show that it has been misunderstood. Its authority has been challenged in England, where it has been overruled by the later cases. In the case of *Johnson v. Lindsay* [1891] App. Cas. 371, in the house of lords, Lord Herschell and Lord Watson reviewed the previous cases upon this subject, and declared that it is essential to the defense of common employment that the person suing should himself be the servant of the master by whose negligence the injury has been caused. Unless the person sought to be rendered liable for the negligence of his serv-

ant can show that the person so seeking to make him liable was himself in his service, the defense of common employment is not open to him. Lord Herschell says: "It is obvious that, if the exemption of the master results, as it does, according to the authorities, from the injured person having undertaken, as between himself and the person he sues, to bear the risks of his fellow servants' negligence, it can never be applicable where there is no relation between the parties from which such an undertaking can be implied. There are other considerations which point in the same direction. It must be remembered that whilst a servant contracts with his master to bear the risks of the negligence of his fellow servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servants' negligence in any case where he is not under this obligation." English had no power to control the subcontractor in the selection of his servants, and was clearly under no duty in that respect.

The relation between master and servant is a contractual relation, and the liabilities and duties existing between them arise out of the contract of employment and the right of the master to control and discharge the servant. If there is no employment, the relation of master and servant and the obligations incident to it do not exist. In *Johnson v. Lindsay* the court disapproved of *Wiggett v. Fox*, and referred to the fact that in *Abraham v. Reynolds*, 5 Hurl. & N. 143, Baron Channell explained *Wiggett v. Fox*, and the reason why he concurred in that decision, by saying that it was proved that the servant in that case was paid by the defendants, and that the defendants had a control over and power to dismiss him, though he was engaged by the subcontractor. The conclusion of the house of lords in *Johnson v. Lindsay*, after a discussion of the cases, was that in an action to recover damages for injury caused by the negligence of the defendants' servant the defense of common employment cannot prevail, unless the injured person and the servant whose negligence caused the injury were not only engaged in a common employment, but were in the service of a common master. In my judgment, that should be accepted as the true rule upon this subject. In this case *Lindsay* was an independent contractor, while the servant injured in *Wiggett v. Fox* was the servant of the subcontractor; but that, in the view taken by the court, made no difference. The reasons given for the decision of *Johnson v. Lindsay* apply with equal force to *Wiggett v. Fox*. In *Cuff v. Railroad Co.*, supra, the supreme court ex-

pressly declared that the principle upon which the superior, who has contracted with another exercising an independent employment for the doing of the work, is exempt from liability for the negligence of the latter in the execution of it, applies as between the contractor and his subcontractor. This immunity of the contractor places the subcontractor in the same relation to him as that occupied by one exercising an independent employment upon the work, and therefore the same rule of law must pertain to both cases. Mr. Justice Dalrymple, in pronouncing the opinion of this court in *McAndrews v. Burns*, 39 N. J. Law, 117, said that a fellow servant in a common employment is one who serves and is controlled by the same master. In the case before us *Jansen* cannot be regarded as a fellow servant with the servants of the defendant English, and English can claim no exemption from liability on the basis of such fellow service. The obligation and the exemption must be correlative; the one being absent, the other cannot reasonably be held to be present. The duty which English owed to *Jansen* was the same duty he was under to every other person not in his service or employment, who was lawfully on the premises, who was there in the exercise of a right to be there. I do not refer to mere permission to pass over the premises, or acquiescence in such passage for the convenience of the licensee, which was held in *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478, to create no duty on the part of the owner except to refrain from acts willfully injurious. The obligation resting on English was to exercise the ordinary care of a prudent man to secure safety to persons upon the premises during the erection of the high wall. If the injury to *Jansen* was caused by the failure of English or his servants to use reasonable precaution in bracing the wall, or reasonable care in doing the work of laying it up, he is guilty of actionable negligence. The manner in which the wall which fell was constructed was the subject of evidence before the jury. Witnesses differed as to the propriety and safety of the method adopted by the contractor to secure it. It did not appear that unavoidable danger attended work of that character, where due care was exercised. Nor was it conceded that there was any wind of consequence to account for the disaster. There was testimony both ways on that point. It was, therefore, a question for the jury, under all the circumstances of the case, whether English had exercised the degree of care he owed to the plaintiff. The trial court erred in withdrawing the case as to English from the consideration of the jury, and ordering a nonsuit as to him. A *venire de novo* should be awarded.

(91 Me. 250)

**MARCOUX v. SOCIETY OF BENEFICENCE
ST. JOHN BAPTIST OF FAIRFIELD.**(Supreme Judicial Court of Maine. Jan. 20,
1898.)**BENEFICIAL ASSOCIATIONS—FORFEITURE OF BENEFITS—MISREPRESENTATIONS—AGE AND HABITS OF MEMBER—WAIVER OF FORFEITURE.**

1. The by-laws of the defendant corporation, a religious, social, and beneficial society, prohibited the admission of a person more than 50 years of age. A member of the society at the time of his admission, in answer to the question propounded by the president, in accordance with the by-laws, declared that his age was then 49 years. He was, in fact, at that time 50 years, 9 months, and 17 days old. *Held*, that the declaration of the member in regard to his age was a misrepresentation of a material fact, and that such misrepresentation rendered invalid the contract with the society.

2. The plaintiff's husband became a member of the St. John Baptist Benevolent Society of Waterville, an unincorporated association, July 15, 1877. The members of this society were incorporated December 21, 1878, under the provisions of Rev. St. c. 55. The by-laws of the association were adopted by the corporation. April 5, 1887, the members of the Waterville society residing in Fairfield withdrew by consent of the parent society and organized the defendant corporation. The plaintiff's husband was one of these members. The old and the new societies made a "contract and alliance, so that the member of each of the societies should pay at the death of each member the sum of one dollar to his widow, the same as before their separation." At its organization, the defendant corporation adopted the constitution and regulations of the Waterville society, and which are identical with those in force when the plaintiff's husband became a member. These by-laws absolutely prohibited the admission of a person who was more than 50 years old. *Held*, that the defendant corporation assumed the obligations pertaining to the membership of the plaintiff's husband only upon the implied condition that his declaration to the Waterville society, in regard to his age, was true. The defendant corporation continued the contract undertaken by the parent society, and it is liable, in this particular, only when the old society would have been. Also, that any fact which rendered the contract invalid, when so adopted, furnishes a good defense by the defendant corporation to the plaintiff's action upon it.

3. The laws of the defendant society provided that a member while retaining his membership should forfeit temporarily his right to sick benefits if his illness is due to intemperance, or if he failed to pay the monthly contribution promptly in advance, and in such case, if he afterwards paid, the forfeiture would extend through the month succeeding his payment. These laws further provided that the defendant society should not be liable to a beneficiary for a death benefit, unless the member at the time of his death was entitled to sick benefits. *Held*, upon the facts reported, that there was a forfeiture of the contract in this case upon both grounds, and that, therefore, the beneficiary cannot recover the death benefit.

4. *Held*, that the plaintiff's right under the contract to recover the expenses of worship and burial is contingent upon a valid membership of the deceased. His widow, therefore, is not entitled to recover under this claim, it appearing that her husband's membership was invalid by reason of his age at the time of joining the society.

5. One cannot be said to waive that which he does not know. *Held*, that the defendant corporation did not waive its defenses by attending the funeral of the deceased, pursuant to a vote of the society, as a body and in uniform.

The society did not have any knowledge of the true age of the member until long after his funeral. Also, that the attendance at the funeral is not a waiver of the other defenses. While intemperance and failure to make prompt payments work a forfeiture of benefits, they do not work a forfeiture of membership.

(Official.)

Report from supreme judicial court, Somerset county.

Action by Adelaide Marcoux against the Society of Beneficence St. John Baptist of Fairfield, to recover benefits under a certificate of membership of defendant society. Heard on report. Judgment for defendant.

This was an action of assumpsit against the defendant, a society incorporated for the mutual assistance of its members while living, and the benefit of the members' widows and heirs after their decease.

Declaration: "In a plea of the case, for that Michel Marcoux, of Clinton, in the county of Kennebec, on the thirteenth day of April, A. D. 1887, at said Fairfield, became a member of the defendant society, and the defendant, in consideration that said Michel should pay twenty-five cents per month at the meeting of each month, and should pay one dollar during the thirty days following a member's death, and should pay one dollar in advance, did promise the said Michel to pay the expense of religious services and burial, not exceeding twenty-five dollars, and did promise the said Michel to pay to his widow or heirs the sum of one dollar for each member in said society and in the Society of Beneficence St. John Baptist of Waterville, Maine, at the time of his decease; that the plaintiff is the widow of said Michel; that said Michel died on the eleventh day of October, 1896. And the plaintiff avers that, at the time of the decease of said Michel, there were five hundred members in said society; that said Michel had paid all his dues and assessments to the defendant society; that due notice has been given said society of the decease of said Michel. Yet though requested," etc.

Plea, general issue and brief statement, as follows:

"And for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendant further says that, if it promised in manner and form as the plaintiff in her writ has declared against it, it was in consideration of the promise and agreement of the said Michel Marcoux that, if his death should be caused by his intemperance or bad conduct, the defendant should be released from the obligation of said promise; and the defendant says that the death of the said Michel Marcoux was caused by his intemperance and bad conduct.

"And the defendant further says that its said promise was made in further consideration of the promise of the said Michel Marcoux that he would pay to the defendant society the sum of twenty-five cents as a monthly contribution at each monthly meeting of said defendant society held on the first Sunday of each month,

and, in the event that he should not pay his said contribution at any monthly meeting, that he would lose his right to receive any benefits from the defendant society, even for the month succeeding the payment of said contribution which he had neglected to pay; and that, if he should not be entitled to benefits at the time of his death, his widow or his heirs should not be entitled to receive any.

"And the defendant says that the said Michel Marcoux did not pay the contribution due from him to the defendant society at the monthly meeting of said society held on the first Sunday of September, 1896, and did not pay said contribution until the meeting of said society which was held on the first Sunday of October, 1896; that the death of the said Michel Marcoux occurred within one month next after the payment of said contribution due on the first Sunday of September, 1896.

"The defendant further says that the said promise, if made, was made in further consideration of the promise and agreement of the said Michel Marcoux that the statements made by him when he became a member of the Society of St. John the Baptist at Waterville, Maine, were true; that said statements were not true in this, viz. that the said Michel Marcoux declared when he became a member of said Society of St. John the Baptist at Waterville, Maine, that he was not over fifty years of age, but that he was forty-nine years of age, whereas the said Michel Marcoux was then and there more than fifty years of age."

S. S. Brown and F. W. Clair, for plaintiff.
C. F. Johnson and G. G. Weeks, for defendant.

SAVAGE, J. The plaintiff, as widow of Michel Marcoux, seeks to recover from the defendant certain benefits which she claims are due to her by virtue of the "constitution" and "regulations" of the defendant society, of which her husband is alleged to have been a member in his lifetime. The defendant is a religious, social, and beneficial society. It issues no benefit certificates or contracts to its members. It is conceded that its obligations to its members and their beneficiaries are to be found in its by-laws; otherwise called its "constitution" and "regulations." In these we find the following provisions, which are material to the decision of this case:

"The principal object of this society of beneficence is to establish, by a monthly contribution made by the members, a fund to help the sick associates, and, after their death, for the widows and children." Const. art. 2. "No person can be admitted before the age of fifteen nor after the age of fifty." Id. art. 3. "The monthly contribution will be twenty-five cents, payable in advance at the regular meeting on the first Sunday of each month." Regulations, art. 14. "Any member, when elected, will be obliged to pay his admission fee himself the next month. He must answer the questions made by the president." Among the questions is the following: "Tell us, upon

your word of honor, that you are not older than fifty." Regulations, art. 14. "The society binds itself to pay three dollars a week, excepting the first, to any member who by sickness or accident is unable to work. * * *" "During the thirty days following the death of a member, every associate must pay one dollar to the secretary of finance." "The secretary of finance will remit the total amount to the widow of the deceased." "In order that the * * * widow be entitled to this amount, the member must be entitled to benefits at the time of his death." "At the death of a member, the society will pay the expense of the worship and burial, provided the sum does not exceed twenty-five dollars." "When a member receives benefits, he must pay in advance one dollar to the secretary of finances, who will give him a receipt, and deposit this money in bank; said money will be paid to the widow or heirs of the deceased." Regulations, art. 16. "When the physician or visitor proves that the sickness is due to intemperance or bad conduct, the member will lose all his rights for help from the society." "He who will not pay his contribution at each monthly meeting will lose his rights to benefits, even for the month succeeding his payment." Regulations, art. 17.

1. The plaintiff claims to recover one dollar for each member of the defendant society, at the time of her husband's death, which was October 11, 1896. This claim is made under the provisions of article 16 of the regulations, cited above. She also claims to recover of the defendant one dollar for each member of the St. John Baptist Benevolent Society of Waterville, by virtue of a contract or "alliance" between the two societies.

The defendant resists payment, claiming (1) that Michel Marcoux when he joined the parent society at Waterville was more than 50 years old, though he then represented his age to be 49 years, and that the defendant, by reason of facts to be hereafter stated, can take advantage of this misrepresentation, and of the fact that he was then actually more than 50 years old; (2) that Michel Marcoux, at the time of his death, was not entitled to "benefits," i. e. sick benefits, because his last sickness and death were due to his "intemperance," and because he failed to pay in advance, when due, the monthly contribution due on the first Sunday of September, 1896; so that, not being entitled himself to sick benefits at the time of his death, his widow is not entitled to a death benefit.

Plaintiff's husband became a member of the St. John Baptist Benevolent Society of Waterville, an unincorporated association, July 15, 1877. The members of this society became incorporated December 21, 1878, under the provisions of Rev. St. c. 55. The by-laws of the association were adopted by the corporation. April 5, 1887, the members of the Waterville society, residing in Fair-

field, withdrew, by consent of the parent society, and organized the defendant corporation. Michel Marcoux was one of these members. The old and the new societies made a "contract and alliance, so that the members of each of said societies shall pay, at the death of each member, the sum of one dollar to his widow, * * * the same as before their separation." At its organization, the defendant adopted the "constitution" and "regulations" of the Waterville society, from which we have taken the foregoing citations, and which are identical with those in force when Michel Marcoux became a member.

These by-laws absolutely prohibited the admission of a person who was more than 50 years of age. It appears that Marcoux at the time of his admission, in answer to the question propounded by the president, in accordance with the by-laws, declared that his age was then 49 years. It is satisfactorily proved by an examined copy of the registry of births in the parish of St. Mary, county of Beauce, province of Quebec, his birthplace, that he was born September 28, 1828, and that he was therefore 50 years, 9 months, and 17 days old when he joined the Waterville society. The declaration of Michel Marcoux made to the Waterville society, in regard to his age, was a misrepresentation of a material fact; and that such a misrepresentation rendered invalid the contract with the parent society is well settled. *Swett v. Society*, 78 Me. 541, 7 Atl. 394.

But the plaintiff earnestly contends that even if this is so, as to the Waterville society, still her husband's membership in the defendant society was valid, because he became a member of it at its organization, and was a member when it adopted its constitution and regulations, and therefore was not affected by the provision relating to age. We do not think so. The solution of the question does not depend alone upon the effect of the adoption of its by-laws by the defendant. Marcoux was received as a member by the defendant upon the assumption that his membership in the Waterville society was valid, and therefore upon the necessary implication that he was not more than 50 years old when he joined that society. The defendant assumed the obligations pertaining to his membership only upon the implied condition that his declaration to the Waterville society, in regard to his age, was true. Virtually, the defendant continued the contract undertaken by the parent society, and it is liable, in this particular, only when the old society would have been. In the language of *Swett v. Society*, supra, "any fact which rendered the contract invalid, when so adopted, furnishes a good defense by the defendant to the plaintiff's action upon it."

Further, the defendant is not liable to the widow for the death benefit, unless the member was entitled to benefits at the time of

his death. Regulations, art. 16. The word "benefits" clearly refers to sick benefits. The laws of the defendant society provide that a member while retaining his membership shall forfeit temporarily his right to sick benefits, if his illness is due to "intemperance," or if he fails to pay the monthly contribution promptly in advance, and in such case, if he afterwards pays, the forfeiture is extended through the month succeeding his payment. It is not objected that these rules are not reasonable and enforceable. It is claimed that Marcoux at the time of his death was not entitled to "benefits," and that, inasmuch as he was not entitled to sick benefits, for both of these reasons, therefore the plaintiff, by virtue of the regulation above cited, is not entitled to the death benefit. The proof is plenary that on the day before his death he became intoxicated, and while in that condition he attempted to drive his team from Fairfield village to his home in Clinton. While on the way, being unable to steady himself in the wagon, he rolled out over the wheel, and onto the ground. He was fatally injured, and died in about 24 hours. The accident was due to his intoxication. Under these circumstances, was he entitled to "benefits" at the time of his death? We think not. By his own conduct he had incurred the forfeiture. When "the sickness is due to intemperance, or bad conduct, the member will lose all his rights for help from the society." Regulations, art. 17.

Still further, it is conceded that Marcoux's monthly contribution, due in advance on the first Sunday of September, 1896, was not paid to the secretary of the defendant until the following day. As we construe the laws of the defendant, this failure would have debarred him from sick benefits "for the month succeeding his payment," and, as the term "month" as used in defendant's by-laws extends from the first Sunday in one month to the first Sunday in the next, he would not have been entitled to benefits during the month beginning the first Sunday of October, that being the month succeeding the one in which he made his belated payment. But he died during that month. It is unnecessary to elaborate further. Marcoux not being entitled to sick benefits at the time of his death, his widow is not entitled to the death benefit.

2. The plaintiff also claims to recover \$25 for the expenses of worship and burial. The by-laws do not make the payment of this sum contingent upon anything except the membership of the deceased, but it is necessarily contingent upon a valid membership. We have already held that Marcoux's membership was invalid by reason of his age at joining. His widow, therefore, is not entitled to recover under this claim.

The plaintiff claims that the defendant has waived its defenses. It appears that the defendant society, in pursuance to a vote,

attended Marcoux's funeral as a body and in uniform; and it is contended that this was a recognition of the validity of his membership, and that it is evidence of a waiver, on the part of the society, of any objections on account of any invalidity of his membership. Without considering what would be the effect in a case like this of an intended waiver, we do not find that there was in fact any waiver; certainly not as to the effect of the misstatement of age, for it does not appear that the society had any knowledge of the true age of Marcoux until long after his funeral. One cannot be said to waive that which he does not know. Nor was the attendance at the funeral a waiver of the other defenses. Intemperance and failure to make prompt payment did not work a forfeiture of membership, but of "benefits." In all other respects, the rights and privileges of membership continued, and the society might well extend to the memory of the deceased such tributes as it saw fit, without waiving any defense it might have to an action like this.

Judgment for the defendant.

(91 Me. 274)

COHEN v. MANUEL.

(Supreme Judicial Court of Maine. Jan. 22, 1898.)

NEGLIGENCE OF INNKEEPER — LIABILITY TO UNLICENSED PEDDLER.

1. The want of a license to peddle does not bar a peddler from recovering against an innkeeper for the value of goods lost while in the keeping of the innkeeper, though the goods were intended for sale without license.

2. When an innkeeper directed his guest to take his horse and cart to a livery stable which belonged to the innkeeper, but was not connected with the inn, and the guest did so, and put the horse and cart into the care of the innkeeper's hostler, *held*, that this constituted a delivery to the innkeeper for safe custody, and that the property was *infra hospitium*.

(Official.)

Exceptions from supreme judicial court, Penobscot county.

Action by Jacob Cohen against Anthony O. Manuel. Verdict for plaintiff, and defendant excepts. Overruled.

P. G. White, for plaintiff. J. B. Peaks and E. C. Smith, for defendant.

SAVAGE, J. This is an action on the case, wherein the plaintiff claims to recover of the defendant, an alleged innkeeper, for the loss of his goods while he was a guest at the defendant's inn. The plaintiff was a peddler, and stopped at the defendant's inn; and while his peddle cart was in the defendant's stable it was broken open, and the goods in question were stolen therefrom. By their verdict for the plaintiff, the jury, under instructions to which no exceptions were taken, have settled that the defendant was an innkeeper; that the plaintiff was a traveler, and a guest at the defendant's inn; and that the

goods were lost while the plaintiff was defendant's guest.

The defendant contends that the plaintiff, being a peddler, and the goods lost having been merchandise carried by him for the purpose of sale, is not entitled to recover unless he shows affirmatively that he was licensed as a peddler under the provisions of the Public Laws of 1889, c. 298. The defendant also contends that under the circumstances of the case he is liable, if at all, only as bailee, and not as innkeeper.

1. The defendant's bill of exceptions states that "there was evidence tending to show that at the time of the loss the plaintiff was traveling from town to town, and from place to place in the town of Brownville, selling said goods and chattels, in violation of section 1, c. 298, of the Public Laws of 1889, unless the plaintiff had a license from the secretary of state so to do. There was no evidence from either plaintiff or defendant as to whether the defendant had a license or not."

The defendant requested the presiding justice to instruct the jury that "an innkeeper is not liable for the loss of merchandise carried by a peddler for the purpose of sale, who stops at said inn, unless such peddler has a license to peddle under the laws of the state." This instruction was refused.

There was no evidence in the case that the plaintiff did have or did not have a license, and the defendant claims that the burden to show a license was on the plaintiff. But we do not consider or decide this question, because, if, as we hold, the want of a license does not preclude the plaintiff from recovering, the matter of the burden of proof is immaterial.

We think that the plaintiff is not debarred from maintaining this action, though he may have had no license as a peddler.

The defendant relies upon the principles stated in *Lord v. Chadbourne*, 42 Me. 429, *Mohney v. Cook*, 26 Pa. St. 342, and other cases. It is true, in the language of *Lord v. Chadbourne*, *supra*; that "the common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statutory enactment." It is true, in the language of *Mohney v. Cook*, *supra*, that "there are cases wherein an injured party will be remediless, because of his own fault, even when the fault does not contribute to the accident. A vessel engaged in the slave trade, piracy, or smuggling, and injured by another, or the keeper of a gambling house injured in his business by a neighboring nuisance, could have no remedy. Not, however, because the persons are out of the protection of the law for these offenses, nor because their illegal business brought them to the place of danger, but because their business itself, with all its instruments, is outlawed. Prohibited contracts, prohibited trades, prohibited things, receive no protection." Among such prohibited contracts is

the sale of intoxicating liquor intended for illegal sale in this state (*Wasserboehr v. Boulter*, 84 Me. 165, 24 Atl. 808); the sale of hay pressed and baled, and not branded (*Buxton v. Hamblen*, 32 Me. 448); the sale of lumber not surveyed and marked (*Richmond v. Foss*, 77 Me. 590, 1 Atl. 830); the sale of hoops not culled (*Durgin v. Dyer*, 68 Me. 143).

All such sales are expressly or by implication forbidden by law. So a party has been held remediless who seeks to enforce a contract made on Sunday. *Towle v. Larrabee*, 26 Me. 464. And he who suffers an injury arising from his violation of the Sunday law, so-called, is equally without remedy. *Wheelden v. Lyford*, 84 Me. 114, 24 Atl. 793.

The language in *Lord v. Chadbourne* and in *Mohney v. Cook*, above cited, is a correct statement of a general proposition. How inapplicable it is to the case at bar can easily be seen when we look at the questions which were decided in these cases. In the former, the precise question decided was that under the provisions of the statute of 1851, c. 211, § 16, no action whatever could be maintained for intoxicating liquors or their value. Intoxicating liquors were thus practically outlawed. Trespass against a wrongdoer, even, could not be maintained. But when the statute was modified the rule was modified accordingly, and it was thereafter held that trespass would lie for the unauthorized conversion of intoxicating liquors, even though they were intended for illegal sale in this state. *Hamilton v. Godling*, 55 Me. 419; *Bliss v. Winslow*, 80 Me. 274, 13 Atl. 899; *Adams v. McGlinchey*, 66 Me. 474. In *Mohney v. Cook*, *supra*, the question actually decided was that a party who erects an obstruction in a navigable stream, and thereby occasions an injury to another, cannot, in an action for such injury, set up as a defense that the plaintiff was unlawfully engaged in worldly employment on Sunday, when the injury occurred.

It will be seen in the illustrations which we have given that a remedy has been refused because the plaintiff's right of action was directly connected with, or grew out of, a violation of law. But it is not unlawful for a peddler, with or without license, to put up at an inn. The plaintiff did not lodge at the defendant's inn as a peddler, but as an individual. As a property owner, merely, he intrusted his property to the defendant's safekeeping. It was not unlawful for him to eat, drink, and be sheltered in an inn, nor to deliver, or offer to deliver, his money and other property to the innkeeper for safe custody. If his property consisted of merchandise carried by him for the purpose of sale without a license, in violation of law, it was none the less property. A peddler may lawfully care for and protect his property. If he exposes it for sale, or sells it, without license, he may be fined. No penalty attaches to the merchandise itself. It cannot be seized or forfeited. It is neither contraband nor outlawed. The rights and liabilities which exist between the innkeeper and

his guest, who is a peddler, are created by law, and grow out of the relation between them, and are in no degree dependent upon the purpose of the owner to sell the goods at some future time without license. It is therefore the opinion of the court that, even if the plaintiff had no license to peddle, that fact would not constitute a defense to this action, and that the requested instruction was properly refused.

2. The evidence tended to show that the defendant's stable, where the plaintiff's peddle cart was kept, was a livery stable, unconnected with the inn, and known by the plaintiff to be so. The defendant directed the plaintiff to take his horse and cart to the stable. The plaintiff did so, and there put them into the care of the defendant's hostler. The defendant requested that the jury be instructed that "an innholder is not liable for the loss of merchandise carried by a peddler who stops with said innholder, which is left by such peddler in a livery stable known by said peddler to be a livery stable, and not connected with said inn." This request was refused, and we think correctly refused.

The defendant does not claim that an innkeeper may not be liable for the loss of the merchandise of his guest, under some circumstances; but he insists that when the plaintiff left his cart in the livery stable, "not connected" with the inn, the defendant's liability, at the most, was that of bailee, and not that of innkeeper. As the stable belonged to the defendant, and was used by him for putting up the team of his guest, we understand the expression "not connected," as applied to the stable, to mean that the stable was not physically attached to the inn,—that it stood in a different place.

By the statute law of this state (Rev. St. c. 27, § 7) an innkeeper is not liable for goods such as it is claimed were lost in this case, except upon delivery, or offer of delivery, by the guest to the innholder, his agents or servants, for safe custody. The plaintiff put up at the defendant's inn. He thereby became a guest. He had a horse and peddle cart. He was directed by the defendant to take them to the stable. He did so. He put them into the care of the defendant's hostler. This constituted a statutory delivery to the defendant. It is clear that the delivery was "for safe custody," and in this respect this case is unlike the cases cited by the defendant, where a peddler took his merchandise to a separate room to show and sell (*Neal v. Wilcox*, 49 N. C. 146), or where one procured from the landlord a lot in which to keep his hogs and horses for the purpose of showing and selling them (*Burgess v. Clements*, 4 Maule & S. 306), or where one had a room especially for the purpose of keeping or selling his goods (*Carter v. Hobbs*, 12 Mich. 52).

When the plaintiff's goods were thus delivered to the defendant for safe custody, they were *infra hospitium*. Though the defendant directed them to be placed in a stable "not

connected" with his inn, his liability was not modified or discharged. It was his stable. It was the place he selected in which to keep the goods safely. That the place was not connected with the inn does not control. *Hilton v. Adams*, 71 Me. 19. It was a single transaction,—the putting up at the inn, and the delivery of the goods to the defendant. We cannot doubt but that the defendant received the plaintiff's goods as an innkeeper. *Norcross v. Norcross*, 53 Me. 163, and cases cited; *Clute v. Wiggins*, 14 Johns. 175, and note to same case, 7 Am. Dec. 449. The refusal of the presiding justice to give the requested instruction was right.

The defendant waives his other exceptions. Exceptions overruled.

(31 Me. 297)

WHITMORE v. ORONO PULP & PAPER CO.
(Supreme Judicial Court of Maine. Jan. 26, 1898.)

SALES—LEASE—CAVEAT EMPTOR—NUISANCE.

1. The common-law rule of caveat emptor is still in force in this state, and applies to the lease as well as to the sale of property.

2. The owner of private property, unaffected by any public use, owes to a prospective lessee or his servant no duty of exercising ordinary care to ascertain and apprise him of unknown defects in the property to be leased, where such prospective lessee has equal opportunity to ascertain the defects.

3. Machinery or fixtures which are harmless when at rest, and dangerous only when in use, are not nuisances per se, as between a lessor and a lessee or his servant.

Nugent v. Railroad Co., 12 Atl. 797, 80 Me. 62, distinguished.

(Official.)

Exceptions from supreme judicial court, Penobscot county.

Action by Bertha L. Whitmore, administratrix, against the Orono Pulp & Paper Company. Verdict for plaintiff. Defendant excepts, and moves for a new trial. Exceptions sustained, and motion granted.

The plaintiff in this action is the administratrix of the estate of her husband, who was in the employ of the Bangor Pulp & Paper Company, the lessee of the defendant company, and was injured while so employed by the explosion of a digester in its mill, and afterwards died from the effects of the injury. The plaintiff had previously brought an action for the same injuries against the Bangor Company, and recovered a judgment, but the judgment was unsatisfied, as that company became insolvent.

The defendant company is the lessor of the mill under a lease dated October 1, 1892, by which it leased its mill and property to the Bangor Pulp & Paper Company for the term of 25 years, with the right, after 10 years, to purchase. The lessee was to keep the mills and property insured, and it was provided in the lease that "said lessee shall keep the property substantially in repair." The lessor had no right to inspect any secret process which the lessee should use.

The Bangor Company, lessee, went into possession of the premises on the 1st day of October, 1892, and was operating the mills at the time of the accident on October 11th. The writ alleged that the defendant company knew, or ought to have known by the exercise of due diligence, when it leased the mill, that the digester which exploded was in a weak and dangerous condition, and that the injury came from want of care on the part of defendant company in leasing the mill with defective digesters.

The defendant company denied these allegations. It claimed that there was no testimony on part of plaintiff that defendant company knew that the digesters were in an unsafe condition, and further claimed that the only testimony as to its unsafe condition was the pieces of the digester picked up after the explosion, showing corrosion of the metal, and the testimony of an expert that they indicated that these pieces were pitted and corroded to a considerable extent. The defendant company offered testimony showing that the digesters were purchased of manufacturers of the highest standing, were of the highest cost, and were carefully examined, both at the time of the purchase, and from time to time during use (the last examination being in September before the explosion, and report made in writing that they were in good condition); they had been in use only about 18 months, and the company was assured that they would be good for 10 or 15 years; was assured and believed that they were in good and safe condition, and there was nothing to lead them to believe that they were unsafe.

The verdict was for the plaintiff. The defendant moved that the verdict be set aside, as against law and evidence, and alleged exceptions to the rulings of the presiding justice.

The exceptions were to those parts of the following rulings and instructions of the presiding justice that are included in brackets:

"I will rule on another point that they [defendants] make, and that is, [they offer a judgment against another company, the Bangor Pulp & Paper Company, as a bar or estoppel here; and I rule against that proposition, and that need not trouble you at all.] As a legal proposition, I rule that if that judgment remained in no part satisfied, nothing appearing more than that they recovered judgment and took out an execution, getting no value with it, [that it is not a bar to this action;] that, while the other company has been held liable, this company may also be held liable, if the evidence satisfies you. But I say this: that you should not be influenced the least in the world, in your consideration of the questions here, by the fact merely that another judgment was recovered against another company. You are not to give judgment here because there was judgment in another case."

"Now, the defense set up by the defendants

is this: They say they were not operating the mill at that time,—that is, when the accident happened, on the 11th, they were not in possession,—and therefore they are not liable for what was done by the other company. But the plaintiff invokes the principle which I shall rule, if you are satisfied of it, to be sufficient to enable him to recover against these defendants: That is, if they were the owners of this property, and had been conducting the business there, and using the digesters until the digesters in question became dangerous to use, and knew that fact, or they did not take, in the use of it, due and ordinary care, and then leased the same premises to the Bangor Company to be used in the same way, with a continuation of the same business,—the defendants, the lessors, receiving rent and compensation for the use of the property,—they might be as liable as the Bangor Company would have been had the accident occurred on the 1st day of October, when the defendants were in possession; that is, they are liable for what took place afterwards, unless the dangerous condition, or condition of the nuisance, did not exist when they sold it, although it existed ten days afterwards.

"I find authority enough to sustain the ruling *prima facie* (that is, for you to sustain it until the full court overrules it); and I give the ruling that the plaintiff should satisfy you that it was a dangerous condition, amounting to nuisance, which existed when the lease was made, rendering the defendants liable. Now it is on this principle, Mr. Foreman: Supposing your neighbor erects a nuisance—some building amounting to a nuisance—on his own premises, to your injury, and then he sells it to somebody else. Both parties might be liable,—the first man for creating the nuisance, the lessor; and the second, the lessee, for continuing the nuisance. They might each be liable, not jointly, but separately; one party for putting in the nuisance, and the other party for continuing the nuisance.

"Now, what is a nuisance? Lord Coke, in his blunt way, said it was doing anything illegal to the injury of another, by way of trade. The modern, general definition is that a man who uses even his own property (real property or personal property) unreasonably or unwarrantably or unlawfully, to the injury of another, not having a right to do it, is guilty of nuisance; and if it be a dangerous thing, besides being noxious and disagreeable, then it is otherwise an offense. If it be dangerous to life by its continuance in use, then it is even more a nuisance, or more emphatically a nuisance.

"The plaintiff claims that here were premises dangerous to use, such as could not be legally or warrantably used, because, in the situation in which things were, it would be dangerous to other persons.

"The counsel for the defendant says that could not be extended to the lessee, or em-

ployé of the lessee. There is some question about it, but I rule, for the purposes of this trial, that the employé, such person as the deceased was— He could not protect himself if I should rule as the defendant claims, so I rule, for the purposes of this trial, that, [if the defendants are liable on all other grounds, the rule can be so applied as to make them liable to this employé, although in the service of the lessee under such an instrument as is produced here, which is a lease or contract,] under certain conditions."

"The plaintiff alleges negligence, and therefore he must prove negligence. The burden of proof is on him to prove negligence. It does not follow at all that they are guilty, merely from the accident happening. It does not follow that anybody was in fault, merely from the existence of the accident, because it may be an inevitable accident, for which nobody is responsible. And that is the defense here,—that this must be regarded an inevitable accident for which no one at all was responsible. The way to get at what negligence may be is to define the correlative terms of 'ordinary care.' [The duty which rested upon the defendants was that of ordinary care.] Not of extraordinary care, if distinction is to be made between the two kinds of care, or between negligence and extraordinary negligence. But certainly it is true, as claimed by the plaintiff, that what would be ordinary care must depend upon the circumstances. What would be ordinary care in some circumstances would not be in other circumstances. The more the exigency, the greater the danger and risks at stake, the more care to make ordinary care."

P. H. Gillin and C. J. Hutchings, for plaintiff. C. P. Stetson and O. J. Dunn, for defendant.

EMERY, J. The defendant company, the Orono Pulp & Paper Company, constructed, and for a few years, up to October 1, 1892, operated, a pulp mill in Orono. On that day it leased its mill and plant to another and distinct corporation, the Bangor Pulp & Paper Company, for 25 years. This latter company, the lessee, took possession of the leased property on the same day, and for some little time thereafter operated it as a pulp mill on its own account. By the terms of the lease the Bangor Company, the lessee, was to have the exclusive possession of the property, and was to keep it in substantial repair; the lessor reserving the usual right to enter upon and view the premises at times convenient to the lessee. The lessor made no stipulation as to the condition of the property.

The plaintiff's intestate, Austin J. Whitmore, had entered into the employ of the lessee, the Bangor Company, and was in its employ, upon the premises thus leased and operated by it, on the 11th day of October, 1892. On that day one of the digesters (a large cylinder of deoxidized bronze, and an es-

sential part of the machinery of the mill) exploded while Mr. Whitmore was at work near it in the line of his duty. He was so severely injured by the explosion that he died a few weeks afterwards. The explosion resulted from the inability of the digester to resist the usual pressure of steam injected into it in the course of the business of the mill.

For this injury the plaintiff, as administratrix, first brought an action against the Bangor Company, the lessee operating the mill and plant, and her husband's employer, counting upon the negligence of that company, and recovered judgment upon the ground that that company had not exercised due care in examining into and ascertaining the real condition of the digester, which in fact was too weak to withstand the steam pressure used. By reason of the insolvency of that company the plaintiff has not been able to collect any part of that judgment.

The plaintiff thereupon brought this action against the lessor of the mill and plant, the Orono Pulp & Paper Company, counting upon its neglect of its duty in the matter of the faulty digester. The defendant company did not construct the digester, but purchased it from a reputable manufacturer of digesters. In selecting, purchasing, and setting up this digester, it is not questioned that the defendant company exercised due care. At the first it was sufficiently strong. It was weakened after a time by the peculiar and continued action of the necessary chemicals upon the particular metal of which it was composed. This action was wholly confined to the interior of the closed cylinder, and was invisible from the outside.

Granting that at the time of the execution of the lease, and the change of the possession and control of the premises from the lessor to the lessee, the digester was then in fact too weak for its purpose, it does not appear from the evidence that any officer or agent of the lessor company was actually aware of that condition of the digester, or that knowledge of it could have been obtained, except by actual examination of the interior, or by inference from sufficient technical learning as to the peculiar action of the particular chemicals upon the particular metal. The outward, visible indications all were that the digester was as strong as ever.

The defendant company did not make the necessary examination before or at the time of leasing, and did not possess the requisite technical learning to make the correct inference without examination, but there is no suggestion of fraud or concealment in the matter. It may be that this omission and ignorance were a breach of a duty owed by the defendant company to its own employees or servants, but that proposition, alone, will not sustain the plaintiff's action. A person may owe a duty to one individual or class which he does not owe to another. The duty may depend wholly upon the relation between the parties. The plaintiff must therefore maintain the proposition

that the defendant owed to the servants of its lessee the duty of making the requisite examination, or of possessing the requisite technical learning, and communicating the results, before turning the plant over to the lessee. Whether the law of this state supports that proposition is the question presented.

It should be noted at the outset that the defendant company is not a public corporation, engaged in a public business, enjoying public franchises, and owing special duties in consequence thereof. It is a private corporation, transacting a purely private business, and dealing in this instance with another private party. Hence the rules and principles applied to owners of railroads, wharves, elevators, public halls, etc., do not necessarily govern this case. Again, the plaintiff's intestate was not upon his own premises, nor upon any public road or place, at the time of the explosion, but was voluntarily upon the leased premises under a contract with the lessee only. Hence the doctrines of the law of liability for nuisances to strangers or the public are not necessarily applicable. It should be further noted that the lessee engaged to make repairs; that the lessee had as much ability and opportunity as the lessor to ascertain and guard against the actual condition of the digester before accepting and using it, and subjecting the plaintiff's intestate to the consequent danger. Indeed, the plaintiff recovered her judgment against the lessee for this same injury upon that very ground,—that the lessee by reasonable effort could have done, and yet did not.

It is not questioned that under such circumstances the lessor owes no more or other duty to the lessee's servants or assigns than he does to the lessee himself. If his duty or freedom from duty to the lessee is made plain, his duty or freedom from duty to the lessee's servant is equally plain. The discussion therefore may be confined to the duty of the lessor to the lessee.

Under such circumstances as have been disclosed and stated in this case, does the owner of property unaffected by any public use owe to his prospective lessee the duty to actively exert ordinary care at the time of the lease, to find out and apprise him of unknown defects which the lessee can equally well find out for himself?

The development of the law has not yet progressed so far in this state. Here the common-law rule of caveat emptor is still in force, and is applied to the lease as well as to the sale of property. It was early said in *Hill v. Woodman*, 14 Me. 38, 42, 43, that, in the absence of express stipulations as to the condition of the premises, the lessee took them for better or worse,—at least, when he had sufficient means for ascertaining their condition. In *Libbey v. Tolford*, 48 Me. 316, it was explicitly declared to be the law that there is no implied obligation upon the lessor to see that a leased building is safe, well built, or fit for any particular use; that a leased house is reasonably fit

for habitation; or that leased land is fit for the purpose for which it is taken. In *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, the owner was held bound to effectually repair where he assumed and began to repair, but it was declared (page 136, 82 Me., and page 108, 19 Atl.) he was under no obligation to repair, and that "the tenant, on the principle of caveat emptor, and in the absence of any fraud upon the part of the landlord, takes them [the leased premises] in the actual condition in which he finds them, for better and for worse." In *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469, the defendant had leased the second story of a dwelling house, with a defective landing for a stairway, which was the only means of ingress and egress for the second story. The plaintiff had made a social call upon the tenant, and, on leaving, fell through the defective landing. The court held that the defendant owed no duty to the tenant or to his caller, the plaintiff, as to the defective landing upon the premises, even though the landing was essential to the reasonable use of the leased tenement. It was again iterated (pages 548, 549, 83 Me., and page 470, 22 Atl.) that "the law, in the absence of any fraud or concealment on the part of the lessor, leaves the lessee to the operation of the maxim caveat emptor, and he takes the premises as he finds them, for better or worse"; and many authorities were cited. The court also necessarily decided that the lessor owed to no one on the premises under the lessee any more duty than he owed to the lessee himself.

So stands the law in this state to-day, well known and hitherto acted upon. Any desired change or extension of it should be asked of the legislature, and not of the court.

The case of *Nugent v. Railroad Co.*, 80 Me. 62, 12 Atl. 797, rightly understood, is no departure from the former decisions of this court. The defendant railroad company, the owner of the railroad, had not leased it to the Portland & Ogdensburg Railroad Company, the plaintiff's employer, nor had it in any way turned over the whole plant to the latter company. It had simply permitted the Portland & Ogdensburg Company to run through freight trains over a part of its tracks. It retained the possession and control of its tracks, station houses, platforms, etc. The plaintiff, a brakeman in the employ of the Portland & Ogdensburg Company, was injured, in the line of his duty, through the defective construction of a station awning on the defendant's road. It was conceded that, upon the above facts, the defendant company, having control of the station house, awning, platform, etc., and inviting the plaintiff to pass and repass in the line of his duty as such brakeman, owed him the duty of so constructing and maintaining the awning as not to be dangerous to him. But after this arrangement with the plaintiff's employer, and while it

was in force, and before the injury, the defendant company leased its entire road, including stations, to the Boston & Lowell Railroad Company, which latter company completely took over and operated the entire road, agreeing to assume all liability for injuries, etc.

The plaintiff was injured while the lessee was in possession under that lease. It was contended by the defendant company that such lease and transfer of possession freed it from what otherwise would have been its duty and liability to the plaintiff. The court held that they did not. That was the point of the decision.

The decision in the *Nugent Case*, supra, is really based upon the proposition that the owner of a railroad, or other property affected by a public use, with which the public have business relations, owes a duty to all persons who lawfully come upon the property to make and keep the property safe for all such persons, and cannot avoid that duty by merely leasing the property and retaining rents. That proposition, as before stated, does not include this case of property of a purely private nature, with which the public has no business relations.

It is true, as urged by the plaintiff, that the learned justice writing the opinion in the *Nugent Case* also adduced as an additional support for the judgment the responsibility of a lessor in some cases for the condition of the demised premises; but this was not necessary for the decision, and was not intended to be applied to a case like this. The same justice afterwards wrote the opinion in *McKenzie v. Cheetham*, supra, reaffirming the doctrine of the earlier cases.

The plaintiff, however, advances another and distinct proposition,—that the weak digester was a nuisance, allowed to become and remain so by the owner prior to and at the time of the lease, and hence that the owner must answer as for a nuisance. This proposition cannot be assented to. Some things may be nuisances *per se* under all circumstances, and as to all persons. Other things are nuisances only under certain circumstances, and as to certain persons. A slaughter house may be a nuisance as to the owner's neighbors, but none at all as to his employes in the business. What may be a nuisance as to others may not be a nuisance as to one's lessee, and here we are dealing with lessee and lessor.

To constitute any particular thing a legal nuisance *per se* (apart from statute nuisances), as between lessor and lessee and the servants of the lessee, the thing itself must work some unlawful peril to health or safety of person or property,—as defective cess-pools, imperfect sewers and drains, walls and chimneys liable to fall, unguarded excavations, etc. A fixed, inert mass of metal, upon a solid foundation upon one's own land, like this digester, was not in itself dangerous to any one. The employes of the lessee

could have worked around and near it without any danger from it, to person or health, so long as it was let alone. The danger arose only when the lessee, the employer, began to make use of the digester without first ascertaining its tensile strength, and gauging the applied force accordingly. Indeed, the plaintiff has once alleged, and recovered judgment upon proof, that the misconduct of the lessee caused the peril and injury complained of. This is inconsistent with her present contention that the digester was a nuisance per se as to her intestate, the lessee's employé.

The question of what is a nuisance upon leased premises was considered at some length, with citation of authorities, in *McCarthy v. Bank*, 74 Me. 315. It was there held that a discharge pipe insufficient to vent the water flowing into a bowl from a faucet, so that the water overflowed the bowl and caused damage, was not a nuisance as to the tenant. See, also, *Brightman v. Bristol*, 65 Me. 423, *Burbank v. Mill Co.*, 75 Me. 373, and *Leavitt v. Railroad Co.*, 89 Me. 509, 38 Atl. 998, though those were not cases between lessor and lessee.

We have hitherto confined our citation of authorities to the decisions in this state, thinking they sufficiently showed our law to be against the plaintiff's contentions. She has, however, cited cases from other states, of which one or two notably support her contentions. *Stenberg v. Willcox*, 96 Tenn. 163, 33 S. W. 917, 34 Lawy. Rep. Ann. 615, and *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 Lawy. Rep. Ann. 824. As to these cases, the learned editor of the *Lawyers' Reports Annotated Series* says they are a new departure in the law; that they transfer to the landlord a duty which has heretofore rested upon the tenant,—the duty of taking active care to find out unknown and unsuspected defects. As we have said above, we think it is for the legislature, not the court, to make this transfer of duty, if thought desirable.

On the other hand, many courts, in late decisions, adhere to the long-established rule of caveat emptor. In *Jaffe v. Harteau*, 56 N. Y. 398, a boiler defective in construction exploded. In *Edwards v. Railroad Co.*, 98 N. Y. 249, a gallery defective in construction fell. In *Doyle v. Railway Co.*, 147 U. S. 414, 13 Sup. Ct. 333, a house was too weak structurally to resist snow slides known to the lessor to be recurrent and dangerous. In *Tuttle v. Manufacturing Co.*, 145 Mass. 169, 13 N. E. 465, a floor defective in construction fell. In *Bowe v. Hunking*, 135 Mass. 380, a stair tread had been sawed. The lessor knew of the sawing, but supposed the tread sufficient. In *Kern v. Myll*, 94 Mich. 477, 54 N. W. 176, a well had been used as a cess pool, and thus had become offensive. In *Burdick v. Cheadle*, 26 Ohio St. 393, fixtures put up by the lessor were structurally defective, and fell. In *Willson v. Treadwell*,

81 Cal. 58, 22 Pac. 304, a stairway was defective. In *Railroad Co. v. Mangum*, 68 Tex. 342, 4 S. W. 617, a defective platform fell. In *Fellows v. Gilhubler*, 82 Wis. 639, 52 N. W. 307, an unsafe awning fell upon a guest. In *McConnell v. Lemley*, 48 La. Ann. 1433, 20 South. 887, a defective gallery fell upon a guest. In *Johnson v. Lumber Co.*, 3 Wash. St. 722, 29 Pac. 451, defective machinery in a mill gave way. In all these cases, it appearing that the lessor was unaware of the defects, it was held that he was not liable to the lessee or his servants for the injury occasioned by them.

Motion and exceptions sustained.

(31 Me. 326)

BRAGDON v. BLAISDELL.

(Supreme Judicial Court of Maine. Jan. 31, 1898.)

DEED—COVENANT—CONSTRUCTION.

1. The plaintiff, Bragdon, and defendant, Blaisdell, were each owners of separate wharves, and the defendant was the owner of a quarry. The defendant conveyed the quarry to the plaintiff by quitclaim deed containing the clause, "It is also agreed, and made a part of the condition and consideration of this deed, that all stone taken from the above-described lot shall be shipped from said Bragdon's wharf and landing, except that all stone which for any reason cannot be shipped as aforesaid, the same shall be shipped over J. D. Blaisdell's wharf, and no other." At the same time the plaintiff conveyed one undivided half of the quarry, by quitclaim deed containing the above clause, to the defendant. Thereafterwards partition of the quarry was had, and the defendant, by himself and lessees, shipped stone from his part of the quarry, so held by him in severalty, from his own wharf, when they might have been shipped from the plaintiff's wharf, who sued to recover damages therefor, as a breach of the defendant's covenant above mentioned. *Held*, that the agreement in question was meant to apply to the management of the quarry so long only as it remained common property, and that, the partition having severed the title and canceled the agreement, the action cannot be maintained.

2. Also, that the agreement has none of the elements of covenants that run with the land, and a future grantee would hold the land free of it.

(Official.)

Action by Theodore Bragdon against John D. Blaisdell. Judgment for defendant.

H. E. Hamlin and H. Boynton, for plaintiff.
A. W. King and L. B. Deasy, for defendant.

HASKELL, J. The plaintiff and defendant were each the owners of separate wharves, and the defendant was the owner of a quarry. The defendant conveyed the quarry to the plaintiff by quitclaim deed containing the clause:

"It is also agreed, and made a part of the condition and consideration of this deed, that all stone taken from the above-described lot shall be shipped from said Bragdon's wharf and landing, except that all stone which for any reason cannot be shipped as aforesaid,

the same shall be shipped over J. D. Blaisdell's wharf, and no other."

At the same time the plaintiff conveyed one undivided half of the quarry, by quitclaim deed, to defendant, containing the clause above quoted. Thereafterwards partition of the quarry was had, to be held by the plaintiff and defendant in severalty; and defendant, by himself and lessees, proceeded to ship stone from his part of the quarry, so held by him in severalty, from his own wharf, when they might have been shipped from plaintiff's wharf, who sues to recover damages therefor, as a breach of defendant's covenant before mentioned.

The action is, covenant broken. Plaintiff cannot sue on the covenant in his deed to defendant, because he did not sign and seal the deed. The remedy, if any there be, is assumpsit, and not covenant. *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994; *Maine v. Cumston*, 98 Mass. 217; *Locke v. Homer*, 131 Mass. 93. Nor is it plain how plaintiff can maintain his action on the covenant in defendant's deed to him, for want of a breach thereof. By that deed the plaintiff took the whole title to the quarry, and he might deliver the stone upon his own wharf as he pleased. Any covenant that he might do so would seem to have been unnecessary and inoperative, and become merged in his fee.

But assuming that both deeds were contemporaneous, and became effectual as an indenture, so that the covenants were mutual, and each party was bound to the other thereby, what was their purpose, and what is their scope and effect? Did they attach to the land either as a condition subsequent or covenant real that ran with it? It cannot be both, and it can hardly be held a condition.

The supposed covenant recites: "It is also agreed, and made a part of the condition and consideration of this deed," that stone from the quarry shall be shipped from plaintiff's wharf, when feasible. When considered with the whole transaction apparent from the deeds themselves, they fairly negative any such intention of the parties, and that intention must govern. *Bray v. Hussey*, 83 Me. 329, 22 Atl. 220. The strongest words of condition will not work a forfeiture of the estate, unless they were so intended to operate. The absence of a clause for re-entry may signify that no condition was intended, when its presence may make such intent plain. *Post v. Well*, 115 N. Y. 361, 22 N. E. 145; *Avery v. Railroad Co.*, 106 N. Y. 142, 12 N. E. 619; *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013; *Countryman v. Deck*, 13 Abb. N. C. 110; *Hoyt v. Kimball*, 49 N. H. 322; *City Mission v. Appleton*, 117 Mass. 326; *Stanley v. Colt*, 5 Wall. 119.

Nor does a consideration named as a condition always imply one. *Laberee v. Carleton*, 53 Me. 211; *Ayer v. Emery*, 14 Allen, 67; *Martin v. Martin*, 131 Mass. 547; *Morrill v. Railway Co.*, 96 Mo. 174, 9 S. W. 657; *Rainey v. Chambers*, 56 Tex. 17; *Risley v. McNiece*,

71 Ind. 434; *Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 90.

If the words raise a doubt whether a condition or covenant be meant, they are always to be construed as a covenant. *Jones*, Real Prop. § 635, and numerous cases cited. Moreover, if the clause, which is the same in both deeds, were considered a condition, it would apply to the whole quarry. The supposed condition does not attach to the land. For illustration, see *Jewell v. Lee*, 14 Allen, 145. A future grantee would hold the land free of it. No other reasonable construction can be given to it. It is not for the benefit of, and in aid of, a title, but, if anything, of a nature that attaches to the soil,—a servitude or incumbrance upon it; a fee on condition that any future conveyance of the title would become subject to. It does not purport to be an incumbrance,—a claim upon the land,—nor does it subject the land to any easement, servitude, or right against the owner. It is the personal agreement of tenants in common to ship stone quarried from the common land at a particular wharf.

What did the parties mean by the clumsy method taken to serve their respective interests? Plaintiff had a wharf, and defendant had a wharf and quarry. For some reason, he wanted plaintiff to become half owner in the quarry, and plaintiff wanted the first chance of the business of the quarry for his wharf. To accomplish that result, deeds were made, containing an agreement for the purpose. Clearly, the parties contemplated a continued common ownership in the quarry, and perhaps joint operations in working it, preference being given to plaintiff's wharf. The agreement rather related to a joint operation—to business—than to the title to the land. The parties meant to give plaintiff's wharf the benefit of their operations in the quarry, to the extent of its capacity, and then use the defendant's wharf. They did not contemplate partition in severalty. Their agreement does not fit such a condition. So long as the quarry was held in common, the agreement was sensible; but when held in severalty it became impracticable. Unless it attaches to the land qualifying the estate, it cannot be made effective as a personal covenant of the parties after partition, without complications and burdens little thought of when it was made. It has none of the elements of covenants that run with the land. They follow the title, not by assignment, but by conveyance of the land. They are ordinarily in aid of the title, not in derogation of it. They usually strengthen it, not weaken it. It can therefore be considered neither a condition, nor a covenant real that runs with the land,—follows the title. Nor is it a limitation upon the estate conveyed, creating a servitude in favor of the wharves. The parties became tenants in common of the quarry, and owned in severalty their respective wharves, neither of which appears to be contiguous to the quarry. It is unlike the cases

that limit or restrict the use of the land conveyed, or cast some additional burden upon it, as the building of fences or maintaining partition walls. They attach to the land, by imposing a duty upon the owner, or by restricting his use. *Newell v. Hill*, 2 Metc. (Mass.) 180; *Bronson v. Coffin*, 108 Mass. 175.

Nor is it a stipulation to remove incumbrances or the like, as in *Pike v. Brown*, 7 Cush. 133, and *Baldwin v. Emery*, supra, 89 Me. 496, 36 Atl. 994. It is but a personal agreement between tenants in common as to the management of the common property, and when the property ceases to be held in common it has no application. This is the only reasonable construction that can be given to it. The parties, perhaps, did not contemplate a change of the conditions between them. They had no idea of a partition of the land, or they never would have created their common interests as they did. Changed conditions many times arise, not in contemplation of parties where they attempt to agree as to their interests, that, although unforeseen, cause such agreements to become absurd, or burdensome and unreasonable. In such cases, where it fairly appears that it was not intended that a contract should apply to such changed conditions, the reasonable and proper construction of it is that it does not apply. So, in this case, we think the agreement in question was meant to apply to the management of the quarry so long only as it remained common property, and that when partition ensued it became *functus officio*,—inoperative. It had served its intended purpose, and by partition it was denuded of subject-matter upon which it could operate. We therefore consider that partition severed the title and canceled the agreement.

Judgment for defendant. .

(87 Md. 333)

GORMAN v. GORMAN et al.

(Court of Appeals of Maryland. April 1, 1898.)

GIFTS INTER VIVOS.

In an action to decide the ownership of an account at a savings bank, the entry in the pass book read: "M. and J., joint owners. Payable to the order of either, or the survivor." It appeared that the former was the aunt of the latter; that she was a domestic in a family who were in the habit, when opening an account in a savings bank, to put a second name on the bank book as a matter of convenience in case of illness: that the deposit was the bulk of her savings for years; that the niece never obtained possession of the pass book until after her aunt's death; that the aunt made a will, which would be of no effect if she intended to give the deposit in the bank to her niece. *Held*, that there was no such delivery as is necessary to make a valid gift *inter vivos*.

Appeal from circuit court of Baltimore city.

Action by Bryan Gorman, executor of Theresa McConnell, and others, against Maggie S. Gorman, to decide the ownership of a bank account. From a judgment for plaintiffs, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BRISCOE, PEARCE, BOYD, and FOWLER, JJ.

Gans & Haman, for appellant. M. A. Mullin and Niles & Wolff, for appellees.

FOWLER, J. The controversy in this case grows out of a dispute as to the ownership of a fund deposited in the Savings Bank of Baltimore. The bank filed a bill of interpleader in the circuit court of Baltimore city requiring the claimants, Bryan Gorman, the executor of Theresa McConnell, and Maggie Gorman, to interplead, and settle their adverse claims. Both parties answered, each claiming the whole fund, amounting to nearly \$3,000. It was held by the learned judge below that the executor was entitled to the money in the hands of the bank, upon the theory that the evidence fails to show a complete gift *inter vivos*. Maggie Gorman has appealed.

But for the ingenious and able argument of counsel for the appellant, there would, we think, be but little difficulty in the case. For it seems to us that, notwithstanding the effort to distinguish this from all the other cases heretofore decided by this court of a like character, involving questions of ownership of funds deposited on joint account in savings banks, the general principles which must decide this case are settled in Maryland and other states as well. It is true, the language used here by the bank in making the entry in the deposit book is different from that used in other cases, but, after a careful consideration of the entry itself, and all the circumstances of the case, we are forced to the conclusion that it was not, and could not have been, the intention of Theresa McConnell to make Maggie Gorman a joint owner with herself of the money in question; and, secondly, that, if any such intention ever existed, there was no such delivery of the money as is required to make a perfect gift *inter vivos*. The whole contention of the appellant in this case hinges upon the words "joint owners," used in the entries made by the bank both in the depositor's book and the signature book, which are as follows: "Theresa McConnell and Maggie S. Gorman, joint owners, payable to the order of either, or the survivor." The circumstances under which this entry was made in the depositor's book are entitled to consideration. It appears that Theresa McConnell had been for many years a confidential friend and trusted servant in the Wheelright family, in the city of Baltimore, and that she and other members of the family ("Theresa was one of them") had been in the habit, when opening an account, of opening it "in the name of the person to whom the money belonged, and a second name was always placed on the bank book as a matter of convenience in case of illness, and in no way included any ownership in that book." On

the 4th of June, 1895, Theresa McConnell had an account in the Savings Bank of Baltimore in her own name, no second name appearing upon the book. On that day she went to the bank, with her niece, Maggie Gorman, the appellant, and had the account standing in her name alone closed, and opened the one which gives rise to this controversy. The testimony as to what took place comes for the most part from the appellant, either from her own testimony or her declarations testified to by other witnesses. The witness Dorsey, the teller, had no recollection of the transaction, but testified it was the custom of the bank to call the attention of depositors to the words, "Payable to the order of either or the survivor," and to make the fact known to them that, in case one dies, the other can get it, provided the survivor produced the book. This testimony as to the importance of the bank book is very significant when compared with that of the witness Dally, who testified that the appellant told him that she was requested by Theresa McConnell, her aunt, to go to the Savings Bank of Baltimore, and that after the deposit was made, and the transaction was ended, the aunt called her, and the clerk or teller explained that the appellant, Maggie, would have power to draw the money. The aunt said she understood that; but, after leaving the bank, she said to the appellant: "Was not that a funny remark the clerk made, saying you could draw the money. I don't see how you can draw it when I have the book." Another witness (Mary Dally) testifies that the appellant said that when she was returning from the bank with her aunt she wanted to see the bank book, but the desired permission was refused. Mrs. Ashton, a member of the Wheelright family, who was well acquainted with Theresa's feelings in respect to her nieces and nephews, says that she said again and again that another, not the appellant, was her favorite. It is true that the appellant gives an entirely different account of the whole transaction, but, without further comment, we deem it necessary only to say that, in our opinion, the circumstances surrounding the transaction, so far from establishing an intention to make a gift of the money, or any part of it, to the appellant, show the contrary. If any such intention existed in the mind of Theresa,—that is, if she intended then and there, when the deposit was made, to give the appellant a joint half interest in the bulk of her fortune,—it would be only reasonable to expect that she would have mentioned it, if not to third persons, then at least to the appellant herself; and that, instead of excluding her from the interview with the bank clerk when the deposit was made, she would have been invited to be present. If any valid gift was made, it was made when the entry was made; but when we remember that the appellant was never permitted to put her hand upon the bank book until after

the death of Theresa, when the executor allowed her to have it to draw the money for him, it is difficult to believe that she had, or was intended to have, any beneficial interest whatever in the deposited fund. But, in addition to this, it must be remembered that Theresa left a will, and that the fund here in question constitutes a large part of her estate. This will and the two bank books, one of which contained the entry now before us, were carefully guarded, and were placed in the hands of Mrs. Ashton for safe-keeping only a few months before Theresa's death. If the money deposited in the Savings Bank of Baltimore, as contended, was, during the joint lives of the appellant and Theresa, their joint property, and after the death of the latter belonged to the former absolutely, what remained of Theresa's estate was altogether inadequate to gratify the provisions of her will. But, believing and knowing that she had never given this money to the appellant, she disposed of it by her will. We say she disposed of it by her will, not because it is mentioned therein specifically, but because without it the provisions made for her kinsfolk in Ireland and this country were so many idle words.

But it is unnecessary to pursue this view, for, as we have said, the contention of the appellant rests upon the theory that the language used in the entry, irrespective of the facts and circumstances under which it was made, together with the deposit of the money, or its representative, a cash ticket, in the bank, operated to make a perfect gift *inter vivos*. What is requisite to make such a gift perfect is so well settled here and elsewhere that only a statement of the rule is necessary. It is briefly and clearly stated in *Taylor v. Henry*, 48 Md. 557, by the former chief justice, Alvey: "To make such a gift perfect and complete, there must be an actual transfer of all right and dominion over the thing given by the donor, and an acceptance by the donee, or some competent person for him; and it is essential to the validity of such gift that it should go into effect,—that is, transfer the property at once and completely." What kind of a delivery must be made depends upon the nature of the property or thing alleged to have been given. In this case the contention is that the words "joint owners" mean exactly what they imply, namely, ownership, and not mere agency with authority to draw. But the question before us is not as to the meaning of the word "owners" or the words "joint owners" in themselves and apart from the connection in which they are used in the entry in the bank book. And while we may admit that these words have an ascertained legal meaning in themselves, yet we entirely agree with the learned judge below that they are not used here in the definite legal sense imputed to them by the appellant. Can we, for one moment, suppose that, with the information we have in this case, the alleged donor intended to put it in the power of the

appellant on the day the entry was made to claim—and successfully claim if the appellant's view be correct—one-half of the larger part of the savings of a lifetime; and that, in case the appellant should survive, she would get the whole fund, and the beneficiaries under the will, which had been so carefully guarded, would get none of it? We have said that the question in this case must be decided by the general principles already decided in this state. One of these is that, in order to ascertain the intention of the alleged donor as manifested by the entry, not only the entry itself, but "all the circumstances surrounding the deceased at the time," should be considered. *Taylor v. Henry*, supra. In the case just cited the entry was, "Joseph Henry and Margaret Taylor, and the survivor of them, subject to the order of either." "It is quite certain," say the court, "that if the words, 'and the survivor of them,' had been omitted in making the entry, the case would have been controlled by *Murray v. Cannon*, 41 Md. 466, and the gift would have been incomplete." The contention there in behalf of Margaret Taylor was the same as that made here in behalf of the appellant,—that the fund was the joint property of herself and the depositor, and that the survivor would be the owner of the whole. But the court held otherwise, and said that there were no terms in the entry that import of themselves an actual present donation, and that by the dominion retained by the depositor over the fund by retaining in his possession the bank book, he was enabled "to displace and utterly destroy all power conferred upon the sister in respect to the fund." And, whatever may be the meaning and legal effect of the words "joint owners" generally, we think it impossible to give them the broad signification claimed for them in the connection in which they are used in the case now before us, and with the controlling fact admitted that Theresa always held possession of the bank book. The cases of *Dougherty v. Moore*, 71 Md. 248, 18 Atl. 35, and *Baker v. Hedrick*, 85 Md. 645, 37 Atl. 363, are quite similar to that of *Taylor v. Henry*, supra, and in each of them it was held that the fund did not pass, and that there was not a perfect and complete gift *inter vivos*. If it be conceded that this case is to be decided upon the legal, technical meaning of the words "joint owners" placed upon them by the appellant, and that thereby she became a joint owner pure and simple, without any limitation whatever, then it might be conceded that the cases of *Murray v. Cannon*, 41 Md. 466, and *Gardner v. Merritt*, 32 Md. 50, would sustain the theory that the delivery to the bank was a delivery to her, and the gift is complete. But we cannot close our eyes to all the other evidence in this case, and give effect alone to two words in the entry. In *Murray v. Cannon* the court said the original depositor retained dominion and control over the deposit by the very terms of the account, and it was therefore held that,

his ownership of the fund being beyond dispute, the mere fact that the bank book was not retained by him could not affect his title, or establish that of the persons in whose possession the book was found; not that the possession of the bank book is not an important fact to consider in determining the ownership of the fund, but, when the ownership is fixed beyond dispute by the entry, or in some other way, then the mere possession of the bank book is not to be taken as conclusive of the ownership of the person in whose possession it may be found. The case of *Gardner v. Merritt*, 32 Md. 80, is the common case of a guardian making a deposit for the benefit of infants, the entry containing, immediately after the name of such infants, the words, "subject to the order of the guardians." It was proved that by the laws of the bank in that case guardians may deposit for the benefit of their wards, and subject such deposits to the control of such guardians. It was held that the delivery to the bank for the benefit of the infants was a perfected gift to them, and that the control retained by the depositor was such a control as was contemplated by the by-law,—a control for the benefit of the infants,—and not such a control as would pertain to a continuing legal power and dominion over it. In a word, the court there held that the delivery to the bank, and the character of the entry, under all the proof in the cause, divested the depositor of her title to the money, and vested it in the infants. But, as we have already said, such is not, and cannot reasonably be held to be, the effect of the entry and delivery in this case, when viewed in connection with all the evidence in this case. In the case of *Bank v. Murphy*, 82 Md. 319, 33 Atl. 640, the language construed is this: "Subject to the order of either. The balance, at the death of either, to belong to the survivor." The whole amount was paid by the bank to the survivor. We said: "The only question which we are now called on to decide is, had the bank authority in law to make such payment?" And we held that, inasmuch as the depositor who originally owned the money entered into a contract with the bank, the bank had only done its duty by complying therewith; and we refused, after such payment by the bank, to require it to pay a second time. It was also said that the transaction took somewhat of an equitable assignment, looking to the interests of the parties, rather than to matter of form. But in the case we are now considering there is no question as to the rights of the bank under the contract of deposit, but the object is to ascertain who is the legal and true owner of the fund. It may well be, as said by the learned judge below, that, as between the depositor and the bank, perhaps the entry in the bank book might be conclusive; and, if the bank had paid the money according to the terms of the entry, it might be protected; but, as between the depositor or her ex-

ecutor and the appellant, the entry is not conclusive. It is a fact to be considered in connection with the other circumstances of the case to determine the donor's intention. As we said in *Baker v. Hedrick*, what we decided in *Bank v. Murphy* was that, under the facts of that case, and because of the express language of the entry that the balance should belong to the survivor, the bank was right in paying it to the survivor. Nor is there any suggestion here that we are now dealing with an equitable assignment of the fund. On the contrary, the contention is that by virtue of the language of the entry there was, at the time it was made, a full, complete, and legal transfer to the appellant of a joint interest, and such a delivery as was necessary to make a perfect gift inter vivos. But, as we have already said, we cannot adopt this view. Decree affirmed; costs to be paid by the executor out of the fund.

(87 Md. 459)

SELBY v. CASE et al.

(Court of Appeals of Maryland. April 1, 1898.)

BILLS AND NOTES—DEFENSES—ENFORCEMENT IN EQUITY.

1. It cannot be set up as a defense to notes that they were given in aid of a fraudulent combination between the maker and payee to cheat the payee's creditors.

2. Equity will not enforce against the estate of the maker the collection of notes under seal in the hands of the payee, given by the decedent to him of his own free will and accord, simply with the desire of benefiting him, and without valuable consideration.

Appeal from circuit court, Montgomery county.

Bill in equity by William B. Selby against James M. Case and others. Bill dismissed, and complainant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BOYD, and PEARCE, JJ.

Tho. Anderson and W. Veirs Bouie, Jr., for appellant. Robert B. Peter, for appellees.

BRYAN, J. William B. Selby filed a bill in equity, wherein he alleged that he was a creditor of Mary A. Case, deceased, and that her personal estate was not sufficient for the payment of her debts. The bill prayed for a sale of her real estate in aid of the personalty for this purpose. The heirs of the decedent were made defendants. After answers, issue, and testimony, the court dismissed the bill, and the complainant appealed.

There can be no question on the issues in the case, and the testimony that Mrs. Case executed and delivered to Selby two notes under seal, of the amount of \$500 each, with interest from date, and dated, respectively, September and November, 1888. Mrs. Case was Selby's mother, and the defendants were her children and children in law. It is set up as a defense that there was no indebtedness of Mrs. Case to Selby, but that a fraudulent combination had been formed between them to cheat Selby's

creditors, and to prevent the collection of the debts due to them, and that the giving of these notes was a part of the scheme devised for this purpose. There is no doubt that Selby confessed a judgment in favor of Mrs. Case for \$1,000, and that it was entered to the use of Selby's wife. There is also no doubt that, for the alleged consideration of \$1,000, he conveyed to her the land on which he was living and his household and kitchen furniture and other personal property, and that this land and personal property, for an alleged consideration of the same amount, were immediately conveyed by her to Selby's wife. We are satisfied from the proof that there was no real consideration either for the judgment, or its entry to the use of Mrs. Selby, or for either of the deeds, and that the intention of the whole proceeding was to shield Selby's property from the just claims of his creditors. We do not see how the execution of the notes in question in this case would have any tendency to sustain the judgment or the deed. The existence of these notes would tend to negative the conclusion that Selby was indebted to the maker of them, and would therefore draw in question the bona fides of the alleged indebtedness, for which the judgment was confessed, and the deed executed. But, if it were otherwise, the question would be of no consequence in this case, for a reason which we will state. The defendants are entitled to make the same defenses against the validity of these notes which could have been made by the maker in her lifetime, but none other. If a fraud had been perpetrated on Mrs. Case by the obligee of these sealed notes, they could not be enforced against her estate, real or personal, after her decease. But the allegation is that she executed them in pursuance of a combination with the obligee, made for the purpose of practicing a fraud on other persons, to wit, his creditors. And this charge, if true, would present a very different inquiry. If she or her estate could be relieved from responsibility on this ground, she or her heirs would in this way make her own turpitude a successful defense. The policy of the law has sometimes been constrained to admit such a defense, from the necessity of avoiding greater evils. The general principle is, however, well settled by the authorities that the law will not permit a party to a fraudulent transaction to derive any benefit from it when an attempt is made to rely on the fraud. In *Cushwa v. Cushwa's Lessee*, 5 Md. 44, in an action of ejectment, the defendants maintained that the title of the plaintiff's lessor was conveyed to him by a deed from their deceased father, which was made in fraud of his creditors. This court disallowed the defense. In the opinion the question was very fully and carefully considered, and many interesting cases were cited, which had been decided in this court and other appellate courts. It was said: "The courts have repeatedly declined to suffer a grantor to rely upon the fraud, when, as plaintiff or complainant, he is claiming relief against the effect of his deed, or when, as de-

defendant, he is resisting the claim of the grantee. The case of *Stewart v. Iglehart*, 7 Gill & J. 132, is one of the latter class of cases; and that of *Freeman v. Sedwick*, 6 Gill, 29, is one of the former class." And *Starke v. Littlepage*, 4 Rand. (Va.) 372, was quoted with approbation, where it was said: "If, for the purpose of frustrating the original design of such transactions, it may be necessary either to enforce such contracts at law or to grant relief against them in equity, it will be done, notwithstanding both the parties are in pari delicto." And it was further said: "The contract is enforced or avoided both at law and in equity, as may best answer the purpose of discouraging the fraud or contract against the policy of the law."

We do not think it necessary to pursue this discussion, because there is a fact which must decide this case independently of every other question. We are satisfied that Mrs. Case gave these notes to her son of her own free will and accord, simply with the desire of benefiting him. There was some vague testimony about the sale of a horse and a wagon, but we think that she was not in any way indebted to him, and that the notes were given without valuable consideration. They were under seal. A seal imports a consideration; that is to say, it supplies its place, and makes a contract as valid as if value had been actually paid and received. In a suit at law a judgment might have been obtained on these notes. But in equity remedial justice is administered on very different principles. The court will not lend its aid by decreeing the execution of a contract unless meritorious circumstances exist which ought, in justice, to require the exertion of its powers. It will do full and complete justice as far as its jurisdiction will extend; but it does not look with favor on a bare, naked right, founded on the technicalities of the law. Hence it has always been held that it will not enforce an executory contract which is merely voluntary, and not founded on a valuable consideration really and actually existent. Many illustrations might be given of the application of this principle. One from our own reports will suffice. In *Snyder v. Jones*, 38 Md. 542, the female appellant, when unmarried, had executed a covenant under seal to pay the appellee a sum of money. It was stated on its face to be made for value received. Under the circumstances of the case, it was necessary to make application to a court of equity to obtain payment. This court said that it was an executory contract for the payment of money; and it found from the evidence that it was made without consideration. We will quote an extract from the opinion: "In such case the court acts upon the same principle as governs it in a proceeding for specific performance; and the general rule is correctly stated by Judge Story to be now established that the court will not execute a voluntary contract, but will withhold assistance from a volunteer, whether he seeks to have the benefit of a contract or a covenant or

a settlement." 1 Story, Eq. Jur. § 793d. In *Pulvertoft v. Pulvertoft*, 18 Ves. 84, Lord Eldon said: "The distinction is settled that, in the case of a contract merely voluntary (I do not speak of a valuable or meritorious consideration), this court will do nothing. But if it does not rest in a voluntary agreement, but an actual trust is created, the court does not take jurisdiction." It was said by Lord Chancellor Nottingham, in *Jefferys v. Jefferys*, 1 Craig & P. 138, 141: "The principle of the court is to withhold its assistance from a volunteer, whether he seeks to have the benefit of a contract, a covenant, or a settlement." The facts in *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64, were different from these in this case, but the principle of the decision is the same. As the appellant had no cause of action which a court of equity could enforce, the decree must be affirmed. Affirmed, with costs.

(37 Md. 368)

GORE v. CONDON.

(Court of Appeals of Maryland. April 1, 1898.)
ACTION ON THE CASE—DAMAGES—PLEADING—DECLARATION—DUPPLICITY—DEMURRER.

1. One who had procured another to execute a fraudulent mortgage on real estate of which he was not the owner obtained a foreclosure and sale under a provision for an ex parte decree, and then prevented the rightful owner of the premises from collecting rent, and interfered with her possession. *Held*, that the holder of the void title was liable to the rightful owner for her damages.

2. A declaration claiming damages for wrongful interference with real property, and damages to the reputation of the owner, occasioned by foreclosure and sale of the premises under a fraudulent mortgage, states two causes of action, and is defective because of duplicity.

3. An action will not lie to recover damages for disgrace and disrepute occasioned by the advertisement and sale of property in judicial proceedings instituted to foreclose a fraudulent mortgage.

Appeal from Baltimore city court.

Action by Martha E. Gore, by her husband and next friend, Lewis D. Gore, against Levi Z. Condon. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PEARCE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

H. P. Jordan and R. E. Jordan, for appellant. R. B. Tippet & Bro., for appellee.

BRISCOE, J. This is an appeal from a judgment for the defendant upon a demurrer to the plaintiff's declaration. The cause of action set forth is of an unusual character, and we will state it in the language of the declaration itself, which is as follows: "And the said Martha E. Gore, by her husband and next friend, Lewis D. Gore, of Baltimore city, in the state of Maryland, sues Levi Z. Condon, of the city and state aforesaid, for that on or about the 11th day of May, 1889, the said defendant fraudulently obtained from one Daniel Frazier a fraudu-

lent and void mortgage for the sum of six hundred dollars upon the property of the plaintiff, situate in the city of Baltimore, on North Gilmor street, near Presstman street, which said fraudulent and void mortgage contained a consent clause for an ex parte decree; the said Condon well knowing at the time of obtaining said fraudulent mortgage that the property upon which it was obtained, and which was described therein, was the property of the said Martha E. Gore, and not the property of the said Daniel Frazier, the mortgagor therein, and that said mortgage was fraudulent, and null and void, as to the said plaintiff and her said property therein described. Yet, notwithstanding the said defendant knew that the said mortgage was fraudulently obtained, and was fraudulent and void as to the said plaintiff, the said Martha E. Gore, and her said property therein described, yet, nevertheless, to further carry out his fraudulent design, the said defendant did, on or about the — day of —, 1894, file his petition and said fraudulent mortgage in the circuit court of Baltimore city, alleging said mortgage to be in default, and under the said consent clause therein obtained an ex parte decree from said circuit court for the sale of the plaintiff's property, Charles W. Nash, Esq., of the Baltimore city bar, being appointed trustee by said decree to make said sale; and on or about the 18th of June the said defendant actually caused said trustee to advertise said property for sale, and he (the said defendant) notified the said plaintiff's tenants on the property to pay no more rents to the plaintiff. That, in order to save her said property from sale as aforesaid under said fraudulent mortgage and decree so fraudulently obtained as aforesaid, plaintiff was compelled to file her bill of complaint in said circuit court aforesaid (which she did on or about the 20th day of June, 1894), setting forth the fraudulent character of said mortgage, and praying for an injunction to restrain said sale aforesaid, and that said mortgage be decreed to be fraudulent and null and void as to her and her property therein described. The said writ of injunction did issue, and was served upon the defendant, Condon, and the said trustee, and remained in force until on or about the 3d day of June, 1895, during all which time the said plaintiff received no rents or profits from her said property, on account of the said defendant notifying the tenant in said property to pay her no rents; and during all which time the taxes, water rents, and ground rents were accumulating,—when, after hearing said cause, said circuit court dismissed the plaintiff's bill of complaint, with costs to the defendant, from which said last decree the said plaintiff, on or about the 5th day of June, 1895, took her appeal to the court of appeals of Maryland; the said defendant, Condon, having full knowledge of said appeal. That, notwithstanding the said de-

fendant, Condon, had actual knowledge of the fraudulent character of said mortgage, and that the property therein described was the property of the said plaintiff, Martha E. Gore, and that there was an appeal pending in said court of appeals from said decree dismissing her bill of complaint, yet, pending said appeal, he seized and sold said property under said ex parte decree; whereupon all her tenants moved out without paying her any rent, and leaving said ground rents, taxes, water rents, and other expenses unpaid. That, after arguing said appeal in the court of appeals, the said court reversed the decree of said circuit court of Baltimore city, and decided the said mortgage from said Frazier to said Condon to be fraudulent and void as to the said plaintiff, the said Martha E. Gore, and her said property, and remanded said cause to said circuit court, the said defendant, Levi Z. Condon, to pay all costs above and below; all which more fully appears from the opinion, of said court of appeals, recorded among the cases of said court designated to be not recorded, liber —, folio —, October term, 1895,—a copy of which opinion, taken from the Daily Record of November 25, 1895, is hereto attached as part hereof. And said circuit court of Baltimore city, in pursuance of said opinion and decree of said court of appeals, pass a decree setting aside said sale made pending said appeal aforesaid, making said injunction perpetual, and declaring said mortgage null and fraudulent as to the said plaintiff, Martha E. Gore, and her property. That at the time of advertising the said property, and of the defendant, Condon, notifying her tenants to pay her no more rent, the plaintiff had upon the premises three good, prompt-paying tenants, who had occupied the premises for some time previous to said advertising and notice aforesaid, to wit, a tenant in the dwelling house, paying twenty dollars per month; a tenant in the two rooms over the stable, paying five dollars per month; and a tenant on the ground floor of the stable, paying two dollars and fifty cents per month rent,—all of whom, upon the sale of said property, moved out, paying the plaintiff no rent, and leaving the property in the hands of the defendant vacant (unless tenants he may have put in), the said defendant not even paying the taxes, ground rents, and other expenses during all the time he was in possession thereof. And the plaintiff claims she has been damaged by the unlawful trespass upon her property, and advertising the same for sale, and sale thereof, and for the disgrace and disrepute into which she was brought on account of said advertising and sale, for the loss of her rents and profits from the time the defendant notified her, said tenants to pay her no more rents, and for her large expenditure of money in securing possession of her said property, in paying witnesses' per diem and mileage, besides her own loss of time and expense, and for the depre-

clation in the value of her property from neglect and nonoccupancy while in the hands of the defendant, and other damages to the said plaintiff and her property from and by the unlawful acts and doings of the said defendant in this behalf."

It will be seen that this is not an action for the malicious prosecution of a civil suit without probable cause. Such an action is generally maintainable, as was held by this court in *McNamee v. Minke*, 49 Md. 133, where there has been an alleged malicious arrest of the person, or a groundless and malicious seizure of property, or the false and malicious placing of the plaintiff in bankruptcy, or the like. But such suits are not, however, encouraged, says this court in *Clements v. Apparatus Co.*, 67 Md. 463, 10 Atl. 442, and 13 Atl. 632, because the law recognizes the right of every one to sue for that which he honestly believes to be his own; and the payment of costs incident to the failure to maintain the suit is ordinarily considered a sufficient penalty. In an action for malicious prosecution or the abuse of process the plaintiff must allege and prove that the suit was instituted maliciously, and without probable cause. The declaration before us does not aver malice or the want of probable cause, and does not count upon the malicious prosecution of a civil suit. No suit was, in fact, instituted against the plaintiff. It alleges a wrongful interference by defendant with the property of the plaintiff, and is an action on the case for consequential damages.

The allegations of the declaration which are admitted by the demurrer show that the defendant caused plaintiff's tenants to refuse to pay to her their rents, and caused other injuries to plaintiff, and that the defendant did intermeddle with property of which plaintiff was in possession with the right to possess, and which defendant knew to belong to the plaintiff. The question, then, is whether the conduct of the defendant, under the circumstances stated in this case, constituted such a wrongful act as will give rise to an action of damages. It would certainly seem just that if a man knows that certain property is not his, but another's, and that he acquired an apparent title to the same by fraud, and that the title is void, then his intermeddling with such property to the damage of the real owner is an unlawful act, for which a remedy should be afforded. To deny a remedy to the aggrieved party in such cases would be a reproach to the law. The mere fact that the interference with another's property was done under a claim of right and title is no defense, especially when, as in the present case, he knows that his title is fraudulent and void. An action has been held to lie in many cases of such interference when the parties have acted in good faith, and under an honest mistake. *Levi v. Booth*, 58 Md. 318, this court regarded it "as clear law that a person is guilty of a conversion who intermeddles with the property of another, and disposes of it; and it is no answer that he acted under authority from some

other person, who had himself no authority to dispose of it." No good reason can be given why the same principle is not applicable to such acts of interference with a party's ownership of land as are described in the present case. The right to maintain the action can also be sustained upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other, or to obtain a benefit for himself, does the other an actionable wrong. *Lucke v. Clothing Cutters*, 77 Md. 398, 28 Atl. 505; *Angle v. Railway Co.*, 151 U. S. 14, 14 Sup. Ct. 240; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333; *Walker v. Cronin*, 107 Mass. 555.

But it is manifest that the declaration in this case is bad for duplicity. It states two distinct causes of action in one count,—one for damage to the interference with plaintiff's real property, and the other for damage to reputation. As we have seen, the first is a good cause of action; but the second, which seeks to recover for "the disgrace and disrepute into which plaintiff was brought on account of the advertising and sale," etc., is clearly demurrable. It is well settled that no action will lie for words spoken or written in the course of giving evidence, or for words spoken or written in the course of any judicial proceeding. *Bartlett v. Christliff*, 69 Md. 225, 14 Atl. 518. We are therefore of opinion that the demurrer to the declaration was properly sustained, and the judgment will be affirmed; but, inasmuch as the declaration contains a good cause of action, the cause will be remanded, with leave to the plaintiff to amend; the costs to abide the result of this suit. Judgment affirmed, and cause remanded, with leave to the plaintiff to amend; the costs to abide the result of this suit.

(87 Md. 447)

TIERS et al. v. CODD.

(Court of Appeals of Maryland. April 1, 1898.)

JUDGMENT—REVIVAL.

1. Where the judgment against a deceased defendant has been revived against his administrator, a writ of scire facias subsequently issued to bind his lands should issue on the original judgment.

2. Where the original defendant in a judgment is dead, and a writ of scire facias is issued to revive the same against the land of deceased. It must be issued against the terre-tenant and also the personal representatives.

Appeal from superior court of Baltimore city.

Writ of scire facias issued by William T. Tiers & Co. against Edward J. Codd. From a judgment sustaining a demurrer to, and quashing, the writ, plaintiffs appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Jos. P. Merryman, for appellants. D. Meredith Reese, for appellee.

ROBERTS, J. In a case in the superior court of Baltimore city entitled, "William T. Tiers vs. Henry C. Codd, Administrator of William H. Codd," the appellants (plaintiffs below) filed an order directing the clerk of that court to issue the writ of scire facias on the judgment in that case against Henry J. Codd only, terre-tenant of William H. Codd, to be levied on the property conveyed by him to Edward J. Codd. The order then gives a description of the property upon which the writ is to be levied. On the same day the writ was issued, and on the 18th of May, 1897, the appellee demurred to the writ; and on the 29th of May, 1897, the demurrer was sustained, and the writ quashed. The record is very imperfectly made up, and the docket entries are in a most profound state of confusion. Without any system or regularity, it is almost impossible to unravel their intricacies. It will, however, not be necessary to do more than ascertain the state of the record and the condition of the judgment at the date when the writ of scire facias was issued. Without discussing in detail the docket entries antedating the 8th of March, 1897, when the judgment against Henry C. Codd, administrator of William H. Codd, was revived, it will be important to note the form of the judgment, which is as follows: "Judgment that the plaintiff do recover his debt, to be levied on the goods of the intestate which shall hereafter come into the hands of the administrator." Shortly after the entry of this judgment the appellant caused to be issued the writ of scire facias now under consideration here, which was made known to Edward J. Codd only, terre-tenant of William H. Codd; but no service of the same was made upon Henry C. Codd, the administrator of said intestate, and who was entirely omitted as a party to said writ. From a careful examination of the record, we are well satisfied that the demurrer interposed to this writ was properly sustained, for the following reasons:

1. Because the writ was issued in the case of William T. Tiers against Henry C. Codd, administrator of William H. Codd, whereas in fact it should have been issued in the case of the original judgment against William H. Codd.

2. Because, where the original defendant in a judgment is dead, and a scire facias is issued to revive the same, it may be issued against the administrator alone, and the judgment thereon can only bind assets, etc.; but, if it is desired to revive such judgment against the land of the deceased, it is irregular, and not a justifiable practice, to issue against the terre-tenants alone, but they must be joined with the personal representative as defendants,—not for the same reason, however, that all terre-tenants must be joined, but because the personal representative is the one best able to defend the suit. This court, in *Prather v. Manro*, 11 Gill & J. 266, has said: "The principle upon which an original party to the judgment, if living, or his representative aft-

er his death, is to be made a party to a scire facias, is not that of contribution, as amongst different terre-tenants. Neither the original defendant nor his heir could claim contribution from terre-tenants; but they are regarded as the persons most competent to know, and to prove, the satisfaction of the judgment. We think the appellants might well demur to this scire facias, as manifestly insufficient on its face to authorize the plaintiff to enforce his execution against them alone." To like effect are *Warfield v. Brewer*, 4 Gill, 265; *Bish v. Williar*, 59 Md. 382; *Bowie v. Neal*, 41 Md. 134.

There are other questions in the record which have been discussed at the hearing in this court, but what we have already said is all that is necessary to the determination of the merits of this controversy. Finding no error in the ruling of the court below in sustaining the demurrer, we affirm the judgment. Judgment affirmed, with costs.

(87 Md. 473)

LOWNDES v. COOCH et al.

(Court of Appeals of Maryland. April 1, 1898.)

WILLS—CONFLICT OF LAWS.

The law of Delaware, making a legacy lapse where the legatee dies before testator, controls the disposition of bank stock held in a Maryland bank, bequeathed by a resident of Delaware.

Appeal from circuit court of Baltimore city.

Action by Mary Lowndes against J. Wilkins Cooch, executor of the estate of Nathaniel H. Clark, deceased, and another. Decree for defendants, and plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PEARCE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Pollard & Bagby, for appellant. Barton & Wilmer, for appellees.

ROBERTS, J. This appeal is from a decree of circuit court No. 2 of Baltimore city, sustaining a demurrer to the bill of complaint, and dismissing the same. The facts are that Nathaniel H. Clark, a resident of the state of Delaware, departed this life on the 18th of March, 1892, leaving a last will and testament by which he bequeathed to his brother, Moses Clark, the dividends to accrue upon the stock held by the testator in the Commercial & Farmers' National Bank of Baltimore during his life; and thereafter the said stock was bequeathed to his "friend, Andrew Lowndes, of Baltimore." Mr. Lowndes died on the 16th of March, 1892,—two days prior to the death of the testator, Clark. The dividends upon said stock were paid to the said Moses Clark, the life tenant, during his life; he having only recently died. The children of said Andrew J. Lowndes, subsequently to the death of the life tenant, assigned all of their interest in said bequest to their mother, who is the appellant in the record of this appeal. This bill is filed against J. Wilkins Cooch, the executor of said

testator, and against the said bank, to compel the transfer to the appellant of the stock bequeathed to said Lowndes. The will of the testator has been admitted to probate in the orphans' court of Baltimore city, and letters testamentary have been granted by said court to said executor. The bank answered the bill, disclaiming any interest in the controversy, and submitting its rights and liabilities to the order and direction of the court below. Cooch, the executor, demurred to the bill, and, while relying on the same, he, by way of answer, set up the defense that there is no statute in the state of Delaware, similar to that of our own state, to save the lapsing of a legacy given by a testator to one dying before him, which is the meaning and effect of section 313, art. 93, Code Pub. Gen. Laws. The leading inquiry, therefore, which this appeal presents, is, does the law of Delaware or the law of Maryland control the disposition of the bank stock in controversy here? The facts of this case are few, and easily understood, and the law is well settled, and free of difficulty. It is undoubtedly true that, so far as it can be done consistently with its own interests, one country will respect, and give effect to, the laws of another. This doctrine finds expression in the legal maxim that "*mobilia sequuntur personam*," which is the maxim of our own, as of the Roman, law, while things immovable are governed by the *lex rei sitæ*. The leading case in this state is that of *Noonan v. Kemp*, 34 Md. 73. The facts are, briefly, that David Kemp, a citizen of this state, bequeathed to his daughter Mrs. Noonan, who then resided with her husband in the state of Kentucky, certain distributive portions of his personal estate. Mrs. Noonan survived her father, and died in the state of Kentucky, leaving her husband and two children surviving her. No distribution of her father's estate was made until after her death. Her surviving husband claimed the portion which had been distributed to his wife. It was admitted that by the law of Kentucky the surviving husband was entitled to the personal estate of his deceased wife. Robinson, J., in delivering the opinion of this court in that case, said: "If there be a principle of international law settled beyond dispute, it is that the succession to personality is governed and regulated by the law of the domicile," etc. And he quoted approvingly the language of Chancellor Kent in 2 Kent, Comm. 429, where he says: "It has become a settled principle of international jurisprudence, and one founded in a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to, and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happen to be situated." Judge Story says: "Be the origin of the doctrine what it may, it has so general a sanction among all civilized nations that it may be treated as part of the *jus gentium*." But no-

where is the general doctrine stated with greater force and vigor than by Lord Loughborough in *Sill v. Worswick*, 1 H. Bl. 690, where he says: "It is a clear proposition, not only of the law of England, but of every country in the world where the law has the least semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession, or by the act of the party. It follows the law of the person. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." The principle so admirably expressed, which we have just quoted, finds recognition and support in numerous decisions of this court. *De Sobry v. De Lalstre*, 2 Har. & J. 191; *Newcomer v. Orem*, 2 Md. 297; *Wilson & Co. v. Carson & Co.*, 12 Md. 54; *Hooper v. City of Baltimore*, Id. 404; *Latrobe v. City of Baltimore*, 19 Md. 14; *Railroad Co. v. Glenn*, 28 Md. 322. This doctrine, however firmly established, is nevertheless subject to proper limitation, to the effect that if a foreign law directly violates some recognized principle of public policy, or some established standard of morality prevailing in the forum exercising jurisdiction, the rules of comity will not compel such forum to enforce the foreign law, rather than its own, if to do so would be hurtful or detrimental to the interest and welfare of its own citizens. The appellant contends that in the application of any proper test the law of Maryland, and not the law of Delaware, should control the case under consideration, for the reason that the shares of stock, the subject-matter of this controversy, are in their nature things immovable, and incapable of having any situs except that of the corporation of which they are a part, and that in the event the law of Delaware shall be allowed to prevail the result will be, as heretofore stated, the lapsing of the legacy, contrary to the policy recognized in the law of this state. It is not essential to the merits of this case that we should indulge in extended comments upon the subject of the character of the bank stock in question, or as to what may be its situs. It has been variously held by the courts of other states, and text writers as well, that shares of stock have no situs apart from that of the corporations of which they are a part, as already stated, but that for various purposes shares of stock may be given an arbitrary situs, as in attachment cases, or for purposes of taxation. The law in this state has, however, been settled and determined to the effect that shares of stock of a corporation are personal property only, and governed by the law of the owner's domicile. *Donovan v. Insurance Co.*, 30 Md. 159; *Keyser v. Rice*, 47 Md. 212; *Appeal Tax Court v. Rice*, 50 Md. 317; *Appeal Tax Court v. Gill*, Id. 377; *Bonaparte v. State*, 63 Md. 472; *Baldwin v. Commissioners*, 85

Md. 145, 36 Atl. 764; Kerr v. Urie (Md.) 37 Atl. 789.

Other questions have been argued at the hearing of this case which are not necessary to its determination, and we forbear comment upon them. It is only just that we say that the case has been argued with exceptional ability and learning. From what we have said, it follows that the court below has committed no error in its decree, and we affirm the same, with costs. Decree affirmed, with costs.

(87 Md. 531)

BROUMEL v. WHITE.

(Court of Appeals of Maryland. April 1, 1898.)

STREETS—DEDICATION—IMPROVEMENTS IN STREET
—REMOVAL—EQUITY.

1. Certain receivers were authorized to sell land, which they platted into city lots. They filed the plat in the cause in which the decree was passed authorizing the sale. They conveyed some lots, describing them as bounded by a certain street; and others were described as certain lots as designated on the plat, which disclosed that they abutted on said street. *Held*, that the street was dedicated to the use of the public.

2. A plat dividing land into lots showed a dedication of a certain portion thereof as a street, but there was nothing on the ground showing where it was. Defendant in good faith erected buildings in the bed of the street, believing it was a part of lots that she had purchased. Owners of lots abutting on the street made no objection until after the improvements were completed. *Held*, that such owners were not entitled to an order requiring defendant to remove her buildings unless they paid her the damages resulting from such removal, as he that seeks equity must do equity.

Appeal from circuit court of Baltimore city.

Bill by Francis White against Louisa Broumel. Decree for plaintiff, and defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, BOYD, PEAROE, and FOWLER, JJ.

Isidor Rayner, for appellant. Rich & Bryan, for appellee.

FOWLER, J. The bill in this case was filed by Francis White, the appellee, for an injunction to restrain the appellant, Louisa M. Broumel, from maintaining her dwelling and other houses on what is alleged to be the bed of Chestnut street; and a mandatory injunction is prayed, requiring the appellee to remove said buildings from the bed of said street. The ground upon which the appellee places this application for the exercise of this extraordinary power of a court of equity is that Chestnut street, nearly 20 years ago, was dedicated to the public as a street or highway. The answer denies that there ever was any intention to dedicate as a public street what is claimed to be the bed of Chestnut street, and that, if there ever was any such dedication, it was long ago abandoned by all parties having any interest in the adjoining land, or any right to the use of the way so claimed to have been dedicated. The court

below decreed, *pro forma*, that Chestnut street or avenue is dedicated to the public as a street, that the appellant should no longer maintain her dwellings now in the bed of said street, and that she should remove them at her own cost within 60 days from the date of the decree.

In the case of Baltimore against this same appellant (decided at last April term, and not yet officially reported) 37 Atl. 648, we held that, if there ever was a dedication of this cul de sac (Chestnut avenue), it most certainly has never been accepted, and that "the city of Baltimore does not, therefore, own this alleged avenue, and was without authority to interfere with the buildings thereon." In concluding the opinion in the case just referred to, we said: "If the public convenience require that this avenue should be opened, it must be opened pursuant to, and not in defiance of, law. Most assuredly, private property cannot be ruthlessly taken from its owner by the strong hand of force, under a pretext that the buildings are located on a dedicated highway, without an opportunity being given to the owner to be heard in some duly-constituted tribunal." Subsequent to the filing of the opinion just cited, the appellant filed the bill in this case, and by agreement all testimony and exhibits in the former case are to be considered as evidence in this, and the only additional testimony before us now relating to dedication is that of the appellee. The controlling question, therefore, is whether Chestnut avenue was dedicated as claimed by the appellee; and, if so, what are the rights of the appellant? The general principle that a dedication of private property to public use must be established by clear, satisfactory, and cogent proof is so well settled in this state that any citation of authorities is unnecessary. Do the facts here relied on satisfy the requirements of this rule? In 1878 certain receivers appointed by the circuit court of Baltimore city were authorized by that court to sell a tract of land in Baltimore county. The receivers prepared a sales plat of the land, on which a number of streets (among them, Chestnut avenue) were laid out; and the lots appear to have been sold, and some of them conveyed, as designated on the plat. The appellee purchased at the receiver's sale a number of lots abutting on the north side of the alleged street. At the same sale the appellant purchased several lots abutting on the south side of said street, immediately opposite those purchased by the appellee. In the deed from the receivers to the appellee the lots purchased by him are described as one tract, running southerly "to the north side of Chestnut avenue; thence east, on the north side of Chestnut avenue, one hundred and fifty feet, to the west side of an alley twenty feet wide." In the deed from the receivers to James Broumel, under whom the appellant claims, the land now owned by her is described as certain lots designated on the plat, on which, as we have

said, Chestnut avenue is laid out as a street. The plat in question was used at the sale of the lots, and was filed in the cause in which the decree was passed authorizing the sale at which both the appellant and appellee's predecessors in title purchased. Under these circumstances, we think it may fairly be said there was a dedication, under the rule established by all the authorities in this state, from *White v. Flannigan*, 1 Md. 540, down to the present time, namely, "Where an owner lays off land in lots, and sells them as bounding on certain streets, which are sufficiently designated, the streets so called for are held as dedicated to the public." The presumption of dedication arising from selling and conveying lots binding on streets located on maps or plats prepared by the vendor may be rebutted in various ways. But there is nothing shown in this case by which the legal presumption can be rebutted. In the case of *Lippincott v. Harvey*, 72 Md. 578, 19 Atl. 1041, the whole reliance to establish dedication was based upon a plat which was held to be too indefinite to constitute evidence of dedication. Nor were there in that case, as there are in this, conveyances to both parties, clearly calling for the street. And in addition to this the map or plat here is free from any ambiguity whatever. In the cases in which we have held that the general rule does not apply, we have always found something in the deed or lease clearly showing there was no intention of the grantor or lessor to make a dedication to the public. *Glenn's Case*, 67 Md. 390, 10 Atl. 70; *McCormick's Case*, 45 Md. 512; *Pitts' Case*, 73 Md. 326, 21 Atl. 52; *Fear's Case*, 82 Md. 254, 33 Atl. 637; and others not necessary now to cite. Nor can there be any contention here that there is anything in the deeds in this case to prevent them from working a dedication because, as in the cases cited, a contrary intention is expressed upon the face of the instrument.

Without undertaking to discuss all of the positions taken by the appellant, we will confine our attention to the discussion of the one in which we think the strength of her case lies, viz. that she is a bona fide possessor, and that, therefore, the improvements on the bed of Chestnut avenue cannot be taken without compensation. We have said in the former case that it would be the greatest injustice to allow the city, without compensation to the appellant, to destroy her dwellings and other buildings on the bed of Chestnut avenue. And, under the peculiar circumstances of this case, we think it would be equally contrary to the plainest principles of equity that the appellee or the public should be authorized to do what the city has been prohibited from doing. It is true, as we have said, the facts which we have found to exist in this case compel us to hold that there was a dedication in law; but it does not follow that because there was such a dedication the appellant must be deprived of the value of the im-

provements and buildings she owns on the bed of the dedicated street. If she, or those under whom she claims, did in good faith, and without actual notice from the appellee, or others who, like him, claim a right of way over Chestnut avenue, make the improvements in question on the bed of the paper street, with nothing on the ground to indicate there was a street intended to be there, we think that before he or the public can come into a court of equity, asking for the relief prayed for, they must offer to do equity, namely, pay or offer to pay the damages which will result to the appellant by the removal of her building. In this case there can be no question as to the bona fides of Robinson, who built the house in the bed of the street. He testifies that he never had any intimation that there was any street or avenue on the property, and that there was nothing to indicate that there was any proposed road or street there. The appellee saw him building, never made any claim to the street, and offered to lease him land north of the fence which then inclosed the appellant's lot, including part of Chestnut avenue. Broumel, from whom Robinson purchased, purchased at the receiver's sale, and afterwards purchased from Robinson, having previously sold the property to him; but there is nothing to show that he had any other notice of a dedication, except that which is furnished by the plat, and the reference to it in his deed. If, knowing these facts, he made a mistake, and drew an incorrect legal inference from them, and believed that the house was on his own land, when it was on a dedicated street, a court of equity will not allow him, or his wife, who claims under him, to be impoverished by reason of such mistake of law, nor the appellee nor the public to be the gainers thereby. "*Nemo debet locupletari ex alterius incommodo.*" Under the peculiar facts of this case, and presenting as it does a strong appeal to the protecting power of a court of equity, we cannot see why the well-settled doctrine applied in the case of *McLaughlin v. Barnum*, 31 Md. 453, should not be equally applicable here. In that case the appellant, *McLaughlin*, purchased valuable property in Baltimore city, and made extensive improvements thereon, at great expense. It was subsequently decided that his title, which depended upon the proper construction of the will of David Barnum, was not good. "He had knowledge," the court said, "of the will; and the law imputed to him knowledge, also, of its true construction, in so far as to prevent his relying upon estoppel, or the plea of bona fide purchaser without notice, to defeat a recovery by the complainants. But the fact that a party cannot successfully maintain such a defense in bar of a recovery upon title will not deprive him of any equity he may have for an allowance for improvements, and especially not in a case where relief is sought against him as a defendant in a court of equity. * * * In such a case a

court of equity enforces * * * the cherished maxim of equity jurisprudence that 'he who seeks equity must do equity.' It seems to us that it would be the greatest injustice to allow the appellee and adjoining owners of lots, who, in case of the opening of Chestnut avenue, would be otherwise called on to pay the value of the appellant's improvements, to escape from all liability therefor because, and only because, such improvements were placed on the bed of a dedicated street by reason of the fact that the builder drew an erroneous inference of law from the plat and deeds. At most, it was at that time a doubtful question as to whether, from the facts known, or which could have been known, there was or was not a dedication. It was said by Maule, J., in *Martindale v. Falkner*, 2 C. B. 719, that: "There is no presumption in this country that every person knows the law. It would be contrary to common sense and reason if it were so." In *Lamot v. Bowly*, 6 Har. & J. 525, the court said: "It is not intended to say that the plea, 'Ignorantia legis,' would in all instances be available in civil cases (in criminal it never can be), because some legal propositions are so plain and familiar, even to ordinary minds, that it would be doing violence to probability to impute ignorance in such cases; but it is only meant to say that where the legal principle is confessedly doubtful, and one about which ignorance may well be supposed to exist, a person acting under misapprehension of the law in such a case shall not forfeit any of his legal rights by reason of such mistake." See, also, the excellent notes of Mr. Brantly, and his collection of authorities on the subject of "Mistake of Law," in his notes to the case of Mayor and City Council of Baltimore v. Lefferman, 4 Gill, 425. In *McLaughlin v. Barnum*, supra, the definition of a "bona fide possessor or occupant," as laid down by the supreme court of the United States in *Green v. Biddle*, 8 Wheat. 79, is quoted and approved. It is as follows: "One who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it." As we have already seen, the evidence before us places beyond doubt the character in which the successive owners of the buildings appear. They are, according to the definition adopted in *McLaughlin v. Barnum*, from Robinson, who built the houses in question, down to Mrs. Broumel, the present owner, bona fide possessors, and as such are entitled to the protection of a court of equity. But a court of equity will sometimes grant relief where there is a mutual mistake of fact. In the case of *McKelway v. Armour*, 10 N. J. Eq. 115, also cited in *McLaughlin v. Barnum*, a bill was filed "to relieve the complainant from the embarrassment of having erected a valuable dwelling house by mistake on the land of the defendant, Armour." There, as may be conceded in the case here, there was

a mutual mistake. "It is proved," says the chancellor, "beyond all doubt, that the complainant erected his improvements on this lot by mistake. He supposed that it was the lot next that belonged to Armour. Armour labored under the same mistake. He lived in the vicinity. He saw the complainant progressing from day to day with these improvements. If he knew this to be his lot, his silence was fraud upon the complainant; but this is not pretended. He admits that he did not suspect the erections to be on his lot until some time after their erection, when, by actual measurement, to his surprise, he discovered the mistake." The conclusion of the court was that it would be most unjust to permit Armour to take the improvements, and accordingly full relief was decreed in favor of the complainant. In our opinion, it would, under the circumstances of this case, be equally unjust to allow the appellee or the public to place upon the appellant the whole loss, which, upon the most favorable view of the case for the appellee, resulted from a common mistake. We hold, therefore, that while the facts of the case show a dedication of the bed of Chestnut street or avenue as designated on the plat and referred to in the deeds to both the appellant and appellee, yet the appellant is entitled, whenever hereafter Chestnut street or avenue shall be opened, to such compensation as shall be ascertained to be the fair market value of her buildings in the bed of the street. Decree reversed, with costs to appellant, and cause remanded.

(185 Pa. St. 399)

In re NEBINGER'S ESTATE.

Appeal of LANDIS.

(Supreme Court of Pennsylvania. April 11, 1898.)

WILLS—CONSTRUCTION—TESTACY.

Testator dies intestate as to one-sixteenth of his residuary estate, B., for whom there was left in trust for life one-eighth thereof, having died leaving issue; the provision being that on the death of B., if she leave issue, half the principal of such fund shall go to them, and, if she die without issue, then the whole of the principal to a Catholic order, to be used in erecting the "hospital as above stated"; an omission, by mistake, of words, giving the remaining one-sixteenth for the hospital in case B. died leaving issue, not necessarily being shown by the fact that a previous paragraph, giving one-eighth of the residue in trust for A. for life, provided, in case A. died leaving issue, that one-half the principal go to them, and the other half to said order, to be used in erecting the "hospital on the above-mentioned lot of land," and, in case A. died without issue, giving all the principal to said order, in language identical with that employed in case of B. dying without issue; the words "hospital as above stated" being referable to a preceding bequest, to be used in erecting a hospital on a certain lot.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Andrew Nebinger, deceased. From a decree sustaining exceptions to the adjudication of the auditing judge on the account of the trustee under the

will of deceased, John B. Landis, guardian, appeals. Reversed.

Landis & Smead and R. M. Henderson, for appellant. V. Gilpin Robinson, for appellee.

STERRETT, C. J. This appeal, by the guardian of the three minor children of Annie H. Beetem, deceased, from the decree of the court below sustaining exceptions to the adjudication of the auditing judge, involves the construction of the last will of Andrew Nebinger, deceased. After making pecuniary bequests to individuals and charities, the testator says: "I give and bequeath unto the Sisters of the Order of St. Francis the sum of five thousand dollars, to be by them used and expended in the erection and construction of a hospital on the lot bounded on the north by Tasker street, south by McKean street, east by Broad street, and west by Nebinger avenue." He then says: "As to the rest, residue, and remainder of my estate, real, personal, and mixed, of what nature and kind soever, and wheresoever the same may be at the time of my decease, I give, devise, and bequeath as follows." Two-fourths are then given to his brother, Robert, absolutely. One-fourth is given as a separate use trust to his sister Charlotte C. Sheaffer, for life. After her decease, one-half of this fourth is to be held in trust for her son, Andrew N. Sheaffer, for life, if living; and on his death in trust for his children. He then continues: "As to the other half part of said principal, which is the one-sixteenth of my residuary estate, to grant, convey, and assign the same to the Sisters of the Order of St. Francis, their successors and assigns, to be by them expended in the construction and erection of the hospital on the above-mentioned lot of ground." In the event of the death of his nephew, Andrew N. Sheaffer, without issue, this one-eighth part of the residuary estate is given to the Sisters of the Order of St. Francis in language identical with that employed in a similar bequest in the next paragraph of the will, substituting nephew for niece. In the next paragraph—the one in dispute—he says: "And at and immediately upon the decease of my said sister, then to collect and receive the rents, issues, and profits thereof, and pay the remaining half part thereof from time to time, when and as the same shall be got in and received, unto my niece, Annie H. Beetem, daughter of my said sister Charlotte C. Sheaffer, for and during the term of her natural life, so, nevertheless, that the same shall be for her sole and separate use notwithstanding any coverture, and not to be in any way or manner whatever liable to the contracts or engagements of any husband, and not to be in any way or manner subject to the control or interference of such husband. And at and immediately upon the decease of my said niece, Annie H. Beetem, if she shall leave any child or children, or lawful issue of any deceased child or children, her surviving, then as to the principal of the share in trust, as to

the one-half part thereof, being the one-sixteenth of my residuary estate, to and for the only proper use and behoof of all and every the child or children which she, my said niece, Annie H., may leave surviving her, and the lawful issue of any of them who may then be deceased having left such issue, to be equally divided between them share and share alike; such issue of any deceased child of my niece taking, however, only such part or share as his, her, or their deceased parent or parents would have had or taken had he, she, or they been living. And in the event of the decease of my said niece without any child or children or issue of any deceased child her surviving, then in trust to grant, convey, and assign the whole of the said principal sum, which is the one-eighth part of my said residuary estate, unto the Sisters of the Order of St. Francis, their successors and assigns, to be by them used and expended in the erection of the hospital as above stated." The remaining one-fourth of the residuary estate is given in trust for another sister, Mrs. Mary A. McMinn, for life, and then to her husband for life, and at their death the sum of \$2,000 is directed to be paid to each of three charities, "and the residue thereof unto the Sisters of the Order of St. Francis, to be by them used and expended in the erection and construction of the aforesaid hospital building." Testator's niece, Annie H. Beetem, died, leaving three minor children surviving her, whose guardian is the appellant. The learned auditing judge held that, under the above-quoted paragraph of the will, there was an intestacy as to the one-sixteenth part of the residue included, but not disposed of, therein, and accordingly awarded the same to the testator's heirs at law; but the court in banc, sustaining exceptions to the adjudication, awarded the fund to the Sisters of the Order of St. Francis, in order to carry out what was held to be the testator's intention as expressed in his will.

In this we think the learned court erred. In our opinion, the will is not susceptible of such construction. When no evidence has been introduced to explain ambiguous expressions, or when no ambiguity exists, the language employed by the testator is our only guide. In this case the testator, in terms which call for no construction, disposed of two-fourths of his residuary estate absolutely, after specific bequests. The remaining two-fourths are separate use trusts for and during the respective lives of testator's two sisters. After further contingent trusts, and at their termination, the remainders, with the exception of the one-sixteenth in question, are left in unequal proportions to several charities. That one-sixteenth part of the residue is undisposed of only in the event of a life tenant (Mrs. Beetem) dying with issue then living,—an event which has actually happened. Provision is made for the death of said life tenant without issue surviving her; in which event the one-sixteenth in question, with another equal portion, theretofore settled on the life tenant, passes to the Sis-

ters of the Order of St. Francis. Appellee's contention is that the failure to dispose of the one-sixteenth in question was an oversight on the part of the scrivener or of the testator,—that the intent of the latter not to die intestate is apparent from the will, and that the bequest of this and another equal portion to the Sisters of the Order of St. Francis, in the event of the life tenant dying without issue, shows an intent that the same Sisters should have the portion in question. It is further suggested that they are given the residue of the Mary A. McMinn trust, and that the clause disposing of the one-sixteenth held in trust for Andrew N. Sheaffer upon his death is identical with the clause disposing of the one-sixteenth held in trust for Annie H. Beetem upon her death, with the exception of the omitted portion. Speaking of the interest of the appellee under these two last-mentioned clauses, the learned court below says: "That its share in the gift to the niece was meant to be identical with the share in the gift to the nephew is as clear as anything in the compass of probabilities." This much may be conceded, and yet the appellee may not be entitled to the fund. It is not a question of probabilities, but of intention. In *Jarm. Wills*, *356, it is said: "Conjecture is not permitted to supply what the testator has failed to indicate, for, as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase that the heir is not to be disinherited unless by express words or necessary implication." In *re De Silver's Estate*, 142 Pa. St. 75, 21 Atl. 882, the learned court below used the following language, which on appeal was adopted by this court: "The rights conferred by the intestate laws are only taken away by a will which effectually disposes of the entire estate of the decedent; and, while a construction is not to be adopted, if it can be avoided, which will lead to an intestacy, interpretation is never to assume the proportion of reformation. The question is confined to the meaning of what the testator has said, and does not extend to the consideration of what he might have said, but did not. The maxim also is fundamental that the heir or statutory distributee will not be disinherited except by express words or necessary intendment." In this state, the rule that in the construction of a will of doubtful meaning every intendment is to be made in favor of the heir or next of kin is of universal application. *Clayton v. Clayton*, 3 Bln. 486; *Brendlinger v. Brendlinger*, 26 Pa. St. 132; *Hancock's Appeal*, 112 Pa. St. 532, 5 Atl. 56. As an illustration of the extent to which our courts have gone in the interest of the heir, it is only necessary to refer to *In re Gray's Estate*, 147 Pa. St. 67, 23 Atl. 205, where the cases are reviewed, and it is held that a lapsed legacy passes to the next of kin, as a case of partial intestacy, although

this rule, as stated by our Brother Mitchell, on page 74, 147 Pa. St., and at page 206, 23 Atl., "is a sacrifice of the well-settled presumption that a testator does not mean to die intestate as to any portion of his estate, and also of his plain actual intent—shown in the appointment of general residuary legatees—that the next of kin shall not participate in the distribution at all. The rule is in fact a concession to the set policy of the English law, nowhere more severely asserted than in chancery, to keep the devolution of property in the regular channels to the heir and next of kin whenever it can be done." In *Re Wain's Estate*, 156 Pa. St. 194, 27 Atl. 59, it was held that, where part of a residuary legacy is revoked by codicil without a substitutionary gift, the amount passes to the next of kin, and not to the other residuary legatees, notwithstanding the rule that the execution of a codicil is a republication of the will.

Appellee contends, however, that *Ferry's Appeal*, 102 Pa. St. 207, and *In re Stevens' Estate*, 164 Pa. St. 209, 30 Atl. 243, are direct authorities for a transposition of the language of the will by placing the last sentence of the paragraph under consideration before the sentence immediately preceding it, and in that way expressing the meaning for which the order contends. But in both the cases cited it is plain that the testator, as stated in the opinion of the court in the former case, "neglected * * * to give the natural and logical order of his thought." In 2 *Jarm. Wills*, *499, the learned author intimates that the transposition of words or sentences should be limited to cases where a clause or expression is otherwise senseless or contradictory. As an illustration of this, see *Sauer v. Mollinger*, 138 Pa. St. 338, 22 Atl. 80. It is practically conceded by the learned counsel for appellee that such construction is permissible only in case of apparent ambiguity due to the language of the will itself. He accordingly argues that "the words 'hospital as above stated,' in the clause as it stands, without supplying the omission, clearly relate to the omitted portion [consisting of over fifty words], and show that it was omitted." Unfortunately for this contention, the quoted words apply with equal force to the bequest of \$5,000 in the earlier part of the will. If the language here used had referred to the hospital "as above stated in this paragraph," or by other words indicated an omission, and the character thereof, there would be much force in the suggestion; but, as there is nothing here to take the case beyond the limits of mere conjecture, however much we may be satisfied that there was an omission of some sort, we have no means of supplying it. Without further consideration of the subject, we think the learned auditing judge was right in holding that there was intestacy as to the one-sixteenth in question, and, as to so much of the decree as relates to that amount, the same is reversed, with costs to be paid by the appellee, and the record remitted for correction in accordance with this opinion.

(185 Pa. St. 376)

COMMONWEALTH v. HUFNAL.

(Supreme Court of Pennsylvania. April 11, 1898.)

ADULTERATION—SKIMMED MILK.

Act June 26, 1895 (P. L. 317). "An act to provide against the adulteration of food," though providing: "An article shall be deemed to be adulterated: * * * (a) In the case of food: * * * (3) if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it;"—does not authorize conviction of one who, under the description of "skimmed milk," sells milk from which the cream has been taken by separator process, known as the "centrifugal method," though thereby more cream is extracted than by the old-fashioned skimming process.

Appeal from court of quarter sessions, Philadelphia county.

Elizabeth Hufnal was convicted of selling adulterated food, and appeals. Reversed.

Wm. Righter Fisher, for appellant. Samuel A. Boyle, Asst. Dist. Atty., and George S. Graham, Dist. Atty., for the Commonwealth.

MITCHELL, J. The appellant was indicted under the act of June 26, 1895 (P. L. 317), entitled "An act to provide against the adulteration of food," etc.; and the offense charged was selling, as "skimmed milk," milk from which the cream had been taken by the centrifugal, or separator, process. The word "adulteration," in its ordinary and proper sense, means the corruption, debasing, or making impure by the admixture of a foreign or inferior substance or ingredient. Cent. Dict.; Oxford New English Dict.; Webster Int. Dict. (Ed. 1893). It was therefore incumbent on the commonwealth to prove that the word was used in the statute in a sense different from its ordinary meaning, and sufficient to cover the act charged as a violation. This the commonwealth undertook to do by reference to the third subdivision of section 3, as follows: "Sec. 3. An article shall be deemed to be adulterated within the meaning of this act: (a) In the case of food: * * * (3) If any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it." The facts were not really in dispute, and showed that there were in common use three methods of separating the cream from the whole milk: First, the immemorial skimming, by setting the milk in shallow vessels, and allowing the cream to rise, and then removing it by a sliding motion of a paddle or dipper; secondly, the Cooley process, of setting the milk in deep vessels, subjecting it to rapid cooling, and then drawing off the heavier, watery ingredients from the bottom; and, thirdly, the centrifugal method, by which the milk is subjected to a rotary motion, with very high velocity, which separates the watery ingredients from the cream by reason of their greater specific gravity. All three of these methods are alike in being mechanical only, and dependent on the difference in gravity between the cream and the other constituents. It was admitted that the milk sold by

the appellant was produced by the third process; that it was sold under the name of "skimmed milk," plainly so marked; and it was not charged that any other substance was mixed with it. But the commonwealth claimed that by the centrifugal process a much larger proportion of the cream or butter fat (amounting practically to the whole of that component) was removed from the milk than by the ancient process, which alone could rightfully be called skimming, and that, therefore, the milk was adulterated, in the statutory sense, by having a "valuable or necessary constituent or ingredient wholly or in part abstracted from it." The learned judge of the quarter sessions and the majority of the superior court took this view, but we are of opinion that it was erroneous. The act in question deals with the affairs of everyday life, and is highly penal in its provisions. There is therefore double reason why its language should be construed according to its popular, practical, everyday use among the people. It may be conceded that the word "skim" or "skimming" has not materially changed from its long-established meaning, and that it refers to a process substantially the same, whether performed with a Southern plantation gourd, a big New Jersey clam shell, or a modern patent tin skimmer. When, however, we come to name the product, the process becomes a mere incident, and the substantial subject is the difference in quality between the article in its original and in its subsequent state. The cream does not change its name, although under the new process it is more exclusively composed of the butter fat than under the old. So it is with the residuum of skimmed milk. Milk is only one of the thousand things that may be skimmed, though it is undoubtedly one of the first and most universal to which the name and the process were applied; and popular use, the "*jus et norma loquendi*" of Horace, has preserved the name of the process, even though the implements employed have varied. So the practical common sense of the people in dealing with the product has looked to substance, rather than mere process, and has called milk from which the cream has been taken by its ancient name of "skimmed milk," without regard to whether the cream was skimmed in the primitive, or abstracted in a more modern, way. The dictionaries support this definition of the word: "The milk from which cream is separated is skimmed milk." Cent. Dict. sub verb. "Milk." "Skim milk, milk from which the cream has been taken." Webster Int. Dict. (Ed. 1893). "Skim milk, milk from which the cream has been removed." Standard Dict. We believe this is the popular understanding and use of the term "skimmed milk," and we find a notable instance of it in the testimony even of the witnesses for the commonwealth in this case. The chief inspector of milk, strenuous as he was to show that the milk sold by appellant was not skimmed, but adul-

terated, has continual recourse to the phrase 'separator skimmed'; and the chemist, in testifying to the results of analysis, constantly uses the terms "hand-skimmed" and "so-called separator skimmed." Nor are we without legislative usage to the same effect. The act of June 10, 1881 (P. L. p. 116), "To protect the manufacturers of butter and cheese," makes it a penal offense to sell to any such manufacturer, with intent to defraud, any milk diluted with water, or adulterated, uncleanly or impure milk, or "any milk from which the cream has been taken, or milk commonly known as skimmed milk." We are constrained to hold, therefore, that skimmed milk is not adulterated milk, even within the very broad and peculiar meaning of the word "adulterated" in the act of 1895. Undoubtedly, if sold as "whole milk" or even as "milk," without any descriptive epithet, it would be within the statute, as milk from which a valuable constituent had been abstracted. But, even though it has lost its most valuable ingredient, skimmed milk is still a useful and important article of consumption, and its sale has never been prohibited. When sold candidly under its own name, there is nothing legally or morally wrong in the transaction. And "skimmed milk" we understand to be the generic term by which is meant milk from which its natural cream has been taken in part or in whole. The process is a mere incident, and the result in the product is a difference only in the proportion of the cream or fatty constituents left in it,—a difference of quality only, and not greater, as appears, than that in milk skimmed once or skimmed twice in the old-fashioned way, and after 12 hours' or after 24 hours' setting. It is conceded that the centrifugal method takes out a larger proportion of the cream than the other processes, and it is suggested that it should properly be called "separator milk," as in fact it was by some of the witnesses in this case, though the most intelligent or best educated of them used the qualifying phrase "so-called" to indicate that it was not a commonly recognized term. There may not improbably come a time when the variations in the quality of skimmed milk shall receive popular recognition and differentiation by name, but whether the product of the old method or the new shall retain the old name is something that neither jurist nor philologist can foretell. This is an age of mechanical and industrial revolution, and all of us who have passed middle life have seen an entire change in the methods and processes of production in nearly everything that we use in our daily life. Nearly everything that in our youth was made singly by the individual mechanic is made now in thousands or millions by machinery in the factory. In some cases the newcomer has had to take a distinctive title, while in others he has elbowed out his predecessor and appropriated his name. Our fathers' carpenters made the doors and window sashes for each house separately, and

when the new order of wholesale making was introduced it had to call itself "mill work." The latter has certainly come out victor in popular use. Whether it has triumphed also in the language, I do not know; but I suspect that the citizen who wants a house furnished with doors and sashes made in the old way will have to specify that he wants them "hand made," and insist pretty strongly before he gets them. His grandfather would have had no such necessity of defining his wants. There may come a time when popular use will differentiate skimmed milk into "separator" and "hand skimmed," or similar terms of classification, but there is no such use now, and none can be adopted by anticipation for the construction of a penal statute. The act of July 7, 1885 (P. L. p. 260), has no applicability to this case, and the references to it by the expert witnesses were irrelevant and erroneous.

Most of the assignments of error must be overruled, and it is not necessary to discuss them in detail. But the fifteenth, which covers the defendant's point that the third clause of the third section of the act does not apply to separator skimmed milk, when sold as skimmed milk, must be sustained. The point should have been affirmed. On the undisputed facts of the case, the jury should have received a binding direction to find a verdict of not guilty. Judgment reversed, and appellant is discharged without day.

(155 Pa. St. 406)

TURTON v. POWELTON ELECTRIC CO. et al.
(Supreme Court of Pennsylvania. April 11, 1898.)

JOINT TORT FEASORS—NEGLIGENCE—INSTRUCTIONS.

1. As there is no right of contribution between joint tort feasors, one of two sued as such cannot complain that the action is dismissed as to the other.

2. Considered in connection with its context, the part of the instruction in brackets does not invade the province of the jury, where the court, after stating that plaintiff's contention was that defendant's wire became worn, and the electricity ran down a guy wire, causing the accident, and that it was for the jury to say whether that was the cause, continued: "If you should think" it was, the question would be, "has this electric light company been guilty of negligence which caused the accident? Negligence * * * is the absence of proper care under the circumstances of the case. Every man understands that care which is sufficient for a barrel of potatoes is negligence with a barrel of gunpowder. [This wire is admittedly a dangerous wire. It is insulated for that, among other reasons. And the question is whether you consider that putting a wire of that kind on a pole already covered with other wires, and going through the city, * * * is not a very dangerous thing, of itself.] The question for you to decide is, do you think that this company took such care and supervision of this wire, under the circumstances, as, considering its dangerous nature, they should have? If you think they did everything they ought to do to protect the public and everybody else, they would not be guilty of negligence. If you think they did not, they would be."

Appeal from court of common pleas, Philadelphia county.

Action by Emily E. Turton against the Powelton Electric Company and another. Judgment for plaintiff against said company, and it appeals. Affirmed.

John K. Andre and Henry F. Walton, for appellant. Alex. Simpson, Jr., for appellee.

STERRETT, C. J. This action, against the Powelton Electric Company, appellant, and the Postal Telegraph Cable Company, as joint tortfeasors, was brought to recover damages for personal injuries to the plaintiff alleged to have been caused by an electric current negligently brought in contact with her person by one or both of the defendant companies. When the testimony was all introduced, the learned trial judge directed a verdict in favor of the Postal Telegraph Cable Company, and submitted to the jury the question of appellant company's liability under all the evidence. His action in thus directing a verdict in favor of one of the defendants has been assigned for error; but inasmuch as joint tortfeasors are jointly and severally liable for injuries caused by their torts, and, as between themselves, no right of contribution exists, the appellant company has no standing to complain of the action of the court in directing a verdict in favor of its co-defendant. Independently of that, however, the action complained of was clearly right, and the fourth specification of error is dismissed.

The refusal of the court to give binding instructions in favor of appellant company is also assigned as error. It is wholly unnecessary to review the testimony in detail, for the purpose of showing how unfounded this complaint is, and what manifest error it would have been to have granted the request. In view of the undisputed evidence, it could not be seriously questioned that plaintiff's injuries resulted from an electric shock received from a guy wire running from a pole in the street across plaintiff's yard to an attachment in the wall of a neighboring property. While it was shown that numerous telegraph and other wires were strung upon the same pole, the evidence tended strongly to prove that the current which caused plaintiff's injury came from the electric light company's wire. It was testified that the voltage or pressure from the other wires was not sufficient to have caused such an injury. It was also clearly shown that the insulation of appellant company's wire, in close proximity to the guy wire, was worn off by contact with the latter, and that flames and sparks had been seen at this point for months before the accident. This and much other evidence of a similar character not only required submission of the case to the jury, but it is also a complete answer to appellant company's contention that it had no notice of the defective and

dangerous condition of its wire. It was clearly shown that the wire had been in such a defective condition so long prior to the accident that it was impossible to escape the conclusion that the company knew, or at least ought to have known, the fact.

The case was fairly submitted to the jury, with well-guarded instructions, not only as to the primary liability for the injury, but also as to the amount of damages. As to the former, the learned trial judge charged: "It is contended here by the plaintiff that this wire became worn, and the electricity ran down the other wire, and produced the effect described. You have heard what has been said by the other side against that theory, and it is for you to say, after considering the testimony, whether you think that has been established,—whether that was the cause of this accident. If you should think that was the cause of the accident, then the second question would be, has this electric light company been guilty of negligence which caused the accident? Negligence, as its definition was given to you by the counsel for plaintiff, is the absence of proper care under the circumstances of the case. Every man understands that care which is sufficient for a barrel of potatoes is negligence with a barrel of gunpowder. [This wire is admittedly a dangerous wire. It is insulated for that, among other reasons. And the question is whether you consider that putting a wire of that kind on a pole already covered with other wires, and going through the city of Philadelphia, is not a very dangerous thing, of itself.] The question for you to decide is, do you think that this company took such care and supervision of this wire, under the circumstances, as, considering its dangerous nature, they should have done? If you think they did everything they ought to do to protect the public and everybody else, they would not be guilty of negligence. If you think they did not, they would be." That part of the above quotation inclosed in brackets constitutes the fifth specification of error. When considered in connection with its context, this excerpt is obviously free from error. As explained by the court, the question of defendant company's negligence depended upon the proper degree of care under the circumstances. As the degree of care increased with the dangerousness of the material and appliances with which the defendant was dealing, it was a most pertinent question to consider the character of the circumstances. In the sentence immediately following the one assigned for error the learned judge carefully submitted the question to the jury for their consideration. The company appellant has no just reason to complain that the question was thus submitted. Its rights were carefully guarded, and the controlling questions of fact were fairly submitted to the jury, with instructions which appear to be adequate and free from substantial error.

On the question of contributory negligence, it is sufficient to say there was no evidence to bring home to the plaintiff a knowledge of the dangerous character of the guy wire. There was therefore nothing to justify submission of that question to the jury, and defendant's request was rightly refused.

This disposes of all the questions that require consideration. The verdict was fully warranted by the evidence, and we find nothing in the record that would justify us in reversing the judgment entered thereon. Judgment affirmed.

(185 Pa. St. 385)

COMMONWEALTH v. HILL

(Supreme Court of Pennsylvania. April 11, 1898.)

HOMICIDE—APPEAL—SUPERSEDEAS—MANDATE OF GOVERNOR.

1. The mandate of the governor, authorizing and requiring the sheriff "to cause the [death] sentence of the said court to be executed upon the said" H. on a day named, between certain hours, in the manner directed by law, is an "execution issued," within Act May 19, 1897 (P. L. 67), which furnishes a complete and exclusive system on all appeals (section 22), and provides that no appeal shall be allowed unless taken within six months from entry of sentence, order, judgment, or decree appealed from, and that an appeal shall not "supersede an execution issued, or distribution ordered, unless taken within three weeks from such entry."

2. The date of execution being no part of the sentence, the mandate of the governor, requiring the sheriff to cause the sentence to be executed on a day named, is in full force, and should be executed without undue delay, though the day named has passed without execution; there having been no actual escape, but the sheriff having delayed action under advice on doubt as to the effect of an appeal taken more than three weeks after sentence.

Appeal from court of oyer and terminer, Allegheny county.

Phillip Hill was convicted of murder, and appeals. Affirmed.

George H. Kane, W. H. Stanton, and George W. McLain, for appellant. John C. Haymaker, Dist. Atty., for the Commonwealth.

MITCHELL, J. The errors assigned are of the most formal and perfunctory kind, and are sufficiently answered in the opinion of the learned judge below refusing a new trial. There is nothing in the case to justify bringing it here, and, indeed, there is considerable ground for belief that it was never intended in good faith to reach a hearing in this court. It is a flagrant example of the perverted standard of professional ethics which assumes that counsel should help his client to escape the proper consequences of his act by any move or device, short, perhaps, of actual fraud or imposition. This is a very serious error, and apparently becoming more widespread, especially in cases involving life. The boundaries of professional privilege and professional obligation are clearly defined, and in no way doubtful. Counsel represents

the prisoner to defend his rights. In so doing he is bound to exercise competent learning, and to be faithful, vigilant, resolute. But he is at the same time an officer of the court, part of the system which the law provides for the preservation of individual rights in the administration of justice, and bound by his official oath to fidelity as well to the court as to the client. It was well said by the chief justice in *Com. v. Jongrass*, 181 Pa. St. 172, 37 Atl. 207: "There is no code of professional ethics which is peculiar to the criminal courts. There are no methods of practice to be tolerated there that are not equally entitled to recognition in the civil courts." The duty of the counsel is to see that his client is tried with proper observance of his legal rights, and not convicted except in strict accordance with law. His duty to his client requires him to do this much. His duty to the court forbids him to do more. An independent and fearless bar is a necessary part of the heritage of a people free by the standards of Anglo-Saxon freedom, and courts must allow a large latitude to the individual judgment of counsel in determining his action; but it must never be lost sight of that there is a corresponding obligation to the court, which is violated by excessive zeal or perverted ingenuity that seeks to delay or evade the due course of legal justice.

The serious question in this case, and the only one, is whether the appeal to this court, without special allocatur, was a supersedeas of execution. The appellant was sentenced on July 31, 1897, and the governor fixed December 8th as the day of execution. On the morning of that day the counsel of appellant entered the appeal in the office of the prothonotary of this court at Pittsburgh, and the sheriff of Allegheny county, being advised that the question of supersedeas was at least open to doubt, deemed it his duty to postpone the execution. The practical importance of the matter is so great that we think proper to consider it, although not specifically raised by any motion of record.

The doubt seems to have arisen under the act of May 19, 1897 (P. L. 67), regulating the practice, etc., on appeals to the supreme and superior courts. But an examination of the provisions of that act in connection with the prior acts repealed by it shows that the doubt is not well founded. Without going further back in the history of the law than the statutes in force in 1897, we find that by the act to consolidate, revise, and amend the laws relating to penal proceedings and pleadings, passed March 31, 1860 (section 33, P. L. 439), all persons indicted in the quarter sessions or any county court of oyer and terminer might remove the indictment, and all proceedings thereon, into the supreme court, by certiorari or writ of error, but only upon special allowance by the supreme court, or a justice thereof. By section 57 of the same act (P. L. 444), the defendant in an indictment for murder or voluntary manslaughter may have a bill of

exceptions to the decision of the trial court on any point of evidence or law, and a writ of error thereon, after conviction and sentence; but by section 59 no such writ could issue except by special allowance made upon application within 30 days after sentence. By the act of February 15, 1870 (P. L. 15), in cases of murder and voluntary manslaughter a writ of error was made of right, and might be sued out on the oath of the defendant, as in civil cases; and as to all cases of felonious homicide a review by the supreme court is made a constitutional right by section 24 of article 5 of the constitution of 1874. At that time the statutory limitation for writs of error was two years, and the inconvenience and delay of justice by a review at the mere will of the prisoner for such a period was too great to be long endured. By the act of March 24, 1877 (P. L. 40), "to prevent delay in the review of capital offenses in the supreme court," it was enacted that no writ should issue in such cases after 20 days from sentence, unless specially allowed by the supreme court, or a judge thereof. It thus appears that by the state of the law in 1897 an appeal in any case of felonious homicide was of right upon the mere oath of the prisoner that it was not intended for delay, but in capital cases, by the act of 1877, it could not issue more than 20 days after sentence, without special allowance. The act of May 19, 1897, expressly repealed the act of March 24, 1877; and hence, apparently, arose the questions whether an allocatur is necessary in any case, and whether an appeal does not operate as a supersedeas of execution, without regard to the time when it is taken. These questions, however, overlook the purpose and language of the act of 1897. The act of 1877, and many other acts, including most of those heretofore cited, were expressly repealed, not necessarily to change the law as therein enacted, but in order, in the words of the last clause of section 22, that the act of 1897 "shall furnish a complete and exclusive system in itself on all appeals to such appellate courts." Turning then to the act of 1897, as the exclusive guide, we find that all appeals, of every kind, in civil and criminal cases, are classed together, and put under the same limitations of time. The language of section 1 is, "In every case in which an appeal is taken to the supreme or superior court," etc.; and, by section 4, "No appeal shall be allowed in any case unless taken within six calendar months from the entry of the sentence, order, judgment or decree appealed from nor shall an appeal supersede an execution issued, or distribution ordered unless taken * * * within three weeks from such entry." This limitation includes criminal as well as civil cases, not only by the generality of the language, and the use of the appropriate word, "sentence," but also by the clear intent, as shown in the latter part of the same section, that appeals taken after the time specified shall be quashed on motion, "provided that in civil cases in

which the right of appeal to the superior court has now expired"; i. e. at the date of the act an appeal may be taken within three months from the time the act goes into effect. It is therefore clear that although appeals in criminal cases, including capital cases, are allowed as of right upon the oath of the prisoner, as in civil cases, that they are not for the purpose of delay, yet they do not supersede executions issued, unless taken out within three weeks from sentence.

As already noted, the governor had issued his mandate to the sheriff of Allegheny county, appointing December 8, 1897, as the day of execution of the appellant. The origin of the issue of a mandate by the governor in capital cases is not entirely clear. It was called in question by an assignment of error in *Cathcart v. Com.*, 37 Pa. St. 108; but this court merely said that was "a novel exception to be taken at this late period in the history of the commonwealth, as the power had always been exercised by the governor, and referred to the act of May 31, 1718, that on conviction judgment should be given "according to the manner, form, and direction of the laws of that part of Great Britain called England, in like cases." But it was also said that this provision was hardly necessary, for without it our courts, being common-law courts, would have had that power, unless restrained by statute. And it is clear that the practice was established before the act of 1718. It is impliedly recognized in the Laws of 1664, under the charter of New York, which covered the territory on the South or Delaware river now included in Pennsylvania. "No man condemned to die shall be put to death within four days next after his condemnation unless the governor see special cause to the contrary." *Duke of Yorke's Book of Laws*, p. 24. The earliest instance that appears in our records is found in the minutes of the provincial council of May 19, 1688, at which a petition was read from John Richardson in behalf of his sister, Judith Roe, who had sentence of death passed upon her in a provincial court held in Kent county, beseeching that the governor would be pleased to grant a reprieve; and it was ordered that a warrant should be sent to the sheriff, to suspend her execution until further order. 1 Colonial Records (2d Ed.) 227. And at a meeting on March 4, 1689, "the governor acquainted ye council that he had received instructions from ye chief governor wherein he was pleased to direct that ye murderous woman's sentence should proceed, ye case being notorious and barbarous"; and thereupon the governor and council, having examined the record, ordered that the previous order of suspension be of no further force, and that the sheriff do cause execution to be done according to the tenor of the judgment, "and that ye day for doing thereof be on ye fifteenth day of this first month, commonly called March." *Id.* 209, 252. At a meeting

of the council held November 5, 1720, "the attorney general informed the governor that two criminals, which at the last court of oyer and terminer held in Philadelphia were convicted, viz. a man (by name Edw. Hunt), for high treason, having counterfeited the current coin, and a woman (Anne Hudson), for burglary, lay now in Philadelphia jail under sentence of death, but that no execution had been yet awarded, that he knew of. One of the judges present observed that, the governor being abroad when sentence was pronounced, the judges had delayed awarding the execution to give the criminals a reasonable time for making their application to the governor, lest they had anything to offer which could entitle them to any share of his mercy, but the governor declared that no such thing had yet been offered to him, and that it was his steady resolution not to interpose his authority or suspend the execution of any legal sentence, except when either a certificate from the judges, or other weighty recommendation from this board, should offer such reasons to him as might convince his conscience that such an interposition was prudent, just, or necessary." The matter not being concluded, the council adjourned until November 9th, when "the governor acquainted the board that the day before he had issued his warrants for executing the sentence of death against the criminals mentioned at the last council, and that, the 19th instant being the day appointed for the said execution, there was sufficient opportunity given for an application from the judges, if there was anything of that kind to be offered." 3 Colonial Records (Ed. 1852) 109. The practice may have grown out of deference to the power to relieve and pardon inherent in the king's prerogative, and expressly granted in the charter to Penn, as to all crimes and offenses, "treason and wilful and malicious murder only excepted, and in those cases to grant reprieves until our pleasure may be known therein." Duke of Yorke's Book of Laws, 83. The jealous care with which even the liberal Penn maintained his proprietary rights is well known, and in the present regard it was no doubt aided by the tenderness in the taking of life, which even at that early day had begun to show itself among the Quakers,—a tenderness which only a little later made Pennsylvania the pioneer of the civilized world in the amelioration of the bloody codes of criminal law. The minutes of the council of 1720, already cited, show that some members were then opposed to the infliction of the death penalty, even for so serious a crime as counterfeiting, although considered a branch of treason. It is not improbable, also, that the practice may have been aided by the absence of courts of supreme authority as the direct representatives of the king. The warrant for execution, at common law, was issued by the court that pronounced judgment. The superior

courts at Westminster and the commissions of oyer and terminer issued warrants of death, which, *proprio vigore*, were sufficient authority. 2 Hale, P. C. 409. And the court of king's bench, being in theory of law held before the king himself, had further power to order the execution of judgments upon attainder in parliament or in other courts. Id. 4; 2 Hawk. P. C. c. 50, § 17; Earl of Ferrers' Case, Foster, Crown Law, 140. But it appears by the report of Doyle's Case, 1 Leach, 67, that, after a sentence of death by the recorder's court of the city of London, the king's sign manual was obtained before warrant of execution. Blackstone (4 Bl. Comm. 404) speaks of the "more solemn and becoming exactness" used in London, but does not discuss the reason of the difference in practice. Many of the first settlers of Philadelphia were from London, and probably tenacious of their privileges as citizens of that great city, which Lord Campbell says had long been "a sort of free republic in a despotic kingdom." 1 Lives of the Lord Chancellors, p. 8. The influence of the customs of London on our early institutions is well known (see Wimmer's Appeal, 1 Whart. 96), and included, among other things, the establishment of the recorder as a judicial officer next in authority to the mayor, in the charter of 1691. Allinson & P. Hist. Phila. pp. xlvii., 13, 14; *Respublica v. Dallas*, 3 Yeates, 300; Id., 4 Dall. 229; *Rhoads v. Com.*, 15 Pa. St. 272. He was the only judge of the first courts of oyer and terminer required to be learned in the law, and it is natural to suppose that, before awarding execution involving life, he would follow the precedent of his London prototype, and obtain the sign manual of the proprietary, or his *locum tenens*, the governor, as the representative of the crown. Whatever the origin of the procedure, it was firmly established in the earliest days of the province, and passed into the practice of the commonwealth. I am informed, by the courtesy of the governor and the secretary of the commonwealth, that the executive minutes show the issue of a warrant by Gov. Mifflin, January 22, 1791, to the sheriff of Delaware county, for the execution on the 29th of the same month of one William Gelaspie for murder,—being the first warrant issued under the constitution of 1790; and the records of all similar warrants have been regularly preserved from that date. The governor's warrant is referred to in the acts of April 10, 1834 (P. L. 234), and March 31, 1860 (P. L. 450, § 76). And by the act of the same date (March 31, 1860) to consolidate, revise, and amend the penal laws (P. L. 402, § 75), the record of all convictions of murder of the first degree is required to be sent to the governor within 10 days after sentence,—plainly for the information of the governor, in order to issue his mandate for executions. The same practice prevails in some other states, though usually regulated by statute.

See *Costley v. Com.*, 118 Mass. 35; *Lowenberg v. People*, 27 N. Y. 336; *In re Dyer*, 56 Kan. 489, 43 Pac. 783; *Holden v. Minnesota*, 137 U. S. 483, 11 Sup. Ct. 143; *State v. Oscar*, 13 La. Ann. 297.

The mandate of the governor authorizes and requires the sheriff "to cause the sentence of the said court to be executed upon the said" A. B. on a day named, between specified hours, and in the manner directed by the act of assembly, etc. By its express terms, therefore, as well as from its purpose and effect, it is an "execution issued," within the act of 1897, and was not superseded by an appeal taken more than three weeks after sentence. The sheriff is in default for failure to obey the warrant on the day named, and is technically liable as for an escape. The question therefore arises as to the further steps in the case. At common law the time of execution was no part of the judgment, and was not usually fixed in the sentence, though the court had power to do so if it thought proper. *Rex v. Wyatt*, Russ. & R. 229. The opinion of the 12 judges on the subject was certified to the lord chancellor in *Doyle's Case*, 1 Leach, 67: "The sheriff upon receipt of his warrant is to do execution within a convenient time, which in the country is also left at large." 4 Bl. Comm. 404. And in the case of *Rex v. Rogers* (1809) 3 Burrows, "the court were of opinion, not only that it was not incumbent on them to name the day, but even that it was more proper for them not to do it. It is not usual at the assizes. The sheriff will do as he thinks proper." See, also, *Cathcart v. Com.*, 37 Pa. St. 108; *Costley v. Com.*, 118 Mass. 1; *Schwab v. Berggren*, 143 U. S. 442, 12 Sup. Ct. 525. In 1752, however, the act of 25 Geo. II. c. 37, directed the execution to be on the next day but one after sentence, unless that should be Sunday, and in such case on the Monday following. 7 British Stat. at Large, 440. The time of execution being no part of the judgment, but a mere executive or ministerial act in pursuance of it, the judgment is not affected by the prisoner's escape, or other occurrence which merely prevents or delays execution. The judgment is not satisfied until the sentence be fully carried out. "If the party be hanged, and cut down and revive again, yet he must be hanged again; for the judgment is, to be hanged by the neck till he be dead." 2 Hale, P. C. 412; 2 Hawk. P. C. c. 51, § 7. So if for any other reason, not affecting the validity of the judgment, the appointed day be allowed to pass without execution, the sheriff must proceed. In *State v. Klitchens*, 2 Hill (S. C.) 612, the sheriff died after the date of the sentence, and when the day of execution arrived there was no sheriff to carry it out. The prisoner thereupon moved for a discharge, but on appeal the supreme court, by O'Neill, J., reviewed the authorities, and held that "the judgment can only be satisfied by an actual execution, and, if the execution attempted is prevented by accident from being

effectual, still the judgment of the law remains, and must be executed." This was followed in *Ex parte Nixon*, 2 S. C. 4, where it was said that "the time was nothing more than a direction to the officer that he should enforce it [the judgment] on a particular day. If he failed in the duty on the day, he might be amenable to the law, but the force of the judgment would still remain." Where there is an actual escape, and a recapture, the party so taken has a right to a day in court to deny his identity as the person sentenced. In *Middleton's Case* (1617) Poph. 131, the prisoner, after sentence, escaped, and, being retaken, was brought to the bar; and, on his confession that he was the same party who was condemned, the court awarded execution. So, in *Rex v. Okey* (1662) 1 Lev. 61, the prisoners (three of the regicides) pleaded that they were not the same persons attainted by the act of parliament; and, issue being taken on this, a jury was forthwith summoned, and the court held that the only question was the identity ("Quia ils ne sont ore d'estre try pur le treason, mes del identity des persons"); and, the jury finding that they were the same persons, execution was awarded. Where, as in some states, by statute or custom the date of the execution is fixed by the court, and is an integral part of the sentence, and the day is passed, the cases seem to require that the court should fix a new day. *Ex parte Howard*, 17 N. H. 545; *Bland v. State*, 2 Cart. 608; *Nicholas v. Com.*, 91 Va. 813, 22 S. E. 507; *State v. Cardwell*, 95 N. C. 643; *In re Cross*, 146 U. S. 271, 13 Sup. Ct. 109; and *Aaron v. State*, 40 Ala. 307. The last two cases, however, appear to be ruled on express statutory directions for the contingency raised in them. The foregoing cases rest largely on the authority of *Earl of Ferrers' Case*, *Fost. Cr. Law*, 140. Lawrence, Earl Ferrers, was tried and convicted of murder by the house of peers, sitting as a high court of parliament, and the question arose whether he should be sentenced under the special provisions of the act of 25 Geo. II. c. 37, heretofore referred to, which, among other things, fixed the time of execution, and the disposal of the body afterwards. The house resolved to take the opinion of the 12 judges, and, foreseeing that the second day from sentence fixed by the statute for execution might pass before settlement of the matter, included in the questions to the judges whether, if the appointed day should lapse before execution done, a new time might be appointed, and by whom. The judges delivered their opinion that a new time might be appointed either by the high court of parliament, or by the court of king's bench; the parliament not then sitting, and the record of the attainder being properly removed into that court. The difficulty on this point in *Ferrers' Case* arose from the fixing of the time of execution by the statute. The materiality of this fact does not seem to have been always observed in the foregoing American cases, though I make this observation

with becoming hesitation, conceding the difficulty of weighing the influence of statutes and local customs in the decisions of other states. Where, as in the present case, the escape is merely constructive, and the time is no part of the sentence, there is no further fact or issue to try, or supplementary change to be made in the judgment. Neither the precedents, nor the principles on which they were decided, seem to require the mere formality of the fixing of a second date of execution. The governor's mandate is in full force, unaffected by anything that has occurred since (the appeal not being a supersedeas); and the failure of the sheriff to obey it on the day is no reason for continued disobedience in the future, or for requiring either the court or the governor to go through a formal repetition of their action. Indeed, there are serious objections to holding that it is within the power of a hesitating or contumacious sheriff to so obstruct the administration of justice. Of course, what is here said is not meant to reflect on the sheriff in the present case, as he acted under the advice of counsel, upon a doubt raised by a new statute; but it is his plain duty now to proceed upon the mandate already in his hands, and any undue delay on his part will subject him to the very serious consequences of an escape. Judgment affirmed, and record remitted for purpose of execution.

LE PARD v. RUSSELL et al.

(Court of Chancery of New Jersey. April 13, 1898.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—PRENUPTIAL PROMISE TO CONVEY—EVIDENCE.

An alleged promise to convey real estate in consideration of marriage was incorporated in an ordinary love letter, the precise language used depending on the accuracy of the memory of the husband and wife, she having destroyed the letter after the marriage. The promise made was years after they were engaged to be married, and they did not regard it at the time as a consideration for the marriage. No conveyance was made to the wife until the husband was pressed with the debt which constituted the basis of the judgment against him, and then for only a nominal money consideration. *Held*, that from the vague nature of the contract, and the lack of proof that it formed any consideration for the marriage, even if it was taken out of the statute of frauds, the conveyance should be set aside, and the land subjected to complainant's judgment.

Suit by Edward A. Le Pard against M. Eloise Russell and Andrew A. Russell. Heard on pleadings and proof. Decree for complainant.

David Harvey, Jr., for complainant. S. Howell Jones, for defendants.

PITNEY, V. C. The complainant is a judgment creditor of the defendant Andrew A. Russell, and by his bill seeks a decree declaring void, as against his judgment, a conveyance made by Russell to his wife, the

defendant M. Eloise Russell, through a third party, after he incurred the debt upon which the judgment is based, on the ground that such conveyance was without consideration, and therefore fraudulent and void as against his judgment. The defense is that the conveyance was made in consideration of marriage, and in pursuance of a written promise made before marriage. The defendant and his wife live in or near the city of Newark, and the real estate in question consists of two adjoining vacant building lots situate at Belleville, near Newark. The parties became acquainted with each other in 1888, and engaged to be married in 1889. The marriage took place in October, 1894. The husband was a salesman at a moderate salary in a New York clothing store. The two lots were purchased by him, the first in November, 1891, and the second in February, 1893. The evidence of both the husband and wife is that after the engagement, and before the purchase of the lots, they were driving out together, and the husband pointed out the lots to his wife, and told her that he thought of buying them, and, if he did, he would give them to her after they were married. This understanding that he was to give her the lots after they were married was mentioned between them several times, and in the presence of the father of the wife, Mr. Littlefield. If the case stood there, and the evidence on this subject were believed, a serious question might arise, in the absence of the statute of frauds, whether the promise to convey was a consideration for the marriage,—whether the one in any wise depended upon the other. The difficulty arising out of the statute of frauds, as construed and applied in the case of *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810, was attempted to be met by proof tending to show that the promise was put in writing in a letter—an ordinary love letter—written by the husband to the wife prior to the marriage. The proof by the wife on that subject is as follows: She said that she was staying away from home, on a visit up the Hudson river, and received a letter from her future husband, telling her that he had purchased the lots; that she had destroyed the letter, with numerous others, after she was married; and, after stating that she would not like to tell all that was in the letter, swore that he said, with regard to the lots, "that some day after we were married they should be mine, and he hoped it would be soon, or something to that effect; I can't remember just exactly now what it was." The husband swears that he purchased the lots while she was at Haverstraw on the Hudson, and wrote her that he had made the purchase, and informed her that she was to have the lots after they were married, and the sooner the better, or words to that effect. In this connection it is to be observed that it does not appear how long the wife stayed on that occasion on her visit up the Hudson. It

does appear that a year and three months elapsed between the dates of the several purchases of the lots. Admitting that the evidence of the two witnesses as to the contents of the letter is reliable, the promise is still subject to the criticism that it does not appear that it was considered by either of them as a consideration for the marriage, but simply as an ordinary promise by a man to his betrothed of what he hoped and expected to do for her after they were married. In 1892 the defendant Russell, the husband, bought two lots of land in Monmouth county, and gave back a purchase-money bond and mortgage for part of the consideration money, and that bond and mortgage were assigned by the mortgagee to the complainant, and, the interest falling in arrear, the complainant urged the husband to pay it. On the 23d of May, 1896,—four days before the conveyance in question,—Mr. Russell wrote him a postal card, promising to pay the interest on Tuesday morning next, and on the 26th of May again wrote him a letter, saying that he thought he could raise the money by the latter part of the week, or Monday, and promised to be over Monday evening next to settle it. On the next day—May 27th—the conveyance in question was made to his wife for a nominal consideration. After he made the conveyance to his wife, he flatly refused to make any more payments, his reason being that he was deceived in the original purchase of the premises, there being a large blanket mortgage covering those and other premises, which would prevent his holding the title as against it. Foreclosure proceedings were commenced in July, 1896, and the premises sold on October 26th, leaving a deficiency. Suit was commenced on the bond in December, 1896, and judgment was rendered in the latter part of that month for \$403.94 damages and costs. The judgment debtor was brought up on supplemental proceedings, and examined, and denied owning any property, real or personal, and, when asked if his wife owned any, said that she did, and referred to the two lots here in question. He was asked from whom he had bought them, and how much he had paid, and he stated their cost, and that there was no mortgage or incumbrance upon them, and further stated how he conveyed them to his wife, namely, through a Mr. Mott. Asked how much Mott paid for them, he said "One dollar"; that then Mott conveyed them to his wife; and, when asked for what consideration Mott had conveyed them to his wife, he answered, "For a consideration." Then followed: "Q. For a consideration? A. For a consideration. I don't know what it was. Q. You don't know, sir? A. No, sir. Q. Was it more than a dollar? A. I think so; I don't know." On that examina-

tion he was attended by competent counsel, and, when the examination was closed, his counsel, in the presence of all the parties, asked him why he was such a fool as to make that conveyance to his wife, and asked him if he did not know that the conveyance was not worth the paper it was written on, or something of that kind; and the defendant stated, in substance, that he did it simply to protect himself and the property. Throughout that examination, and in the open conversation that occurred afterwards, he nowhere suggested that he did it in pursuance of a prenuptial contract. That the object of the defendant Russell in making the conveyance to his wife was to defeat the complainant's debt is too plain for argument, and the only questions that remain are: First, whether evidence has been adduced to the court, upon which it can rely, that a prior written promise was made by the husband to the wife to convey the premises to her after marriage; and, second, whether such promise formed a consideration for the marriage.

Equity judges in this state have frequently taken occasion to remark upon the dangerous character of the evidence of parties situate as these are here. The promise to convey, incorporated as it was in an ordinary love letter, was seen by nobody but the interested parties. The precise language used depends upon the accuracy of their memory. It was made years after they had become engaged to be married, and it does not appear that it was regarded by the parties at the time as to any extent a consideration for the marriage, but the contrary is inferable from the destruction of the writing, and neglect to convey until the husband was pressed with the debt which constituted the basis of the judgment. In that respect the present case is in marked contrast with that of *Manning v. Riley*. It seems to be of the essence of the rule, as settled in this state in that case, that a prenuptial promise to convey, which will support a subsequent conveyance as against pre-existing creditors, should be such as will support a suit for specific performance; in other words, there must be an existing and enforceable liability by the husband to the wife to make the conveyance. Applying this test, and taking into consideration the unreliability of the evidence, the vague nature of the contract, the lack of any proof that it formed the consideration for the marriage, the destruction of the letter which is relied upon to take the case out of the statute of frauds, I conclude that the wife could not successfully prosecute a suit for specific performance against the husband, if he resisted it; with the result that the defense falls, and that the complainant must succeed here.

O'CONNOR v. MESKILL et al.

(Court of Chancery of New Jersey. March 23, 1898.)

MORTGAGES—DEFAULT IN PAYMENT OF INTEREST—
OPTION TO DECLARE PRINCIPAL DUE—
WAIVER OF DEFAULT.

1. Statements indicative of a considerate feeling on the part of the mortgagee for the mortgagor, and of his disposition to treat him with forbearance, made at or about the time of the inception of the mortgage in question, which provided for the payment of interest semiannually, and that, in case of default in such payment thereof in 30 days after it became due, the mortgagee should have the privilege, at his option, of declaring the whole sum secured thereby to be due, neither constituted a contract nor amounted to a fraudulent misrepresentation, where the mortgagee exercised such option on default in such payment of interest.

2. Under a mortgage providing for the payment of interest semiannually, and that, in case of default in such payment thereof in 30 days after it became due, the mortgagee might elect to declare the whole sum secured thereby to be due, the mortgagor could not, after such default, and before such election, compel the mortgagee to accept payment of the interest due, though such defaults had been on previous occasions waived.

Bill by Patrick O'Connor against John Meskill and others to foreclose a mortgage. Heard on bill, answer, and proofs. Decree as prayed.

Robert S. Clymer, for complainant. Walter F. Hayhurst, for defendants.

GREY, V. C. (orally). I think this case can be determined now, as it is largely controlled by decisions which have been made in our own courts. The mortgage sought to be foreclosed is so drawn that it is expressed to be due in eight years after its date, and contains the usual clause that the interest should be paid in semiannual payments, with the proviso that, in case these semiannual payments are not paid within 30 days after they become due, then the mortgagee should have the privilege at his option of declaring the whole principal to be due, and of enforcing payment of the mortgage for its collection. It is undisputed that the semiannual interest which, by the face of the mortgage, came to be due in October, 1895, was not paid. It was not paid at the time it was due, on October 26, 1895, nor was it paid within 30 days after that semiannual period, nor was any tender or offer made to pay it within those 30 days. The complainant has elected that the whole principal sum shall come to be due, and files his bill in this cause to collect it. There are two explanations or defenses which are made. One is that the parties themselves supposed the payments were annual payments, because of a conversation had at or about the time of the inception of the mortgage, in 1890, between Meskill, the decedent mortgagor, and Mr. O'Connor, the mortgagee, whereby the defendants were misled by the complainant into a belief that the interest payments were to be made annually. The statements then made by the complainant were obviously such as might

pass between two friends, but I do not understand that they in any way affected the legal obligation of the contract into which they had already entered; nor was any consideration passed which would have made these conversations binding obligations. The statements which are testified to as made by Mr. O'Connor impress me as indications of his considerate feeling for the mortgagor, and of his disposition to treat him with patience and forbearance, and perhaps with generosity. But nothing in the nature of a contract was indicated by the conversation, nor did the statements made amount to a fraudulent misrepresentation. I may say, however, that whatever was the original understanding from Mr. O'Connor, in 1890, as to the time when the interest came to be due, it is perfectly evident that in 1895 Mr. Lukens, who was conducting the business for the defendants since the death of Mr. Meskill, was perfectly competent to manage it; that he was a business man, and knew exactly the relations of the parties to the contract for a long time before the default occurred; and that he was acting for them up to the time of the last payment, which credited the interest due up to April, 1895. It also appears that the correspondence between him and Judge Clymer, who acted for the complainant, touching the mortgage and the time when it might become due, was sent to the family; and I do not see why it is not entirely fair to believe that Mr. Lukens made known, to the parties for whom he was acting, the actual situation, which was fully disclosed by the correspondence between him and Judge Clymer. So that whatever may have been the original understanding of Mr. Meskill and his family as to Mr. O'Connor's relations to them, and the nature of the contract, and the authority to enforce it by making the principal due for non-payment of interest, the evidence shows that, when they came to deal with it in relation to this default, they all knew that the interest payments called for were to be semiannual, and that nonpayment within 30 days after they were due might bring the payment of the principal to be due.

The other ground for defense which has been opened is purely a legal one, and that is a claim that the construction of the contract should be that the mortgagor and his heirs are entitled to make the semiannual payments of interest not only during 30 days after they fall due, but for such further period, indefinite in its character and extent, as might elapse between the time when the 30 days expired and the time the election was actually exercised and notified to them, on the part of the mortgagee, to bring the principal due; and some cases in the Western states are cited to support that view. I cannot accept that as the law of this state; nor do I see how such a construction can be given to the contract. The parties themselves stipulated with relation to this incident by express agreement, which is perfectly clear and simple in its character. The mortgagors said to the mortgagee: "In

consideration that you loan us \$2,000, and give us a credit for eight years, we agree that if we fail to pay you the semiannual interest on this money at equal semiannual dates, or within 30 days after, you may, if you choose, call the principal to be due." The defendants failed a number of times to make these payments within the time, and a strong intimation is given in one of the letters referred to that there would be, or had been, an actual election to bring the principal due; but even after that the mortgagee waived it and accepted payments of interest, and the foreclosure is now asked on later defaults.

In the case of *Land Co. v. Post* (N. J. Err. & App.) 37 Atl. 892, just such a contract as this, giving time for payment of the principal sum, was construed, and payment of the principal was enforced after omissions to pay interest within the periods named, and the subsequent acceptance of payments which operated as waivers of the previous defaults, but where later payments were omitted, on account of which the principal was claimed to have become due under the contract. The mortgagee filed his bill to foreclose, claiming that the principal should be held to be due, and on that a defense was made that the previous waivers had exhausted the contract for the default, and that it did not operate on the subsequent omissions. The court said that the contract applied to each separate successive undertaking to pay the semiannual interest; and default on one, even if a waiver had previously been had on others, was sufficient to enable the mortgagee to elect to call the principal to be due. That election the parties have in the case before me agreed might be exercised when 30 days had elapsed after the interest fell due; but there is nothing in the contract by which the mortgagee agreed that after that time, and until he had elected, the payments of interest might still be made, and thus prevent the exercise of his option. Why should the 30 days have been prescribed at all if it was not final? If it were true that the mortgagor and his heirs might tender or pay up to the time that the mortgagee elected, then the "thirty-days" element is of no significance, and the contract must be construed to mean that the parties agreed that the option to call the principal to be due arose only when the mortgagee demanded payment or notified the mortgagor. The efficiency of the limitation to 30 days would thus be entirely destroyed, although it is clearly expressed, and is an essential part of the contract.

It seems to me that to construe this contract according to the contention of the defendants would require this court, not only to thrust into it a term which is not there, but to give it a meaning which is in express contradiction of what is there, and with regard to which the whole tenor of the proofs shows the parties themselves acted. It may be hard to these defendants that they find the mortgagee indisposed to continue to extend to them the same generous consideration which they say he ex-

tended or offered to their father; but this court cannot take notice of that, and compel this man to be generous if he does not choose to be so. The contract is complete and unambiguous, and this court has no power either to remodel it, to make it more lenient, or to so construe it as to defeat its manifest intent. I will advise a decree in accordance with the prayer of the bill. The complainant's solicitor may present such a decree.

TER KNILE v. REDDICK et al.

(Court of Chancery of New Jersey. March 25, 1898.)

BILL OF INTERPLEADER—WHEN LIES—PLEADING—MECHANICS' LIENS—APPLICATION OF CONTRACT PRICE.

1. If complainant is under any personal liability to a defendant in respect to the matter concerning which he seeks to have him interplead, he cannot maintain his suit.

2. One who has made no demand on the contractor, or who has given no notice to the owner of a refusal of such a demand, has no claim, under the mechanic's lien law, to funds due the contractor.

3. Before equitable relief will be granted, it is the duty of complainant to set out fully and clearly the facts on which his claim for relief rests.

4. Where a bill, by the owner of a building, to compel defendants to interplead their claims for work performed on the building, contains nothing more than the allegations that complainant received, in a certain order, notices from certain persons for specified sums, no reason is shown for the interposition of equity; it not appearing that there is any doubt or dispute as to the priorities of the respective claims.

5. In a suit by the owner of a building to compel the contractor who constructed same, and several claimants of a fund under the mechanic's lien law, to interplead their claims, the fact that a larger deposit than the sum mentioned in the complaint as due the contractor was brought into court, with a view of obtaining an injunction to stop certain actions at law, does not alter the real character of the suit.

Suit by Jacob Ter Knile against Milo Reddick and others, in chancery. Dismissed.

Luther Shafer, for complainant. Milton Demarest, for defendant Terhune. Peter W. Stagg, for defendant Cisco. Frank P. McDermott, for defendant House.

STEVENS, V. C. The pleadings in this case are meager in their statements of fact. As no replications were filed or proofs taken, the case stands, and was argued, on bill and answer alone. The bill is a bill of interpleader. It avers that complainant entered into an agreement in writing with one Milo Reddick, a contractor, for the erection of a dwelling house; that the contract was filed in the office of the clerk of Bergen county; and that the building was constructed thereunder. It then avers that complainant received notices of certain claims for materials and labor, some of which he paid. It alleges that the balance of \$1,008.25 still remaining due the contractor is insufficient to discharge the claims of which the com-

plainant has been notified. It alleges the complainant's willingness to pay this money to the persons lawfully entitled to receive it, and prays that he be allowed to pay it into court, and that defendants may be decreed to interplead, and settle their right to it. The defendants are the contractor and seven claimants of the fund. The contractor has not answered. All the claimants, with one exception, have. The answers, with one exception, deny the right of complainant to take this proceeding. I will consider the case of each defendant separately.

The bill alleges that the defendant Cisco makes a personal claim upon the complainant in respect of a part of his work. This the answer admits, averring its validity. In this situation of affairs, the suit cannot be maintained as against Cisco. The rule is well settled that a complainant who is under any personal liability to defendant in respect to the matter concerning which he asks that defendant be compelled to interplead cannot maintain his suit against him. *Wakeman v. Kingsland*, 46 N. J. Eq. 113, 18 Atl. 680. The same difficulty exists in the case of the defendant Octignon.

As to the defendant House, the facts set up in the bill and answer fail to show that he has any claim upon the fund under the mechanic's lien law. No demand is alleged to have been made upon the contractor, and no notice of a refusal of such demand is alleged to have been given to the owner. *Hall v. Baldwin*, 45 N. J. Eq. 858, 18 Atl. 976; *Reeve v. Elmendorf*, 38 N. J. Law, 125. The meager statement of facts in reference to the claim of Hildebrandt, who has not answered, would seem to indicate that his claim is open to the same objection. It is the duty of the complainant to state with fullness and certainty the facts upon which his claim to equitable relief rests. If the facts which he states do not warrant such relief, he cannot have it. *Arnett v. Welch's Ex'rs*, 46 N. J. Eq. 547, 20 Atl. 48.

There remain for consideration the claims of Serven, Duncan, and Terhune. As to these claims, the bill fails to show any reason for invoking the assistance of equity. The order in which claims must be paid by an owner who has received the statutory notice is perfectly well settled. *Superintendent v. Heath*, 15 N. J. Eq. 22; *Kirtland v. Moore*, 40 N. J. Eq. 106. If, therefore, there is in the bill nothing more than an allegation that complainant "received, in the order following, notices from the following named persons for the sums respectively specified herein; * * * that is to say, James Serven, materials, \$478.89; Alexander Duncan, labor and materials, \$275.00; Charles E. Terhune, labor and materials, \$275.70,"—no reason is shown for the interposition of equity. The bill fails to allege that there is the least doubt or dispute as to the priorities of the respective claims of these three persons. It

does not allege any facts from which the existence of such doubt or dispute is properly inferable. The foundation of the jurisdiction is therefore wanting, for this is based upon the existence of a conflict. If the claims are not shown to be conflicting, the necessity for a resort to equity does not appear.

I may add that the bill, on its face, is a bill of strict interpleader, and not a bill in the nature of a bill of interpleader. The fact that a larger deposit than the sum of \$1,008.25 mentioned in it was brought into court, with a view to the obtaining of an injunction to stop certain actions at law, does not and could not alter its real character. If this larger sum (sufficient to pay all the claims in full) had been named therein, the bill would have been altogether anomalous. The bill should be dismissed.

(61 N. J. L. 476)

STATE ex rel. SEA ISLE CITY IMP. CO. v.
ASSESSOR OF TAXES OF BOROUGH
OF SEA ISLE CITY.

(Supreme Court of New Jersey. April 4,
1898.)

MANDAMUS—LEVY OF TAX.

A mandamus to assess and levy a tax to pay an execution for costs recovered against a municipal corporation upon certiorari will not be denied because of an offer by the municipal authorities to credit the amount of the execution upon taxes in arrear on property of the prosecutor within the municipality.

(Syllabus by the Court.)

Application by the state, on the relation of the Sea Isle City Improvement Company, for a writ of mandamus to the assessor of taxes of the borough of Sea Isle City, in the county of Cape May. Order to show cause why mandamus should not issue to assess and levy a tax. Granted.

Argued at February term, 1898, before
DIXON and COLLINS, JJ.

C. K. Landis, Jr., for relator. E. O. Cole
and S. W. Belden, for defendant.

COLLINS, J. Costs were awarded against the borough of Sea Isle City, in the county of Cape May, upon a certiorari brought to set aside a tax sale, and successfully prosecuted by the Sea Isle City Improvement Company. Judgment was entered, and execution issued therefor. The sheriff served a copy of the execution upon the defendant as assessor of the borough. Upon such a service an assessor is required by law (2 Gen. St. p. 1421, pl. 34) to assess and levy, in addition to the regular taxes, the amount due upon the execution; but the defendant refuses so to do, and sets up as justification in response to a rule for mandamus that taxes previously assessed against property in the borough belonging to the improvement company are in arrear and unpaid, and that the borough council has offered to cred-

it thereon the amount of the execution. No enforceable right of set-off is claimed, but it is urged that this court should recognize the supposed equity, and refuse a writ resting in discretion. The word "discretion," when applied to a court of justice, is amplified by Lord Mansfield to mean "a sound discretion guided by law." *Rex v. Wilkes*, 4 Burrows, 2539. Even as to mandamus, —the prerogative writ most sparingly used,—discretion to deny is not arbitrary, but is guided and limited by fixed principles. *Shortt, Mand.* 233. In this case we are afforded no legal reason why the relator should be thwarted of his statutory right to collect a judgment against a municipality by compelling resort to the taxing power. The borough of Sea Isle City, like every municipal corporation, has a legal method to enforce payment of taxes, and that method is exclusive. *City of Camden v. Allen*, 26 N. J. Law, 398. This court cannot create a right of set-off, and, if it could, it has no power in this proceeding to determine that the taxes claimed are really on relator's property, or that they have been legally assessed. Moreover, the costs awarded on the certiorari belong to the attorney in that proceeding. There is no proof or presumption that he has been paid by his client. Applying the analogy of setting off judgments under the equitable power of the court, the lien of the attorney for his costs should be preserved. In such cases this is always done, and is done irrespective of the priority of the judgments. Examples of such protection, where the costs attached to the later judgment, will be found in the following cases: *Cole v. Grant*, 2 Caines, 105; *Perry v. Chester*, 53 N. Y. 240. We decide that the relator is entitled to a mandamus as prayed. If the defendant desires to review this decision, and shall so notify this relator's attorney within five days, the case may be put in the shape of an alternative mandamus return and demurrer, with a judgment thereon in favor of the relator, with costs; otherwise a peremptory mandamus may go, but without costs.

(56 N. J. E. 642)

LYON et al. v. CLAWSON et al.

(Court of Chancery of New Jersey. April 6, 1898.)

WILLS—REVOCATION OF BEQUEST BY CODICIL.

There was a bequest to executors, of \$20,000, to pay the interest thereof to A. during life, and the principal sum to A.'s children after her death. There was a codicil reciting the former gift as one to the executors to pay interest to A. during her life, and revoking this bequest, and directing the executors to invest \$12,000, instead of \$20,000, and pay the interest thereof to A. during her life. *Held*, that the clause in the will directing the executors to pay the sum invested to A.'s children after her death was not revoked by the codicil.

(Syllabus by the Court.)

Bill by Samuel H. Lyon and another against William S. Clawson, trustee under the will of Isiah D. Clawson, deceased, and others, for a construction of the will. Decree for complainants.

W. T. Hillaird, for complainants. Samuel P. Grey, for defendants.

REED, V. C. This bill is filed to obtain a construction of the will of Isiah D. Clawson, deceased, and also to compel William S. Clawson, trustee under the said will, to pay to the complainants the shares of a legacy bequeathed to Israel Hires and Harry S. Hires, and by them assigned to the complainants. The deceased, by his will, dated December 13, 1871, made the following bequest: "Item. I give, devise, and bequeath to my executors the sum of twenty thousand dollars, which I direct them to keep at interest, on good mortgage security, and to pay to my sister, Elizabeth, wife of Rev. Allen J. Hires, during her natural life, annually, the interest thereof; the first payment to be made to her in one year after my decease. And I do order my executors within one year after the decease of my said sister, Elizabeth, to pay over the principal sum of twenty thousand dollars, and the interest which may have accrued thereon, to the children of my said sister, Elizabeth, in equal portions, share and share alike; and should any child or children of my said sister, Elizabeth, die before my said sister Elizabeth, leaving a child or children surviving, then such child or children to take the share of such deceased parent. But should any child or children of my said sister, Elizabeth, or any child or children of a deceased child, not having attained the age of twenty-one years at the decease of my said sister, Elizabeth, then I order the share of such minor child or children to be paid to them, respectively, when they arrive at the age of twenty-one years." The testator afterwards, under date of December 11, 1876, executed a codicil to this will, in the terms following: "Whereas, I, Isiah D. Clawson, of Woodstown, Salem county, New Jersey, have made my last will and testament, bearing date the first day of December, A. D. eighteen hundred and seventy-one, and in my said last will I give and bequeath unto my executors the sum of twenty thousand dollars, which I direct them to keep at interest on good security, and to pay the interest annually to my sister, Elizabeth, wife of the Rev. A. J. Hires, during her natural life: Now, I do take from my said executors the said sum of twenty thousand dollars, and revoke and annul the said bequest, and direct them to keep and put at interest the sum of twelve thousand dollars, instead of the twenty thousand dollars, for my said sister, Elizabeth, to have the interest of, annually, during her natural life, which sum of twelve thousand dollars I give my executors for the purposes afore-

said." All the rest of the estate was given to the executors to hold in trust for certain purposes. All these executors had died or resigned, and the defendant William S. Clawson is now trustee, and entitled to said residue. Elizabeth, the wife of Rev. Allen J. Hires, died July 29, 1896. She left surviving her three children,—Israel C. Hires, Harry S. Hires, and Elizabeth E. Clawson. On April 9, 1886, while their mother was still living, the two sons assigned their shares in said legacy to the complainants, for a valuable consideration, and directed the executors of said will to pay the same to the complainants. This assignment seems to have been made to secure the payment by the two Hireses to the complainants of the sum of \$4,500, with interest thereon from April 9, 1886, and also to secure the repayment of premiums paid by the complainants upon an insurance policy issued upon the life of Harry S. Hires, and also to secure the repayment of premiums paid by the complainants for fire insurance upon a steamboat. The complainants seem to have paid these premiums, and there is a debt due to them from the two Hireses in excess of the sum of \$8,000. William S. Clawson and Martha Clawson, two of the defendants, filed an answer denying that any legacy belonged to the children of Elizabeth, and alleging that, therefore, no interest passed from them to the complainants by the assignment. They also challenge the right of the complainants to file this bill, even if the legacy belonged to the children of Elizabeth.

The first question in order is whether, assuming that Israel C. and Harry S. Hires were each entitled to one-third of the principal sum of \$12,000 upon the death of their mother, and assuming that such right passed to the complainants by assignment, the complainants are rightly in this court in this suit. I can perceive no substantial reason for a doubt. Upon the death of Elizabeth there was imposed upon William S. Clawson, as trustee, the duty of paying over the money to the legatees. The right of the legatees to compel the executor to execute this trust in this court is entirely clear. The right of the cestuis que trustent passed to the complainants by the assignment; and whether the assignment was absolute, or in pledge to secure the personal indebtedness of the legatees, in either case the complainants were invested with the right to recover the full amount of the gifts assigned to them. Their right to compel the execution of the trust therefore seems entirely clear.

The second is the important question: Had the children of Elizabeth E. Clawson any interest in the \$12,000 after the death of their mother? The insistence of the trustee is that the codicil to the will revoked the provisions in the will by which the children of Elizabeth were to receive the principal sum of \$20,000, or any other sum. The gift contained in the codicil is clearly substitutional. The language

is that \$12,000 shall be kept out at interest, instead of \$20,000, as is provided for by the will. The complainants rely upon the rule that the substituted legacy is subject to the same incidents and conditions as the original legacy. Hawk. Wills, p. 306; Jarm. Wills (Rand. & T. Ed.) p. 354. Mr. Theobald states the rule, to be drawn from the cases cited by him, in this way: "A gift in addition to, or in lieu of, a previous gift to the same legatee, is subject to the same conditions as the previous gift, with respect to vesting, separate estate, the fund out of which it is payable, freedom from legacy duty, and provisions against lapsing." Theob. Wills (4th Ed.) 125. In respect to the question whether a substitutional gift is subject to a gift over attached to the original gift, the same author remarks: "It is not quite clear whether an additional or substitutional gift will be subject to the same executory gift over as the original gift. It seems, however, that it will not." Sir W. Paigé Wood, M. R., in *Mann v. Fuller*, Kay, 624, said: "If the former gift was absolute, and free of legacy duty, the additional gift has been held to have all the same incidents; so, if the former is to be lost on a certain event, the additional gift is to be defeated on the same conditions. In no case has it been held that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift." In that case a legacy was given to A. for life, with an executory gift over, and then there was an additional gift simply to A.; and it was held that A. took the latter gift absolutely. And in *Sanford v. Sanford*, 1 De Gex & S. 67, the same was held in respect to a substitutionary gift. I have found no case, however, which seems to me to be similar to the one in hand. It is insisted by the counsel for the trustee that the case of *Sanford v. Sanford* is directly in point. In that case the testatrix bequeathed £3,000 to a person for life, and after her death to her children, and, in case there should be no children, to P. By a codicil, which stated that the legatee for life had been largely provided for from other sources, the testatrix deducted £2,900 from the legacy of £3,000, and revoked so much of the legacy, accordingly; leaving the legatee £100 only, as a remembrancer. It was held that the legatee took the £100 absolutely. If the gift of the \$12,000 in the codicil of the present will had been given to Elizabeth absolutely, these two cases would bear an appearance of similarity; but this codicil gives her only a life interest in the \$12,000,—the same interest that she had in the \$20,000 mentioned in the will. Unless the children take after her death, this sum in this case falls into the residuum. Apart from this difference between the two cases, there were indications in the will in the former case of a testamentary intent (always the ultimate object to be ascertained) that the legatee should take the substituted gift absolutely. The substituted gift was an insignificant fraction of the original gift, and it was expressly given

to the legatee as a souvenir. It was not intended as a substitutional legacy, for the purpose of providing for the family of the legatee, as was the obvious object of the original gift. On the other hand, in *Condict v. King*, 13 N. J. Eq. 381, there was a devise of land to testator's grandson for life, with a remainder to testator's daughter; and after the execution of the will the testator sold the land, and put the proceeds into a mortgage, and then made a codicil giving the mortgage to the grandson, instead of the land, but making no limitation over. Chancellor Green held that the grandson took the life estate, only, in the mortgage, and at his death it became the property of the daughters. The circumstances in that case—particularly the fact that the mortgage represented the land—showed a testamentary intent that the incidents attached to the gift of the former were, although unmentioned in the codicil, inherent in the gift of the latter. But, as already remarked, there is no question in this case whether Elizabeth took the substitutional gift upon the same terms as she took the original. The language of the codicil gives her a life interest, just as did the will. The query is whether the silence of the codicil relative to the disposition of the principal after the death of Elizabeth revokes that part of the will that gave it to her children. It is urged that the gift in the will was to the executors, and not to the children, that this gift was annulled and revoked in the codicil, and that, therefore, unless the substituted gift to the executors was coupled with a new direction to them to pay the principal, after the death of Elizabeth, to her children, the principal belongs to the trustee. But the same argument would apply to any substitutional gift, whenever the codicil revokes and annuls the provision in the will bequeathing the original gift. The use of the words "revoke" or "annul" has no special force whenever the object of the revocation is to make a substitutional gift. The use of these words does not prevent the substituted legacy from having the incidents of the original one. *Cooper v. Day*, 3 Mer. 154; *Fisher v. Brierley*, 30 Beav. 267. Besides, it is to be observed that the testator only revoked the bequest recited, and the bequest, as recited, was that for the use of Elizabeth during her life. It seems obvious that the mind of the draftsman of the codicil was intent only upon a change in the amount of the gift. In making the change, he wished to identify the particular gift in the will referred to. The feature of that gift which occurred to him as the most useful for that purpose was the fact that it was given to the executors to invest for the benefit of Elizabeth during her life. That it was a gift made for that purpose was entirely sufficient to identify the particular gift to be changed by the codicil. The draftsman did not go on to set out that it was the gift which the executor was to pay, after the death of Elizabeth, to her children, and also the provisions concerning the effect upon its course arising

from the death of such children. The incorporation of all that in the description was unnecessary for the purpose then in mind, namely, to identify the original gift meant. After describing the gift meant to be changed, the codicil proceeds: "I do take from the said executors the said sum of \$20,000, and revoke and annul the said bequest, and direct them to keep and put out at interest \$12,000, instead of \$20,000, for my said sister, Elizabeth, to have the interest during her natural life." His meaning was this: "Instead of giving my executors the \$20,000 which I directed them to invest and pay to my sister the interest thereof during her life, I give them \$12,000 to invest and pay the interest to her during her life." The concluding words, "which sum I give for the purpose aforesaid," are merely redundant, and do not mean that it was given for that purpose solely and only. A change in the gift over to the children, apart from the amount given, was not in the mind of the draftsman of the codicil at all. If it had been his intention to annul the gift to the children, it is inexplicable why he did not do so in express words. It seems to me, he would have limited the gift in the codicil solely to the payment of the interest to Elizabeth, or would have provided that after the death of Elizabeth the \$12,000 should fall into the residue. The revocation of the gift over must be clear. It is not clear. I am of the opinion that there was no intention to revoke the gift over of the principal sum. The amount was reduced by the fact that the sum of \$12,000 was substituted for the \$20,000 as the amount to be invested by the executors; and, as it was the sum directed to be invested for the life use of Elizabeth which the executors were directed to pay over to her children after her death, the change in that sum to be invested from \$20,000 to \$12,000 reduced the amount of the principal sum, upon which the executory gift over was to operate. Decree advised for complainants.

DRESSER et al. v. ZABRISKIE et al.
(Court of Chancery of New Jersey. April 4, 1898.)

**FRAUDULENT CONVEYANCES—HUSBAND TO WIFE—
EVIDENCES OF FRAUD.**

1. The fact that no note or other memorandum was given for money advanced by a wife to her husband, and that in the latter's will he provided for the repayment of said money, which he spoke of as that "given" him, does not show that there was no debt arising out of the transaction, where the husband had written the will without the aid of counsel, and had probably used the word "given" as an equivalent for "delivered."

2. In a suit to set aside a deed of lots by husband to wife, it appeared that the wife in 1891 had received a legacy, which she had loaned to her husband, and he used it in buying the lots in question; that he was then in prosperous circumstances, but in 1895, becoming financially embarrassed, and after mortgaging his home for nearly its full value, transferred the lots, his only other property, to his wife, to secure

the loan; that at this time he was engaged in business transactions with plaintiffs, and was considerably indebted to them, which resulted in a judgment against him in 1896. *Held*, that the transfer was not fraudulent as to plaintiffs.

3. That a husband who was financially embarrassed, after a transfer of lots to his wife in satisfaction of a debt due her, had retained management of them, is not a badge of fraud, nor does it show that the conveyance was merely colorable, where the wife knew nothing concerning the business of selling lots.

4. The transfer, by one financially embarrassed, to his wife, of all his personal property, in addition to certain lots, to secure a debt owing her, does not show that the transfer was intended to defraud subsequent creditors, where nearly all of the personal property was exempt from execution, and part of it belonged to the wife.

Bill by D. Leroy Dresser and others against Andrew J. Zabriskie and wife and others to subject to the lien of a judgment certain lands and personal property conveyed by defendant Zabriskie to his wife. Heard on pleadings and proofs.

The complainants are judgment creditors of the defendant Andrew J. Zabriskie, and the object of the bill is to subject to the lien of the judgment certain lands and personal property conveyed by Zabriskie to his wife, through an intermediary, in September, 1895. There are three conveyances of real estate and one of personal property. The consideration mentioned in one of the deeds is \$3,500, and in the others it is nominal. At the time these conveyances were made, the husband was engaged in certain business transactions with the complainants, and, according to their showing, was considerably indebted to them. The transactions were brought to a close in March, 1896, and suit was brought by the complainants against Zabriskie, which resulted, after litigation, in a judgment for \$13,183.01. The answer sets up that the object of the conveyance was to secure Mrs. Zabriskie for the amount of a loan by her to her husband, made partly in 1891 and partly in 1892, amounting to \$2,966.67. The proof is clear that at the time stated Mrs. Zabriskie received that amount of money from her brother, the executor of her father's estate, and indorsed the checks over to her husband, who received and appropriated them to his own use. He swears, and the evidence indicates, that he used the greater part, if not the whole, of the money in buying and laying out into building lots the premises in question. No note or other memorandum in writing of the indebtedness was given by him to Mrs. Zabriskie, but both swear that it was understood that he owed her for the amount of that money, and was to pay her. He did, however, shortly afterwards make a will, in which he, in addition to a gift to his wife in lieu of dower, expressly provided that she should be paid the amount he had received from her, but without interest. The will speaks of the money which she had "given" him, and Mrs. Zabriskie knew that such a provision was made; but it is not clear that

she knew that he had used the expression "given." He is a man of middle age, and had been in the mercantile business for many years, part of the time in Chicago, and returned to New Jersey about 1890, and then engaged in business in New York City, at first as a salesman. He appears to have been reasonably successful, earning a good salary, but lived generously, so that in July, 1895, and previous to the conveyance to his wife, he was obliged to mortgage his homestead for \$3,500 to pay current bills for living expenses. His wife swears that this was the occasion of her asking him to secure her for the debt to her, and that it resulted in the conveyances which are attacked by the bill.

Otto Crouse, for complainants. Cornelius Doremus, for defendants.

PITNEY, V. C. Counsel for the complainants contends, first, that the fact that no promissory note or written memorandum was made to the wife at or about the time of the advance of these moneys, together with the language used in the will by the husband, in which he speaks of the money as having been "given" to him by his wife, are sufficient to show that there was really no debt arising out of the transaction, and that the resuscitation of it as a debt to support the conveyance in question was an after-thought. But I am unable to adopt that view. The will was written by Mr. Zabriskie himself, without the aid of counsel, and it is not clear that he used the word "given" in any different sense from that of his wife having "handed" or "delivered" the money to him; and against the view that it was received as a gift is the fact that he did especially provide in his will for its payment to her, over and above the ordinary portion which he gave to her.

The counsel of complainants contends, in the second place, that, granting that there was a debt existing from the husband to the wife, yet that the circumstances prove that the conveyance was made for the purpose (participated in by both parties) of defrauding the complainants; and that on that ground it must be held to be void as against the complainants, upon the principle that, where a conveyance is actually contrived in fraud, the fact that consideration was paid does not relieve it of its fraudulent character. The leading case in New Jersey on that subject, and one which well illustrates the principle, is *Green v. Tantum*, 19 N. J. Eq. 105, 21 N. J. Eq. 364. There the judgment debtor, having suffered a large verdict against him at the circuit, hastened, before judgment could be entered upon it, to assign several mortgages which he held upon real property in this state to his brother, who actually paid him the cash for them. The circumstances indicated strongly that the brother raised the cash for the purpose of enabling him to put the money in his pocket, and keep it from his creditor. In

fact, the conversion by the debtor of fixed and tangible property subject to levy into cash, in anticipation of a judgment and execution against him, is an important and efficient step in a scheme to defraud his creditors, and, unless the cash is honestly applied to the payment of his debts, is of itself a strong indication of fraud. It is, however, more difficult to infer fraud from a mere transfer of fixed property by a debtor to a creditor, either in satisfaction of, or by way of security for, the payment of his debt. The natural result of such an act is, not to enable the debtor to dispose of his property in fraud of his other creditors; and the right to prefer a creditor is still sacred in this state. And here it is to be observed that the natural effect of preferring one creditor is, so to speak, to defraud the others, and yet a conveyance made honestly for the purpose of preferring a creditor must be upheld. See, upon this topic, *Wait, Fraud. Conv. § 201*, especially what was said by Chief Justice Black in *Covanhovan v. Hart*, 21 Pa. St. 500. But fraud in such a case (conveyance by debtor to creditor) may be proven or inferred from the circumstances. The circumstance usually relied upon to show fraud is that the conveyance is merely colorable, and the grantor still remains the actual beneficial owner, while the legal title stands in the creditor. A difficulty in applying this test to the case of a conveyance by the husband to the wife arises from the circumstance that the husband generally manages the wife's property, and naturally derives a personal benefit from it; so that no change in either management or apparent ownership usually attends the transfer of the legal title. In the present case, at the time the money was advanced by the wife to the husband and invested in this real-estate speculation, the husband was in prosperous circumstances, and the speculation promised to be profitable. In fact, it was reasonably profitable, and quite a large amount of money was derived from it prior to the conveyances in question. About that time he entered into business relations with the complainants, which did not prove successful, and he became largely indebted to them, and was obliged to mortgage his homestead heavily to pay his current expenses. In that state of affairs, feeling that it was possible, if not probable, that he would not be able to pay all his creditors, he felt it to be his duty—and, whether he felt it to be a duty or not, he felt disposed—to secure his wife, and conveyed this property to her for that purpose, as they both swear. The criticism made upon the transaction in itself is that it should have been put in the shape of a mortgage, instead of an absolute conveyance. But the character of the property was such as, in my judgment, to excuse the use of an absolute conveyance. The homestead was, as I have said, heavily mortgaged, and there was in it little security for

the wife. Her principal security was in the lots remaining unsold from the land purchased for speculative purposes, and that property was producing no income, and her source of payment was the sale of lots exclusively. Now, it was much more convenient to have the title to the property in her name for the purpose of making conveyances than to have it in the shape of a mortgage, which would require, in order to satisfy purchasers, a special release to be inserted in every conveyance made. The reasons, however, for giving a deed instead of a mortgage were not inquired into at the hearing. There may have been no motive or reason given at the time except the bare advice of counsel. But then it is urged that the husband retained the management and control of the property. But here again such control and management were perfectly natural under the circumstances. His wife knew nothing about the business of selling building lots, and naturally left that to her husband. It was further urged that the fact that all the personal property, house furniture, horse and carriage, etc., of the debtor were also transferred, shows fraud. This is undoubtedly an indication of a desire to protect it from creditors. But the effect of it upon the whole case is, in this instance, much weakened by the small value of the chattels, which exceed very little, if any, the amount exempted from execution by statute, and by the fact that several articles were included in the bill of sale which belonged to the wife; and by the further fact that the transfer was made several months before suit was either brought or threatened.

The result of my study of the case is that I do not find any such indicia of fraud in it as will justify the court in declaring the transfer to have been fraudulent. I think the case is clearly distinguishable from those relied upon by the complainants. In *Luers v. Brunjes*, 34 N. J. Eq. 19, a debt more than 20 years old, about the existence of which originally there was some doubt, was revived for the purpose of defrauding creditors. Evidently the chancellor believed that, if there ever was a debt, it had been forgiven. *Christie v. Bridgman*, 51 N. J. Eq. 331, 25 Atl. 939, and 30 Atl. 429, was in reality much the same as *Luers v. Brunjes*. A debt more than 20 years old, barred by a discharge in bankruptcy, was revived to furnish a consideration for the conveyance there attacked. There were suspicious circumstances as to the actual existence of the debt, and, while the learned vice chancellor states his conclusion that the proofs sustained the existence of the debt, it is manifest that he felt that the wife's claim had no real merit, and was revived solely for the present emergency. In fact, the case might well have been put on the ground taken by Vice Chancellor Emery in the recent and somewhat similar case of *Minzes-*

hiemer v. Doolittle (N. J. Ch.) 39 Atl. 386, namely, that the debt had been paid or forgiven, and ceased to exist. The debt in the present instance is actual and recent, and the wife asked to have it secured. She knew that her husband was not earning a living, and was not prosperous; but the proofs fail to show that she knew, or ought to have known, that he was owing a large sum of money which he could not pay, and intended (if he did intend) to defraud his creditors. The case more nearly resembles *Cole v. Lee's Ex'rs*, 45 N. J. Eq. 779, at page 784, 18 Atl. 854, where an attack was made upon a mortgage given by the husband, through an intermediary, to his wife, to secure an old debt; and *Brock v. Bank*, 48 N. J. Eq. 615, 23 Atl. 269,—both cases in the court of appeals. I will advise a decree that Mrs. Zabriskie is entitled to a lien upon the premises conveyed for the sum of \$2,968.67, with interest from the date of the conveyance, subject to a credit for the actual value at that time of such of the chattels conveyed as did not belong to her, and subject to an accounting for the proceeds of any sales of lots or of collections on account of the price of lots previously sold. She will be credited for taxes, expenses of sales, etc. I will not allow interest before the conveyance, because she, as a member of the family, had the benefit of the use of the money, and there is some evidence to indicate that she acquiesced in that part of her husband's will which forbade payment of interest on that sum.

(61 N. J. L. 454)

STATE ex rel. BRAEUTIGAM v. WHITE.
(Supreme Court of New Jersey. April 4, 1898.)

APPEAL FROM JUSTICE—BOND.

If, in the judgment of a justice of the peace, the surety upon a bond, tendered on an appeal from a judgment in a court for the trial of small causes held by him, be insufficient, he may reject the bond.

(Syllabus by the Court.)

Action by the state, ex rel. Frederick O. Braeutigam, against Theodore F. White. On motion to discharge a rule to show cause why mandamus should not issue. Rule to show cause discharged.

Argued February term, 1898, before DIXON and COLLINS, JJ.

John S. Applegate, for the motion. R. Tenbroeck Stout, opposed.

COLLINS, J. The relator on May 12, 1897, procured from a justice of this court a rule to show cause why a mandamus should not issue to compel the defendant to grant an appeal from a judgment recovered against the relator in a court for the trial of small causes held by the defendant as a justice of the peace. The rule was returnable at the June term of this court, but, as the affidavits taken under it were not com-

plete until June 19th, the cause went over. It was not moved at the November term, and was not noticed for the present term. The defendant now, on notice, moves to discharge the rule upon the facts developed in the affidavits. It is proved that, although the relator, after an adjournment granted at his request, permitted judgment without further appearance before the justice, he did in due season demand an appeal and present a bond, which was rejected because it bore a date prior to the judgment, and because the justice was not satisfied of the sufficiency of the surety. The same bond was tendered later, with the date changed, but with no evidence of re-execution, and was again rejected. On May 1, 1897, the term of office of the justice expired. On May 3, 1897, another bond with a different surety was tendered and rejected, both because the defendant was out of office, and because he was not satisfied of the sufficiency of the new surety. In *Tichenor v. Hewson*, 14 N. J. Law, 26, it was held that, after the expiration of the term of office of a justice of the peace, he could do no official act; but by statute approved March 17, 1875 (2 Gen. St. p. 1890, pl. 134), he may now, among other things, decide pending causes, and may grant an appeal from the judgment rendered in any cause brought before the expiration of his term. The defendant, therefore, was wrong in assuming that he had no jurisdiction in the premises. His rejection of the bond must rest on the other ground. In the case cited it was declared that in passing upon the sufficiency of a surety upon an appeal bond the justice acts judicially. This was also decided in *Stull v. Abbott*, 15 N. J. Law, 339, in which case it was intimated that, if the justice err, there is redress in this court. Without adjudging that such redress can be by mandamus, we are clear that in the case in hand the relator has no grievance. Under the proofs taken, the surety on neither bond was sufficient. Let the rule to show cause be discharged, with costs.

(56 N. J. E. 473)

PLUM v. SMITH et al.

(Court of Chancery of New Jersey. April 1, 1898.)

MORTGAGE FORECLOSURE—SUFFICIENCY OF CROSS BILL.

A bill for the foreclosure of a mortgage alleged that complainant, as executor of his father, had been devised \$2,000 in trust, the interest to be paid to testator's widow for life, and at her death (which had occurred) the principal to be divided among his children; that the \$2,000 was invested in a mortgage; that subsequently the executor individually bought the land, and assumed the mortgage; and that he had assigned his share in the trust fund to another. The cross bill set up a judgment against him obtained by his mother, because of failure to pay the interest to her, before the assignment of his share, and claimed that it was a prior lien thereon, and that all the interest of complainant in said fund represented by the

mortgage was merged in his title, by virtue of his deed to the land, which became subject to the lien of said judgment. *Held*, that the question of merger was properly a part of the case, and hence not liable to be stricken from the cross bill.

Bill in equity by Joseph S. Plum, executor of the will of Joseph Plum, deceased, against John B. Smith, administrator of the estate of Hannah Plum, deceased, and others. Motion to strike out parts of the cross bill denied.

J. A. Bullock, for the motion. J. T. Bird and J. B. Huffman, opposed.

McGILL, Ch. In the previous application to strike out parts of the answer and cross bill, the first part of the present motion, to wit, to strike from the cross bill that part of it which refers to the judgment recovered by Hannah Plum, was passed upon. No further order will be made in reference to it.

Secondly, in the present application the defendant, Joseph S. Plum, asks that the following parts of the answer to the amended bill be stricken out, to wit: "And this defendant claims that the judgment of said Hannah Plum is a prior lien on Joseph S. Plum's share, part, or interest in the said lands and premises, to any interest which he, the said Joseph S. Plum, assigned to the said Oliver I. Blackwell aforesaid, * * * and further says that all the rights, title, and interest of the said Joseph S. Plum in the said mortgage became and was merged in his title by virtue of the said deed of conveyance in the said land, and became and was and is subject to the lien of the judgment of the said Hannah Plum, deceased." In the first application to strike out, it appeared that the defendant Smith proceeded upon the theory that a portion of the \$2,000 mortgage money would become the property of Joseph S. Plum, against whom his intestate had recovered a judgment, and that by his cross bill he could secure that share of the \$2,000 to be applied to the payment of the judgment, and at the same time urge, that the interest on the \$2,000, as between all the parties to the suit, under the will of Joseph Plum, deceased, should be first paid in full, before any part of the principal moneys, so that, in case there should be a deficiency in the proceeds of the sale of the mortgaged premises to pay both principal and interest, the interest would be fully paid. It appeared to me that the effort to charge the judgment upon the interest of Joseph S. Plum in the mortgage money was a matter foreign to the object of the suit, and mixed with claims that the interest, within the intent of the will, was to be first paid, made the cross bill multifarious; and I therefore struck it out, leaving the cross bill to set out the will, and urge the claim that the interest was intended to be first paid. I also directed that the others interested in the corpus of the money secured to

be paid by the mortgage, as *cestuis que trustent* of the complainant, should be made parties defendant, and brought into court, because, under the allegation that the complainant was insolvent, and under the claim for priority in payment of the interest, they seemed to be necessary parties. This determination led to the amendment of the bill. In that amendment, among other things, it was alleged that the interest of Joseph S. Plum in the estate of Joseph Plum had been assigned to Oliver I. Blackwell. The defendant Smith then answered the bill as amended, and met the allegation of the assignment to Blackwell with the parts of the answer now asked to be stricken out. It is apparent, if his interest under the mortgage merged in his estate in fee in the mortgaged lands at the time the mortgaged premises were conveyed to him, and he remained owner of the fee until the recovery of the judgment, that the judgment became a lien upon his whole equity of redemption, made up of both the estate conveyed to him by Bateman, and the equitable estate under the mortgage which merged in it. It appears to me that the question of merger is properly in the case. Whether or not there was a merger can only be determined at the final hearing upon the proofs establishing intention and equities. The allegations now objected to charge merger in general terms. I think that they must stand. The motion will be denied, with costs.

(56 N. J. E. 468)

PLUM v. SMITH et al.

(Court of Chancery of New Jersey. April 1, 1898.)

EQUITY PLEADING -- MORTGAGE FORECLOSURE -- PARTIES--PROPRIETY OF CROSS BILL.

1. A general clause in an answer in equity, reserving exceptions, will be stricken out as in contravention of rule 208.

2. A will devised \$2,000, in trust, to the executor (one of testator's sons), the interest to be paid to testator's widow until her marriage or death, when the principal was to be divided among his children. The \$2,000 was invested in a mortgage, and subsequently the executor individually bought the land and assumed the mortgage. Afterwards he became insolvent, and, on the death of his mother, brought suit to foreclose the mortgage, making only the executor of his mother, himself individually, and his wife, defendants. *Held*, that there was a lack of necessary parties defendant, since all the beneficiaries in the fund should have been made parties.

3. The objection of lack of necessary parties defendant should precede the filing of a cross bill.

4. A cross bill seeking the distribution of a trust fund created by will, and to subject complainant's share of the trust fund to the payment of a judgment obtained against him by one of defendants, is multifarious.

5. The share of complainant in a trust fund created by will, and for the recovery of which entire fund he sues, cannot be subjected by a cross bill to the payment of a judgment obtained against him by one of defendants.

Bill in equity by Joseph S. Plum, executor of the will of Joseph Plum, deceased, against John B. Smith, administrator of the estate of Hannah Plum, deceased, and others, for the foreclosure of a mortgage. Heard on motion to strike out the general clause of an answer reserving exceptions in contravention of rule 208, and to dismiss all of the answer which is filed by way of cross bill. Motion granted in part.

The original bill was filed to foreclose a \$2,000 mortgage made on the 22d of March, 1892, by one Israel Bateman to the complainant and Hannah Plum, his co-executrix, upon land in Hunterdon county, conditioned for the payment of \$2,000 upon the death or marriage of Hannah Plum, with lawful interest, payable annually from the 1st of April, 1892. The bill alleges the conveyance of the mortgaged premises by Israel Bateman to Joseph S. Plum, individually, on the 28th day of March, 1892, six days after the making of the mortgage; the recovery of a judgment by Hannah Plum against Joseph S. Plum on the 4th of December, 1894; the death of Hannah Plum, intestate, upon the 20th of July, 1895; and the appointment of John B. Smith as the administrator of her estate on the 27th of August, 1895. It prays process against Joseph S. Plum (individually) and his wife and Smith, as the defendants in the suit.

The defendant Smith answered the bill, claiming the validity and lien of the judgment against Joseph S. Plum, and, by way of cross bill against Joseph S. Plum, set forth that the mortgaged premises were the property of Joseph Plum in his lifetime; that Joseph Plum was the father of Joseph S. Plum and the husband of Hannah Plum; that Joseph Plum died testate, on the 15th of December, 1890; that by his will he gave to his son Joseph S. a pecuniary legacy, and gave his household furniture, except a wardrobe, to his wife, and the wardrobe to his daughter Mary; that the will made this provision: "I give and bequeath to my beloved wife, Hannah, the interest of two thousand dollars, as long as she lives and remains unmarried and my widow, to be left secured on my real estate, but on her decease or marriage to be equally divided among my children;" that, after the payment of the testator's debts and funeral expenses, the residue of the estate is given to the testator's three children in equal shares. The cross bill further represents that, after the death of Joseph Plum, the executor and executrix of the will sold the mortgaged premises to Mr. Bateman, taking back from him the mortgage in question; that Joseph S. Plum did not pay Hannah Plum the interest on the \$2,000, and has not since her death paid it to her administrator, Smith; that, after the payment of the debts of Joseph Plum and the legacies bequeathed by his will, nothing of his estate remains but the mortgage sought to be foreclosed by the original bill; that Joseph S. Plum has no property out of which the judgment against

him in favor of Hannah Plum can be made by execution; that the mortgaged premises will not sell for sufficient to pay the \$2,000 mortgage and the interest in arrears thereon in full; and that, as son of Joseph Plum, Joseph S. Plum will be entitled to some portion of the recovery had upon that mortgage. Upon this allegation of facts the defendant Smith insists—First, that the interest of the \$2,000 during the life of Hannah Plum, by the will of Joseph Plum, is made a first charge or lien upon the recovery to be had from the mortgaged premises, before the principal sum of \$2,000, and that it is to be first paid to him in full, and not to abate proportionately with the corpus, if the proceeds of sale of the mortgaged land shall not be sufficient to pay both corpus and interest in full; and, second, that he should, in this suit, have recourse to the share of Joseph S. Plum in the corpus recovered in the foreclosure for the payment of the judgment of Hannah Plum.

The complainant moves to strike out a clause of the answer reserving exceptions and to dismiss the cross bill on two substantial grounds: Because (1) it "is multifarious, seeking a construction of the will of Joseph Plum, deceased, the settlement of his estate in this court, and is a creditors' bill exhibited against a co-defendant"; and (2) "it seeks to litigate matters between the defendant and complainant, and between the said defendant and his co-defendant Joseph S. Plum, which are not the subject of the original suit."

J. A. Bullock, for the motion. John T. Bird and J. B. Huffman, opposed.

McGILL, Ch. (after stating the facts). The motion to strike out the clause of the answer which reserves exceptions must prevail. The 208th rule forbids the incorporation of that clause in an answer.

The questions which the cross bill seeks to present are—First, whether, in case enough shall not be realized to pay the whole \$2,000, with the interest in arrears, the full interest should not, under a proper construction of the will of Joseph Plum, be paid to the administrator of the widow out of whatever may be realized for both principal and interest; and, second, whether the distributive share of Joseph S. Plum in the fund to be divided among the children of his father should not be subjected to the payment of the judgment which Hannah Plum recovered against him.

According to the allegations of the cross bill, the complainant is really a trustee, seeking the recovery of the trust fund which he has invested. With the recovery and immediate distribution the trust will terminate. The trustee is irresponsible. He is the owner of the property which is held as security for the fund. I think that his cestuis que trustent are necessary parties to his suit, and that the court should not suffer him to proceed to sale and have the possession of

the money realized before the cestui que trustent shall be, as parties, heard; and, under the circumstances, I also think that a cross bill which seeks a direct distribution of the whole trust fund by the court, when it shall be recovered, will justly and with eminent appropriateness lie. The difficulty at present is that upon the face of the original bill the special trust character of the \$2,000 investment does not distinctly appear. The terms of the will under which the executor acts are not stated, and although the allegation that the mortgage was to continue till the death or marriage of Hannah Plum indicated that the investment was to answer a particular purpose, yet, from the will, that purpose, and cestui que trustent concerned in it, are not ascertainable. A plea would properly have shown a lack of parties. The making of the objection of lack of parties and its determination should have preceded the cross bill, in order that all parties necessary to the final decision of the question raised by the cross bill should be before the court. I do not mean to say that the answer might not have been so framed as to cause the court to arrest the suit until the necessary parties should be brought in, so that they could be served with the answer by way of cross bill, but that course is objectionable, because it creates delay and the confusion and annoyance of a double hearing; for proofs will be taken before the arrest of the cause will come, and new parties will have the right to review the proofs taken.

I think that the objection is well taken that the cross bill is multifarious in that, while it seeks a construction of the will and distribution of the trust fund (a matter common to all the parties at present in the suits and the remaining children of Joseph Plum or the holders of their interest), it, at the same time, seeks to apply the share in the \$2,000 to which Joseph S. Plum as cestui que trust may be entitled to, to the payment of a judgment against him held by a single defendant. Such joining of claims presents issues which are independent of each other, and which concern different parties, and in which all the parties necessary to the suit are not concerned, and issues which those parties should not all be obliged to follow or be burdened with. Story, Eq. Pl. 270.

Besides, the judgment matter does not appear to be the proper subject of cross bill. It is an independent effort to subject a debtor's property to the payment of a judgment at law. It has no connection with, or relation to, the matter of the original suit. Its object can and should be accomplished by an independent bill, and through the instrumentality of injunction and receiver.

I will make this disposition of the motions: I will deny the motion to dismiss the cross bill, but will strike out that part of the cross bill which seeks relief with reference to the judgment. The complainant may

amend his bill by reference to the second paragraph of the will of Joseph Plum, and the investment of the \$2,000 in pursuance of the direction of that paragraph, and by making the other children of his father, or the holders of their interests, parties defendant to the bill; and he may by due process bring them into court. When the original bill shall be thus amended, and the new parties shall be brought into court, I will permit the cross bill to be amended so as to include those new parties, in order that it may be served upon them and they may answer it. If the original bill shall not be amended as above suggested, I will give the defendant Smith leave to withdraw his answer and cross bill, and file a plea, so as to take the objection of lack of parties. Costs will be allowed to the complainant upon the motion to strike out the clause of the answer which reserves exceptions, but they will not be allowed to either party on the motion to dismiss the cross bill. I have felt constrained to go somewhat beyond the motions, in dealing with this case, in order to expedite its proper presentation on the merits, because it concerns a trust in which the trustee occupies an anomalous position, which awakens the court's serious and jealous attention.

(90 N. H. 221)

SANBORN v. LADD.

(Supreme Court of New Hampshire. Belknap.
March 11, 1898.)

MORTGAGE—CONSTRUCTION—RIGHT TO FORECLOSE.

1. A. gave B. his demand note for \$2,500, secured by mortgage. B. agreed separately in writing not to foreclose so long as A., during his life, paid him, his executors, or administrators, or legal representatives, five dollars per month, and kept the buildings on the land insured in B.'s favor. A. became in default in the monthly payments. *Held*, the employment of three papers to express the contract in the foregoing transaction does not impair its validity or change its effect.

2. The right to foreclose the mortgage for the face of the note accrued without any formal demand as soon as default in any monthly payment occurred, and, in the absence of fraud influencing the contract, equity would not enjoin the foreclosure suit.

Writ of entry to foreclose a mortgage by Maria T. Sanborn against Daniel T. Ladd, and bill in equity by defendant to enjoin the same. Judgment for plaintiff.

June 12, 1894, the defendant, being indebted to the plaintiff in the sum of \$2,500, gave her a note of that date for that sum, payable on demand, without interest, and a mortgage of the land described in the writ, to secure the payment of the note. As a part of the same transaction, the plaintiff gave the defendant a writing, as follows: "It is agreed by the undersigned that if Daniel T. Ladd * * * shall pay to her the sum of five dollars per month, or to her executor or administrator, or legal representative, during his life, the mortgage this day given her * * * by said Ladd to secure the payment of his note to her for

twenty-five hundred dollars, without interest, shall not be foreclosed and the said Ladd shall not be disturbed in the peaceable possession thereof, provided he, the said Ladd, shall at all times keep the buildings reasonably insured, the insurance to be paid to her in case of loss. The meaning and intent of this agreement is that if the said Ladd will pay and insure as aforesaid he may occupy the premises during his life; if he should die, or fall in his payments, or to keep the buildings insured, then the payment of the note or foreclosure would be demanded." The defendant failed to make the monthly payments becoming due between December, 1895, and September, 1896, although several times requested to pay them. After the plaintiff's action was begun, he offered to pay them, but the plaintiff declined to receive payment. The plaintiff made no demand for payment of the principal of the note prior to the commencement of her action. She moved for conditional judgment, and the defendant moved for leave to pay the monthly installments in arrears, with interest and costs, and for an injunction to restrain the plaintiff from prosecuting her action so long as he continued to perform the agreement.

Jewell, Stone, Owen & Martin, for plaintiff.
E. A. & O. B. Hibbard, for defendant.

CHASE, J. By the terms of the note, the principal is not on interest, but the contemporaneous agreement requires the payment of \$5 a month, which amounts to \$60 a year or $2\frac{2}{3}$ per cent. of the principal. By the note, the principal is payable on demand, but by the agreement the payment, so far at least as it relates to a foreclosure of the mortgage, is postponed until the decease of the defendant or until he shall make default in paying the monthly installments or keeping the buildings upon the mortgaged premises reasonably insured for the plaintiff's benefit. Construing the note and mortgage as embracing the contemporaneous agreement (*Hill v. Huntress*, 43 N. H. 480), the note is payable, with interest monthly at the rate of $2\frac{2}{3}$ per cent. per annum, on demand after the decease of the defendant if the interest is paid when due, and, if not, on demand after a default in the payment of interest; and the mortgage secures the payment of the note and the performance of the defendant's agreement in respect to insurance. The mortgage could not be foreclosed so long as the defendant made payments and kept up the insurance according to his agreement. The employment of three papers, instead of two, to express the contract, does not impair its validity, or change its effect. There having been a default in the making of the monthly payments, the principal is due by the terms of the contract. The right thus secured to the plaintiff is as reasonable and equitable as the right of the defendant to have the payment of the principal postponed until his decease, if he made the monthly payments in accordance with his agreement. The

parties having entered into the contract uninfluenced by any fraud, it governs their rights, and there is no ground on which equity can interfere with the enjoyment of them. The plaintiff is not insisting upon a forfeiture of a right possessed by the defendant, but upon the payment of a debt due her by the terms of the contract. The defendant can redeem the land from the mortgage by paying the note. His obligation to pay the principal having become complete before the action was begun, no prior formal demand of payment was necessary. *Watson v. Walker*, 23 N. H. 471, 493. The plaintiff is entitled to conditional judgment upon the mortgage, treating the principal of the note as due. Case discharged.

WALLACE, J., did not sit. The others concurred.

(68 N. H. 519)

CONCORD & M. R. R. v. BOSTON & M. R. R.
(Supreme Court of New Hampshire. Merri-
mack. July 31, 1896.)

RAILROAD COMPANIES—RIGHTS INTER SE—AD-
JUSTMENT OF RATES—AWARD—REFERENCE.

1. By Laws 1855, c. 1666, § 3, an award of referees appointed to fix rates to be paid by one railroad company for the use of the tracks of another is binding on the parties until three months after the next session of the legislature, and for such further time, not exceeding one year, as the referees may fix, unless altered by the legislature. *Held*, that Laws 1858, c. 2125, § 2, making the award subject to the judgment of the supreme court, did not extend the duration of its binding force, as fixed by the original act.

2. Where, after the expiration of a judgment entered on an award fixing the rate of compensation to be paid by one railroad company for the use of the tracks of another, under Laws 1855, c. 1666, the parties continue to pay and receive the rate so fixed, they will be bound by such rate so long as it is paid and received without objection. But, on notice of objection being served, the implied contract existing between the parties is terminated, and the amount to be paid thereafter becomes a matter for legal adjudication, under Pub. St. c. 157, § 12.

3. Where referees appointed on notice under Pub. St. c. 157, § 12, to determine all unsettled claims relative to the use of the tracks of defendant railroad company by plaintiff, and determine the rates and terms for such use thereafter, report that plaintiff "shall" pay a certain rate, but fail to state whether that rate shall take effect from the date of the service of the notice or from the filing of the report, such report is sufficiently uncertain to require its recommitment to the referees for a specific finding on that point, since the determination of the rate to be paid from the time of the service of notice is a matter within the authority of the referees.

Petition of the Concord & Montreal Railroad against the Boston & Maine Railroad, under Pub. St. c. 157, § 12, for the adjustment and determination of unsettled claims and accounts relative to the use by the plaintiffs of the tracks of the Eastern Railroad in Portsmouth, of which the defendants are lessees, and of the rates and terms for such use hereafter. On a similar petition in 1865, the rate was fixed at five cents per ton. Heard on report of referees. Recommended.

Frank S. Streeter, for plaintiffs. Oliver E. Branch, J. S. H. Frink, and C. B. Gafney, for defendants.

BLODGETT, J. The primary question in this case is whether the judgment rendered upon the referees' award of 1865 was limited in its operation to any particular period or time, or whether it is binding and conclusive until a judgment is rendered in the present proceeding. The legislative act approved June 27, 1859 (Laws 1859, c. 2234), authorized the Concord & Portsmouth Railroad to enter upon and use certain portions of the track of the Eastern Railroad in Portsmouth, "subject, as to rates of compensation, to all liabilities and conditions, and entitled to all the benefits and privileges contained in chapters 1666 and 1847 of the Pamphlet Laws." Chapter 1666 (Laws 1855) made it obligatory upon all railroads chartered by this state, in whole or in part, and then in use, to draw over their roads the cars, passengers, and freight of connecting roads for such compensation as might be fixed by the legislature, or by its authority, and then provided (section 3), in case of disagreement between connecting roads, "either party may, on giving the other three months' notice, apply to the superior court, or any two justices thereof, who are disinterested, in vacation, for the appointment of an impartial and disinterested board of referees, and the superior court, or said justices, on due notice to the opposite party, shall appoint such board of referees to adjust and determine the rates of compensation for transportation, and all matters of connection between said roads, and the said referees, after giving due notice to the parties, and after full hearing of the same, shall make their award thereon, which shall be valid and binding until three months after the close of the next session of the legislature, and for such further time not exceeding one year, as said referees may fix, unless sooner altered by the legislature"; and (section 4) "all unsettled claims or accounts, for or on account of such transportation, which may exist at the time of the passage of this act, or at the time of the appointment of any such board of referees, shall, in case the parties are unable to agree in respect to the same, be heard and determined by a board of referees, appointed on petition of either party, in the manner prescribed in the third section." And in 1856 (Laws 1856, c. 1847) the provisions of chapter 1666 were extended so as to apply to all connecting railroads lawfully chartered, "notwithstanding neither of said connecting roads are by law authorized to unite with or enter upon and use the other." In 1858 (Laws 1858, c. 2125), chapter 1666 was further amended by an act providing (section 2): "In any case where any award shall hereafter be made by referees appointed under section three of the act to which this act is in amendment, such award shall be re-

turned to any subsequent law term of the supreme judicial court, for examination, acceptance, recommitment and final judgment thereon, notice of the return thereof having been first given by the referees to the parties in interest." But, while the effect of this amendment was to make the award subject to the control and final judgment of the court, we do not think that the duration of its binding force, as fixed by the original act of 1855, was extended or affected. Taking this to be so, the award of 1865, upon which judgment was rendered at the December law term, 1866 (*Eastern R. Co. v. Concord & P. R. Co.*, 47 N. H. 108), ceased to be binding on the parties at the expiration of the time prescribed in the act of 1855; and there was no longer any obligation upon either party to pay or to receive the five-cent rate established by the award; but, so long as that rate continued to be paid and received without legal objection, the parties would, of course, be bound by it.

Such objection having been duly made by the plaintiffs on July 3, 1891, by service of notice on the defendants, the then-existing implied contract between the parties as to the rate of compensation was terminated, and the amount which the plaintiffs should thereafter pay the defendants became a matter for legal adjudication, under section 12, c. 157, Pub. St., enacting that if connecting railroad corporations cannot agree upon the terms and conditions of making the interchange of their business, or in regard to the accommodations to be furnished at their junction point, "the supreme court, upon petition of either party after notice to the other, shall hear the parties, and shall determine all questions arising between them in regard to such interchange and accommodations, having reference to the convenience and interests of the corporations and of the public." Subsequently, and in accordance with the notice of July 3d, the plaintiffs filed their petition at a trial term of the court for this county, asking for the appointment of a board of referees, "who shall hear the parties, and adjust and finally determine all unsettled claims or accounts relative to the use of said Eastern Railroad Company's tracks, and adjust and determine the rates and terms for such use hereafter, according to the provisions of our statutes"; and at the following term, after hearing had, the petition was sent to referees agreed upon by the parties, who filed their report September 24, 1894, the material part thereof being as follows: "We determine that the Concord & Montreal Railroad, as the operator of the Concord & Portsmouth Railroad, shall pay to the Boston & Maine Railroad, lessee of the Eastern Railroad in New Hampshire, for the use of the tracks of said Eastern Railroad between the terminus of said Concord & Portsmouth Railroad in Portsmouth and the side track leading to Rindge's Wharf, two and three-fourths cents (\$.02375) per ton for

all freight hauled over said eastern tracks by said Concord & Montreal Railroad." Upon this finding, it is contended by the plaintiffs that in view of the fact that no contract can be inferred to have existed for the payment of the 5 cent compensation since their notice of July 3, 1891, the rate of compensation since that date must be regarded as a disputed and unsettled claim, and one of the matters referred to the commission making the finding, and within their authority, and hence, when judgment shall issue upon the report, the rate of compensation established by it should take effect from and after July 3, 1891; while the defendants contend that, if any judgment can issue upon the report as it now stands, it can only be a judgment for the future, not only because the report says nothing about the compensation to be paid during the time intervening between the notice and the award, but because it does say in express terms that the plaintiffs "shall pay * * * two and three-fourths cents per ton," etc., the plain meaning of which is that they shall pay it from and after the time of the making of the award. In view of these contentions, as well as in view of our conclusion that the judgment of 1866 had ceased to be operative at the time of the filing of the plaintiffs' notice, so that the proper rate of compensation since that time would be one of the matters coming within the authority of the referees, we think sufficient uncertainty exists relative to the true construction of the report as to require its recommitment for a specific finding by the referees whether the 2½ cent rate is to take effect from July 3, 1891, or from the date of the filing of their report, September 24, 1894. Recommitted accordingly.

CHASE, J., did not sit. The others concurred.

(69 N. H. 224)

DUNN v. NATIONAL LIFE INS. CO.

(Supreme Court of New Hampshire. Belknap. March 11, 1898.)

INSURANCE—AUTHORITY OF AGENT—EVIDENCE.

1. A policy provided that premiums were payable at the home office, but would be accepted when paid to agents of the company in exchange for its receipts, and that agents were not authorized to extend the time of payment. The insurer's agent authorized to collect premiums told insured to have the premium ready for him, and that he would call for it, and that if he called after it was due it would not affect the policy. He had made some similar statements to other policy holders, and once a month he reported collections made, and insurer did not know whether premiums were paid promptly except by the reports, and in a few instances had accepted premiums that were paid when overdue. *Held*, that the question as to whether insurer had authorized the agent to make said statements should be submitted to the jury, though the agent denied having such authority.

2. An insurer's agent, authorized to collect premiums, acts within the apparent scope of

his authority in telling insured to have the premium ready for him when he should call for it, and that, if he failed to call within 30 days after it was due, it would not affect the policy, though the policy stated that agents were not authorized to extend the time of payment of any premium.

Exceptions from Belknap county.

Assumpsit by Charles A. Dunn, administrator of the estate of Nellie E. Crockett, deceased, against the National Life Insurance Company. A nonsuit was denied, and defendant brings exceptions. Exceptions overruled.

Assumpsit upon an insurance policy on the life of Nellie E. Crockett. Verdict for the plaintiff. The policy, dated December 24, 1895, provides that a premium of \$13.05 shall be paid to the defendant on or before the 24th days of December, March, June, and September in each year during the continuance of the contract, until twenty annual premiums have been paid; that "failure to pay any premium, or any part thereof, * * * when due, shall cancel the insurance" and the contract; that "all premiums are payable at the home office, in Montpelier, Vermont, but will be accepted when paid to agents of the company in exchange for its receipts, signed by its president or secretary"; and that "agents are not authorized to extend the time of payment of any premium, and cannot give credit, make, alter, or discharge contracts, nor waive forfeitures." The plaintiff's evidence tended to show that the company had a general agent at Manchester, through whom all business with its policy holders in this state was transacted; that A. T. Roberts was a sub-agent to solicit applications for insurance, and collect premiums upon policies issued upon such applications, receiving for his services a percentage upon the premiums collected; that receipts for premiums were made out at the home office, a month in advance of the times when the premiums became due, and were sent to the general agent; that the receipts pertaining to Roberts' sub-agency were countersigned by the general agent and forwarded to Roberts; that on the 10th day of each month the general agent, and Roberts, through him, reported to the company the collections made during the preceding month; and that the company had no means of knowing whether the premiums were paid when due except from these reports. The policy in suit was procured through Roberts. Evidence introduced by the plaintiff, subject to exception, tended to show that when Roberts solicited the application for the insurance, and also after the delivery of the policy, he told the insured he would call upon her to collect the premium, and she must be sure to have it ready for him; if he did not call by the day it was due, it would make no difference, it could be paid to him any time within 30 days, and he would call in season; and if she died within the 30 days the insurance,

less the premium, would be paid by the company; also that Roberts had made similar statements to other policy holders; and that, in the case of one, remittances for premiums several days past due had been accepted by the general agent without question, several times. Roberts testified that he had no authority to collect premiums after they were overdue. The insured lived in Laconia, and could not read or write. Roberts did not live in Laconia or have an office there. The insured had the money in readiness to pay the premium due March 24, 1896, and kept it on hand for the purpose until about a week before she died, when it was used by her daughter for household expenses. She died April 17, 1896. Roberts never called for the premium. The day before her death it was sent to the home office, but did not reach there until after the death occurred, and the defendant declined to receive it. The defendant moved for a nonsuit, which was denied, subject to exception.

Frank M. Beckford, E. A. & O. B. Hibbard, and Walter S. Peaslee, for plaintiff. Jewett & Plummer, for defendant.

CHASE, J. Although premiums were payable at the home office of the defendant, they were to be accepted "when paid to agents of the company in exchange for its receipts, signed by its president or secretary." In other words, they were payable either at the home office or to the company's agents having proper receipts for the same. It was essential that each person insured should definitely understand which method of payment was adopted in his case, and, if it was the latter method, whether the agent was to call on him for payment or he was to tender payment to the agent wherever found or at some designated place. Uncertainty as to this matter would necessarily tend to prevent the making of payments when due, and subject the insured to the liability of unwittingly losing his insurance. It is not presumed that the defendant intended that there should be such liability. On the contrary, it appears that it attempted to remove the uncertainty in respect to its New Hampshire business, at least, by providing its agents residing in the state with receipts for premiums and making the collections through them. The sending of the receipts to the agents, in connection with the provisions of the contract, tended to show that the defendant authorized the agents to make all necessary arrangements with the insured for the payment of the premiums to the agents. It would justify the jury in finding that Roberts was authorized to direct the insured in this case not to send the premiums becoming due upon her policy to the home office, but to pay them to him in exchange for receipts with which he would be furnished; and, further, to prom-

ise, in behalf of the defendant, to call on her in season to enable her to make the payments when due. There was also evidence tending to show that the agents were authorized to allow some grace in the making of payments. The defendant had no means of knowing whether the premiums were paid promptly except from the agents' reports, which were made on the 10th day of each month for the preceding month. This afforded the agents an opportunity to grant some indulgence. In the case of one policy at least, the general agent accepted the payment of overdue premiums several times without question. This evidence was competent, in connection with the other evidence, to show the defendant's course of business. Roberts' denial that he had authority to collect overdue premiums was not conclusive on the point. The jury might find, from a consideration of all the evidence, that Roberts' assurance to the insured that her policy would not be avoided by his neglect to seasonably present the receipts to her for payment was authorized by the defendant. Such neglect would be his fault, and, as it would occur in the execution of apparent authority conferred by the defendant, it would be attributable to the defendant. *Deming v. Railroad Co.*, 43 N. H. 455, 472; *Nixon v. Brown*, 57 N. H. 34. Even if he attempted to extend grace beyond the limits of his authority, the defendant, instead of the insured, should suffer the loss occasioned thereby; for "when one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract by voluntarily placing the agent in a situation of apparent authority." The insured relied upon Roberts' representations in regard to the payment of premiums. She had the money on hand at the appointed time, and kept it for some time afterwards. If it was found that Roberts had authority to make the representations, and that the insured relied upon them, the defendant would be estopped from setting up the provisions of the policy relating to forfeiture to defeat the plaintiff's action. *Appleton v. Insurance Co.*, 59 N. H. 541, 544, 545. The evidence excepted to was competent, and, in connection with the other evidence, was sufficient to warrant the denial of the defendant's motion for a nonsuit. Exceptions overruled.

PARSONS, J., did not sit. The others concurred.

(37 Md. 102)

BALTIMORE & O. R. CO. v. FLAHERTY.

(Court of Appeals of Maryland. Jan. 5, 1898.)

Dissenting opinion. For majority opinion, see 39 Atl. 524.

BRYAN, J. The charter of the Baltimore & Ohio Employes' Relief Association was repealed by Acts 1888, c. 527. It was provided

by this act that it should go into effect on the 1st day of April, 1889. We have already had before us on three several occasions controversies which have ensued in consequence of the repeal of this enactment. The cases are reported in 72 Md. 493, 20 Atl. 123 (Railroad Co. v. Cannon); 77 Md. 566, 26 Atl. 1045 (Baltimore & O. R. Co. v. Baltimore & O. Employes' Relief Ass'n); and in 79 Md. 442, 29 Atl. 524 (Railroad Co. v. Brown). The greater portion of the facts which bear on the questions now before us are stated in the opinions which were filed in the cases mentioned. Nevertheless, some repetition is unavoidable for the purpose of explaining the present case, and of showing the grounds of the opinion which we have formed.

A couple of days before the day appointed for the expiration of the charter of the relief association, it made a contract with the Baltimore & Ohio Railroad Company for a conveyance to it of all its property upon certain conditions, and for certain purposes, specially and distinctly set forth in the contract. It was recited in the contract that the railroad company had established the relief department under regulations issued by its president, which relief department was intended and was adapted to carry out the purposes and continue the business of the relief savings fund and the building and pension features, respectively, of the relief association; and that it was desired to wind up the business of the several features of the relief association, and to afford opportunity to the members of the relief feature, the depositors in the savings fund, and the pensioners of the association to retain and continue the privileges and advantages afforded them, respectively, in the association, by becoming members of the relief feature, depositors in the savings feature, and pensioners, respectively, in the relief department; and the contract was made to carry into effect the purposes mentioned in these recitals. The railroad covenanted and agreed that the property of the relief feature to be conveyed should be held and applied to the payment of the liabilities of the association in connection with the business of its relief feature, and thereafter for the benefit and advantage of the members of the relief feature of the relief department, and that the property of the pension feature and of the savings fund and building feature to be conveyed should in like manner be held and applied to the payment of their proper liabilities, and thereafter for the benefit of the members of said features respectively; and it further covenanted and agreed that, if any member of the relief feature of the association should refuse to become a member of the relief department, the value of his membership and interest in the association should be paid to said member in money; and it further covenanted and agreed that all the property, assets, credits, and securities the conveyance and transfer of

which is provided for in this agreement should be kept and remain distinct and separate from the property of the company held for its railroad purposes. After the making of this contract, the relief association transferred to the railroad company a large amount of assets. This amount will be a subject of consideration in another part of this opinion. More than 19,000 of the members of the relief association became members of the relief department, and executed assignments to the railroad company of their interest in the assets of the association. By these assignments, they became members of the relief department; and these instruments each contained a clause by which they agreed to be bound by all the regulations of the relief department then in force, and which might thereafter be adopted. There was also in each assignment a clause declaring assent to, and confirmation of, the transfer of the assets made by the relief association to the railroad company, "for the purposes of the like features of the relief department, respectively." Eleven hundred and sixty-five members of the relief association declined to join the relief department, and, of course, made no assignment of their interests. In March, 1889, Conley filed a bill in equity against the Baltimore & Ohio Railroad Company and the relief association; and soon afterwards another bill in equity was filed by Cannon against the same defendants. Both of these complainants were nonassigning members of the relief association, and the scope and purpose of each suit was the same. Both bills were filed by the complainants in their own behalf, and also in behalf of all the members and creditors of the relief association who might choose to become parties. They both alleged that the assignment made to the Baltimore & Ohio Railroad Company by the relief association was ultra vires and void, and they prayed for the appointment of receivers to take charge of the assets of the dissolved corporation, and make distribution of them. Shortly afterwards the railroad company filed a bill in equity in the same court against the relief association and each and every of the 1,165 nonassigning members of the said association. The bill set forth the trust created by the contract with the relief association, and prayed the court to take jurisdiction of the matter, and direct the complainant in the administration of the trust. These three cases were consolidated by the order of the court. After a long litigation, the court passed a decree requiring the railroad company to account with all the members of the relief association who were in good standing at the time of its dissolution on March 31, 1889, and, after prescribing the terms of accounting, gave the following direction (among others) to the auditors, to wit: "They shall audit the amount due all the members when ascertained as above directed, who have as

signed their interest in said association to the Baltimore & Ohio Railroad Company, upon proof of said assignment to said railroad company in one sum, to be held by it for the benefit of the members of the relief feature of the relief department of said company." An appeal was prayed by the railroad company, and this court, in 77 Md. 566, and 26 Atl. 1045, reversed the decree in a particular not connected with the matter now in hand. In due course, the auditors made their report, and, after having distributed their share of the assets to the non-assigning members, distributed to the Baltimore & Ohio Railroad Company, in trust for the benefit of the relief feature of the relief department of said company, the sum of \$548,899.04, in which sum were included certain securities. This account was duly ratified and confirmed on the 14th day of December, 1895. On the 26th day of February, 1896, John Flaherty, a member of the relief department, filed a petition praying that the railroad company should be required to pay into court the trust fund distributed to it by order of the court in trust for the relief department. After hearing in the regular order (answer having been filed, testimony having been taken, and argument of counsel having been heard), the court passed an order requiring the railroad company to pay into court the amount of money embraced in the distribution made to it by the auditor's report. The railroad company has appealed.

It has been maintained by the appellant that the court had no jurisdiction to pass this order. We shall examine this question. Cannon's bill was filed in behalf of all the persons interested in this fund who chose to become parties to the suit, and it prayed the decision of the court on the responsibilities of the Baltimore & Ohio Railroad Company to all of them. This court decided that the case did not justify the appointment of a receiver; but it was fully recognized that Cannon had a right to demand an adjustment of the interests of the members of the relief association. Conley's bill does not appear in the transcript of the record, but we are given to understand that it was of similar import with Cannon's. The bill of the Baltimore & Ohio Railroad distinctly brought before the court the rights of all the parties concerned in the affairs of the relief association. As has been stated, all these cases were consolidated. Consequently, every question was before the court which was validly presented in each of them, and the court had all the jurisdiction which could be derived from all the cases combined. The railroad company, by virtue of the contract hereinbefore mentioned, being possessed of the funds and assets of the relief association for the purpose of carrying out the objects of the agreement, duly represented in the litigation all the members who had made assignments. It was its duty to hold the property for the

benefit of the assigning members after the payment of the liabilities properly chargeable on it. It is a necessary consequence that it had the right and power to protect it by representing the members in any litigation which might arise, and it was its duty to do so. This consequence is also evident from the absolute impossibility of bringing the 20,000 assigning members into court as parties litigant to defend the fund.

In *Kerrison v. Stewart*, 93 U. S. 160, it was held that, where a trustee represents his beneficiaries in all things relating to their common interest in the trust property, the beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, nor to one by a stranger against him to defeat it in whole or in part, and that in such cases the trustee is in court for them and in their behalf. Many illustrations might be given of this principle. One of the most familiar is the case of an executor whose duty is to protect the interests of the estate, and who prosecutes and defends suits which concern the augmentation or diminution of the personal assets, without the joinder of residuary legatees or any other persons interested in the estate. In *Lucas v. McBlair*, 12 Gill & J. 1, the doctrine of representation was declared in the fullest manner, where trustees held property for a large number of persons who could not be made parties without great hardship and inconvenience. The case involved the rights granted to Lucas and others by an act of assembly to raise, by sales or drawing of schemes of lotteries, the requisite money for the construction of an armory and town hall in the city of Baltimore. But, in the determination of the questions which arose, it became necessary to consider the doctrine which we have stated. This court gave its full assent to the opinion of the learned Story in his work on Equity Pleading, quoting at large from it as follows (section 140): "It has been well remarked by an eminent author, in many cases, that the expression that all persons interested in the subject must be parties to the suit is not to be understood as extending to all persons who may be consequentially interested. In all cases of bills by creditors and legatees, the persons entitled to the personal assets of a deceased debtor or testator, after payment of the debts or legacies, are not deemed necessary parties, though interested to contest the demands of the creditors and legatees." And also as follows (section 142): "Courts of equity do not require that all persons having an interest in the subject-matter should, under all circumstances, be before the court as parties. On the contrary, there are cases in which certain parties before the court are entitled to be deemed the full representatives of all other persons, or at least so far as to bind their interests under the decree, although they are not or cannot be made parties." Section 143: "Thus, for example, where real

estate had been purchased by a joint fund, raised by a subscription in shares of more than two hundred and fifty subscribers, and the property had been conveyed to certain persons as trustees for the subscribers, and afterwards a bill was brought against the trustees for the sale of the real estate, under a mortgage made in pursuance of the trust, it was held not necessary for the subscribers to be made parties to the bill; for the trustees, by the very nature and constitution of such a trust, must be held sufficiently to represent the interest of all the subscribers, and a different doctrine would be attended with intolerable hardship and inconvenience, as it might be impossible to make all the subscribers parties."

One of the principal objects of the bill filed by the railroad company was to ascertain the extent of the interests of the nonassigning members of the relief association. Yet this, manifestly, could not be done without also ascertaining the correlative interests of the other members in the same funds. The fund was to be apportioned between the two sets of owners, and the shares of each were increased or diminished by the amounts allotted to the other set. Necessarily, it was required that the shares of each set should be determined. The railroad company duly represented the twenty-odd thousand assigning members, and did not and could not make them parties to the suit. Its right to represent this large body of members was fully recognized by the courts throughout the litigation. It must be seen that all the members of the relief association have been made parties to the proceedings in these consolidated cases; the nonassigning members by name, and the assigning members by representation. It is only because they are parties that members of this latter class are bound by the audit which determined the amount which the railroad company is to hold for their benefit. By the consolidation of the different cases, the court had full and complete jurisdiction over all the parties interested in this litigation, and over all the subjects embraced in the different suits.

A question has been made as to the right of Flaherty to proceed by way of petition. The large sum of money already mentioned had been audited to the railroad company in trust for the benefit of the relief feature of the relief department. Flaherty was one of the members of the relief department. The moneys held by the railroad company in trust for it were under the jurisdiction of the court; and, of course, Flaherty had a right to apply to the court to secure the fund if it should be in danger; and there could be no more appropriate method of making such an application than by petition. All the other members of the relief department were in court as parties by representation in the person of their trustee, the railroad company. It would cause a most useless and unjustifiable accumulation

of costs to file an original bill for the purpose of bringing before the court the matters which were already on record in the litigation between the parties concerned in the subject on which the action of the court was desired. There is no rule of practice in this state which sanctions such procedure. Without considering any vexed questions of practice which have been the subject of controversy in other jurisdictions, we are content to abide by the rule which has been established by the wisdom and thoughtful providence of our predecessors. In *Hays v. Miles*, 9 Gill & J. 198, it was said: "A petition may not in all cases be the proper course to reach a fund in chancery; as where new parties are to be made, not necessary to have been made to the original bill, and where the investigation may involve inquiries calculated, by protracting the cause, to delay others, not having an interest in such controversy. But we think it may be safely stated as a general rule that a petition is the proper mode of affecting a fund in equity where no other parties are to be brought in to litigate the application than such as are or ought to have been parties to the original bill." We believe that this is the settled practice in this state. A similar course was approved in *Balch v. Zentmeyer*, 11 Gill & J. 283. And *Hays v. Miles* has been repeatedly cited as a decisive authority. *Griffith v. Parks*, 32 Md. 5; *Thomas v. Bank*, 46 Md. 56; *Brown v. Thomas*, Id. 641.

Flaherty's petition alleged that the funds which had been allotted to the Baltimore & Ohio Railroad Company, by order of the court, in trust for the relief department, had not been invested, but had been borrowed by the railroad company, to be carried as a part of its floating debt. On the 30th day of November, 1895, an entry was made on the books of the Baltimore & Ohio Railroad Company showing a money credit of \$364,666.56 in favor of the relief department. This amount is \$25,606.48 less than the sum of money with which the Baltimore & Ohio Railroad was charged in the audit, and does not include the securities. The ninth regulation of the relief department is in these words: "All moneys and securities of the department, with the exception of the mortgages made to secure loans from the savings feature, shall be intrusted to the official custody of the treasurer of the company, to be held subject to proper requisitions. All such securities will be held in the name of the company, in trust for the relief department. Interest at the rate of 4 per cent. per annum will be paid on the monthly balances for cash deposited with the treasurer for the several features of this department, including in such balances the amount of checks not presented for payment or unclaimed on the last day of the month." It is important to ascertain in whose custody the moneys and securities

were at the time the petition was filed. Mr. Ijams, the treasurer of the railroad company, was examined as a witness. He testified that he had been the treasurer for 37 years. We make an extract from his testimony, as it appears in the record: "3d Int. During your connection with the railroad company as treasurer, have the moneys deposited by the relief association up to March 31, 1889, and by the relief department since that time, been kept separate from the moneys of the B. & O. Railroad Company? A. I presume so. That is a question the auditor will have to answer. 4th Int. In what banks were the moneys of the B. & O. relief department kept prior to the time of the receivership? A. There was no separate bank accounts kept by the B. & O. relief department. They were kept right in with the other moneys of the B. & O. 5th Int. Did you have in your hands the securities belonging to the relief department? A. I was the custodian of the boxes in which they were contained. 6th Int. Do you know what securities belonging to the relief feature of the relief department were in your possession at the time of the appointment of the receivers? A. I do not know the contents of the boxes. 7th Int. Who has the authority to open these boxes? A. The chairman of the relief committee, Aubrey Pearre, and the chief clerk of the relief department, John P. Hess. 8th Int. Did you or not, in August, 1895, receive any orders from any official of the railroad company to hold a large sum of money for the benefit of the relief department? A. I do not recollect of receiving any. 9th Int. Do you remember of receiving any order to transfer or hold any sum of money, amounting to \$300,000 or \$400,000, for the benefit of the relief department, since the 1st day of August, 1895, up to the time of the appointment of the receivers for the B. & O. Railroad Company? A. I do not." Mr. Pearre was also examined as a witness. We make an extract from his testimony: "1st Int. Are you a director of the Baltimore & Ohio R. R. Co. A. I am a director of the Baltimore & Ohio R. R. Co. 2nd Int. Were you a member of the board of directors through the month of September, 1895? A. Yes, sir. 3rd Int. And continuously from that time until now? A. Yes, sir. 4th Int. Have you been during the past year a member of the committee of management of the relief department? A. I have, sir. 5th Int. Do you have charge of the investment of funds held by the railroad in trust for the relief department? A. The committee on the relief department has charge of those investments. 6th Int. Can you state what investments your committee has made of the funds audited to the Baltimore & Ohio Railroad Co. in the Baltimore & Ohio Employees consolidated cases, by the report of the auditor finally ratified September 14, 1895? A. We have only invested

\$2,500 in City Brunswick bonds. 7th Int. Where is the balance of that money now deposited? A. With the treasurer of the Baltimore & Ohio R. R. 8th Int. Do you know in what banks it is deposited? A. I do not. 9th Int. Can you state whether, at the time this auditor's report was ratified, any separate account was opened in any bank by the R. R. Co. in which this special fund was deposited? A. I cannot. 10th Int. Did your committee make any report advising that such a special account be opened? A. No, sir. 11th Int. Do you know whether the treasurer can now point out where this particular fund is to be found, or whether it was merged in the general cash balances of the R. R. Co.? A. I cannot; I do not know. 12th Int. What officer is possessed of this knowledge? A. That I do not know. 13th Int. What inquiries have you made as to the whereabouts of this trust fund under your charge? A. We have made no special inquiries. All the funds of the relief department pass through the hands of the treasurer. I do not know whether they are separated or not." He also testified that he had been chairman of the committee on the relief department six or eight years. It is shown by the testimony of Mr. Ijams that on the 13th day of November, 1895, the balances of the railroad company in bank amounted to \$1,300,869.90; but of this amount certain deposits in the hands of the Maryland Trust Company of the United States Trust Company were made for special purposes, and were not subject to check for any general use of the railroad company. These deposits amounted in the aggregate to \$1,387,500; so that the railroad company had overdrawn its account in bank, and had nothing in the hands of its treasurer, which could be applied to the payment of the credit on its books in favor of the relief department. So, it is shown that the railroad company has broken its covenant with the relief association, whereby it agreed that all the property, assets, credits, etc., of the association which were to be conveyed to it should be kept distinct and separate from the property of the company held for its railroad purposes. Neither has the ninth article of the regulations of the relief department been observed, which required that the moneys should be intrusted to the official custody of the treasurer of the railroad company, to be held subject to proper requisitions. The Baltimore & Ohio Railroad Company committed a breach of trust of a very serious character. The trust fund confided to it has disappeared, and it is not shown in the evidence what has become of it. The relief department is one of its agencies established, regulated, and controlled by it. A construction cannot be given to the ninth article of the regulations issued March 15, 1889, which would release the railroad company from its solemn contract under seal made on the 29th day of

the same month. Far less would a court of equity regard this article as an excuse for the misapplication of funds which by its own order it had placed under the control of the trustee. The insolvency of the trustee, and the placing of its property in the hands of receivers, are proved in the proceedings.

The duty of a court of equity to preserve trust property when endangered is imperative. It would be idle to discuss a matter so familiar; and it would be difficult to conceive how the trust property could be in greater peril. Flaherty proceeds in this case in his own behalf, and in behalf of all others having a like interest in these funds. He is not invested with a separate and divisible share of them, but his interest is involved in a proper administration of all the trust property. He has a right to protect himself, and, in protecting himself, he is at the same time securing the rights of all others interested in the preservation of the trust property. The fact that his individual right is of small pecuniary value imposes no disability upon him, in the view of a court of justice. His rights must be protected by the law; and in this particular case he is proceeding for the benefit of all others similarly situated. The order of the circuit court requiring the fund to be paid into court was a wise and provident step for securing it for the benefit of all concerned in it. It is the usual course taken in like cases. It was pursued in *Ehlen v. Ehlen*, 63 Md. 207. In that case, on the petition of a party entitled to one-fifth interest in trust property, the court ordered the trustee to bring into court the securities and money held in trust, it being shown that the property was in danger. This order was passed, notwithstanding the fact that the other parties interested in the trust were willing that he trustee should retain the property. The court said that the fund was an entirety, and that the petitioner's interest could not be protected without securing the whole fund; and this the petitioner had a right to do, although the other persons interested in it were willing to relinquish their rights. It is well to notice that the petition was filed in the *Ehlen Case*, in a suit where, by a decree in equity, property had been divided, and certain stocks and bonds had been allotted to Ehlen, the trustee, to hold in trust, according to the provisions of his father's will. It was not suggested in any quarter that the jurisdiction of the court over the trustee terminated when, by its order, the stocks and bonds were allotted and delivered to him; nor was it suggested that a petition was not the proper mode of proceeding against him by a beneficiary of the fund. If the trustee is unable to produce the fund, it must show some satisfactory reason for its inability, and must disclose where the fund is; so that it may be recovered for the benefit of the trust. As germane to this matter, the remarks of two eminent judges may be quoted. A bill in equity had been filed to restrain a breach of trust in behalf of an infant interested, with

many others, in the property, but whose own interest in the property was very small. In deciding the case, Sir W. M. James, L. J., said: "The cestui que trust has a right in this court to prevent the sale when a breach of trust has been committed, and it would be *pessimi exempli* for us to say: 'A breach of trust has been committed, but the amount which any one cestui que trust suffers by reason of that breach is not sufficient to justify a chancery suit.' That is not an effectual answer in this court." And Lord Justice Mellish said: "I also agree that the small interest of the infant can make no difference. The interest of each of them may be so small that no one of them might think it worth while to file a bill at his own risk; but, the bill being filed on behalf of one infant, we must look at the whole substantial interest which is in question, not merely at the individual interest of the infant." 8 Ch. App. 902.

Flaherty's petition in this case was filed on the 26th day of February, 1896. Subsequently to this petition, proceedings were instituted in the circuit court of the United States for the district of Maryland, whereby all the property of the Baltimore & Ohio Railroad Company was placed in the hands of receivers. When a court once rightfully acquires jurisdiction over a subject, no other court can interfere with the matter by subsequent proceedings. "The rule is well established that, when two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it, and the other co-ordinate court has no authority to interfere, and will, as soon as judicially informed of the pendency of the prior suit, dismiss the subsequent proceedings." *Dunnoch v. Dunnoch*, 3 Md. Ch. 150. To the same effect: *Albert v. Winn*, 7 Gill, 447; *Jenkins v. Simms*, 45 Md. 537. All courts desire that the administration of justice shall be conducted in an orderly and harmonious manner. The rule which has been universally adopted prevents conflict of jurisdiction,—a great evil, which cannot be too earnestly deplored. There is no reason to apprehend anything of the kind in this case. If the fund which is the subject of this controversy shall be found to be in the possession of the receivers, we shall confidently believe that the United States court will promptly order it to be delivered to the court which has the rightful custody of it.

(87 Md. 352)

MAYOR, ETC., OF CITY OF BALTIMORE v.
FAIRFIELD IMP. CO. OF BAL-
TIMORE CITY et al.

(Court of Appeals of Maryland. April 1, 1898.)

NUISANCE—PEST HOUSE—ABANDONMENT—
PRESCRIPTIVE RIGHTS.

1. The fact that a public pest house was not a nuisance, when erected by the city, because of its secluded location, does not prevent persons who subsequently located in the vicinity thereof from obtaining redress, on the ground that they have come to the nuisance, where

such building has not been maintained long enough to give the city a prescriptive right.

2. The city of Baltimore owned a 20-acre tract three miles outside of its limits, on which it maintained pest houses up to 1883, when the buildings were burned by order of the city, the land directed to be sold, and a quarantine station established in another part of the city. No further use was made of the property until 1897, when the city kept a woman afflicted with leprosy at the home of unskilled laborers living on this tract. Complainants owned the adjoining property, which they divided up into lots subsequent to 1883, many of which have been sold, and are occupied by buildings erected in the belief that the city had abandoned the land for quarantine purposes. *Held*, that there was an abandonment of the property, and hence the city possesses no prescriptive right to use the land for quarantine purposes, and cannot, to the detriment of complainants, resume occupation of the tract for the detention of the leper.

3. The placing a woman afflicted with leprosy in the private home of a laborer (not an officer of the city) living on said tract did not amount to an establishment of a hospital for the isolation and treatment of contagious diseases, as permitted by Code Pub. Loc. Laws, art. 4, §§ 378, 409.

4. The power to erect and maintain hospitals and pest houses does not justify the making of a contract with a laborer for the keeping of one afflicted with leprosy at his home located on city land in a settled district, since the act has a tendency to extend the disease instead of protecting the community.

Appeal from circuit court of Baltimore city.

Bill by the Fairfield Improvement Company of Baltimore City and others against the mayor and city council of Baltimore for an injunction. From a decree for complainants, defendants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, PEARCE, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

Tho. I. Elliott, for appellants. J. Ch. Linthicum, Enoch Harlan, John P. Poe, and Robert Moss, for appellees.

McSHERRY, C. J. This appeal was taken from a decree of the circuit court of Baltimore city. That decree enjoined the mayor and city council of Baltimore from placing and keeping on a 20-acre tract of land owned by the city an unfortunate woman afflicted with leprosy. This land adjoins property belonging to the Fairfield Improvement Company of Baltimore, and the property of the company is divided into building lots. Many lots have been sold, and quite a number of houses have been built in the vicinity of the city's land. This 20-acre tract was acquired by the city perhaps half a century ago. It is situated some three miles distant from the city, and lies in Anne Arundel county. Up until the year 1883 it was occupied as a place of quarantine against contagious diseases brought towards the city by water, and there were hospitals upon it that were used for the isolation and treatment of similar diseases originating or found in the city during the prevalence of epidemics. In about the year just named the mayor and city council purchased other property, located near Hawkins

Point, some 16 miles distant from the city, and there established a quarantine station, which has ever since been in charge of a resident physician selected by the city. There have been no cases of contagious or infectious diseases treated upon this 20-acre lot or tract since 1882 or 1883, and it was subsequent to that time that the Fairfield Improvement Company's property was developed. A great many persons, chiefly employes of fertilizer and other factories, now reside in Fairfield; and doubtless they located there in the belief that the city had permanently abandoned the hospitals and pest houses formerly used in that locality. The ground upon which the relief by injunction was sought is the apprehended injury to the company's contiguous property by the placing of a person suffering with such a loathsome and horrible disease in close proximity thereto. The statute law of the state confers upon the mayor and city council plenary power to establish, both within and beyond the city's limits, hospitals and pest houses for the isolation and treatment of contagious and infectious diseases. Code Pub. Loc. Laws, art. 4, §§ 378, 409. The preservation of the public health renders such legislation highly essential, and the authority of the general assembly to enact it, in the exercise of the police power of the state, is beyond question or controversy. Within the scope of the power thus granted, the whole authority of the state is included and delegated (*Harrison v. Mayor, etc.*, 1 Gill, 264), and, therefore, whatever the state may directly do in furtherance of these objects, the municipality, clothed with a delegated power from the state, may also lawfully perform, though there may be a difference as to the legal consequences resulting from an exercise of the power by the state directly and those flowing from an exertion of the same power by the municipality. If it be conceded that the state may, in exercising a public power, create a private nuisance with immunity, the immunity grows out of the public necessity, and rests upon the state's sovereignty; but it cannot, or, at all events, will not, in the absence of an explicit legislative declaration, be assumed that the state would, if directly exercising the same power, so exercise it as to produce or cause an injury to the rights of property of an individual, unless, perhaps, the very doing of the act directed to be done will necessarily and unavoidably, under any condition, result in the creation of what would be, but for the authorization, a private nuisance. The delegation of a power to do an act, while conferring full authority to perform the act itself, does not, therefore, without more, essentially and without exception carry the right to so do it as to inflict loss or injury upon an innocent individual. As thus understood, the power of the municipality to erect and maintain hospitals and pest houses may be exerted and applied precisely as the same power, if not delegated, could have

been availed of by the state. Acts done under such delegated authority, which without that authority would in themselves be public nuisances, furnish no ground for civil or criminal proceedings at the instance of the state; for the authority to do the acts makes them, when done, perfectly lawful as respects the public, and, being lawful, there is no superior public right which they invade or violate. These are what have been sometimes described as "legalized nuisances" (Wood, Nuis. c. 23), since they are strictly necessary and probable results of legislative authorization. They ultimately rest for their sanction upon the paramount power of the legislature, and the importance of the public benefit and convenience involved in their continuance as affecting the greatest good to the greatest number. *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U. S. 659. But, however free from interference by the public acts of this character may be when authorized to be done by a municipality under competent and sufficient legislative grant, the right of an individual to complain of the special injury sustained by him as a consequence of their being done is, ordinarily, in no way impaired or affected. The mere naked grant of power to a municipality to do acts which, if done without the sanction of that power, would be nuisances, does not, in all instances, carry with it a guaranty of immunity from claims for private injuries that result directly from the exercise of the power. And this is necessarily so in the absence of an explicit or implicit legislative declaration to the contrary, because the legislature cannot be presumed from a general grant of authority to have intended to sanction or legalize any acts or any use of property that will create a private nuisance which will injuriously affect the property of another. That the state may, in the exercise of the police power, and for the preservation of the public health, authorize the summary destruction of private property contaminated with the germs of disease, is thoroughly and definitively settled. *Deems v. Mayor*, etc., 80 Md. 174, 175, 30 Atl. 648; *Boehm v. Mayor*, etc., 61 Md. 259; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273. But there is a broad distinction between a summary destruction of an offending thing and a direct injury to unoffending property; that is, property itself not liable to destruction because not dangerous to the public health or safety. The immediate and imminent danger to life or health justify, under the police power, the one; while the other is left to be redressed in the due course of the law. However broad, therefore, may be the powers of a municipality to erect and maintain hospitals and pest houses for the segregation and treatment of contagious and infectious diseases, and however necessary their exercise may be, they must, generally speaking, be exerted and put into operation subject to the no

less well-defined right of the individual to possess and enjoy his unoffending property without the molestation of a nuisance. It cannot be pretended that the city authorities could, even under their comprehensive powers, locate a pest house in the midst of a thickly-settled community. The right to locate the pest house does not carry with it or include the right to locate it in a place where other persons would be exposed to the contagion and disease. "Powers given by statute are not to be used to the peril of the lives or limbs of the queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others,"—observed Watson, B., as quoted in 2 Add. Torts, § 1041. Where commissioners of sewers and boards of health have obtained statutory powers of drainage into rivers, streams, and natural water courses, the power must be exercised so as not to create a nuisance, or interfere with the private rights of individuals. 2 Add. Torts, § 1085. The mere power to erect and maintain hospitals and pest houses does not imply or include the further power to erect and maintain them in such a way or at such a place as will cause injury to others. And so in *Brower v. Mayor*, etc., 3 Barb. 254, it was held that statutory authority given to commissioners of emigration to lease or purchase docks where emigrants may be landed will not justify them in leasing for that purpose property situated in a thickly populated part of a city, where the contemplated use of the premises would be a serious menace to the health of the community. See, too, *Commissioners v. Wise*, 71 Md. 52, 53, 18 Atl. 31; *Inhabitants v. Field*, 37 N. J. Eq. 600; *Danbury & N. R. Co., v. Town of Norwalk*, 37 Conn. 109; *Seifert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321; Wood, Nuis. § 764. Whatever immunity a municipality may have in exercising a public, as contradistinguished from a strictly corporate, power, it does not result from some collateral act, or from the negligent doing of a permissible act. The infliction of an injury upon another is neither the natural nor the necessary result of an exercise of the power to build a hospital; but, if injury does ensue, it would result from the collateral circumstance that the place selected was not the appropriate site, or from the negligent method of doing what would otherwise be a lawful act.

Assuming at this point that leprosy is a contagious disease which is a menace to the health of a community, and assuming also that the mayor and city council through its health department were about to utilize this 20-acre tract of land for the first time for the erection of a pest house thereon for the reception of this particular patient, there can, in view of the legal principles just discussed, and in the light of the facts to which allusion has been made, be no doubt as to the right of the Fairfield Improvement Com-

pany to invoke the restraining aid of a court of equity to prevent the establishment of such a nuisance. *Wood, Nuis. § 796*. But it is insisted that the company went to the nuisance, and it is denied that the nuisance went to the company, and therefore it is contended that the relief sought cannot be granted. Though there cannot be a prescriptive right to maintain a public nuisance, there may be such a right as to a private one. The authority given by the legislature to the city to erect such a pest house prevents it, when erected and used, from being a public nuisance. If it be no nuisance at all when erected, because of being erected in a secluded locality, persons who afterwards locate near it are not, if injured, deprived of redress merely because they have voluntarily chosen to reside in close proximity to it, if the right to maintain it has not ripened by prescription into an indefeasible right. This doctrine was settled in *Fertilizer Co. v. Malone*, 73 Md. 280, 281, 20 Atl. 900, and is fully supported by the cases therein cited.

This brings us to an examination of the facts, so that we may determine whether they fall within the principles we have been considering. Leprosy is, and has always been, universally regarded with horror and loathing, and it is conceded to be an incurable disease. In past ages its unfortunate victims, shunned and avoided by their fellow men, viewed by all with superstitious dread, wandered about the open country, naked and starving. Hospitals for the relief of those smitten with the terrible malady seem to have been unknown in antiquity. The sufferers were eventually isolated in villages occupied by them exclusively. With the tide of emigration westward during the decline of the Roman empire, leprosy was spread over Europe, and in the Middle Ages it prevailed to an alarming extent; its principal ravages dating from the first crusades. The influence of Christianity tempered the rigor of the affliction, and as early as 583 the third council of Lyons directed the bishops of each city to feed and support the lepers at the expense of the church. In the thirteenth and fourteenth centuries, hospitals and asylums were numbered by hundreds in almost every country. But, whether isolated in villages in the East, or segregated in hospitals in the West, the leper was completely and forever an outcast, being considered both legally and politically dead. The advance of civilization, while in a measure ameliorating his condition, and checking the spread of the pestilence, stripped the disease of none of the dread with which it had always been regarded by the great majority of mankind. The horror of its contagion is as deep-seated to-day as it was more than 2,000 years ago in Palestine. There are modern theories and opinions of medical experts that the conta-

gion is remote, and by no means dangerous; but the popular belief of its perils, founded on the Biblical narrative, on the stringent provisions of the Mosala law that show how dreadful were its ravages, and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot, in this day, be shaken or dispelled by mere scientific asseveration or conjecture. It is not, in this case, so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious, but the question is whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do a serious injury to the property of the plaintiff there located. As to this the record leaves no room for doubt. That the disease is contagious no one seems to deny. Its liability to contaminate others is the element that makes its introduction into a community a nuisance, and when it is conceded that the purpose is to place this woman, having a fully-developed and far-advanced attack of leprosy, in charge of a laborer and his wife, who have had no experience in such a case, and who have several small children in their family, the danger of spreading the contagion is perfectly obvious. It will not do to say that the children are to be separated from their parents. There would be great hazard of their being brought in contact with the patient. The record abundantly shows that the Fairfield Improvement Company's property will be seriously lessened in value, that residents of the vicinity will abandon their homes, if this unfortunate and afflicted woman should be placed where the city proposes to confine her. On this branch of the case we entertain no doubt that the facts fully warranted the issuing of the injunction. "In all such cases the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable, and in derogation of the rights of the complainant." *Dittman v. Repp*, 50 Md. 521, 522; *Wood, Nuis. § 86*, and note 4, and cases therein cited. Inasmuch as the infliction of injury on any individual was not necessarily contemplated in the grant of the power referred to,—that is to say, was not a necessary and inevitable consequence of an exercise of the power to maintain a hospital,—the right to maintain it at this particular place in the existing circumstances cannot be put on the ground of explicit or implicit authorization; and it remains now to inquire whether a prescriptive right is possessed by the city to build or to continue a pest house in the vicinity of Fairfield. Had the city never abandoned this lo-

cality as a place for the confinement and treatment of contagious diseases, it is very doubtful whether its right to place this patient there could now be challenged. It is equally doubtful whether the adjoining property would ever have been improved and peopled as it now is if the old quarantine station, hospitals, and pest houses had not been long ago discontinued. In 1883, when the new quarantine property at Hawkins Point was purchased, this 20-acre tract was in point of fact abandoned by the city as a place for the isolation of contagious diseases. Later on, and after improvements had progressed in the vicinity, the hospital buildings and pest houses were burned by the city health officers; and still later a resolution was adopted by the city council directing the sale of the property, except that portion which had been used as a burying ground for those who died during the epidemics years ago. When persons have acted on the belief, founded on such palpable evidence indicating that the city had physically abandoned this property for the isolation and treatment of contagious diseases, it is too late, especially when that physical abandonment has been followed by the passage of a resolution actually directing the property to be sold, to assert the right to restore the place to its former uses, if such a restoration would cause injury to those who have in good faith relied on the conduct of the city in actually discontinuing the use of the property for the purposes of quarantine and isolation. The conclusion of fact we draw from the record is that there was an abandonment of this property by the city when it removed its quarantine officers and attendants to Hawkins Point; and the city cannot now, to the detriment of the appellee, resume the occupation of this place for the detention of this patient. She must be placed elsewhere. The evidence shows, as we have indicated, that the health authorities of the city propose to place this woman in the charge of a laborer and his wife. A contract has been made with them, and under it this laborer and his wife agree to care for the patient. They are unskilled people. They possess no authority to restrain the woman from wandering away, and they have no legal right to detain her against her will. They are not officers of the city, nor clothed with any of the powers of the board of health. They are simply employed by the city to care for this woman on the city's property, where no health officer or city official is stationed. The mere fact that the place of her proposed detention belongs to the city adds nothing to the power of the laborer to hold her; and most certainly these facts do not amount to the establishment of a hospital under the power which the city possesses. The contract is, on its face, unreasonable. Its tendency is to cause a dissemination of the disease, and not to protect the community; and for this, if for no oth-

er, reason, the injunction ought to be made perpetual. There was no error committed in granting the relief prayed, and the decree appealed from must be affirmed. Decree affirmed, with costs above and below.

(70 Vt. 225)

STATE v. WHITE.

(Supreme Court of Vermont. Washington.
Jan. 8, 1898.)

INTOXICATING LIQUORS—KEEPING FOR SALE—EVIDENCE—INSTRUCTIONS—JURISDICTION OF COURT—CONSIDERATION—ELECTION AS TO DATE OF OFFENSE—NEW TRIAL—SUBSEQUENT OFFENSE.

1. An examined copy of the record of special-tax payers in the office of the collector of internal revenue, showing that defendant paid special taxes as a retail liquor dealer, is admissible to show that defendant kept intoxicating liquors for sale.

2. Where, in a prosecution for keeping intoxicating liquors, the examined copy of the list of special-tax payers of internal revenue contained defendant's name, with the letters "R. L. D." and "\$25" after it, it is proper to receive evidence to explain their meaning.

3. The court can interpret the meaning of abbreviations contained in a document received in evidence.

4. A copy of the record in the collector's office of special-tax payers, made and testified to by the sheriff as correct, and whose request for a certified copy was refused, is an examined copy.

5. On an appeal from a conviction in the city court for keeping intoxicating liquors contrary to law, the case is before the county court as though originally brought there, and a conviction may be had for an offense committed in June, though the conviction in the city court was for an offense in September of the same year, both offenses being within the jurisdiction of the city court.

6. In a prosecution for keeping intoxicating liquors with intent to sell same contrary to law, the defendant may be convicted for an offense prior in time to that alleged in the complaint.

7. It is within the discretion of the court when to compel the state, in a prosecution for keeping intoxicating liquors for sale contrary to law, to elect a date upon which to rely as the time when the offense was committed, where the defendant is given an opportunity to make his defense.

8. Where no application was made for a continuance on the ground of surprise, a new trial on that ground will be denied.

9. On a prosecution for keeping intoxicating liquors with intent to sell same contrary to law, on June 18th, the fact that intoxicating liquors were kept with like intent on September 14th may be considered by the jury as bearing on the question of defendant's intent on June 18th.

Exceptions from Washington county court.

E. L. White was convicted of keeping intoxicating liquors with intent to sell the same contrary to law, and brings exceptions. Exceptions overruled.

Fred A. Howland, State's Atty. R. A. Hoar and G. T. Swasey, for respondent.

THOMPSON, J. This was a prosecution against the respondent for owning and keeping intoxicating liquor with intent to sell the same contrary to law, commenced in the city court of Barre, and appealed therefrom

to the county court. The complaint was dated September 18, 1896, and the offense was alleged therein to have been committed September 14, 1896. No specifications were filed in the city court, nor did it appear upon what time the state there relied for conviction.

The evidence tended to show that Vermont belongs to the same internal revenue district as New Hampshire, and that the collector's office is kept at Portsmouth, N. H. The state offered in evidence a copy of the record in the collector's office of special-tax payers in Barre, on which appeared the name of the respondent, and after it the letters "R. L. D.," indicating the business for which the license was granted, and also "\$25," which indicated the amount paid for the license. The sheriff of the county was produced as a witness, who testified to his having himself made the copy from the official records, and to its correctness, and that his request for a certified copy was denied. The exceptions state that, from the evidence, the court found as a fact that said paper was an "exemplified copy" of the record in the collector's office of the special-tax payers for the fiscal year 1895-96, in the city of Barre, and admitted the copy in evidence; to which finding and admission in evidence the respondent excepted.

Mr. Weeks, deputy collector for Vermont except Windham county, was improved as a witness by the state, and testified, in substance, that he used abbreviations in his official business, and used some of those in note "a" at the bottom of the form produced by him, which came to him with other forms from the collector's office in Portsmouth; that this is the form on which the special-tax payer makes his application for a special-stamp tax; that there are three kinds of licenses issued by the government for the sale of liquors in his district, viz. the retail liquor dealer's license, retail dealer in malt liquor, and wholesale dealer in malt liquor; and that the amount of the special tax as retail liquor dealer is \$25, as retail dealer in malt liquors \$20, and as wholesale dealer in malt liquors \$50. The state offered said form in evidence in connection with the examined copy, for the purpose of obtaining the aid of note "a" in interpreting the letters "R. L. D." as they appeared in the copy in the column headed "Business," and to its admission for that purpose the respondent excepted. The court found to be true all that the testimony of Mr. Weeks tended to prove, and admitted the form for the purpose for which it was offered, and by the aid of note "a" at the foot thereof, which stated, in substance, that the abbreviation "R. L. D." might be used for "retail liquor dealer," interpreted said letters as used in said copy to mean "retail liquor dealer," and to indicate, as connected with and applied to the person thereon called "White, E. L.," that his business was that of a retail liquor dealer; but the court left it to the jury to say whether or not the respondent was that person. To the interpreta-

tion and finding that said letters indicated the business of that person to be that of a retail liquor dealer the respondent excepted.

It is claimed by the respondent in argument that the copy was not an exemplified copy. Technically, it is not. But it is apparent from the exceptions that the use of the word "exemplified" is a clerical error, because the copy was offered as an examined copy, and is elsewhere referred to as an examined copy, which in fact it was. It was held in *State v. Spaulding*, 60 Vt. 233, 14 Atl. 769, that the records in the collector's office were competent evidence, and that they were clearly within the class of public books and official registers which may be proved by an examined or sworn copy. Hence it was not error to admit the examined copy in evidence, nor was it error for the court to receive evidence to explain the meaning of the letters "R. L. D.," and the significance of the "\$25" appearing after the name of E. L. White in the examined copy, in order to enable the court to properly interpret it to the jury. *State v. Stevens*, 69 Vt. 411, 38 Atl. 80. Extrinsic evidence is admissible to explain the meaning of characters technical or not commonly intelligible, and abbreviations. *Steph. Dig. Ev. (Chase's Ed.)* 167; 1 *Greenl. Ev.* § 280. It was the province of the court to interpret the meaning of the letters as used in the document, in connection with its interpretation of it. 1 *Greenl. Ev. (12th Ed.)* § 277, and notes 2, 3.

The evidence further warranted the finding of the fact by the court that the paper was an examined copy of the record in the collector's office of the special-tax payers for the fiscal year 1895-96, in the city of Barre.

The evidence on the part of the state tended to show that June 18, 1896, officers searched the hotel of the respondent, at No. 59 South Main street, in Barre, for liquor, and found in the cellar thereof a place fitted up as if for a drinking place, and found liquor there, which they seized and carried away; and that they again searched the place September 14, 1896, and found substantially the same condition of things as before, and liquor in the cellar, which they seized and carried away; and also found in the cellar three men, all of whom were more or less intoxicated. At the close of the testimony, and before argument, the state elected to rely, as to time for conviction, on June 18, 1896, instead of September 14, 1896, which the court allowed it to do, to which the respondent excepted. The court charged the jury that the time alleged in the complaint was not material, but that a conviction could be had for an offense committed June 18, 1896, to which the respondent also excepted. He now contends that the state was confined to the time alleged in the complaint, and also urges that the respondent was tried and convicted before the

city court for the offense committed September 14, 1896. This contention is not tenable. The exceptions disclose that it did not appear upon trial what time the state relied upon in the city court for conviction. The appeal brought the case before the county court as if it had been originally commenced there, and a conviction could be had for an offense committed on any date within three years next before the exhibiting of the complaint, if it was one for which the respondent might have been convicted in the city court. The prosecution in either court was not confined to the date alleged in the complaint, and the respondent in that court might have been convicted for an offense committed either on June 18th or September 14th. *State v. Remelee*, 35 Vt. 562.

It was wholly within the discretion of the county court when to compel the state to elect, if the respondent was given an opportunity to make his defense. *State v. Bridgman*, 49 Vt. 202. The respondent now urges that he was surprised by the ruling of the court below in this respect, but the exceptions do not disclose that fact, nor that he made any application for a continuance on the ground of surprise, and he cannot now be heard to urge a new trial upon that ground. *Briggs v. Whitcomb*, 27 Vt. 114.

Subject to the exception of the respondent, the court charged the jury that, as bearing on the question of what the respondent's intent was on June 18th, in respect to selling liquor, it was competent in the circumstances to inquire, among other things, what his intent was in that regard September 14th following; that if they found he then kept liquor with intent to sell, contrary to law, he could not be convicted for that, but the fact might be used as bearing on the question of what his intent was June 18th. If the liquor found September 14th was kept with intent to sell, contrary to law, the fact that it was so kept tended to show that the place where it was kept was still a liquor saloon. The characteristics of the place, bearing upon the intent with which the liquor was kept, were then identical with what they were at the previous search, except that men were found drunk there September 14th. There was such continuity of the surroundings and the business carried on in the place searched that the intent with which the liquor was kept at the time of the latter search clearly bore upon the question of the intent with which it was kept on the first-named date, and the court correctly instructed the jury in regard to its bearing on that question. *Pierce v. Hoffman*, 24 Vt. 525; *State v. Bridgman*, 49 Vt. 202; *Eastman v. Premo*, 49 Vt. 355; *State v. Haley*, 52 Vt. 476; *Fertilizer Co. v. Fuller*, 58 Vt. 315, 2 Atl. 162; *Wagon Works v. Moore*, 61 Vt. 230, 17 Atl. 1007; *Castle v. Bullard*, 23 How. 172; 1 Greenl. Ev. (12th Ed.) § 53.

What has already been said disposes of the claim made by the respondent that the coun-

ty court had no jurisdiction to try the respondent for the offense for which he was convicted, and to pronounce judgment and sentence thereon, and consequently his motion in arrest of judgment cannot avail him. Judgment that there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions. Judgment and sentence affirmed. Let execution of sentence be done.

(70 Vt. 71)

In re JONES.

(Supreme Court of Vermont. Rutland. Jan. 8, 1898.)

CUSTOM OF COURT—EVIDENCE—DISBARMENT OF ATTORNEY—REVIEW.

1. In proceedings for disbarment of a prosecuting attorney for misconduct in prosecuting recognizances, evidence of the action of the court in individual cases in regard to chancering bail where the principal had been rearrested is incompetent to prove that such a custom existed in the court.

2. Where charges of misconduct of an attorney were referred to a committee of the bar, selected by the court on approval of the attorney, before which the parties were fully heard, and no exception taken, no finding by the committee will be disturbed; it not being claimed that any evidence exists, not adduced on the hearing.

3. The court may suspend or disbar an attorney for misconduct relating to duties as prosecuting attorney for the state, though he is also subject to impeachment by the state, and rejection by the voters if a candidate for re-election.

4. A prosecuting attorney, being directed by the judge to sue on recognizances, sued out writs thereon, many of which were defectively prepared and served, and consented to nominal judgments being entered against sureties in cases where the principal had been rearrested. By the statute, he was not entitled to draw his salary until he presented a certificate by the judge of faithful performance of his duties. To obtain this certificate, he informed the judge by letter that he had brought the suits, but withheld the facts as to the entry of judgment. *Held* to justify disbarment.

Start, J., dissenting.

Proceedings for the disbarment of Joseph C. Jones from practicing as attorney at law and solicitor in chancery. The case was heard before commissioners, on whose report judgment of disbarment was rendered.

The complaint alleged that at the September term, 1896, of the county court of Rutland county, Hon. John W. Rowell presided; that there were then pending in said court a large number of prosecutions in behalf of the state against various respondents named in the complaint, for violation of the law against the traffic in intoxicating liquor; that said Jones was then state's attorney for said county, and an attorney of said court; that in each of said cases such proceedings were had that the bail was called and adjudged forfeited, and judgments were rendered against the principals and sureties in the various amounts stated in the complaint, ranging in the aggregate against different parties from \$1,375 to \$100; that said sure-

tles were financially responsible, and the judgments collectible; that said judge thereupon gave said Jones to understand that he regarded it as the duty of said Jones to faithfully sue, prosecute, and collect said sums, so far as they were collectible; that on the 30th day of November, 1896, which was the last day of said Jones' term of office, he was entitled to receive his salary as state's attorney for the six months then ending, upon obtaining from said presiding judge a certificate that he had faithfully performed the duties of his office; that it was his duty to honestly inform said judge in regard thereto, and to sue for and collect such forfeited sums; that nevertheless said Jones, corruptly intending to deceive said judge and procure him to sign such certificate, and to deprive the state of the benefit of said judgments, did on that day bring actions of debt upon said recognizances against certain of the respondents and their sureties in the city court for the city of Rutland, combining in one action counts upon different recognizances, so far as the same could be done without exceeding the jurisdiction of the court, all of which actions were returnable and entered in court on the same day, service thereof being accepted on the part of the defendants, and with the same corrupt intention did procure said court to render judgment in each case that the state recover one cent damages, and costs, taxed and allowed at the sum of \$4.50; that said judgments were on the same day paid, and that no other sums have been collected; that against others of the principals and sureties no action has been brought; that on the 1st day of December, 1896, said Jones, with the same corrupt intention to deceive, informed said judge by letter that he had brought suit to recover forfeitures in all said cases, and inclosed a certificate to be signed; that being deceived thereby, said judge signed the same; wherefore said Jones should be removed from his office of attorney at law and solicitor in chancery. The answer admitted the pendency of said prosecutions, that said Jones was state's attorney, and said Rowell presiding judge, as alleged, and that the recognizances were declared forfeited, as alleged in the complaint, for the failure of the surety to produce his principal, but averred that no appearance was made by or in behalf of the sureties, no motion to chancer made, and no final judgment entered in any case against the surety; that the state's attorney, as was his duty to do, applied to the court for a bench warrant for the rearrest of the respondent in each case, which application was granted, and the warrant issued, and placed in the hands of the proper officer for service; that it was also the duty of said Jones to prosecute each of said forfeitures to final judgment according to law; that only two methods were known of prosecuting the same,—one being by writ of *scire facias* against the bail, returnable to the next term

of said county court, and the other by action of debt before any court having jurisdiction; that, by reason of criticism which had been made for cumbering the docket of the county court with cases that might be prosecuted elsewhere, said Jones considered it his duty to pursue the second method; that he had been state's attorney for nearly four years, and during that time had prosecuted many recognizances, forfeited before the county court, in said city court, with results that were satisfactory to the courts, the people, and the auditor of accounts, and that he honestly believed that it was for the best interests of the state and the cause of justice that that method should be pursued; that said September term adjourned without day on the 13th of November, 1896, and that said Jones directed the making of writs upon all said forfeited recognizances, uniting in a single suit all causes of action that could be united, for the purpose of saving expense, and honestly supposed that all of said writs were served, or service thereof accepted, until the commencement of these proceedings, but that some of said writs were left in his office drawer and overlooked, and were never in fact served; that service of the other writs was delayed for the accommodation of the attorney representing the defendants therein, in consideration of which delay service thereof was accepted; that the only judgment rendered by the county court was that the bail was forfeited, and that the judgment was not collectible against the surety to the amount of said bail until by due process of law the surety had been brought before some court of competent jurisdiction, and a judgment had been entered and damages assessed; that when cases came on for hearing in the city court said Jones took the position that, in all cases where the principal had been rearrested upon the bench warrant, judgment should be rendered for such sum only as would make the state whole for costs and expenses, and that, wherever the principal had not been rearrested, judgment should be rendered for the whole amount; that those cases in which the principals had not been rearrested were continued, upon application of the defendants, to enable the sureties to surrender their principals to be rearrested upon the bench warrants, and so passed beyond his term of office; that in all the other cases the judgment for one cent damages and costs was rendered by the city court in its best discretion, and said Jones is not responsible therefor; that there never was any agreement between said Jones and the defendants in said actions, or any one representing them, as to what judgment should be rendered; that, when said Jones wrote said letter to the presiding judge, he believed it to be strictly true, and did not consider the disposition of said cases so unusual that said judge would desire to be informed thereof; that the same was in substantial accord with previous custom; that in fact said judge was not de-

ceived by said letter, because in fact said judge sent him the required certificate before receiving the communication from said Jones referred to in the complaint.

The commissioners reported, among other things, the following: After the other criminal cases at said September term had been tried, the court asked said Jones if he had any further use for the jury, and he replied that he had not, whereupon the jurymen, except one, were discharged. A large number of liquor cases remained. These the state's attorney said would have to be disposed of by entering a nolle prosequi, because there was no evidence to sustain them. There were in all 125 such cases. The court declined to allow a nolle prosequi to be entered. Some of the respondents pleaded guilty, and were fined and sentenced. In view of these results a new jury was ordered to be summoned for the 10th of November, and an adjournment was taken till that time. Before the adjournment, the judge, in a talk with the state's attorney, advised and urged him to be diligent; telling him he could not afford to neglect his duty. The state's attorney replied that he wished and intended to do so, and that he would do all in his power to get the cases ready. In this there is no reason to find that he was not sincere. The court reassembled on the 10th, but no case was ready, and bonds were called and forfeited in the cases,—about 125 in all. This was not the fault of the state's attorney. Thereupon the judge said to him: "You see how this matter is running. Now, I want you to sue and collect these recognizances." The state's attorney replied that he was going to do it, and was then having forms printed for that very purpose. The state's attorney understood, or ought to have understood, that when the judge said, "Sue and collect these recognizances," he did not mean simply sue and get rid of them. The county court finally adjourned November 13th, and soon after that the state's attorney told F. S. Platt, who was counsel for some of the defendants, that he was about to bring suits to collect the bail. Platt proposed to accept service, and, when Jones objected that he would get no security in that way, promised to pay whatever judgments should be rendered, and asked that no suit be brought until after the adjournment of the legislature, of which he was a member. Finally it was arranged that the suits should be brought in a consolidated form, service accepted, and that Platt should be responsible for the payment of the judgments, and that the suits should be disposed of November 30th. A similar arrangement was made as to other suits with P. M. Meldon, counsel for the defendants therein. The state's attorney being absent until the evening of the 30th, his partner, Mr. Rice, appeared for him in the cases before the city court, and acted in accordance with the state's attor-

ney's instructions. Platt informed the court that the respondents had been rearrested, and insisted that judgment should be entered for one cent damages and costs. In answer to an inquiry by the court touching the costs which had been made upon the bench warrants, Platt replied that those costs were a part of the cases in the county court, and should not be included here. The state's attorney, in instructing his partner, had informed him that he should be satisfied with any judgments the court might render in cases in which the respondents had been rearrested. No opposition was made to the contention of the respondents' counsel, and the city court understood that the state's attorney, through his representative, consented to the judgments for one cent damages and costs. The judgments were rendered with entire acquiescence of everybody concerned, and in conformity with a general expectation. When certain of the cases were called up, it was evening, and the state's attorney had returned. The court inquired what judgments should be entered therein. Mr. Platt said that the same judgments should be entered as in the other cases, and the state's attorney made no objection. Certain of the cases in which the respondents had not been rearrested were continued. The manner of making the writs was as follows: About the 20th of November the state's attorney procured blanks, and instructed a clerk how to fill them, and the writs were being made from that time to and including the 30th. Some of the counsel of the defendants assisted in making the writs. None of the writs were dated. Some contained no recognizance for costs. On some, service was accepted for only one of the defendant; on others, there was no acceptance of service; and on still others, service was accepted before the writs had been signed. In some of the writs different defendants were named in different counts. Upon evidence offered by the respondent herein, and received against the objection of the state, it is found that, when cases of this class have come before the county court for Rutland county, that court, if the respondents had been rearrested, generally chancered the bail to a nominal sum,—\$1, or \$5, or \$25,—but that judgment was rendered in each case according to the condition of the circumstances attending it.

On December 1, 1896, Judge Rowell sent the respondent herein a certificate that he had faithfully administered his office during the September term of the county court. On the same day, before receiving the certificate, the respondent wrote to Judge Rowell, inclosing a certificate to be signed by him, such as the statute required, to the effect that the respondent had faithfully administered his office for the six months just ended. In his letter accompanying this certificate the respondent said, "I have brought suits to recover forfeitures on bail cases,

and I think I have included every case." Judge Rowell did not sign the inclosed certificate, but soon after received from the state auditor a letter informing him that his limited certificate was insufficient, and that he had declined to pay the respondent unless furnished with a certificate covering the whole period of six months. Judge Rowell then, supposing that the cases mentioned in the respondent's letter of December 1st were still pending, sent to the auditor the required certificate, and the respondent received his salary. From all the circumstances, it is found that the respondent, when he wrote the letter of December 1st, had good reason to believe, and knew, or ought to have known, that the manner in which the various suits had been disposed of was a matter material to be made known to enable the judge to determine the question submitted by the respondent in that letter, and that he intentionally omitted to state frankly and fairly what had been done in those suits. It is further found that Judge Rowell was by that letter deceived, and induced to believe that the respondent had stated fully all that had been done, and that he furnished the certificate in consequence thereof.

W. H. Rowland, State's Atty., and Barber & Darling, for the State. J. W. Stewart, for respondent.

THOMPSON, J. At the hearing before this court, neither the respondent nor his counsel made mention of the exception taken by him to the ruling of the commissioners excluding evidence offered by him to show the action of the county court in certain individual cases in regard to chancery ball where the respondent had been arrested. Hence we take no notice of the exception, further than to remark that the commissioners did not err in holding that this evidence offered was not competent to prove a custom in that behalf in the county court.

The respondent, in his statement before this court, and his counsel, in his brief, have made an elaborate effort in support of their contention that the commissioners erred in finding the facts and conclusions reported by them, from the evidence submitted to them. The commissioners are lawyers of ability, and wide and varied experience, and are men of irreproachable character and standing in the bar and among the citizens of this state. They were selected by the court, with the concurrence and approval of the respondent and his counsel, to hear the evidence, and find and report the facts and their conclusions thereon, in respect to the charges made against the respondent as an attorney of this court. We are aware that in some jurisdictions, when charges are preferred against an attorney, involving his official conduct and character, the court hears the evidence, finds the facts and conclusions deducible therefrom, and renders judgment thereon. But we think it is fairer to an attorney,

charged with misconduct, affecting him in his office of attorney, to have the case heard, and the facts and conclusions found, by eminent members of the bar, and reported to the court sitting to render judgment thereon. This insures him a trial by his peers. It also removes the opportunity to charge the court with having misconstrued the evidence, or with having become biased in hearing the evidence, and the arguments in respect to the facts and conclusions to be drawn therefrom. Neither the respondent nor his counsel takes any exception, nor make any objection, to the method of procedure, nor to the ability, integrity, and fairness of the commissioners who heard the case. The commissioners say in their report that all parties interested were fully heard. It is not contended that this is untrue, nor is it claimed that either of the commissioners was in any way biased or prejudiced against the respondent, nor that any fact or conclusion found was without the support of legitimate evidence. It is not claimed that there are any circumstances or testimony bearing upon the truth or falsity of the charges, except those adduced at the hearing. Under these circumstances, for the court to revise, ignore, or reject any relevant fact found and reported by the commissioners would be as capricious as it would be for it to revise, ignore, or reject the verdict of a jury, found from legitimate evidence, without exception thereto, or any suggestion that any other evidence existed bearing upon the issues tried. Such a course would subvert the administration of justice by the courts, and bring them into well-merited contempt. It is apparent that in this case the judgment of this court must be rendered upon the facts and conclusions legitimately found and reported by the commissioners.

The respondent and his counsel claimed before the commissioners, and now contend, that because the misconduct found relates to the respondent's duties as state's attorney for the county of Rutland, for which he is answerable to the voters of the county, and to the state, and for which he might be impeached, this court has no jurisdiction over him in regard to the same. While acting in the county court in the prosecution of cases in which the state was a party, and in all his relations to parties, counsel, and court, in such prosecutions he was also acting in his official capacity as an attorney of this court, and under the obligations assumed by him when he became such attorney. Notwithstanding he might be liable to impeachment, or might be rejected by the voters if a candidate for re-election, his conduct when acting in his office of attorney, and sometimes when acting in a private or other capacity, was open to investigation by this court; and if found to be such that the court, to protect itself and the public, and to keep the administration of justice pure, ought to withdraw the protection and credit under the law which it accorded him by admitting him to the office of an attorney at law and solicitor in chancery, it is, beyond question, the right and

duty of this court to deal with him as justice demands. It may suspend or disbar him. All courts, so far as we are aware, which are empowered to admit attorneys to practice, have at all times the right to inquire into the official conduct of those so admitted, and into their conduct generally, and, if found to be such as shows them to be unworthy and unfit to practice their profession, have the right, and may be under the duty, of withdrawing the right accorded. Nor is this right inhibited if the acts complained of are such as render the attorney liable to criminal prosecution and punishment. It is not necessary to cite authorities in support of these propositions. They will be found stated in the elementary books, and are sustained by the adjudged cases. See *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569; *Ex parte Bradley*, 7 Wall. 364, 19 Lawy. Co-op. Ed. 214, and note; *Dickens' Case*, 67 Pa. St. 169; *In re Cowdery*, 69 Cal. 32, 10 Pac. 47; *State v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314, and note; *Burns v. Allen*, 15 R. I. 32, 23 Atl. 35; 2 Am. St. Rep. 844, and note. From these and many other authorities which might be cited, it is manifest that the object of admission to the bar is to bring to the admission of justice a class of high-minded men, of such education and training, and such mental and moral qualifications, as can and will aid in determining the rights and duties of all litigants, under all circumstances, according to law, so that the administration of the law may be pure, clean, and enlightened, and thereby every one obtain his exact rights and privileges. When one so admitted, by his conduct as an attorney, or as an individual, shows himself unworthy of his high calling, and disgraces the office, it is the duty of the court, empowered to admit, to withdraw the rights and privileges conferred by the admission. It does this, not primarily as a punishment to him, but to protect the administration of justice.

The charges against the respondent, found established by the commissioners, are of a very serious character. They are infidelity to the interest of his client, the state, and intentionally withholding facts which he knew were material, from the judge, when applying for a certificate required by statute to entitle him to draw his salary, whereby the judge was deceived. Fidelity to his client's interests, and honesty and frankness in dealing with the judge in regard to discharging a duty towards him and the state, required by law, are prime qualifications of every attorney,—made so by his oath of office. It is not contended that if these charges are to stand proven, and are such that the respondent is answerable for them, as an attorney, to this court, they do not demand suspension or disbarment. It matters not that his deception of the judge occurred when he was not acting as a member of the county court, nor in the trial of a cause. It occurred when he was discharging a duty imposed by law. The charges touch the fidelity and integrity of the respondent, and show

him to be unworthy to minister at the altar of justice, and that under the law it is the duty of this court to withdraw from him the right which it granted by admitting him to the bar of this state. It is never other than a sad and painful duty for a court to be obliged to render such a judgment against one of its once accredited officers. Judgment that said Joseph C. Jones is removed from the office of attorney at law and from the office of solicitor in chancery.

START, J. (dissenting). If the respondent's motion to recommit the report to the commissioners for further findings was rightfully denied, then, in my opinion, the judgment is right; but I do not concur in the action of a majority of the court in denying this motion, and entering final judgment, without further hearing before the commissioners. On the hearing before this court upon the commissioners' report, the respondent was allowed, in his defense, to make an oral statement, in which he claimed that during his term of office he had been accustomed to bring suits on such forfeited recognizances, returnable before the city court; that said court, in cases where the respondents had been rearrested, or surrendered by their sureties, invariably rendered judgment for a nominal sum in damages, or a sum that would make good any expense incurred by the state by reason of the nonappearance of the respondent; that he understood and believed at the time he brought the suits in question before the city court, and at the time judgments were entered therein, that it had been the uniform practice of his predecessors in office to bring suits in like manner before the city court, and that like judgments had been rendered therein; that his action, and the action of the city court and of his predecessors in office, had never before been questioned or criticized by the auditor of accounts, or by any court; that, at the time of the bringing of said suits and rendering of said judgments, he, in good faith, honestly believed that when the surety returned his principal into custody, and paid such expense as had been incurred by reason of the nonappearance of the principal, he had fully performed the obligation assumed by his recognizance; that, in all he did, he in good faith believed he was pursuing, and that the city court was carrying out, a practice that was well known to the auditor of accounts, and other officials of the state; that it had been the practice of the Rutland county court, when a respondent was returned into custody, to chancer the recognizance to a nominal sum, or a sum equal to any expense incurred by reason of the failure of the surety to have his principal in court when called upon to do so; that it never occurred to him that the judge did not know and understand said practice, or that the judge expected any other course would be pursued; that he supposed, when

the judge told him that he regarded it as his duty to sue and collect forfeitures, the judge had reference to cases in which respondents were not returned into custody, and not to cases where the respondents had been thus returned; that, when he wrote the letter to the judge, he had in mind this class of cases, and, when he said in his letter he had brought suits, he referred to this class of cases; that at the time he wrote the letter all the cases where respondents had not been arrested or returned into custody were then pending, and had not been disposed of, in the city court; that by reason of the uniform practice, which he supposed was well understood by the presiding judge, to render judgment for a nominal sum where respondents had been returned into custody, it did not occur to him that it was material to mention these cases as having been disposed of; and that he had no intention to deceive the judge, but supposed he had disposed of the cases in the way and manner that the presiding judge expected they would be disposed of. And he insists that inasmuch as he exacted from the several sureties all that he in good faith believed to be justly due, and in so doing had followed a practice that had been approved of and acquiesced in by the auditor of accounts, and that had been observed by his predecessors in office, and by the Rutland county court, it ought not to be adjudged that he had not acted in good faith to his client and to the court; and that, if the judge was deceived, it was because the judge did not know or understand what the practice had been in such cases, and not by reason of any intentional wrong on his part. If the facts claimed in this statement were established, they would be material, and ought to be considered, in determining whether the respondent acted with fidelity to his client, the state, and to the court. They tend to show that the respondent in good faith believed that when the sureties in the several causes returned their principals into custody, and paid the expense incurred by the state by reason of their failure to have their principals in court at the time they were first called upon to do so, they had done their full duty; that nothing further ought, in justice, to be required of them; and that the Rutland county court, the Rutland city court, and the auditor of accounts had given such a construction to the statute.

The statute makes it the duty of the court, on hearing a motion to chancer bonds in a criminal cause, to consider in favor of the surety the fact that he has delivered his principal in court. V. S. § 2037. And, in actions brought to recover the penalty or forfeiture annexed to a bond of recognizance taken in a criminal cause, the court may reduce the penalty of such bond, and render judgment therein as circumstances require. Id. § 2038. If the respondent made out writs for the recovery of the sums forfeited in the several

causes, supposing that he had included all such forfeitures, and before the writs were served or judgments were rendered the principals were returned into custody, and the respondent could not have recovered the expense he had incurred in making the writs except by proceeding to judgment in the several suits, and he did proceed for this purpose, believing that, by the construction given to the statute by the courts in Rutland county and the auditor of accounts, only nominal damages were required, and accepted without objection judgments for such damages, believing that the sureties had so far performed and kept the conditions of the recognizances they had entered into that nothing further ought to be required, and that such judgments were in conformity to the usual practice, and the only practice known to him, it is difficult to see wherein he has acted corruptly, or intentionally omitted to discharge his official duty, by not insisting upon judgments for greater sums. The practice and the construction of the statute may have been wrong, and there may have been reasons in these particular cases for a departure from the usual practice, and for insisting upon a stricter construction of the statute; but if it did not occur to the respondent that these cases were exceptional, and that the practice ought not to control, and the necessity for a departure from such usual practice, and a stricter construction of the statute, was in no way brought to his attention, and he in good faith followed such practice and construction, believing it to be just and right, it ought not to be held that he did not act with fidelity to his client, because he did not disregard such practice and construction and adopt some other.

If the facts are as now claimed by the respondent in his oral statement, they should also be weighed and considered, in determining whether he intended to deceive the presiding judge of the county court when he wrote the letter of December 1st. If the statute had received the construction given to it by him, and the practice had uniformly been in conformity to such construction, and this was known to him, and not to the judge, and this construction and practice had not, to the knowledge of the respondent, been questioned, then he may not have understood the judge as the judge intended he should understand him when he said, "I want you to sue and collect these recognizances." The respondent, having in mind the construction that had been given to the statute, and the practice, and not knowing that the judge did not know of such practice, or that such construction had been given to the statute, may have understood, as he claims, that the judge referred to cases in which the respondents had not been returned into custody, and had this class of cases in mind when he wrote the letter; and he may have intended to refer to this class of cases when he wrote that he had commenced suits. It appears from the report of the commissioners that suits had been commenced in this class of cases, and were still pending. If the

respondent, when he wrote to the judge, had this class of cases in mind, and had understood the judge as he now claims, he may well claim that he believed what he wrote was the whole truth, and that he did not intentionally conceal any facts respecting the causes he was writing about, that were material for the judge to know in passing upon the question of whether he was entitled to a certificate. What he stated in his letter was in fact true. Suits had been commenced, and that was all that had been done in those cases that he claims he had in mind. If he did so understand, there was no occasion for saying more; and, if the judge had known of the construction given to the statute, and the practice, he probably would not have been deceived or misled by the letter. The judge, not knowing the practice that had prevailed in Rutland county, nor the construction there given to the statute, was doubtless misled and deceived by the respondent's letter. But for the purposes of this case this fact is immaterial, provided the respondent acted in good faith, and did not intentionally mislead or deceive the judge. The inquiry should be limited to whether the respondent in the conduct of the suits in question acted with fidelity to his client, the state, and whether he intentionally deceived the presiding judge. The court having permitted the respondent (who is still an officer of the court) to make a statement of claimed facts, which do not appear of record, it ought, in my judgment, to assume, in so far as those facts do not conflict with the findings already made by the commissioners, that those claims are made in good faith, and that on rehearing before the commissioners he will be able to produce evidence tending to establish such facts. The importance of such evidence to a right determination of the case is apparent. If the respondent made a mistake in placing his case upon the grounds he did before the commissioners, and in omitting to present to them facts that he has, by his statement, presented to the court, it ought not to be held that it is too late for him to rectify such a mistake. Believing that the respondent, in his oral statement before the court, has submitted a view of his case not fully presented or considered at the hearing before the commissioners, I would recommit the report, and give him an opportunity to thus present it to them.

The commissioners find that, "assuming that the respondent actively contributed nothing to bring about the results in these cases, yet his passive indifference to and acquiescence in those proceedings constitute an infidelity to his client's interests equal to that which an active contribution would have been." This, as I understand the report, is the infidelity of the respondent to his client found by the commissioners. If the judgments in the several causes were in accordance with the construction given to the statute by the courts, the usual practice of the courts, the only practice known to the respondent, and were in fact right,

then indifference and acquiescence on the part of the respondent in obtaining them did not constitute infidelity to his client; and it was material for him to show that the judgments were right, or in accordance with the construction the courts had given to the statute, and that he acted in good faith, believing them to be right; and he offered to show individual cases, similar to those in question, in which the Rutland county court rendered judgments for nominal damages. The commissioners ruled "that it was not competent to show a custom in that manner, even if the fact of there being a custom was material." To this ruling the respondent excepted. I regard this in the nature of an offer to show what construction the court had given to the statute in cases similar to those in question; and if the respondent had knowledge that the statute had received the construction claimed, and the action of the court in this respect led him to an honest belief that he ought not to insist upon judgments for more than nominal sums, such construction was material, and ought to have been considered by the commissioners in determining whether the respondent acted in good faith. In this connection a former judge of the court testified, and the commissioners found, that in this class of cases when respondents were rearrested the court generally chancered the bail to a nominal sum,—\$1, \$5, or \$25,—and that judgment was rendered in each case according to the conditions and circumstances attending it. While the testimony thus received was material, I do not think it rendered the testimony that was offered and excluded immaterial. The respondent may not have known that judgment was rendered in each case according to the conditions and circumstances attending it, and may have been influenced in the disposition of the cases by the construction the statute had received in individual cases that were similar to those in question. It does not appear from the report that the respondent offered to show that he knew of the construction the statute had received, nor that he was influenced by such construction; and, by the rules that govern in actions at law, he cannot, as a matter of right, insist upon a recommitment of the report. But in investigations where good faith is the vital, if not the only, issue, these rules ought not to be held controlling. The object and purpose of this proceeding being to determine whether the respondent has so conducted himself in his office of attorney of this court as to merit suspension or disbarment, the court ought, in my judgment, of its own motion, to order further hearing, and further facts to be brought upon the record, whenever it considers such hearing and facts material for a right determination of the question of the fitness of a respondent to remain an officer of the court. In my judgment, the court ought not, and its com-

missioners should not be required, to follow strictly the common-law rules of procedure, when a proper regard for the rights of the respondent suggest that some other course ought to be pursued. From the rulings of the commissioners, and their entire report, I think it doubtful whether they considered the construction of the statute that had been given by the court material, and whether, in making their findings, they took into consideration the practice of the court that may have influenced the respondent in the disposition of the cases, and in writing to the judge as he did. I would not leave a matter so vital in doubt. I would order a further hearing, and direct the commissioners to receive the evidence that was offered and excluded, and to hear evidence and report respecting all the matters herein suggested, and particularly to hear evidence and report respecting any general or particular practice, in cases where principals are returned into custody, that had come to the respondent's knowledge, and respecting the construction that had generally, and in particular cases, been given to the statute relating to forfeited bail in criminal cases, and to consider all facts that they may find respecting such construction of the statute and practice, and the respondent's knowledge thereof, that in any way influenced him in the disposition of the suits in question, or in writing as he did to the judge, in passing upon the question of whether the respondent acted with fidelity to his client, and whether he intentionally deceived or misled the presiding judge.

THOMPSON, J. I would recommit the commissioners' report for further findings, not as a matter of legal right, but as a matter of discretion, in view of the importance of the proceeding as affecting the respondent's future professional life. The court having denied his motion to recommit, leaving the case standing on the commissioners' report, I concur in the opinion delivered by me for the majority of the court.

(70 Vt. 223)

THOMAS v. LELAND.

(Supreme Court of Vermont. Addison. Dec. 2, 1897.)

TAXATION—LISTING PROPERTY—NOTICE TO OWNER.

1. An assessment for taxation is invalid where the listers made and returned an inventory, and notified the owner of the property of the making of the list, May 2d, instead of on or before the 1st, as required by V. S. § 425.

2. The making of an inventory by a taxpayer, and returning it, is not a substitute for a notice by the listers of the making of the list, under V. S. § 425.

Exceptions from Addison county court; Tyler, Judge.

Action by James W. Thomas against Bet-

sey H. Leland. Judgment for defendant, and plaintiff brings exceptions. Affirmed.

Trustee process for the collection of a tax claimed to be due from the defendant to the town of Salisbury, for which the plaintiff is collector. Upon the report of a referee at the December term, 1896, Addison county (Tyler, J., presiding), a pro forma judgment was rendered for the defendant, and the plaintiff excepted. The defendant, claiming to be a nonresident, returned an inventory containing her real estate only. No use of this inventory was made by the listers, nor did they deposit it in the town clerk's office. They ascertained that the defendant had debts due her from parties in this state, amounting to \$8,000, and made out an inventory containing her real estate and this item of personal property; and these sums (in all, \$8,632) they used in making up her grand list, which was thus \$86.32.

Charles F. Kingsley, for plaintiff. Button & Button, for defendant.

TAFT, J. There is one fatal objection to a recovery by the plaintiff. The inventory made by the defendant in the year in question was rejected by the listers, and never filed in the clerk's office. After its rejection they proceeded to ascertain as best they could the amount of defendant's taxable property. They ascertained she had debts due her amounting to \$8,000, and made her list accordingly. It does not appear that the appraised value of her property was doubled, as required by the statute. Whether it was so done or not is immaterial in the case as it stands; for, whatever mode was pursued, it was the duty of the listers, under section 425, V. S., to give the defendant a written notice of the making of the list, on or before the 1st day of May of that year, or by leaving such notice at her last and usual place of abode, if a resident. Such notice was not so left until a day or two after the 1st day of May. The statutory provision made for notice is mandatory. A strict compliance with it in all essential particulars is a condition precedent to a valid list. As some writers say, a day too late renders the assessment void. The notification in the manner provided by the statute, after the 1st day of May, was null. The provision requiring it to be left on or before that day was a condition precedent to a valid list, and, that provision of the statute not having been complied with, the assessment was invalid, and the tax cannot be collected. The making of the inventory, and returning it, was not a substitute for the notice required by the statute. *Brush v. Buker*, 56 Vt. 143. It is unnecessary to notice the other questions discussed, as there can be no recovery by the plaintiff, in any aspect of the case. The pro forma judgment is affirmed.

(70 Vt. 217)

DAVIS v. NEW ENGLAND FIRE INS. CO.
(Supreme Court of Vermont. Washington.
Feb. 12, 1898.)

INSURANCE—INTEREST—OCCUPATION OF PREMISES—
PLEADING—PARTIES.

1. Where a fire insurance policy is issued to two persons jointly, both are necessary parties plaintiff in an action thereon.

2. A declaration on a fire insurance policy stated that plaintiff became the owner of a portion of the property, and was so at the time of the loss. *Held* a sufficient allegation of interest of the insured as to that portion, but that the declaration was defective as to the remainder, as no insurable interest was stated.

3. A policy of fire insurance provided that "the real property was insured while occupied as a private dwelling house by a tenant." *Held* that, where it argumentatively appeared from the declaration that it was so occupied at the time of the loss and at the time the policy was issued, it was sufficient under the contract.

Exceptions from Washington county court; Rowell, Judge.

General assumpsit by Joshua F. Davis against the New England Fire Insurance Company, with a special count upon a fire insurance policy. Upon general and special demurrer to the special count, a pro forma judgment was rendered sustaining the demurrer and adjudging the count insufficient. The plaintiff excepted. *Affirmed*.

The special count alleged that a portion of the personal property insured and destroyed belonged to the plaintiff. The special demurrer assigned for causes: (1) That the policy was issued to the plaintiff and Mary A. Davis, jointly, upon a consideration moving from both, and that both were necessary parties; (2) that the policy is a contract with the two, and that it is not alleged that the dwelling house or any of the personal property was the sole and separate property of the plaintiff in fee, or of the plaintiff and said Mary A. Davis, or of either of them; (3) that it appears that the plaintiff and Mary A. Davis were not the owners of the personal property.

Frank Plumley and G. A. Davis, for plaintiff. Butler & Maloney, for defendant.

TAFIT, J. 1. This is an action to recover upon a fire insurance policy. It is alleged that the contract was made by the defendant of the one part, and the plaintiff, with one Mary A. Davis, jointly, of the other part. No reason is alleged for not joining Mary A. Davis as co-plaintiff. The contract was made by her and the plaintiff as the insured, the consideration was paid by them, and the promise was made to them jointly. Under our decisions she is a necessary party plaintiff.

2. It is insisted by the defendant that the declaration is defective for that there is no allegation that the property insured was the property of the plaintiff at the time the policy was issued, citing *Dickerman v. Insurance Co.*, 67 Vt. 99, 30 Atl. 808, in which it is said: "It is essential to the sufficiency of the counts that they should allege an insurable interest in the

plaintiffs at the time the policies were issued and also at the time of loss." This is a general rule, according to the current of decisions, and is applicable in all cases when it does not appear that there was any interest in nor ownership of the property from the time the policy was issued to the time of loss. But a policy may be valid and attach to and cover property acquired subsequent to its delivery, and in such cases the rule above stated is modified, and an allegation that subsequent to the delivery of the policy the insured acquired an interest in the property which is the subject of the contract is sufficient. In *Hooper v. Robinson*, 98 U. S. 528, Mr. Justice Swayne cites 1 Arn. Ins. 238, viz.: "It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the insured need not allege nor prove that he was interested at the time of effecting the policy. Indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth." And the learned judge adds: "This is consistent with reason and justice, and is supported by analogies of the law in other cases;" and he mentions that a deed voidable under certain circumstances may be made valid for all purposes by a sufficient after-consideration, devises for certain purposes to grantees not in esse which vest and take effect when the grantee shall exist, and other instances that depend for their efficacy upon events occurring subsequent to the conveyance under which they arise. The declaration before us is defective in respect to some of the property, for not alleging ownership in the plaintiff at the time of the loss, but there is no allegation as to any of it that it was that of the plaintiff at the time the policy was issued. There is an argumentative allegation that, subsequent to the issuing of the policy, the plaintiff became the owner of a portion of it. These allegations that during the time of the policy the plaintiff became the owner, and was so at the time of the loss, are sufficient in respect to alleging the interest of the insured. The declaration is defective in respect to some of the property, and good as to other portions of it.

3. The contract set forth provided that the real property was insured "while occupied as a private dwelling house by a tenant." It argumentatively appears that it was occupied at the time of the loss as it was at the time the policy was issued, and, under the contract sued upon, this is sufficient. Judgment affirmed and cause remanded.

(70 Vt. 240)

STRAW v. STRAW.

(Supreme Court of Vermont. Lamoille. Dec. 3, 1897.)

FIXTURES—WHEAT CONSTITUTES—DEEDS—RESERVATIONS—WAIVER—TROVER AND CONVERSION—WHEN LIES.

1. Where, in a conveyance of factory premises, a water wheel and shafting were reserved,

the effect of the reservation was to treat the part reserved as chattels belonging to the grantor, and not as fixtures.

2. Where a water wheel and shafting were reserved in a conveyance of factory premises, and no limit was fixed in which they could be removed, the grantor did not lose his right to remove them by allowing them to remain attached to the factory for more than two years and to be used by the grantee.

3. The grantor of factory premises reserved the water wheel and shafting which were in their place in the factory. When the grantor made demand for them, the grantee refused to return them, and claimed them as his own. *Held*, that trover would lie.

Exceptions from Lamolille county court; Start, Judge.

Trover by A. R. Straw against John Straw. Heard on report of a referee. Judgment for plaintiff. Defendant excepted. Affirmed.

George M. Powers and L. O. Moody, for plaintiff. George Wilkins, for defendant.

ROSS, O. J. The defendant controverts the plaintiff's right to recover for the water wheel and the main shafting connecting it with the starch-factory machinery. These were put in by Thomas A. Straw, who owned the equity of redemption of the premises. The plaintiff does not contend that, while thus situated, the water wheel and main shafting did not become fixtures, under the decisions of this court, and were covered by the mortgage then owned by W. H. H. Bingham. After the decease of Thomas A. Straw, his administrators did not intend to redeem the factory. Mr. Bingham thereupon sold his interest in the mortgage and mortgaged premises to the defendant. To effect the transfer of his interest in the mortgage and mortgaged premises, he conveyed by a quitclaim deed to the administrators on the estate of Thomas A. Straw. This conveyance merged the estate of the mortgagee in the administrators. Thus the entire estate and interest in the starch-factory premises became vested in the administrators. The plaintiff, defendant, and a brother and sister were creditors, and had claims allowed against the estate of Thomas A. Straw. When the administrators conveyed the starch-factory premises to the defendant, they reserved the water wheel and shafting put therein by Thomas A. Straw subsequently to the giving of the mortgage owned by Mr. Bingham. The plaintiff purchased of the defendant, his brother, and sister their claims against Thomas A. Straw's estate, and their interest in the water wheel and machinery reserved in the deed of the administrators to the defendant. The referee finds that the plaintiff owned the water wheel and shafting in controversy. The plaintiff was one of the administrators on Thomas A. Straw's estate, and in his and his co-administrator's deed of the starch-factory premises reserved it. Whether there was a conveyance by the co-administrator of this property to the plaintiff, the referee has not stated; but that fact must be inferred, because the referee finds that the plaintiff owned it. The defendant

does not contend that, on the facts found by the referee, he has any title to the property in controversy. The referee also finds that, when the plaintiff demanded the water wheel and shafting, they were then in their place in the starch factory, and that the defendant had then been using them in that connection for more than two years after the reservation of them to the plaintiff and his co-administrator in their deed of the starch-factory premises to him. The defendant contends that by their location and use, when demanded, they were fixtures, and that they cannot be recovered for in an action of trover.

The plaintiff and the defendant are parties to the administrators' deed. By the reservation therein and the acceptance of the deed by the defendant, the parties treated the water wheel and shafting as existing separate and apart from the starch factory, or as personal chattels belonging to the plaintiff. The reservation, by implication, gave the plaintiff a license to go upon the premises and remove the wheel and shafting. The reservation, in legal effect, was not unlike the sale of growing trees, stones, or of a building. If to be removed in a short time, the law treats them, as the parties do, not as attached to and a part of the realty, but as personal chattels. *Powers v. Denison*, 30 Vt. 752; *Judevine v. Goodrich*, 35 Vt. 19; *Noble v. Sylvester*, 42 Vt. 146; *Sterling v. Baldwin*, 42 Vt. 306. The defendant contends that, if such was the effect of the reservation, inasmuch as the plaintiff allowed the wheel and shafting to remain over two years attached to the starch factory and to be used by the defendant, he lost the right to remove them. By the reservation, no time was fixed in which they were to be removed or the right should cease to exist, as was done in *Judevine v. Goodrich*, supra. By using them over two years, the defendant acquired no ownership of the property, and the plaintiff did not lose his title to the property. So long as the plaintiff continued to own the property, the right to enter upon the premises and remove it existed by implication. It would seem that the plaintiff's title and right to remove would exist until the defendant acquired title thereto by adverse use under a claim of title thereto in himself. In *Noble v. Sylvester*, supra, where the defendant had set up no such claim, the plaintiff was allowed to recover for stone which he had severed from the realty for a particular use, away from the farm, some 30 years after he had conveyed the farm to the defendant, the defendant in the meantime not having interfered with them nor set up an adverse claim to them.

The defendant further contends that the facts found do not amount to a conversion of the property. He rightfully says that the defendant was under no duty to take the property out of the factory and return it to the plaintiff. If the finding of the referee had gone no further than that, when demanded, the defendant refused to return them, this contention might be sustainable. But the referee finds that defendant not only refused to return

them, but, at the same time, claimed to own them. The defendant's refusal, accompanied by a claim that he owned them, amounts to a denial of the right of the plaintiff to enter and remove the property, or an appropriation of the property to the defendant's use. Certainly, after such a refusal and claim, the statute of limitations would begin to run against the plaintiff's right to the property, and in favor of the defendant's right thereto. The facts found show a conversion of the property by the defendant. Judgment affirmed.

(70 Vt. 244)

BLAISDELL v. GREENWOOD et al.

(Supreme Court of Vermont. Orleans. Dec. 24, 1897.)

MORTGAGES—PRESUMPTION OF PAYMENT.

A decree of foreclosure was rendered in an action in which a subsequent grantee of the mortgagor was joined. After the decree had become absolute, a third party purchased the land, agreeing that the mortgagor should continue as such and the purchaser as mortgagee. *Held*, that the decree in foreclosure was an enforced admission of the mortgage debt, effectual to repel the presumption of payment by lapse of time in favor of grantee subsequent to mortgage.

Appeal in chancery, Orleans county; Taft, Chancellor.

Petition by W. H. Blaisdell against Jacob Greenwood and another to foreclose a mortgage. A decree was rendered dismissing the petition as to defendant Juliette S. Aldrich, and against defendant Greenwood, from which orator appeals. Reversed.

B. F. D. Carpenter and W. W. Miles, for orator. F. W. Baldwin, for defendant Aldrich.

START, J. The orator's right of entry into the house and premises now claimed by defendant Aldrich is barred by lapse of time, in analogy to the statute of limitations, unless the presumption of payment of the mortgage debt is repelled by former foreclosure proceedings brought and prosecuted to final decree within 15 years before the commencement of this suit. It appears that on the 21st day of September, 1869, defendant Greenwood was owner of the premises now claimed by defendant Aldrich, and on that day mortgaged the same, with certain other premises then owned by him, to Charles P. Allen to secure the payment of certain notes; that said mortgage and notes were duly assigned to Sarah M. Wade, and she brought her petition to foreclose said mortgage at the February term, 1878, of the court of chancery for Orleans county, and made Silas Works (who then held the title to the premises in dispute under a conveyance from Greenwood subsequent to the date of the mortgage, and under whom defendant Aldrich claims title) a defendant therein; that said court entered a decree of foreclosure against said Works and other parties, which became absolute on the 5th

day of October, 1878, and was duly recorded in the county clerk's office and in the clerk's office in the town where the land is situate; that in February, 1879, the orator, at the request of defendant Greenwood, purchased of said Wade all the land described in said decree of foreclosure and the notes secured by said mortgage; and that it was agreed between the orator and Greenwood that the orator should stand as mortgagee and Greenwood as mortgagor of the premises. The orator's grantor having thus asserted her right to the premises in question within 15 years before the date of the orator's bill, by foreclosure suit against Works, under whom defendant Aldrich claims title, and it having been judicially determined in that suit that the debt secured by the mortgage was due and unpaid, and it having been ordered that, unless Works pay the same, he, and all persons claiming under him, be foreclosed from all equity of redemption in the premises, the orator's right to enter into the possession of the premises, if the mortgage debt is not paid pursuant to the order of the court, is not barred by lapse of time. The enforced recognition and determination of the continued existence of the debt secured by the mortgage by judicial proceedings inure to the benefit of the orator, and are binding upon defendant Aldrich. In equity, the claimed rights of a mortgagee are not disregarded because of lapse of time, unless the rights are suffered to lie dormant for 15 years without attempt to enforce them, or without a recognition of their existence by the mortgagor, or those standing in his right to the mortgaged premises. When a court of equity denies relief to a mortgagee because of lapse of time, it does so only when silence and want of recognition of the mortgage, and the mortgagee's rights under it, by both mortgagee and mortgagor, for 15 years, afford a conclusive presumption of payment of the mortgage debt; but, in this case, we cannot presume that the debt secured by the mortgage is paid. The enforced recognition of the mortgage debt in the foreclosure suit rebuts the presumption of payment, and is as effectual to remove the bar by lapse of time as a voluntary recognition of the existence of the mortgage debt; and the judicial determination in the former foreclosure suit that the debt was due and unpaid is, in equity, as effectual to remove such bar as a new promise or acknowledgment of the existence of the mortgage debt. By the foreclosure suit, Works was called upon to admit or deny the allegation that the debt secured by the mortgage was due and unpaid. He did not deny it, and his silence was taken as a confession that the debt was still due and owing, and thereupon it was so adjudged. This was an admission that the mortgage debt had not been paid, and a recognition of the mortgagee's rights under the mortgage; and, although it was an enforced admission and

recognition of the mortgage debt, it was none the less effectual to repel the presumption of payment. In *Re Chickering*, 56 Vt. 82, it is held that the bringing of a suit by the trustees of the bondholders to foreclose the mortgage prevents the running of the statute of limitations as to all the bondholders, although, after an appeal to the supreme court and mandate establishing the mortgage, the suit was discontinued without a decree being drawn up and enrolled. In *Martin v. Bowker*, 19 Vt. 526, it is said that payment of interest upon the debt, or any portion of the principal, by the defendant, or any other act recognizing the existence of the mortgage, and that the same is unsatisfied and obligatory upon him, will be sufficient to repel the presumption of payment, and take the case out of the operation of the statute. In *Hollister v. York*, 59 Vt. 1, 9 Atl. 2, it is held that payment of interest or part of the principal of a mortgage debt by one of several parties who are interested in the equity of redemption, and who have constructive notice, repels the presumption that the mortgage debt has been paid, and takes the case out of the operation of the statute of limitations, not only as to the payor, but as to all the owners of the equity. The holding in *Kendall v. Tracy*, 64 Vt. 522, 24 Atl. 1118, is to the same effect; and the cases there cited sustain the holding that the enforced recognition of the mortgage debt by the foreclosure suit is binding upon defendant *Aldrich*. Decree reversed and cause remanded, with mandate.

(1 Pen. 209)

CHAMBERS v. JONES et al.

(Superior Court of Delaware. Newcastle.
Feb. 19, 1898.)

WRIT OF POSSESSION—SERVICE.

Compliance with the statutory requirement of service, two full days before the return, of a rule to show cause why a writ of possession should not issue, is necessary, and, if not done, an alias writ will issue.

Petition by Jesse Mendenhall Chambers, trustee, against Susan T. Jones and another, mortgagors and terre tenants.

On February 15, 1898, petition and affidavit of the plaintiff filed, and, on motion of plaintiff's attorney, a rule was granted upon the defendants to show cause why a writ of possession should not issue returnable on Saturday, the 19th day of February, 1898, at 10 o'clock a. m. The above-mentioned rule was issued on the 16th day of February, upon which the sheriff made the following return: "The within rule executed by summoning Susan T. Jones and James T. Jones personally to show cause, February 17, 1898." On the 19th day of February, the day to which said rule was returnable, John P. Nields, attorney for plaintiff, asked that the time for defendants in said rule to

appear be extended, because there had been but one full day's service prior to that time.

John P. Nields, for plaintiff.

LORE, C. J. The statute says that such rule shall be served at least two full days before the return thereof. It is no service unless you comply with the terms of the statute.

An alias writ was then asked for by Mr. Nields, and granted by the court.

(1 Pen. 180)

DELAWARE LODGE, NO. 1, I. O. O. F., v. ALLMON.

(Superior Court of Delaware. Newcastle.
Dec. 15, 1897.)

JURY—COMPETENCY—WITNESS—BENEFICIAL SOCIETIES—ACTION BY MEMBER.

1. In an action against a subordinate lodge of a beneficial society, members thereof are disqualified as jurors, but the disqualification does not extend to members of other lodges.

2. On appeal from a justice of the peace, the latter is incompetent to testify in the case.

3. In an action against a beneficial society by a member thereof, the excuse pleaded by the latter for not pursuing his remedy in the society must be proved by a preponderance of evidence to entitle him to recover.

4. Where the constitution of a beneficial society provides that any dispute between the relief committee and a member as to sick benefits should be referred to the lodge for its decision, and giving an appeal to the member in case the decision is adverse, a report of the committee that a member was no longer entitled to sick benefits, and the mere acceptance of such report by the lodge, is not a reference, hearing, and determination; and the member, having received notice of such action, must apply for a hearing, and he is not excused from so doing, so as to be entitled to maintain an action against the lodge, because he had no prior notice of the meeting at which the action was taken.

Appeal from justice court.

Action by George Allman, p. b. r., against the Delaware Lodge, No. 1, I. O. O. F., d. b.

a. The action was tried before a justice of the peace, and, from a judgment for plaintiff, defendant appeals. Verdict for defendant.

Action to recover \$81, balance due, as alleged by the plaintiff, for sick benefits, from the defendant corporation. The usual pleas were filed by the defendant and five special pleas, and special replications filed by the plaintiff. Before the jury was impaneled, Mr. Knowles, on behalf of the plaintiff, asked the court to excuse for cause from serving upon the jury any member of a lodge of Odd Fellows who might be called. This the court refused to do, but limited such disqualification to serve upon the jury to members of the defendant lodge. At the trial it was proved on the part of the plaintiff that he was a member in good standing of the defendant lodge; that up to and for some time prior to October 14, 1895, he had been receiving sick benefits from the lodge; but that on that date, while he was still sick and under the doctor's care, payments to him were stopped,

upon the report of the members of the relief committee to the lodge that, in their judgment, he was not sick enough to entitle him to benefits; that he was informed by a member of the lodge, delegated to come to him and speak for the lodge, that they had held a meeting, and decided that he was no longer entitled to sick benefits, assigning the reason of the lodge for so doing, and telling the plaintiff he hoped he would not bring suit over the affair, and that he would go to the lodge and see if he could not have the matter opened up for him; that thereafter the plaintiff wrote two letters to the lodge, asking what they had done in the matter, or what they were going to do, and received no reply. The plaintiff claimed that he had no notice of the meeting of the lodge at which his name was stricken from the sick list; that the hearing was therefore an illegal one. The defendant contended that there was no hearing of any kind. The only action ever taken by the lodge was merely the passing of a resolution to accept the weekly report of the relief committee made to the lodge at the regular meeting, in which report the relief committee said that they considered the plaintiff no longer entitled to benefits.

William S. Hilles, for appellant. Robert G. Harman and Horace Greeley Knowles, for appellee.

Mr. Harman offered to produce John A. Kelley, the justice of the peace before whom the case was tried below, to prove certain statements that were made by the defendant lodge at said hearing; stating that while he was aware that it had been ruled that a magistrate or other judicial officer could not be compelled to take the witness stand under such circumstances, on the ground of public policy, yet that, if he desired to do so, it had been permitted by the court.

LORE, C. J. This matter has been up before the court recently, and we have ruled such witnesses out on the ground of public policy, broadly.

The plaintiff's counsel excepted to the above ruling.

When the plaintiff below had rested, Mr. Hilles, for the defendant, moved for a nonsuit, because he contended that the plaintiff, by his own testimony, had clearly shown that under the constitution and by-laws of the Grand Lodge of Delaware and of Delaware Lodge, No. 1, I. O. O. F., he had not put himself in the position to maintain his action in court.

The court held the matter under advisement over night, and, upon the reassembling of court the next day, rendered the following decision:

LORE, C. J. After due consideration of the motion for a nonsuit in the case now on trial, the court are of the opinion that the

nonsuit ought to be refused. The points raised can be very properly considered in our charge to the jury.

Plaintiff's prayers: The plaintiff below prayed as follows: First. If the lodge held a meeting without notice to Mr. Allmon, and, without giving him a hearing, decided he was not entitled to sick benefits, or if it was guilty of any act refusing, hindering, or delaying Mr. Allmon in taking an appeal if he so desired, or if it wrongfully broke its contracts with Mr. Allmon, then he was justified at once in invoking the assistance of the courts. (a) A "hearing" means the right to be present and have counsel and an opportunity to question witnesses and offer evidence in one's behalf. (b) And no usage can deprive one of his right to be present and have a hearing; nor justify the hearing of one party and his witnesses only in the absence of and without notice to the other party. Second. If Mr. Allmon was notified by any person sent, or authorized to be sent, by the lodge, that it had acted upon his case, and decided that he was no longer entitled to benefits, then Mr. Allmon, if he received no notice and was given no hearing, was justified in immediately resorting to the courts for legal redress; or if Mr. Allmon was made to believe from any acts or declarations of any officer, member, or agent of said lodge that the lodge had acted upon his case, and decided that he was no longer entitled to benefits (though not expressly authorized by the lodge so to do in this particular instance), and the said officer, member, or agent, by general custom, or by the constitution and by-laws of said lodge, was invested with general authority to so act or so speak, then Mr. Allmon, if he received no notice, and was given no hearing, was justified in immediately resorting to the courts for legal redress.

Defendant's prayers: The defendant below prayed as follows: First. That the court instruct the jury to find for the defendant below. Second. If the jury shall believe from the evidence that George Allmon was notified that he had been declared by the relief committee or by the lodge no longer entitled to benefits, it was his duty to apply to the lodge for a hearing, and to have the matter there determined; and, if he did not do so, he cannot maintain this action. Third. It was the duty of the plaintiff to exhaust all of the remedies provided by the constitution and by-laws of the order to which he belonged, and, until he has so exhausted these remedies, he cannot maintain an action at law.

LORE, C. J. (charging the jury). In this action, George Allmon, the plaintiff, seeks to recover from the Delaware Lodge, No. 1, I. O. O. F., the corporation defendant, a balance of \$81 for sick benefits, which he claims is due to him under the constitution and by-laws of the society, for the period of time

from October 14, 1895, to March 6, 1896. It is conceded that the plaintiff's right to recover depends upon the constitution and by-laws of the society. They constitute the contract between the parties, and govern the case. By them each party is bound. The plaintiff can recover only by showing compliance with the provisions thereof. Where the constitution or by-laws of the society provide that the right of a member to benefits shall be ascertained in a particular mode, that mode must be pursued before he can enforce his supposed right in the courts, unless, by the action of the society, he is prevented from taking such a course. This rule is founded both on the authority of well-considered cases and upon reason. If a member was permitted to refuse or neglect to establish his right to benefits by the methods provided by the rules of the society, the operations of such societies would be thrown into confusion, their usefulness impaired, and the courts would be burdened by a multitude of suits about contentions which should have been settled elsewhere. It seems that, under the report of the relief committee of the society, the plaintiff had been receiving sick benefits for some weeks theretofore, up to October 14, 1895. He claims that the sum so paid amounted to \$30. The society claims it amounted to \$50. At that date, upon the report of the relief committee, the payment of sick dues to the plaintiff was stopped. Section 6 of article 3 of the constitution of the society provides that, should any dispute arise between the relief committee and the brother as to sick benefits, the matter should be referred to the lodge for its decision. Should the decision of the lodge be adverse to the member, the constitution provides a further remedy by an appeal to the grand lodge of Delaware. It is conceded by the counsel for the plaintiff that it was the duty of the plaintiff to pursue his remedy in the subordinate and grand lodges, and that he has no standing in this court unless he was prevented from so doing by the unlawful act or proceeding of the lodge itself. We say to you that that is the law. The plaintiff was bound to exhaust his remedy under the constitution and by-laws within the lodges; and, if he failed so to do, he cannot recover in this action unless he was unlawfully prevented from pursuing such remedy by the lodges themselves. You will note that this case is thus brought within very narrow limits; that is, the solution of this one question: Was the plaintiff prevented from pursuing and exhausting his remedies within the lodges by any unlawful action of the Delaware Lodge, which was a subordinate lodge? If the plaintiff was so unlawfully prevented, the lodge cannot set up its own unlawful act as a bar to the plaintiff's recovery. This would be permitting a person to take advantage of his own wrong, which the law will never suffer.

The claim is that the matter was referred to, heard, and determined by the lodge *ex parte*, and without notice to the plaintiff, and that he thereby was unlawfully prevented from proceeding in the lodge according to the constitution and by-laws. This being the excuse of the plaintiff for not pursuing his remedies in the lodges, it must be proved by a preponderance of the evidence in this case to your satisfaction, or the plaintiff cannot recover. Such a reference and determination by the lodge means something. It means a dispute, raised between the relief committee and the member, which is referred to the lodge for settlement, which matter is heard and determined by the lodge. It is for you to say whether any such reference of a dispute was ever made to the lodge, either by the plaintiff or by the relief committee. If there was no such reference, hearing, and determination by the lodge, the plaintiff cannot recover. The report of the relief committee that they had declared the plaintiff off the sick benefit list, and the mere acceptance or adoption of such report by the lodge, would not, in law, amount to such a reference, hearing, and determination. If the jury shall believe from the evidence that the plaintiff received notice that he had been declared no longer entitled to sick benefits, then it was his duty to apply to the lodge for a hearing; and, if he did not do so, he cannot maintain his action.

Verdict for defendant below.

(1 Pen. 149)

LOUTH et ux. v. THOMPSON.

(Superior Court of Delaware. Newcastle.
Dec. 14, 1897.)

INJURIES TO WIFE — DAMAGES — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF — DEFECTIVE STREETS — OBSTRUCTIONS ON SIDEWALKS.

1. Evidence of any expenses incurred by the husband, or loss to him of his wife's services, is inadmissible in a suit by husband and wife for damages for injuries sustained by the wife.

2. The question whether or not a plaintiff is guilty of contributory negligence must be determined by the jury from all the evidence.

3. In an action to recover damages, based upon defendant's negligence, the burden of establishing such negligence is upon the plaintiff.

4. If a defendant seeks to avoid liability resulting from his negligence by plea of contributory negligence, the burden is upon him to establish such negligence.

5. A city's streets are public highways, but abutting property owners have a right to place thereon doorsteps, stepping stones, hitching posts, and awning posts, which every one is bound to take notice of at his peril.

6. An abutting property owner has the right to have coal holes, cellar doors, areaways for light or ventilation upon the pavement, but must not keep them open and exposed while not in use, without proper protection and warning to persons using the pavement.

7. The traveling public has a right to use every portion of the pavement, and has a right to presume that there are no dangerous impediments unprotected, and that the street is in a reasonably safe condition.

8. Any act or obstruction that unnecessarily impedes the lawful use of the street by the public is a nuisance.

9. The consent of the city to have a cellarway in the pavement is conditioned upon the keeping of the same guarded and protected.

10. A foot traveler, using the pavement, is only bound to exercise such diligence as an ordinarily careful person would reasonably exercise under all the circumstances.

11. On the question of contributory negligence in an action for damages for falling into an open cellar door at night, the jury may consider the plaintiff's familiarity with the place of the accident, the lights and its surroundings in the night, the difficulty of seeing the open door, and every other circumstance bearing on this phase of the case.

12. On the question of defendant's negligence in an action for injuries sustained by falling into his open cellar door at night, the jury may consider whether he or his servants left the cellar door open, without proper protection, on the night of the accident, when not in use.

13. The mere fact that an accident happened, or that a cellar door on the pavement was left open, whereby plaintiff was injured, is not per se evidence of negligence.

14. In an action to recover for injuries received from falling into an open cellar door in front of defendant's premises, the doctrine of proximate or remote cause has no bearing.

15. The measure of damages for personal injuries received by a wife would be such a reasonable sum as would compensate her for her pain in the past, and such as may come in the future, resulting from the accident, and from such permanent injuries as she may have sustained by the accident.

Action by Louis Louth and Ella Louth against John Thompson for injuries alleged to have been inflicted upon the plaintiff Mrs. Ella Louth by reason of falling through an open cellar way on Delaware street, in the city of Newcastle, the defendant being the tenant of the premises. Jury disagreed.

John H. Rodney, for plaintiffs. Alexander B. Cooper, for defendant.

At the trial, Mr. Rodney having proved certain facts as to the accident, and its effects upon her, and the treatment which she received from her physician at home, and his recommendation that she go to a hospital, asked Mrs. Louth what the charges were to her at the hospital. Defendant objected.

LORE, C. J. This question, to my knowledge, has previously been before the court, and decided since I have been on the bench. Unquestionably, this is an action at common law for injuries. The rule upon the point is very well laid down in 1 Chit. Pl. *73: "When an injury is committed to the person of the wife during coverture by battery, slander, etc., the wife cannot sue alone in any case, and the husband and wife must join if the action be brought for the personal suffering or injury to the wife; and in such case the declaration ought to conclude to their damage, and not to that of the husband alone, for the damages will survive to the wife if the husband die before they are recovered. Care must be taken not to include in the declaration by the husband and wife any statement of the cause of action for

which the husband alone ought to sue. Therefore, after stating the injury to the wife, the declaration ought not to proceed to state any loss of assistance, or expenses sustained in curing her. If the battery, imprisonment, or malicious prosecution of the wife deprive the husband for any time of her company or assistance, or occasion him expense, he may and ought to sue separately for such consequential injuries." We think you cannot offer evidence upon that point. Our ruling does not touch anything that goes to show the extent of her injuries, but simply goes to the expenses that were incurred by reason of the accident, and for the loss of service to the husband.

At the conclusion of the plaintiff's testimony, Mr. Cooper, for defendant, moved for a nonsuit on the ground that the proof disclosed that the plaintiff was guilty of contributory negligence.

LORE, C. J. We think the nonsuit ought to be refused. You base your motion for nonsuit substantially upon the fact that the plaintiff's own testimony shows clearly contributory negligence on her part. We think that is a question for the jury, whether, under all the circumstances of this case, she exercised such reasonable care as a reasonably prudent person would be required to do in using a public street. While a person has the privilege to extend his cellar way out into the street, it is only for certain uses; not to keep it open.

Plaintiffs' prayers: First. Public streets and alleys are presumed to be free from obstructions and holes, and want of care is not to be presumed on the part of one injured by the same. Second. In case of injury to a stranger by reason of an excavation or hole in the sidewalk adjoining a public road or highway, the tenant of the premises is liable. Third. Persons who, without authority, make or continue an excavation or opening in a public street or highway for a private purpose, are responsible for all injuries to individuals resulting from the highway being less safe. In this case it is contended the leaving the cellar way open was without authority. Fourth. Assuming that the right to have an aperture in the highway has been granted by the proper authority, yet the occupier of the premises must use proper precautions to protect travelers from injury by it. Fifth. Even if permission be given by the municipal or proper authorities, yet, such consent being conditioned upon certain modes of use, if the opening is left unguarded it becomes a nuisance, and negligence of the defendant is established. Sixth. The plaintiff was only bound to use ordinary care and prudence, and was not required to seek her way with eyes to the ground, but had a right to presume that the street was in proper condition. That the plaintiff was bound only

to use such care as an ordinarily prudent person would exercise under like circumstances. That, if there was necessity, the plaintiff was entitled to the full width of the public highway unobstructed; and, if the jury believe from the evidence that the plaintiff stepped upon this door (especially where the same was raised but a few inches from the pavement), in the proper prosecution of her journey, to escape a crowd,—in other words, was pressed to the wall,—and that the whole transaction was instantaneous, she is not guilty of negligence contributing to the accident. Seventh. If the verdict should be for the plaintiffs, it would be for such reasonable sum as will compensate the plaintiffs for the injuries of the wife, and for her pain and suffering in the past, and such as may come in the future, resulting from the accident; and for such permanent injuries as, from all the evidence, the jury may believe she has sustained by the accident.

Defendant's prayers. The defendant prayed the court as follows: First. The burden of proof is on the plaintiff to show by a preponderance of the evidence the negligence of the defendant. Second. The plaintiff was bound to use ordinary care under all the circumstances. Third. Cellar doors constructed and used under a city ordinance are lawful, and not evidence of negligence per se. They are necessities of city life; and, to make defendant liable, some positive or culpable negligence in leaving the door open must be shown. Fourth. The mere accident itself, or the abstract fact of the cellar door being open, is not negligence per se. Fifth. The defendant was only bound to use reasonable care in using the cellar door for the purposes for which his business required. Sixth. The greatest negligence on the part of the defendant will not excuse the slightest fault or negligence of the plaintiff. If she was guilty of contributory negligence, she cannot recover. If she voluntarily stepped upon the door, she was informed of at least possible danger, and did it at her risk. If there was sufficient light to see, and she did not look, and pay attention to where she was going, she is guilty of contributory negligence, or if she could have reasonably avoided the accident in any way. Seventh. Previous knowledge by the plaintiff of the locus in quo is evidence of negligence. Eighth. Where one chooses a dangerous way when there is a safe one, and is injured, she cannot recover. Ninth. The plaintiff being a married woman, no damage can be recovered except for the actual injury received; only for what is the direct and immediate result of the accident itself. Tenth. The jury are the exclusive judges of the facts.

LORE, C. J. (charging jury). This is an action on the case, brought by Louis Louth and Ella Louth, his wife, the plaintiffs, against John Thompson, the defendant, to recover

damages for personal injuries to the plaintiff's wife. It is claimed by the plaintiff that on the night of Saturday, the 10th day of March, 1894, while the wife plaintiff, Ella Louth, was lawfully and properly using the sidewalk in front of the grocery store and dwelling house of the defendant, Thompson, on Delaware street, in the city of Newcastle, in this county, which street was a public highway, that she, without negligence on her part, in passing from the defendant's store upon the sidewalk fell into the open door of the defendant's cellar way, which cellar way occupied a part of the sidewalk, the door of which was negligently left open; that by this fall she was internally and permanently injured, and has already endured great suffering, and is likely to suffer therefrom in the future. The defendant, on the other hand, claims that he is guilty of no negligence; that the cellar way was a lawful one, under the ordinances of the city; that it had existed immemorably; that the door was not negligently left open on that night; that, even if it had been negligently left open, it was in a locality with which the wife plaintiff was familiar; that the place was well lighted by street and store-window lights on the premises and in the immediate neighborhood; that the open door could have been easily seen if she had exercised ordinary caution; and that she negligently stepped into the cellar way, was therefore guilty of contributory negligence, and cannot recover. You will observe that these contentions are diametrically opposed to each other. It is for you to determine which of them is right, under the evidence in the case, governing yourselves by the rules of law as the court shall declare them.

The plaintiffs' right to recover is based upon the negligence of the defendant. It is, therefore, necessary for them to satisfy your minds by a preponderance of evidence that the negligence, if any, which caused the injury, was the fault of the defendant. If they have failed so to do, the plaintiffs have no case. The burden of proving such negligence is upon the plaintiffs. "On the other hand, if the defendant's negligence is so proved, and he seeks to avoid liability for such negligence upon the ground of contributory negligence on the part of the wife, then the defendant must show such contributory negligence on the part of the wife by a like preponderance of proof, or the plaintiffs will be entitled to your verdict." The respective rights of the traveling public and of the owners or occupiers of property abutting upon the public streets of cities, like the one in question, are quite clearly defined in leading and well-considered cases. While there is some conflict in these authorities, yet it is not difficult to find what the law is, at least so far as this case is concerned. Such streets are public highways from building line to building line. The pavement or footways from building line to curb are usually

appropriated to foot passengers. The whole width of that footway is for their use, subject only to such limitations as the city government and state law may prescribe,—such as the right of owners or occupiers of abutting properties to place thereon stepping stones, hitching posts, awning posts, doorsteps running out a certain distance into the pavement for the purpose of ascent or descent into the dwellings or buildings thereon, area ways for light and ventilation of such buildings, covered coal holes, and cellar ways with doors, as in this case. Some of these, like doorsteps, stepping stones, hitching posts, and awning posts are permanent, and so obvious, that any danger therefrom is manifest, and every one is bound to take notice of them at his peril. Others, such as coal holes in the pavement and covered cellar doors, are only dangerous when defectively constructed, or left open and exposed. The right of the public was to use every part of that sidewalk which, in its lawful and proper condition, was available for foot travelers. The traveling public had a right to presume “that there was no dangerous impediment or pitfall in any part of it, without a light placed to give warning of it, or suitable railing to protect it” (*Durant v. Palmer*, 29 N. J. Law, 548), or some other proper and safe guards placed about it. “The deviation from the middle of the sidewalk is not necessarily an act of carelessness.” *Id.* The use of the whole width of the pavement is the right of the foot traveler exercising due care. In *Robinson v. City of Wilmington*, 8 Houst. 414, 32 Atl. 348, the court thus states the law: “It was not the duty of the plaintiff to be searching for holes or obstructions in the street, as he was walking along, but he had a right to assume that the street was in a reasonably safe and passable condition.” “Any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance.” *Durant v. Palmer*, 29 N. J. Law, 547. On the other hand, it is conceded that the defendant, who occupied premises abutting on the street, had a right to have and maintain within the limits of the city ordinance a covered cellar way out in the pavement, to be used in connection with his dwelling and store, for access to and from his cellar. But the law is well expressed in *Jennings v. Van Schaick*, 108 N. Y. 533, 15 N. E. 426: “But the consent of the city is conditioned upon certain modes of use, and, if the opening is left unguarded, it becomes at once a trap, and a nuisance. No consent to leave it open and unprotected can be possibly claimed.” Thompson had a right to open his cellar doors, and to keep them open, so as to meet the reasonable convenience and necessities of his business; but he had no right to leave them open and exposed while they were not so in use, without proper protection and warning to persons traveling on the sidewalk. “Such person is

not called upon to anticipate danger, and is not negligent for not being on his guard. If the cellar way was negligently left open and uncovered, it was a positive wrong. It amounted to an obstruction of the street. It was a trap set for the unwary, and for those hurried or inattentive.” *McGuire v. Spence*, 91 N. Y. 305.

We deduce from these cases two rules: First, that the defendant was required by law to properly guard those cellar doors when open; second, that the foot traveler on the pavement was only bound to exercise such care and diligence as an ordinarily careful person would reasonably have exercised under all the circumstances of the case. From the law thus stated, as applied to the evidence, you are to determine the negligence of the parties to this suit. Of the existence, extent, and character of that negligence you are the exclusive judges. In dealing with the question of the negligence of the wife plaintiff, you should properly consider her knowledge of or familiarity with the place of the accident, the lights, and its surroundings on that night; the ease or difficulty of seeing the open door, whether it was in the shadow or in the light; the warning or notice, whatever it may have been, to her, of stepping first upon the closed door before she fell; and any and every circumstance that the evidence gives you bearing upon the point whether, at the time she fell she was negligent, or was exercising such reasonable care as an ordinarily prudent and careful person would do under like circumstances. So, as to the negligence of the defendant, you should consider whether he or his servants left that cellar door open on night in question, when it was not in use, and when it should have been shut, and without proper protection; for the defendant is responsible not only for his own personal negligence, but also for the negligence of his servants. The mere fact that the accident happened, or that the cellar door was open, is not, in itself, evidence of negligence, but it would be negligence if it was left open and unprotected to the danger of the lawful foot traveler. It is the law that, if these injuries resulted from some independent cause, or the intervention of some third party, which were the proximate cause of the injuries, the defendant could not be held responsible. But we must say to you that, in our judgment, the doctrine of proximate or remote cause does not apply to this case. Taking the law as delivered to you by the court, and applying it to the evidence as you have heard it in this court room, you are to solve the questions presented, and reach your verdict. If you believe that there was no negligence on the part of Thompson, or that, granting his negligence, the wife plaintiff contributed to the injury, your verdict should be for the defendant. But if you believe the defendant was negligent in permitting that cellar door to be open on that night, and unguard-

ed, and that the wife plaintiff was not guilty of contributory negligence, then your verdict should be for the plaintiffs. Should your verdict be for the plaintiffs, the measure of damages will be such a reasonable sum as will compensate the plaintiffs for the injuries of the wife, and for her pain and suffering of the past, and such as may come in the future, resulting from the accident, and for such permanent injuries as, from all the evidence, the jury may believe she has sustained by the accident. The jury disagreed.

(185 Pa. St. 508)

CLARK v. CITY OF PHILADELPHIA.
(Supreme Court of Pennsylvania. April 18, 1898.)

STREET IMPROVEMENTS—DAMAGES.

In determining damages for change of street grade, the mere establishment of a grade on paper, prior to the one which was consummated by physical construction, cannot be considered; nor can the fact that the city might have fixed a more favorable grade for the landowner.

Appeal from court of common pleas, Philadelphia county.

Action by Clarence H. Clark against the city of Philadelphia for damages from change of street grade in front of plaintiff's lots. The court, in its general charge, while allowing the jury to determine whether the establishment on paper in 1885 of the grade did any injury to the land, required them, if they found it did, to deduct from the amount of damages therefor any benefits the land received by the actual construction of the street at such grade. The rulings complained of related chiefly to a paper grade established in 1878. Judgment for defendant. Plaintiff appeals. Affirmed.

The assignments of error are as follows:

"(1) The court below erred in refusing to allow the plaintiff to prove by William H. Jones the following: 'Mr. Clark: I repeat the offer made by me on page 48 of the stenographer's notes, which I will read to your honor. I offered the figures to show the filling, and then asked, "Are those your figures?" I will read the previous question: 'Q. Did you ever make an estimate of the amount of filling required upon those properties to bring them to the grade regulations of 1878 established by the city? A. I did. Q. Are those your figures? The purpose being to put plainly upon the record again the offer that the amount of filling necessary to bring plaintiff's properties to the grade regulations in force on November 1, 1885, is a material and relevant matter, and one which I am entitled to have before the jury. I repeat that offer; adding that this offer is made, not as an independent item of

damage, but as it influences value. (Objected to by Mr. Miller. Objection sustained. Exception noted for plaintiff.)' (2) The court below erred in questioning the witness George W. Hancock as follows: 'Q. But you are quite uncertain to what height it was to be filled, and it is only after the passage of the ordinance of 1888 that you find the height established according to the lines of 1885. Now, how can you estimate a value, in view of that uncertainty? A. There was a grade established as early—Q. You must not talk about that grade of 1878. That is not in the case. I am putting the question as to the uncertainty which you have just spoken of. You have said that after this grade was adopted practically, and the work was done, you had facts. So you had. You had the facts. You had an established grade according to the lines on the plan of 1885. Before that you had not facts. Now, before you had facts, how could you estimate the value of that land?' (3) The court below erred in refusing to allow the plaintiff to prove by George W. Hancock the following: 'Q. I understand that there could have been a more favorable grade for the development of the plaintiff's property than the grade of November 2, 1885? (Objected to. Objection sustained. Exception noted for plaintiff.)' (4) The court below erred in affirming defendant's first point, which was as follows: 'First. The jury have nothing to do with any plan earlier than the plan of 1885.' (5) The court below erred in affirming the defendant's second point, which was as follows: 'Second. The jury have nothing to do with the question whether the city might have fixed a more favorable grade for Mr. Clark than it has fixed.' (6) The court below erred in affirming the defendant's third point, subject to the consideration set forth in the general charge, which third point was as follows: 'Thrd. No suit can be brought for damages because of the change of a street height on the city plan. The damage is not done until the work is performed. The question, then, is whether the property is worth more or less after the street is constructed to the new grade than it was under the conditions immediately preceding the construction.'"

Joseph S. Clark, for appellant. E. Spencer Miller, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

PER CURIAM. We find nothing in this record that would justify a reversal of the judgment. Defendant's points recited in the fourth, fifth, and sixth specifications were rightly affirmed, and there appears to be no error in the learned judge's rulings referred to in the first three specifications. Judgment affirmed.

(185 Pa. St. 472)

In re PORTUONDO'S ESTATE.

Appeal of DUGRO.

(Supreme Court of Pennsylvania. April 11, 1898.)

WILLS—ELECTION OF WIDOW.

Election of widow to take against husband's will, whereby she became entitled to half of the realty for life, and half the personalty absolutely, does not require immediate distribution, or prevent carrying out the scheme of the will, so far as concerns income for testator's mother during life; the will, after specific devises and bequests, giving the residue in trust to pay the income to the widow and the mother, for life, two-thirds to the former and one-third to the latter, with remainders over as to the principal on death of the widow, though the final distribution will be on a basis of only half the estate.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Juan F. Portuondo, deceased. From decree dismissing exceptions to the adjudication of the auditing judge on the account of the executors of said deceased, Maud Dugro, his stepdaughter, a legatee, appeals. Affirmed.

The opinion of the court below (Ferguson, J.) is as follows:

"The testator, after some specific devises and bequests, gave all the rest, residue, and remainder of his estate to his executors in trust to invest the same, and of the net income arising therefrom pay to his wife during the full term of her natural life two-thirds thereof, and the remaining third of said net income to his mother during the lifetime of his said wife. In case of the death of his mother, her share of the said income was to be paid to his sisters; and, in case of the death of his wife, then the whole principal of his estate was to be divided into three parts, of which he gave to his stepdaughter one-third absolutely; to his executors, in trust for the children of his stepson, another third; and to his mother the remaining third; and, in case of her death during the life of his wife, then this one-third was to go to his sisters. The scheme of the testator's will was therefore very plain and simple, if nothing had happened to interfere with it. But his widow exercised the right given her by the law, and elected to take the share of his estate to which she was entitled under the intestate laws. As there was no issue, she thereby became entitled to one-half of the real estate for life, and one-half of the personal estate absolutely. Thus the plan of the testator was frustrated, and the trust estate which he undertook to establish for the support of his wife and his mother was destroyed, to the extent of having one-half of the principal thereof taken away. The questions presented by the exceptions were: First, whether the trust for the benefit of the mother remained intact, notwithstanding the widow's election; and, second, whether the widow was now to be considered as if she were naturally dead, and the

balance of the principal distributed as provided by the will of the testator upon the happening of that event.

"It was contended that in Ferguson's Estate, 138 Pa. St. 208, 20 Atl. 945, Vance's Estate, 141 Pa. St. 201, 21 Atl. 643, and Woodburn's Estate, 151 Pa. St. 586, 25 Atl. 145, it was held by the supreme court that the election of the widow to take against the will of her husband was equivalent to her death, and therefore the payment of the bequests to those in remainder was accelerated, and they became presently due and payable, as if she were actually dead. This is, no-doubt, the law as declared by these cases, when, under the will, there is no other purpose to be served than to maintain the estate for the widow during her lifetime. Her election is then equivalent to her death. The law is different when there are other trusts in the will besides those for the widow. Then the intention of the testator with reference to these is, as far as possible, to be carried out and performed. As was said in Ferguson's Estate: 'The principle is well settled that equity will depart from the literal provisions of a will in order to carry out a superior or preferred intent of the testator, which would otherwise fail. But the object is not to produce a distribution which the court may think more equal or more equitable, but to approximate as closely as possible to the scheme of the testator, which has failed by reason of intervening rights or circumstances. Hence the regular order of the will is never departed from except of necessity, and then only to the extent that necessity requires.' In Vance's Estate the supreme court said: 'By such election the widow takes her share as if her husband had died intestate, and the will then operates on the rest of the estate precisely as if the widow were dead. A court of equity will interpose, if necessity requires, to preserve the intention of the testator from destruction; but such interposition should never take place in favor of a subordinate, as against a preferred or superior, intent.' In Woodburn's Estate the court said: 'When, therefore, the testator's only discoverable purpose failed or was superseded by the widow's election to take against the will, the trust established only to serve that purpose became useless and ended.' In this case the testator created a trust for the benefit of two persons, his wife and his mother. His wife, by her election, destroyed that created for her. That is the end of that, but how could she by any act destroy the trust created for his mother, by which she is entitled to one-third of the income of the residuary estate during the life of the wife, if by any possibility this trust can be executed? This is not a trust for the widow alone. There is another person interested, and, as long as the purpose of the testator with reference to her can be performed, it must be done. The scheme of the will is not to be departed from

except when necessity requires, and there is no such necessity in this case, because, even after the widow's one-half has been taken from the residuary estate, enough can be set apart to secure to the mother the income which the testator intended she should have during his wife's lifetime. She will be disappointed in not receiving the share of the principal upon the widow's death that the testator said she should have. This cannot now be helped, but the income that the testator intended for her during the life of his widow can be preserved, and this it is the duty of this court to do.

"It was contended that the will of the testator only operated upon what was left after the widow's one-half of the personalty had been taken, and therefore the mother was entitled to only the income upon one-third of this balance. While it is true that, when the time for final distribution of the principal arrives, it will only be what is left that is to be distributed, and the distributees will then receive only one-third of a half, respectively, instead of one-third of the whole residuary estate, yet until that time, by the terms of the testator's will, the mother is entitled to one-third of the income of the whole residuary estate; and as this object and purpose of the testator can be carried out, notwithstanding the widow's election, we think that in equity and justice, and upon the authority of the cases above cited, that it should be done. The exceptions are all dismissed. The schedule of distribution will, however, be amended, in that the legacy of \$1,000 to Edna Faunce will not be deducted before the widow's share is ascertained."

A. T. Freedley, for appellant. M. Hampton Todd and Wm. F. Johnson, for appellees.

PER CURIAM. The decree in this case is affirmed on the opinion of the learned court below. Decree affirmed and appeal dismissed at the cost of the appellant.

(185 Pa. St. 427)

MULCAHEY et ux. v. ELECTRIC TRACTION CO.

(Supreme Court of Pennsylvania. April 11, 1898.)

STREET RAILWAYS—ACCIDENT ON TRACK—NEGLIGENCE.

A street-railway company is not liable for death of boy, 16 years old, occasioned by his suddenly running against, or immediately in front of, the car, so that the motorman had no opportunity to prevent collision.

Appeal from court of common pleas, Philadelphia county.

Action by Martin Mulcahey and wife against the Electric Traction Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

W. Horace Hepburn, for appellants. Dallas Sanders and Thomas Leaming, for appellee.

PER CURIAM. It was clearly established by the testimony of the plaintiff that the accident was occasioned by the boy suddenly running against the car, or upon the track immediately in front of the car. He was 16 years of age, and responsible for his acts. There was no opportunity for the motorman to prevent the collision, and in such circumstances, as we have many times held, there can be no recovery. Judgment affirmed.

(185 Pa. St. 420)

In re FORD'S ESTATE.

Appeal of RICHARDS et al.

(Supreme Court of Pennsylvania. April 11, 1898.)

EXECUTORS AND TRUSTEES—DEVASTATION—VOLUNTARY CONVEYANCE.

Where the children of testator, to whom he had made bequests somewhat obscure in meaning, execute an instrument declaring his intention to have been that they respectively enjoy for life only the income of a certain part of the estate, and agreeing that they hold the property in trust for themselves for life, and from their respective deaths for their respective children, the part going to children of one of them, who was an executor, is not liable for his subsequent misappropriation of funds of the estate, as, even if the others were not estopped to assert it, his agreement for the benefit of his children was not a voluntary conveyance, and, even if he was a trustee as to the others, he could contract with them as to his individual share.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Isaac Ford, deceased. From a decree affirming the adjudication of the auditing judge on the account of the Fidelity Insurance, Trust & Safe-Deposit Company, substituted trustee under the will of deceased, Lizzie F. Richards and others, children and grandchildren of deceased, other than the children of his deceased son, Henry C. Ford, appeal. Affirmed.

The opinion of the auditing judge is as follows (Penrose, J.):

"The decedent died March 6, 1876. By his will, executed two days before his death, he devised certain real estate to his wife, Amanda Ford, for life (directing, also, that one-third of the income of his residuary estate should be paid to her), and gave \$20,000 absolutely to his son Henry C. Ford, and to each of his daughters, Hannah A. Turner, Sallie Ford, and Lizzie Ford; \$10,000 to the trustees of Crozer Theological Seminary, in trust as there set forth; and \$1,000 to the trustees of the Fifth Baptist Church of Philadelphia; one-fifth 'of the remaining two-thirds of income to' Henry C. Ford; and one-fifth each to Hannah A. Turner, Sallie Ford, and Lizzie Ford, 'and to their heirs.' The remaining fifth of two-thirds of the income of the residuary estate was given to Amanda Ford and Henry C. Ford in trust 'to invest * * * for the benefit of' his son Isaac Al-

bert Ford, described as being of 'unsound mind, and unfit to take charge of his share of income'; and if he dies without issue, and not having gained his reason, 'his accumulated share to revert to' the testator's other children or their heirs; and 'in the event of the decease of any of my children, leaving no issue, * * * the share of income of such decedent to be equally divided among my surviving children, or their heirs.' Mrs. Amanda Ford and Henry C. Ford were appointed executors, and letters testamentary were duly granted to them by the register. On the 16th November, 1876, Mrs. Amanda Ford, Henry C. Ford and (Emily) his wife, William M. Turner and (Hannah A. Turner) his wife, Sallie Ford, and Lizzie Ford executed under their hands and seals an instrument in writing, by which, after reciting the provisions of the will as to the income of the residuary estate, the declarations of the testator, two days after its execution, that he 'intended by said provisions that his said children should enjoy and control only the income of their said respective one-fifth shares for their respective lives,' the charitable gifts, and the wish of the parties that they should be paid notwithstanding the invalidity caused by the death of the testator within a calendar month after the execution of the will; reciting further that 'the said Amanda Ford, in consideration of this agreement, and in lieu and waiver of her right of election to claim any interest in the property and estate of Isaac Ford, deceased, otherwise than under his said will and this agreement, has agreed to receive,' and the other parties to assign to her, all their right, etc., in certain real estate and personal property there mentioned,—they, the said children of the testator, with the wife of Henry C. Ford and the husband of Mrs. Turner, 'in consideration of the premises,' granted, etc., to Mrs. Ford, in fee, the real estate mentioned, and assigned the said personal property. Provision was also made for the payment of the charitable gifts, and further as follows: 'That the said Henry C. Ford and (Emily) his wife, William M. Turner and (Hannah A.) his wife, Sallie Ford, and Lizzie Ford do hereby acknowledge, testify, declare, and agree that we hold the residue of our respective said two-fifteenths shares of the residue of the property and estate of Isaac Ford * * * in trust to and for the only proper use and behoof of ourselves for our respective lives, and from and immediately after our respective deaths to and for the only proper use and behoof of such of our respective children as shall then be living at our respective deaths, and the issue of such children as may be then deceased, their heirs * * * and assigns, forever, in equal shares, as tenants in common; * * * and in case either of us should die without leaving, him or her surviving, a child, children, or issue of any deceased child or children, then to and for the only proper use and be-

hoof of our respective right heirs,—so, however, that the share of Isaac Albert Ford, as such right heir, therein, shall go to the trustees, and be under and subject to the trusts and limitations declared in said will of and concerning his devise and bequest therein.' Various accounts were filed by the executors and trustees, viz: in November, 1890, May 1, 1894, and March 27, 1896, which were duly adjudicated; and, in the interval between the account of 1894 and that of 1896, it was discovered that Henry C. Ford had misappropriated funds of the estate to the amount of about \$87,000. He was discharged from the executorship and trusteeship May 2, 1896; and on the 21st November, 1896, the present accountant, the Fidelity Insurance, etc., Company, was appointed 'trustee in place of Henry C. Ford, trustee under the will of Isaac Ford, deceased, of the trust property and estate set forth in the adjudication made May 8, 1896, and the schedule of distribution thereunder.' Mrs. Turner died, as represented in the petition by Henry C. Ford for his discharge, in September, 1891, leaving seven children, as there set forth. Sallie Ford is now the wife of Hamilton C. Haines, and Lizzie Ford the wife of Horace E. Richards. Henry C. Ford, as further represented, died August 17, 1896, leaving four children,—Frank R. Ford, Isaac Ford, Harry H. Ford, and Ralph L. Ford, a minor having no guardian. He also left a wife, Savannah Ford. The account was admitted to be correct, and the only question submitted for the consideration of the court was the validity of the deed of November 16, 1876, so far as concerns the interest limited to the children of Henry C. Ford at his death; it being contended by Mr. Johnson that, Henry C. Ford being trustee, under the will of the testator, for the other parties to the agreement, the latter were not bound by its stipulations so far as his share of the estate was concerned, and also that as against such other parties the limitation to his children was simply a voluntary conveyance, void as to then existing creditors.

"It must, perhaps, be conceded that the children of the testator, under the gift in the will of a share of income to them, respectively, and 'their heirs,' were entitled absolutely to a corresponding share of the corpus of the estate; but in that case, if any trust was created by the will, it was only by reason of the direction 'to pay' to the widow one-third of the income, and the necessity that the whole estate should be held in order that she might have one-third of the income, and not the income of one-third. Willen's Appeal, 105 Pa. St. 121. The trust was purely for the benefit of the widow, and the relation of trustee and cestuis que trustent can scarcely be said to have existed between Henry C. Ford and the other children of the testator. Moreover, the disability of a trustee to contract with his cestuis que trustent only relates to the trust property,

not to the individual estate of the trustee himself, even though he derives title to the latter under the instrument creating a trust for the others; and in the present case Henry C. Ford was neither buying from nor selling to his *cestuis que trustent*—assuming that under the will they were such. He was simply dealing with an estate of which he was the absolute owner, and which the other persons taking under the will could not in any manner interfere with, or deprive him of. Of course, those whose rights had their origin in the agreement of November 16, 1876 (*viz.* the children, born or to be born, of the original parties), took in strict subordination to all its provisions, and cannot now set up or allege disability growing out of a trust relation which did not begin until the transaction was fully consummated. With regard to the suggestion that the transaction is to be regarded as a voluntary conveyance in fraud of the rights of the beneficiaries under the will of the decedent, but little need be said. That legatees or *cestuis que trustent* bear such a relation to an executor or trustee that any voluntary settlement he may make in favor of his wife or children is void as to them, though he has not committed, and does not intend to commit, a *devastavit*, is a startling proposition. His liability is that of depositary or bailee, not that of debtor. It is wholly unlike the case of the maker of a promissory note not yet matured, who is a debtor from the beginning, though the time of payment is suspended. "*Debitum in presenti, solvendum in futuro.*" In the event of his insolvency or bankruptcy, the legatees or *cestuis que trustent*—there having been no *devastavit*—would not share in the distribution of his estate, nor would they be scheduled as creditors. And if it be conceded that they are creditors, as the voluntary conveyance by their debtor is only invalid as to them, they may waive their rights, and agree that it shall be made, as in the present case they have done, by uniting in the conveyance, and binding themselves by seal. But the transaction is not to be regarded as in any sense a voluntary conveyance, and it is admitted that when it was entered into no fraud was contemplated by Henry C. Ford, who had not then, nor did he for many years after, become delinquent in the management of the estate. It was simply the carrying into execution of what all of the parties believed, and what they asserted in the most solemn manner, was the will of the owner of the estate with which they were dealing. They were all of full age, and had the right to waive the benefit of the law requiring wills to be in writing. The written will was obscurely expressed, but the testator had told them what he intended; and this they agreed should be done irrespective of technicalities or rules of interpretation. The agreement of the others to this effect was a valid consideration for the agreement of

each, and the limitations to the children of the first takers are to be regarded as if the written will had expressed them in terms. In the opinion of the auditing judge, the estate given to the children of Henry C. Ford cannot, except by their voluntary act, be taken or in any way be made liable for his debt to the trust estate, nor can they be deprived of it on the ground that it was created by a conveyance from their father not supported by consideration. The balance of principal shown by the supplemental account, composed as there indicated (\$122,623.17), will be held, and the balance of income (\$2,448.33), less clerk's fees (\$20), applied in accordance with the provisions of the will of the testator, and the agreement of November 16, 1876; the estate being held in trust during the lifetime of Mrs. Amanda Ford, in order that she may receive the portion of income to which she is so entitled. The certificate of counsel for the accountant as to the securities belonging to the trust estate, as set forth in said account, will be presented to the auditing judge, in accordance with the rule in such case provided; such certificate, when approved, to be annexed and made part of this adjudication. It is ordered and adjudged that the account be confirmed nisi on payment of clerk's fees."

John G. Johnson, for appellants. Crawford, Loughlin & Dallas, for appellees.

PER CURIAM. We are entirely satisfied with the disposition of this case, as made by the learned auditing judge, and confirmed by the court below. We therefore affirm the decree upon the opinion of the auditing judge. Decree affirmed, and appeal dismissed, at the cost of the appellants.

(185 Pa. St. 496)

CORCORAN v. WANAMAKER et al.

(Supreme Court of Pennsylvania. April 11, 1898.)

EMPLOYEES—INJURY FROM ACID—NEGLIGENCE OF MASTER.

An employé in a laundry, whose sight is destroyed by poisoning from the fumes of acids used in the business, cannot hold the employers therefor; it not being shown that they knew such use of acids would have such effect, or that it was not customary to use acids in laundries in the manner and proportions used by them.

Appeal from court of common pleas, Philadelphia county.

Action by Julia Corcoran against John Wanamaker and others for damages for loss of plaintiff's sight by poisoning from fumes of acids used in defendants' laundry, in which plaintiff was an employé. There was judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed.

J. Martin Rommel, for appellant. W. L. Nevin and P. F. Rothermel, Jr., for appellees.

PER CURIAM. There is no evidence that the defendants had any knowledge that the use of the acids complained of would produce the disease from which the plaintiff suffered, and there was no proof that it was not customary to use acids in laundries in the same manner and proportions as they were used in the laundry business conducted by the defendants. The case was therefore destitute of the evidence necessary to establish the charge of negligence, without which there could be no recovery. Judgment affirmed.

(185 Pa. St. 428)

In re ROGERS' ESTATE.

(Supreme Court of Pennsylvania. April 11, 1898.)

WILLS—POWER OF SALE.

Power given by testator to his executors and trustees to sell "any or all of my real estate" in case they thought it for the best interest of the estate, authorizes the sale of his mansion house, though, after his life estates to his children and certain bequests, he gives the remainder for a home, and authorizes and directs the trustees to establish a home, and "for that purpose to set apart and hold forever" said mansion house.

Appeal from orphans' court, Philadelphia county.

In the matter of the estate of Charles H. Rogers, deceased, on petition of Mary Rogers and others, children of deceased, Charles R. Rogers and others, executors and trustees under the will of deceased, were decreed to have power and directed to sell property of decedent's estate, and said executors and trustees appeal. Affirmed.

Decedent's will, after giving his property in trust for his children for life, and making certain bequests, contained the following provisions:

"And upon the further trust that upon the death of the survivor of my said children, and the payment of all the legacies hereinbefore given and bequeathed, and upon the death of all the annuitants above named, or the payment of the principal of all annuities where the annuitants shall happen to be then living as aforesaid, then the said trustees and their successors in the trust shall at all times hereafter forever hold all the said rest, residue, and remainder of my estate, and the income thereof, for the purpose of establishing and maintaining a home for old and infirm white men and women as hereinafter mentioned and expressed; that is to say, that it is my intention, and I hereby authorize, empower, and direct the trustees under this, my will, to establish a home for old and infirm white men and women of good moral character, born and residing in the city and county of Philadelphia, who have no means of support, and for that purpose to set apart and hold forever all that my said mansion house wherein I now reside, and the thirty-six acres, more or less, of land thereunto belonging, sit-

uate on the Old York road in the Twenty-Second ward of the city of Philadelphia, with full power and authority for them and their successors to alter and add wings to the said mansion house, and so alter and change the same as to make and provide a comfortable and proper home for such old persons who shall be admitted to the said home, and to erect and build such other building or buildings as they in their good judgment and discretion shall think right and proper, and all management and rules for management shall be vested in the said trustees. The said home shall be known as the 'Rogers Home for Old and Destitute White Men and Women.' My wish and desire is that whenever a man and his wife, both old and infirm, and of good moral character, which must in all cases be, shall be admitted to said home, they shall be provided with such apartments so as to make the latter part of their days on this earth as comfortable and happy as possible; and in case of the death of any of the inmates of the said home at any time there shall be set apart a certain part of the said land as a burial place for any one dying, wherein they shall be properly interred."

"Item. I hereby authorize and empower my said executors and trustees, or the survivors or survivor of them, or their successors or successor in the trust, at any time or times hereafter, if they shall think it for the best interest and benefit of my estate, and not otherwise, or for the final settlement thereof, to sell and dispose of any or all of my real estate, either at public or private sale, and upon receipt of the purchase moneys therefor to make, execute, and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance therefor, without any such purchaser or purchasers being bound or obliged to see to the application, nonapplication, or misapplication of the purchase moneys, or any part thereof, and to invest such purchase moneys (if any sale or sales shall be made before the final settlement of my estate) in the legal securities hereinbefore mentioned, and to hold the same upon the trusts and for the uses and purposes contained in this, my will."

William Rudolph Smith, for appellants.
Charles Biddle and John G. Johnson, for appellees.

PER CURIAM. Undoubtedly it was for the best interest of the estate of the decedent that the decree of sale of the property in question should be made. It is perfectly clear also that the power of sale conferred upon the executors and trustees by the will of the testator was amply sufficient to justify the sale by them. It embraced the whole of the testator's real estate of which this property was a part, and the learned court below was entirely right in granting the order. Decree affirmed, and appeal dismissed.

(185 Pa. St. 497)

In re GARIS.

(Supreme Court of Pennsylvania. April 18, 1898.)

ATTACHMENT AGAINST PERSON—RECORD OF ORDER.

1. Attachment against person for failure to turn over property to the committee of a lunatic can only be based on an order of court duly entered. Mere request of the committee is not enough.

2. An order of a court of record, for disobedience to which attachment against the person can issue, must be of record.

Appeal from court of common pleas, Philadelphia county.

In the matter of Katharine Garis, a lunatic. From an order making absolute rule on David V. Garis for attachment for failure to deliver property to the Equitable Trust Company, committee of the lunatic, wife of said Garis, he appeals. Reversed.

Samuel M. Roberts and Mellick & Potter, for appellant. Alfred R. Haig and James M. Beck, for appellee.

STERRETT, C. J. This appeal brings up for review the action of the court below in issuing the attachment to compel the production and delivery to the appellee of personal property, etc., alleged to belong to the estate of the lunatic. Summary proceedings, such as were contemplated in this case, rest upon the necessity of maintaining the dignity and authority of the courts, by punishing both direct and constructive contempts of their authority. *Com. v. Perkins*, 124 Pa. St. 48, 16 Atl. 525; 4 Bl. Comm. 285, 286. In the latter, the learned commentator, referring to ordinary cases of contempt by disobedience to orders made in the progress of a cause, says, "The proceeding is to be looked upon as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of court." Our act of June 16, 1836, § 23, provides that "the power of the several courts of this commonwealth to issue attachments and to inflict summary punishments for contempt of court shall be restricted [inter alia] * * * to disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court." In *Scott's Case*, 1 Grant, Cas. 237, it was held that this act has no relation to attachments to enforce decrees in equity, when the object is not to inflict punishment, but to compel performance of such decrees. While it was also decided in that case that a decree in equity for the payment of money due upon a contract cannot be enforced by attachment, since the act of July 12, 1842, abolishing imprisonment for debt, it has been repeatedly held in later cases that the exception in the act of 1842 of arrests "in proceedings for contempt to enforce civil remedies" applies to cases involving breaches of trust. *Chew's Appeal*, 44 Pa. St. 247; *Tome's Appeal*, 50 Pa. St. 285; *Church's Ap-*

peal, 103 Pa. St. 263; *Wilson v. Wilson*, 142 Pa. St. 247, 21 Atl. 807. It thus appears that jurisdiction to issue attachment, in cases such as that under consideration, is still derived from the common law. As was said by Mr. Justice Sharswood at nisi prius (*Pierce v. Post*, 6 Phila. 494): "An attachment is never issued against a party or a witness unless he is shown to be in contempt of the court. He can only be in contempt by disobeying some process or order of court previously served upon him." This is undoubtedly the correct practice, as indicated by the cases above cited, whether under the common law or statutes. No case to the contrary has been cited, and it is confidently believed that no well-considered case to that effect can be found.

The record before us fails to disclose any rule or order on the appellant, prior to the attachment, which he disobeyed, or could have disobeyed, because no such rule or order was ever issued or served upon him prior to the rule for attachment. The only thing that is suggested as a possible basis for the attachment proceeding against him is the written request by the appellee, committee of his lunatic wife. It is too clear for argument that such requests or demands, not preceded by a rule to show cause, duly issued, served, and returned, and an order duly entered by the court after hearing, are neither rules nor orders of court, and cannot in any proper sense be regarded as the legal equivalents of either. The verbal statement of the court, made at the hearing of the rule for attachment, and recited in the answer to appellant's rule to set aside the attachment proceedings, is of no consequence whatever. Decrees and orders of courts of record cannot be carried in the breast of the judge who makes them. If any regard is to be had to the regular and orderly conduct of judicial proceedings in such courts, all their orders, rules, and decrees must be recorded. The verbal order referred to never was recorded, and its first and only appearance in the case is the reference made to it in the appellee's answer to appellant's rule to show cause. Further elaboration is unnecessary. There is nothing whatever in the record to justify the attachment proceedings against the appellant. If he has any property or evidences of indebtedness belonging to the estate of his lunatic wife, he ought to turn them over to the committee, and save further trouble.

There is no merit in the second and third specifications of error; nor is there anything in either of them that requires discussion. They are both dismissed. The first specification is fully sustained. It is accordingly ordered that the petition of the Equitable Trust Company, committee, etc., praying for a rule on the appellant to show cause why an attachment should not be issued against him, etc., be dismissed, and that all proceedings thereunder be reversed and set aside, at the costs of said Equitable Trust Company.

(185 Pa. St. 536)

ADDISON v. WANAMAKER.

(Supreme Court of Pennsylvania. April 18, 1898.)

REAL-ESTATE AGENT—RIGHT TO COMMISSIONS.

A real-estate broker who, having a customer for property of a certain class, arranges, through an owner's agent, satisfactory terms of purchase of a piece thereof, resulting in a conveyance accordingly, is not entitled to commissions from the vendor, in the absence of an agreement therefor.

Appeal from court of common pleas, Philadelphia county.

Action by Arthur D. Addison against John Wanamaker. Judgment for defendant. Plaintiff appeals. Affirmed.

Jos. K. McCammon and James H. Hayden, for appellant. P. F. Rothermel, Jr., for appellee.

STERRETT, C. J. This action of assumption was brought to recover \$2,250 commissions, at the rate of 2½% on \$90,000, the price for which defendant's former residence in Washington City was sold, in 1893. Plaintiff averred, in substance, that, acting for the defendant as his real-estate broker, he effected the sale and thereby earned the commissions claimed. The defendant, on the other hand, denied that he ever employed plaintiff to sell the property or procure a purchaser therefor, and also denied that he owed him the sum claimed or any sum whatever. It was, of course, incumbent on the plaintiff to prove a contract, express or implied, with the defendant. In that he signally failed. The evidence tended strongly to prove that he had two clients or customers, each of whom wished to buy property similar in grade, etc., to that of the defendant's. For one of these he finally arranged, through defendant's agent, satisfactory terms of purchase, and the property was subsequently conveyed accordingly, but there is not a particle of evidence that the plaintiff was ever authorized by the defendant to represent him in the transaction. On the contrary, the defendant appears to have been studiously careful to avoid saying or doing anything from which any inference of employment as his agent for any purpose might be drawn. The plaintiff's suggestion that, irrespective of any contractual relation whatever between the broker and the vendor, it is customary for the latter to pay the commissions of the former, and therefore he is entitled to recover, cannot be entertained. No such viciously bad custom as that should ever be recognized, unless it has been previously made the subject of agreement between all the parties concerned,—vendor, vendee, and the broker. The plaintiff in this case was manifestly the employé of the person who afterwards became purchaser of the property, and hence he was not in a position to properly act as

agent of the defendant. That "no man can serve two masters" is a sound proposition, resting on the highest and best authority. Any alleged agency that is in conflict with this principle must rest on express contract between the parties in interest. As was said in *Cannell v. Smith*, 142 Pa. St. 25, 31, 21 Atl. 793: "It is against public policy and sound morality for a man to act as broker for both parties, unless that fact is fully communicated to them." To the same effect are *Everhart v. Searle*, 71 Pa. St. 256; *Rice v. Davis*, 136 Pa. St. 439, 20 Atl. 513. Without further reference to the facts or the principles involved, we are all of opinion that the learned referee was clearly right, on the evidence before him, in concluding, "that the plaintiff has failed to establish any undertaking upon the part of the defendant to pay him the commissions demanded, and that judgment should be entered for the defendant." Judgment affirmed.

(185 Pa. St. 529)

WOOD v. DIAMOND ELECTRIC CO.

(Supreme Court of Pennsylvania. April 18, 1898.)

NEGLIGENCE—PROXIMATE CAUSE.

Negligence of an electric company is not the proximate cause of the death of one who touched a screen heavily charged with electricity, in the face of ample notice that it was so charged, his evident purpose being to demonstrate that those who asserted it was thus charged were mistaken.

Appeal from court of common pleas, Philadelphia county.

Action by Annie Wood against the Diamond Electric Company for death of plaintiff's husband, occasioned by his touching a wire screen attached to his photograph gallery, which had become charged with electricity from contact with one of defendant's wires. There was judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed.

H. Homer Dalbey and Louis Bregy, for appellant. Joseph T. Bunting and William C. Hannis, for appellee.

PER CURIAM. We find nothing in the evidence tending to prove that the proximate cause of the death of plaintiff's husband was the defendant company's negligence. On the contrary, it clearly appears that his death was the result of his own voluntary, deliberate act in touching the screen heavily charged with electricity, in the face of ample notice that it was so charged. His evident purpose in thus touching the screen was to demonstrate that those who asserted it was thus charged were mistaken. Further reference to the evidence is unnecessary. It was clearly insufficient to carry the case to the jury, and hence there was no error in refusing to take

off the judgment of nonsuit entered by the learned president of the court below at the trial. Judgment affirmed.

(185 Pa. St. 535)

KELLER v. BOORSE.

(Supreme Court of Pennsylvania. April 18, 1898.)

NEGLECT—CONFLICTING EVIDENCE.

Case is properly left to jury, there being conflicting evidence as to whether defendant's horse, which, frightened by a train, ran away, and collided with plaintiff's husband, was left unhitched and unattended under a railroad bridge.

Appeal from court of common pleas, Philadelphia county.

Action by Anna M. Keller against David O. Boorse. Judgment for plaintiff. Defendant appeals. Affirmed.

E. Cooper Shapley, for appellant. H. Homer Dalbey and Louis Bregy, for appellee.

PER CURIAM. Plaintiff's right to recover depended on disputed questions of fact which necessitated submission of the case to the jury. In support of her averment that the injury of which her husband died was caused by defendant's negligence, testimony was introduced to prove that defendant's horse, left standing under the railroad bridge at Sixteenth and Indiana avenue, unhitched, and unattended by any one, became frightened by the sudden noise of an overpassing train, dashed down the avenue into Broad street, and there ran into the wagon that was being driven down Broad street by plaintiff's husband, and so injured him that he shortly afterwards died. One of plaintiff's witnesses testified, in substance, that she saw the occurrence; that her attention was attracted by the noise of the train passing over the bridge, and saw the horse (with cart attached) "start from under the bridge. It came down Indiana avenue. I didn't see any one with it at all. When it got to Broad street, it hit the farmer's wagon, and mashed it all to pieces." To the question, "Was there any one by the horse when you saw it start?" her answer was, "No, sir." On behalf of the defendant there was some testimony tending to show that the horse was not unattended at the time he became frightened and ran down Indiana avenue, etc. In view of this and other conflicting evidence, it was clearly the duty of the court to submit the case to the jury. That was done in an impartial and fully adequate charge, and, as shown by the verdict, the disputed questions of fact were determined in favor of the plaintiff. It follows that there was no error in refusing to withdraw the case from the jury by giving them binding instructions to find for defendant, and hence the assignment of error must be overruled. Judgment affirmed.

MEMORANDUM DECISIONS.

BROOKS v. BENHAM et al. (Supreme Court of Errors of Connecticut. Jan. Term, 1898.) Motion by appellant for order directing superior court to enlarge the time limited for redemption in original decree of foreclosure, which time expired pending appeal. Denied. For former opinion, see 38 Atl. 908. John O'Neill, for appellant. Frederick M. Peaseley, for appellees.

PER CURIAM. The superior court has jurisdiction to modify its judgment in respect to the limit of time fixed for redemption, and to the stay of execution. This court cannot assume, upon this motion, to control the exercise of such jurisdiction.

(70 Conn. 746)

COMMANDER v. HAHN. (Supreme Court of Errors of Connecticut. Jan. 7, 1898.) Appeal from court of common pleas, Hartford county; William S. Case, Judge. Suit by Miles Commander against Mary Hahn to recover commissions due him upon the sale of defendant's property. From a judgment for plaintiff, defendant appeals. Affirmed. William F. Henney, for appellant. Sidney E. Clarke, for appellee.

PER CURIAM. The question in this case is fully decided by the opinion in the case of Chatfield v. Bunnell, 69 Conn. 511, 37 Atl. 1074.

(67 N. H. 595)

AMERICAN LEGION OF HONOR v. SIDES et al.

(Supreme Court of New Hampshire. Rockingham. March 17, 1893.)

BENEFICIAL ASSOCIATIONS—RIGHT TO FUND.

Bill of interpleader by the American Legion of Honor against Margaret A. Sides and others. Submitted on facts agreed. Case discharged.

The plaintiff is a beneficiary association chartered under the laws of Massachusetts. In January, 1880, a certificate in the association was issued to Asa Swett, upon his application, by which the association promised to pay out of its benefit fund, to the wife and children of Swett, upon his death, a sum not exceeding \$5,000, in accordance with the laws of the association. He, or the beneficiaries, paid the assessments upon this certificate until March 3, 1883, when, without their knowledge, he surrendered it to the association, and applied for a new one, to be made payable to the defendant Sides and others, who were not related to him or in any way dependent upon him; and March 19th such a certificate was issued. The by-laws required that a certificate should be payable to the family or dependents of the member. The beneficiaries named in the last certificate paid all the assessments made upon it, and made due proof of Swett's death, which occurred in January, 1892. His wife and children are also defendants.

Calvin Page, for plaintiff. Frink & Batchelder, for defendant Swett and others. John Hatch and Samuel W. Emery, for Sides and others.

PER CURIAM.¹ The decision in *Lanouette v. Laplante*, 67 N. H. 118, 36 Atl. 931, disposes of this case. Case discharged.

CHASE, J., did not sit. The others concurred.

(69 N. H. 665)

CARROLL COUNTY v. TOWN OF WAKEFIELD. (Supreme Court of New Hampshire. Carroll. July 30, 1897.) Assumpsit by Carroll

¹ See footnote 36 Atl. 607.

county against the town of Wakefield for money paid by the plaintiff to the asylum for the insane, for the support of an insane person who had a settlement in Wakefield, who was not a pauper, and who was committed to the asylum by the judge of probate. Judgment for defendant. A. B. Tasker and Frank Weeks, for plaintiff. A. L. Foote, for defendant.

WALLACE, J. The case is not distinguishable from *Merrimack Co. v. City of Concord*, 66 N. H. 389, 23 Atl. 87. Judgment for the defendant. BLODGETT, J., did not sit. The others concurred.

(69 N. H. 668)

CONWAY SAV. BANK v. DOW et al. (Supreme Court of New Hampshire. Carroll, March 11, 1898.) Action by the Conway Savings Bank against Hiram H. Dow and others. Case discharged. John C. L. Wood, for plaintiff. Worcester, Gafney & Snow and John B. Nash, for defendants.

CHASE, J. The question reserved is decided in *Bank v. Dow*, 39 Atl. 975. Case discharged. CLARK, J., did not sit. The others concurred.

HOLMES v. HOLMES. (Supreme Court of New Hampshire. Coös. July 26, 1895.) Report from Coös county court. Writ of entry by Valorus R. Holmes against Sylvanus Holmes to foreclose a mortgage. Facts found by a referee. Submitted on report. Bingham, Mitchell & Batchelor and Ladd & Fletcher, for plaintiff. Bingham & Bingham and Drew, Jordan & Buckley, for defendant.

CHASE, J. The reserved case presents no question of law that is insisted upon. Conditional judgment on the report for the plaintiff. All concurred.

JORDAN v. ATHERTON. (Supreme Court of New Hampshire. Coös. July 26, 1895.) Foreign attachment. The question reserved was "how much the trustee should be charged." The amount was adjudged to be \$400. CLARK, J., did not sit. The others concurred. T. F. Johnson and Drew, Jordan & Buckley, for plaintiff. J. H. Dudley and G. H. Bingham, for defendant.

ORDWAY v. BOSTON & M. R. R. (Supreme Court of New Hampshire. Merrimack. July 30, 1897.) Action by Bert Ordway against the Boston & Maine Railroad for negligence. The court ordered a nonsuit, and the plaintiff excepted. Exceptions overruled. Sargent, Hollis & Niles, for plaintiff. F. S. Streeter and J. M. Mitchell, for defendant.

WALLACE, J. There was no evidence upon which the jury could properly find that the plaintiff was ignorant of any fact material to his safety. Exceptions overruled. BLODGETT, J., did not sit. The others concurred.

(55 N. J. E. 589)

BORCHERLING, Appellant, v. RUCKEL-SHAUS, Respondent. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion of Vice Chancellor REED, see 34 Atl. 977, 54 N. J. Eq. 344.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery.

(50 N. J. L. 587)

BOROUGH OF EAST NEWARK et al. v. KEARNEY TP. et al. STATE (GRADY, Prosecutor) v. SAME. (Court of Errors and Appeals of New Jersey. Nov. Term, 1896.) Error to supreme court. For opinion of the supreme court, see 34 Atl. 942, 59 N. J. Law, 86.

Edward Kenny and Richard Lindaberry, for plaintiffs in error. J. Franklin Crowell and Charles L. Corbin, for defendants in error.

PER CURIAM. The judgment of the supreme court is unanimously affirmed, for the reasons given by that court.

(55 N. J. E. 590)

BROOKS et al., Appellants, v. VREBLAND, Respondent. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion of the chancellor, see 35 Atl. 658, 54 N. J. Eq. 462.

PER CURIAM. Decree unanimously affirmed, for the reasons given by the chancellor.

(50 N. J. L. 586)

BRUCE et al. v. PEARSALL. (Court of Errors and Appeals of New Jersey. Nov. Term, 1896.) Error to supreme court. For opinion of the supreme court, see 34 Atl. 982, 59 N. J. Law, 62. Appellate & Degnan, for plaintiffs in error. Edmund Wilson, for defendant in error.

PER CURIAM. The judgment of the supreme court is unanimously affirmed, for the reasons given by that court.

(55 N. J. E. 593)

DELAWARE, L. & W. R. CO., Appellant, v. BRECKINRIDGE et al., Respondents. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion of Vice Chancellor EMERY, see 35 Atl. 756, 55 N. J. Eq. 141.

PER CURIAM. Order unanimously affirmed, for the reasons given in the court of chancery.

(55 N. J. E. 589)

DUVALE, Appellant, v. DUVALE, Respondent. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion of Vice Chancellor REED, see 35 Atl. 750, 54 N. J. Eq. 581.

PER CURIAM. Decree affirmed, for the reasons given in the court of chancery. The CHIEF JUSTICE, DE PUE, GARRISON, GUMMERE, LUDLOW, VAN SYKEL, BOGERT, and DAYTON, JJ., for affirmance. HENDRICKSON and NIXON, JJ., for reversal.

(59 N. J. L. 585)

FOLEY v. STATE. (Court of Errors and Appeals of New Jersey. Nov. Term, 1896.) Error to supreme court. For opinion of the supreme court, see 35 Atl. 105, 59 N. J. Law, 1. Samuel Kalisch, for plaintiff in error. Elvin W. Crane, for defendant in error.

PER CURIAM. The judgment of the supreme court is unanimously affirmed, for the reasons given by that court.

(50 N. J. L. 585)

FOWLER et al. v. STATE. (Court of Errors and Appeals of New Jersey. Nov. Term, 1896.) Error to supreme court. For opinion of the supreme court, see 34 Atl. 682, 58 N. J. Law, 423. William D. Daly, for plaintiffs in error. Charles H. Winfield, for defendant in error.

PER CURIAM. The judgment in this case is unanimously affirmed, for the reasons given by the supreme court.

(59 N. J. L. 268)

HERTER v. GOSS & EDSALL CO. (Court of Errors and Appeals of New Jersey. March Term, 1896.) Error to supreme court. For opinion of the supreme court, see 30 Atl. 252, 57 N. J. Law, 42. William D. Daly, for plaintiff in error. Dickinson, Thompson & McMaster, for defendant in error.

PER CURIAM. The judgment below is affirmed, for the reasons given by the supreme court. The CHANCELLOR, GUMMERE,

REED, VAN SYCKEL, and BROWN, JJ., for affirmance. DIXON, BOGERT, KRUEGER, and SIMS, JJ., for reversal.

(55 N. J. E. 593)

HOUPt et ux., Appellants, v. TURNER, Respondent. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion by Vice Chancellor PITNEY, see 33 Atl. 28, 53 N. J. Eq. 526.

LUDLOW, J. On review of this case, the court of errors and appeals are of the opinion that the conclusions and findings of the learned vice chancellor, on which the decree in said case, as advised by him, is made, are not warranted by the evidence and the law. The decree of the court of chancery is reversed, and the bill should be dismissed, with costs. GARRISON, LIPPINCOTT, LUDLOW, MAGIE, VAN SYCKEL, BOGERT, DAYTON, HENDRICKSON, and NIXON, JJ., for reversal. DIXON and BARKALOW, JJ., for affirmance.

(59 N. J. L. 586)

KNOWLES LOOM WORKS v. VACHER et al. (Court of Errors and Appeals of New Jersey. Nov. Term, 1896.) Error to circuit court, Passaic county. For opinion of the supreme court, on case certified from Passaic circuit, see 31 Atl. 306, 57 N. J. Law, 490. Gilbert Collins, for plaintiff in error. J. Franklin Fort, for defendants in error.

PER CURIAM. The judgment of the court below is affirmed, for the reasons given by the supreme court in its advisory opinion. DIXON, GUMMERE, LIPPINCOTT, MAGIE, BARKALOW, BOGERT, DAYTON, HENDRICKSON, and NIXON, JJ., for affirmance. THE CHANCELLOR, for reversal.

(55 N. J. E. 591)

LYNDE, Appellant, v. LYNDE, Respondent. (Court of Errors and Appeals of New Jersey, March Term, 1897.) Appeal from court of chancery. For opinion of the chancellor, see 35 Atl. 641, 54 N. J. Eq. 473.

PER CURIAM. Decree unanimously affirmed, for the reasons given by the chancellor.

(55 N. J. E. 588)

McTAGUE, Appellant, v. FINNEGAN et al., Respondents. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion of chancellor, see 35 Atl. 542, 54 N. J. Eq. 454.

PER CURIAM. Decree unanimously affirmed, for the reasons given by the chancellor.

(55 N. J. E. 591)

MORRIS & E. R. CO. et al. v. STATE ex rel. STATE BOARD OF HEALTH. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion of Vice Chancellor PITNEY, see 35 Atl. 835, 55 N. J. Eq. 116.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery.

(55 N. J. E. 590)

NATIONAL SHOE & LEATHER BANK OF CITY OF NEW YORK, Appellant, v. AUGUST et al., Respondents. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion of Vice Chancellor PITNEY, see 33 Atl. 803, 54 N. J. Eq. 182.

PER CURIAM. Decree unanimously affirmed, for the reasons given in the court of chancery.

PENNSYLVANIA, P. & B. R. CO. v. TRIMMER. (Court of Errors and Appeals of New

Jersey. March 1, 1898.) Appeal from court of chancery. Bill by the Pennsylvania, Poughkeepsie & Boston Railroad Company against Augustus Trimmer. From a decree for defendant, advised by BIRD, late vice chancellor (31 Atl. 310), complainant appeals. Affirmed. Henry S. Harris, for appellant. Chauncey H. Beasley, for respondent.

PER CURIAM. This court adopts the view taken by the vice chancellor that the court of chancery has no jurisdiction of this case, and the decree is therefore affirmed.

(59 N. J. L. 584)

SMITH v. CORBETT. (Court of Errors and Appeals of New Jersey. Nov. Term, 1896.) Error to supreme court. This case was argued at the February term, 1896, before Justices DEPUE, VAN SYCKEL, and GUMMERE. It was upon certiorari to review the action of the court of common pleas of the county of Monmouth, in the matter of an application to keep an inn and tavern. It was held, per curiam, that the common pleas had jurisdiction to grant the license, although the applicant was not at the time in occupancy of the house licensed. Association v. Busby, 44 N. J. Law, 627; American v. Hill, 52 N. J. Law, 328, 19 Atl. 789. On the application to vacate the license, the court below had the discretionary power to postpone the decision of the case to see whether the applicant was entitled to the possession of the house. There was no reversible error in that respect, and the writ of certiorari must be dismissed, with costs. Aaron E. Johnston, for plaintiff in error. William H. Vredenburg, for defendant in error.

PER CURIAM. The judgment of the supreme court is unanimously affirmed, for the reasons given by that court.

(59 N. J. L. 269)

STATE (TIDEWATER PIPE CO., Limited, Prosecutor) v. STATE BOARD OF ASSESSORS. (Court of Errors and Appeals of New Jersey. June Term, 1896.) Error to supreme court. For opinion of the supreme court, see 31 Atl. 220, 57 N. J. Law, 517. Alvah A. Clark, for plaintiff in error. John P. Stockton, Atty. Gen., for defendant in error.

PER CURIAM. The judgment in this case is unanimously affirmed, for the reasons given in the court below.

(55 N. J. E. 592)

STILLMAN, Appellant, v. JOHNSON, Respondent. FRESHMUTH, Appellant, v. SAME, Respondent. (Court of Errors and Appeals of New Jersey. March Term, 1897.) Appeal from court of chancery. For opinion of Vice Chancellor REED, see 35 Atl. 291, 54 N. J. Eq. 333.

PER CURIAM. Decrees unanimously affirmed, for the reasons given in the court of chancery.

BRUNS v. UNION TRACTION CO. (Supreme Court of Pennsylvania. April 18, 1898.) Appeal from court of common pleas, Philadelphia county. Action by Julianna S. Bruns against the Union Traction Company for death of plaintiff's husband, caused, as alleged by plaintiff, by a fall which he received from defendant's street car, which was started up, after he had gotten off to allow some passengers to alight, before he had time to regain a place on the car, and while he had hold of a handle bar on the side of the car. From a judgment on a verdict directed for defendant, plaintiff appeals. Affirmed. The charge of the court directing verdict is as follows: "It is not worth while arguing this case, for I direct the jury to find a verdict for the defendant for two reasons: First of all, the evidence does not show that this man's death was necessarily the result of the accident. I do not

recollect that any evidence has been given to show that fact; in other words, to connect the accident and the death. But, independently of that, the defendant has produced a release regularly signed by the deceased before his death; and the evidence is not sufficient for me to permit the question of his mental capacity to go to the jury, and I therefore direct the jury to render a verdict for the defendant." J. McGregor Gibb and Preston K. Erdman, for appellant. Dallas Sanders and Thomas Leaming, for appellee.

PER CURIAM. We are not convinced that the evidence in this case was sufficient to justify the court in submitting it to the jury, and hence we cannot say there was any error in withdrawing it from their consideration by directing a verdict for the defendant. Finding no error in the rulings of the learned trial judge, the judgment should not be disturbed. Judgment affirmed.

CARSON v. BROMLEY et al. (Supreme Court of Pennsylvania. Feb. 7, 1898.) Appeal from court of common pleas, Philadelphia county. Action by John W. Carson against Thomas Bromley and others for injury from percolating waters. Judgment for defendants. Plaintiff appeals. Affirmed. Ormond Rambo, for appellant. H. Le Grand Ensign and Frank T. Lloyd, for appellees.

PER CURIAM. There was no evidence against Bromley Bros. Carpet Company, and therefore the learned court below did right in directing the nonsuit as against them. As to the defendant Thomas Bromley, the trouble with the plaintiff's case is the insufficiency of his testimony to convince the jury that the percolations complained of came from the defendant's stable at all. The court left to the jury fairly the question whether such percolations did come from the defendant's stable, and the jury found they did not. An examination of the testimony convinces us that the verdict was right in this respect. A discussion as to whether the case was one of negligence or nuisance is altogether unimportant, in view of the verdict. There is no merit in the assignments of error, and they are all dismissed. Judgment affirmed.

(184 Pa. St. 340)

In re COWAN'S ESTATE. Appeal of **WHEELER.** (Supreme Court of Pennsylvania. Jan. 3, 1898.) Appeal from orphans' court, Allegheny county. Accounting by Margaret A. Cowan, executrix of William G. Cowan, deceased. From the decree in the matter of the audit of the account, D. Wheeler, a claimant against the estate, appeals. Affirmed. Levi Bird Duff and L. B. D. Reese, for appellant. John S. Robb and Wm. H. McClung, for appellee Samuel Crawford. J. W. Kinnear, for appellees Wheeler & Dusenbury. Geo. L. McCleary, for appellee Mrs. Geo. T. Green.

DEAN, J. Every question of merit raised by this appeal has been passed on in Du Bois' appeal (30 Atl. 59) from same decree in which opinion has been handed down this day. The finding of fact by the auditing judge was sustained in that case. This disposes of appellant's complaint that he should have been allowed for the price of the lumber delivered after the 24th of August, 1895. The decree is affirmed, and the appeal is dismissed, at costs of appellant.

ECRET v. HART CYCLE CO. (Supreme Court of Pennsylvania. April 11, 1898.) Appeal from court of common pleas, Philadelphia county. Action by Alice Ecret against the Hart Cycle Company for injuries sustained by plaintiff while taking instructions at defendant's bicycle academy, due, as alleged by her, to the recklessness of the instructor in pushing her forward on her wheel without his retaining a hold on it, on her fifth lesson. There was judgment

of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed. Thos. A. Fahy, for appellant. Hampton L. Carson, for appellee.

PER CURIAM. We are not convinced that there was any error in refusing to take off the nonsuit ordered by the learned trial judge. It is unnecessary to refer to the evidence further than to say that it is insufficient to require submission of the case to a jury on the question of defendant company's negligence. Judgment affirmed.

FULFORD v. LEHIGH VAL. R. CO. (Supreme Court of Pennsylvania. April 4, 1898.) Appeal from court of common pleas, Bradford county. Action by Henry Fulford against the Lehigh Valley Railroad Company for injury to plaintiff, received while in defendant's employ as a locomotive engineer; he, while looking out of the cab window of his engine, having his head struck by the flange or edge of the cover plate of defendant's bridge. Defendant claimed that the risk was assumed by plaintiff, and that he, while serving as engineer and fireman, had had ample opportunity to observe how near the bridge came to the engine. There was judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed. Rodney A. Mercur and William Maxwell, for appellant. Davies & Davies and Henry Streeter, for appellee.

PER CURIAM. This appeal is from the refusal of the court below to take off the judgment of nonsuit ordered by the learned president of the Thirty-Fourth judicial district, who specially presided at the trial. Without referring specially to the testimony and the absence of evidence necessary to justify submission of the case to a jury, we are satisfied there was no error in refusing to take off the nonsuit. The assignment of error is not sustained. Judgment affirmed.

In re GIMBER'S ESTATE. Appeal of **COMMONWEALTH TITLE INSURANCE & TRUST CO. et al.** (Supreme Court of Pennsylvania. Jan. 24, 1898.) Appeal from orphans' court, Philadelphia county. Accounting by the Commonwealth Title Insurance & Trust Company and another, executors of Henry W. Gimber, deceased. At the audit of the account a claim was presented for damages resulting from negligence and nonperformance of duty by deceased, as attorney for claimant. From a decree dismissing exceptions of the executors to the adjudication of the auditor allowing the claim, they appeal. Affirmed. S. Morris Waln, for appellants. Wm. Alexander Brown and Chapman & Chapman, for appellees.

PER CURIAM. While the specifications of error are sufficiently numerous, there is nothing in the record to justify us in sustaining any of them. The subjects of complaint in the fourth and sixteenth are in finding the facts therein recited. In 12 of them the subjects of complaint are in not finding certain facts therein referred to, and the remaining 2 relate to questions of evidence, etc. On exceptions to the learned auditing judge's findings of fact and conclusions, the questions presented here were duly considered by the court below in banc, who sustained the auditing judge, and confirmed his adjudications. No error in this has been shown, nor do we think either of the questions referred to requires further notice. The case depended on questions of fact, which, having been correctly determined by the auditing judge, were approved by the court in banc. The controversy should have ended there. Decree affirmed, and appeal dismissed, at appellants' costs.

GREER v. TYSON. (Supreme Court of Pennsylvania. April 4, 1898.) Appeal from court of common pleas, Philadelphia county. Action by

John Greer against Harry G. Tyson for injury inflicted on plaintiff while riding a bicycle, by being run into by defendant's team, driven by his servant. There was judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed. Thos. A. Fahy, for appellant. Frederick Beyer, for appellee.

PER CURIAM. This appeal is from the refusal of the court below to take off the judgment of nonsuit that was ordered by the learned trial judge. A careful consideration of the evidence has not convinced us that there was any error in the refusal of which the plaintiff complains. A discussion of the testimony is unnecessary. It would consume time to no useful purpose. Judgment affirmed.

H. B. CLAFLIN CO. v. WHITE et al. (Supreme Court of Pennsylvania. April 4, 1898.) Appeal from court of common pleas, Philadelphia county. Action by the H. B. Clafin Company against Samuel White and another, trading as White & Spate. Rule to dissolve plaintiff's attachment, under Act March 17, 1869, relative to fraudulent debtors, was discharged, and defendants appeal. Affirmed. Defendants contend that the attachment should have been dissolved, because the affidavit for attachment was insufficient, in not alleging, in the words of Act May 24, 1887 (P. L. 187), that defendants are "justly indebted" to plaintiff, and that they are about to remove "their property out of the jurisdiction of the court"; because defendants filed an affidavit denying the allegations of fraud as contained in the affidavit for attachment; and because, while the bond for attachment was signed in plaintiff's name, "per Peter J. Brady, Atty. in Fact and Ass'n Manager," the record did not disclose any authority for Brady to affix plaintiff's name to the bond. Defendants also contended that, even if their claim that a motion to dissolve an attachment could be made at any time was erroneous, motion in this case was made seasonably, rule to show cause why the attachment should not be dissolved having been granted within two weeks after issue of the writ. Plaintiff contended that the affidavit and bond were sufficient, and that motion to dissolve the attachment was not made till eight months after its issue, and after a general appearance by defendants, and that, therefore, it was too late. Affidavit for attachment: "County of Philadelphia—ss.: Peter J. Brady, being duly sworn, deposes that he is assistant manager of the H. B. Clafin Company, a corporation; that he makes this affidavit for said company; that Samuel White and O. Fred Spate, partners, trading as White & Spate, are indebted to the said H. B. Clafin Company in a sum exceeding one hundred dollars, to wit, in the sum of \$4,391.58, for goods and merchandise sold and delivered, to wit, carpets, by said company, to said White & Spate, from December 1, 1895, to June 1, 1896; that the said Samuel White and O. Fred Spate, have assigned, and are about to assign, dispose of, and remove, their property, money, and evidence of debt, with intent to defraud their creditors and the said company; and that they fraudulently contracted said debt and incurred said obligation. Peter J. Brady." Affidavit for rule to dissolve attachment: "County of Philadelphia—ss.: Samuel White, being duly sworn according to law, deposes and says that he is one of the defendants in the above-entitled action; that, in pursuance of execution issued in above, the sheriff has levied upon the individual property of said defendant; that the allegations set forth in the affidavit for the attachment under the act of 1869 are untrue, especially 'that the said Samuel White and O. Fred Spate have assigned, and are about to assign, dispose of, and remove their property, money, and evidences of debt with intent to defraud their creditors and the said company, and that they fraudulently contracted the said debt and incurred said obligation'; that the firm of White & Spate is a firm

doing business in New York City, to whom goods mentioned in plaintiff's affidavit were sold, and that said firm has no place of business in city of Philadelphia. Said deponent therefore prays for a rule to show cause why said attachment, under the act of 1869, should not be dissolved, and further deponent saith not. Samuel White," Charles J. Sharkey, for appellants. Matthew Dittman and Thomas R. Elcock, for appellees.

PER CURIAM. We are all of opinion that the court below was right in discharging the rule to dissolve the attachment in this case. There is nothing in either of the specifications of error that requires discussion. Judgment affirmed.

(186 Pa. St. 356)

HENSZEY et al. v. PARKER. (Supreme Court of Pennsylvania. April 4, 1898.) Appeal from court of common pleas, Philadelphia county. Action by George C. Henszey and others, trustees, against William F. Parker. Judgment for plaintiffs. Defendant appeals. Affirmed. Walter E. Rex, for appellant. Walter E. Brand and William C. Hannis, for appellees.

PER CURIAM. This case was argued with No. 452 of January term, 1897 (Henszey v. Gross, 39 Atl. 949), and involves substantially the same question. For reasons given in the opinion affirming the judgment in that case, we think there is no error in the decision of the court below. Judgment affirmed.

(194 Pa. St. 608)

HICKS et al. v. CITY OF PHILADELPHIA et al. (Supreme Court of Pennsylvania. Feb. 21, 1898.) Appeal from court of common pleas, Philadelphia county. Suit by Thomas L. Hicks and others against the city of Philadelphia and others. Decree for defendants, and plaintiffs appeal. Affirmed. Alex. Simpson, Jr., for appellants. Charles E. Morgan, Jr., and John G. Johnson, for appellee United Gas. Imp. Co.

MITCHELL, J. This case was argued with Bailey v. City of Philadelphia, 39 Atl. 494; and the decree is affirmed, for the reasons given in the opinion in that case, filed herewith.

In re **LAFFERTY'S ESTATE.** Appeal of CORCORAN. (Supreme Court of Pennsylvania. Jan. 17, 1898.) Appeal from orphans' court, Philadelphia county. Accounting by C. H. Lafferty and others, executors of Charles Lafferty, deceased. From the decree of the orphans' court dismissing exceptions of Patrick J. Corcoran, one of the executors, to the adjudication of the auditing judge, he appeals, individually and as executor and trustee. Affirmed. F. A. Hartranft, James M. Beck, W. F. Harrity, for appellant. E. Spencer Miller, for appellee Charles T. Maginnis. Eli Kirk Price and J. Willis Martin, for appellee Rose E. Lafferty. Samuel Gustine Thompson and George L. Crawford, for appellee Charles H. Lafferty. Henry Budd and George Peirce, for appellees Patrick Lafferty and F. P. Lafferty.

PER CURIAM. A careful consideration of this record, with special reference to the several questions involved, has failed to convince us that there is any substantial error either in the findings of fact or in the conclusions drawn therefrom by the learned court below. As to some of the former—especially the question whether Rose E. Lafferty was a member of the firm of P. Lafferty & Co.—the testimony was conflicting and contradictory; but we cannot say that the finding as to either was not in accordance with the weight of the evidence as it appeared to the learned judge who had the witnesses before him, and thus possessed opportunities of forming a correct judgment that an appellate court cannot have. All the findings of fact, respectively, rest on sufficient evidence, and we must assume that they are severally correct until the contrary clearly appears. It is unnecessary to notice the

specifications of error in detail. It would consume much time to no useful purpose. They are all overruled. Decree affirmed, and appeals dismissed, at appellant's costs.

In re **MARTIN'S ESTATE**. (Supreme Court of Pennsylvania. Jan. 3, 1898.) Appeal from orphans' court, Allegheny county. Judicial settlement of the account of H. W. Martin, executor of the estate of T. H. Martin, deceased. From a decree restating his final account, the executor appeals. Affirmed. H. L. Castle and Jas. M. Nevin, for appellant. J. J. Miller, for appellees.

PER CURIAM. It is seldom that an executor or other trustee renders such a confused and unsatisfactory account of his stewardship as is exhibited in the accounts filed by the appellant, and passed upon in this case. Indeed, it would not be surprising if the court below, in endeavoring to bring order out of the confusion, should have been mistaken as to some items, to the prejudice of the accountant; but a careful examination of the record as presented has not convinced us that there is any such error. The appellees, doubtless, weary of protracted and vexatious delays, are content to abide by the conclusion reached by the orphans' court; and there is no reason why the appellant should not be required to submit thereto. In view of the evidence of carelessness, and, to say the least, mismanagement, in the execution of the trust, the court appears to have dealt leniently with this appellant. Without referring in detail to the specifications of error, it is sufficient to say that there is nothing in the record to justify us in sustaining any of them; and neither of them requires discussion. Decree affirmed, and appeal dismissed, at appellant's costs.

NICODEMUS v. McMULLIN. (Supreme Court of Pennsylvania. April 18, 1898.) Appeal from court at common pleas, Philadelphia county. Action by Rebecca Nicodemus against William J. McMullin for death of plaintiff's husband, killed while on a bicycle, by a heavily loaded double team of defendant, in front of which deceased attempted to ride, after, as claimed by plaintiff, the driver had pulled back on his mules, as though stopping to allow a street car to pass in front of him, whereupon, as claimed by plaintiff, he negligently urged forward his mules, in an attempt to cross in front of the car, resulting in the accident. There was judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed. H. Homer Dalbey and Louis Bregy, for appellant.

PER CURIAM. A careful consideration of the testimony in this case has satisfied us that it is insufficient to have justified the submission to a jury of the question of defendant's liability for the unfortunate accident that resulted in the death of plaintiff's husband. It therefore follows that there was no error in refusing to take off the judgment of nonsuit ordered by the learned trial judge. Judgment affirmed.

RALEIGH v. EARLE et al. (Supreme Court of Pennsylvania. March 21, 1898.) Appeal from court of common pleas, Philadelphia county. Action by Walter Raleigh against George H. Earle and others. From a decree for plaintiff, defendants appeal. Affirmed. Samuel Dickson, for appellants. Joseph P. McCullen, for appellee.

PER CURIAM. We find no error in this decree. It is predicated of the facts correctly found by the learned court below, and we are all of opinion that it should not be disturbed. There is nothing in either of the specifications of error that requires discussion. The decree is affirmed, and appeal dismissed, at appellants' costs.

In re **RICHARD'S ESTATE**. Appeal of **POTTEIGER**. (Supreme Court of Pennsylvania. March 21, 1898.) Appeal from orphans' court, Berks county. Judicial settlement of the account of Adam H. Potteiger, guardian of the estate of Adam Darius Richard, a minor. From a judgment overruling his exceptions to the adjudication of the auditing judge, and confirming such adjudication absolutely, said guardian appeals. Affirmed. Isaac Hiester, Henry D. Green, and Herbert R. Green, for appellant. Cyrus G. Derr and Benj. F. Dettra, for appellee.

PER CURIAM. We find no error in this record that requires either a reversal or modification of the decree from which this appeal was taken. So far as they are material to appellant's contention, the learned judge's findings of fact are sustained by the evidence; and his conclusions based on the controlling facts thus established are substantially correct. Extended discussion of the questions involved would serve no useful purpose. Decree affirmed, and appeal dismissed, at appellant's costs.

RITTER v. PREFERRED MASONIC MUT. ACC. ASS'N OF AMERICA. (Supreme Court of Pennsylvania. March 21, 1898.) Appeal from court of common pleas, Lehigh county. Action by W. Matthias Ritter against the Preferred Masonic Mutual Accident Association of America to recover for 52 weeks' benefits for disability from accident. Defendant claimed that plaintiff's injuries did not, "independently of all other causes, immediately, wholly, and continuously disable him from transacting any and every kind of business pertaining to his occupation," within the provision of the policy, and, therefore, that he was not entitled to recover. Judgment for plaintiff. Defendant appeals. Affirmed. James S. Biery, for appellant. Frank M. Trexler, for appellee.

PER CURIAM. This case was carefully and correctly tried. We find nothing in the record that would justify us in sustaining either of the specifications of error; nor do we think that any of them requires special notice. Judgment affirmed.

SHANNON v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania. April 4, 1898.) Appeal from court of common pleas, Philadelphia county. Action by Alexander S. Shannon, a minor 10 years old, by his father and next friend, Dennis Shannon, against the city of Philadelphia, for injury to plaintiff by falling over a block of stone between the first and second tracks of the Reading Railroad, where it runs along Pennsylvania avenue, and on or just outside of where the curb line of Seventeenth street would be if extended across Pennsylvania avenue, the block having been placed there by the watchman of the railroad company for the purpose of holding the safety gate in place when open, to permit travel on Seventeenth street, and plaintiff having come in contact with the stone, over which he fell, throwing his hand under the wheels of a gondola car in a passing train, by running along by the side of the car, with his hand on it, without looking where he was going. There was judgment of nonsuit, which the court refused to take off, and plaintiff appeals. Affirmed. H. Homer Dalbey and Louis Bregg, for appellant. Leonard Finletter, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

PER CURIAM. This appeal is from the judgment of the court below refusing to take off the nonsuit ordered at the trial. We have carefully considered the evidence, and are all of opinion that it is insufficient to warrant the submission of plaintiff's case to a jury, and hence the court was right in refusing to take off the nonsuit. Judgment affirmed.

(185 Pa. St. 249)

SHANNON v. CITY OF PHILADELPHIA. (Supreme Court of Pennsylvania. April 4, 1898.) Appeal from court of common pleas, Philadelphia county. Action by Dennis Shannon against the city of Philadelphia. Judgment for defendant. Plaintiff appeals. Affirmed. H. Homer Dalbey and Louis Bregg, for appellant. Leonard Finletter, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

PER CURIAM. This case was argued with No. 390, January term, 1897 (*Shannon v. Same Defendant*, 39 Atl. 1117), and involves substantially the same question. For reasons given in opinion just filed in that case, there was no error in refusing to take off the judgment of nonsuit in this case. Judgment affirmed.

TIFFANY v. DELAWARE, L. & W. R. CO. (Supreme Court of Pennsylvania. April 4, 1898.) Appeal from court of common pleas, Susquehanna county. Action by Ida M. Tiffany against the Delaware, Lackawanna & Western Railroad Company for death of plaintiff's husband, who was killed at a crossing of defendant's railroad. Judgment for plaintiff. Defendant appeals. Affirmed. W. H. Jessup and W. H. Jessup, Jr., for appellant. McCollum & Smith, for appellee.

PER CURIAM. This case involved questions of fact relating to the defendant company's negligence, as the proximate cause of the death of plaintiff's husband, and also to the alleged contributory negligence of said deceased. Under the testimony before the court, these questions were manifestly for the exclusive consideration of the jury, and they were accordingly submitted to them in an impartial and fully adequate charge, to which no just exception can be taken. By their verdict, the jury definitively determined all the material questions of fact in favor of the plaintiff; and we find nothing in the record to justify us in disturbing the judgment entered on the verdict. The case was ably and accurately tried. It is not our purpose to notice the specifications of error in detail. To do so would consume much time, to no good purpose. The assignments of error are all overruled, and the judgment is affirmed.

(185 Pa. St. 293)

VON STEUBEN v. CENTRAL R. CO. OF NEW JERSEY. (Supreme Court of Pennsylvania. April 4, 1898.) Appeal from court of common pleas, Northampton county. Action by Simon D. Von Steuben against the Central Railroad Company of New Jersey. Judgment for plaintiff. Defendant appeals. Affirmed.

MCCOLLUM, J. When this case was here before, we held that the defendant company had not shown a warrant in the statutes of this commonwealth for the Port Reading lease, and that the Port Reading Company, in operating the Lehigh & Susquehanna Railroad, must be considered as the agent of the defendant company. 35 Atl. 992. We also held that, upon the evidence in the case, the question whether the destruction of the plaintiff's property by fire was chargeable to the negligent operation of the road was for the jury. On the second trial of the case the rulings of the court below conformed to the rulings above stated, and resulted in a verdict and judgment for the plaintiff. It was contended on the appeal from this judgment that because of the evidence presented by the defendant company on the second trial, in addition to the evidence presented by it on the first trial, the court should have directed the jury to find for the defendant. In order to ascertain whether there was any basis for this contention, we have carefully examined the evidence introduced by the defendant on the second trial. Our examination of this evidence has satisfied us that it is substantially the same as the evidence presented by the defendant on

the first trial, and that neither branch of the defense to this action was strengthened by it. We can find nothing in it or the statutes affording any support to the claim that the Port Reading lease was valid, and exonerating the defendant from liability for damages caused by the negligent operation of the Lehigh & Susquehanna Railroad; nor can we find anything in the evidence which would have justified the court in holding that the destruction of the plaintiff's property by fire was not attributable to its negligence. It follows that the rulings of the court below on the controlling questions in the case should be sustained. There are no other questions raised by the specifications which require consideration. Judgment affirmed.

(184 Pa. St. 364)

WETTENGEL et al. v. GORMLEY et al. (two cases). (Supreme Court of Pennsylvania. Jan. 3, 1898.) Appeal from court of common pleas, Allegheny county. Two actions heard together,—one, by Albert C. Wettengel, guardian of Annie Lockhart and other minors, against James T. Gormley and others; and the other, by Annie B. Wettengel against the same defendants. From the decree, defendant Gormley appeals. Modified. J. McF. Carpenter, for appellant. J. S. & E. G. Ferguson, for appellees.

WILLIAMS, J. These appeals are from the same decree which we have just considered upon the appeals of the plaintiffs. 39 Atl. 57. The opinion filed in that case covers all the questions raised in these. We adhere to *Wettengel v. Gormley*, 160 Pa. St. 559, 28 Atl. 934. Let the same decree be entered in these cases as has been entered in the preceding appeals from the same decree; costs to be paid by Gormley.

WHITELEAF S. S. CO. v. AYER et al. (Supreme court of Pennsylvania. Jan. 24, 1898.) Appeal from court of common pleas, Philadelphia county. Action by the Whiteleaf Steamship Company against Henry C. Ayer and Robert H. Foerderer on a contract guarantying the performance by the Mexican International Steamship Company of the covenants of a charter party executed by said companies. From a judgment for plaintiff, defendants appeal. Affirmed. James Collins Jones and Lewin W. Barringer, for appellants. Alex. Simpson, Jr., for appellees.

PER CURIAM. Each of the 22 specifications charges error in dismissing defendants' exceptions to the learned referee's report, recited therein respectively. Some of these exceptions relate to several of the referee's findings of fact, others to his omission to find certain facts, and the others to his conclusions of law, etc. A careful consideration of the record has failed to disclose any error therein that would justify us in sustaining either of said specifications. There is nothing in any of them that requires discussion. On the referee's findings of fact and conclusions of law, all of which were approved by the court below, we think the judgment should be affirmed. The judgment is accordingly affirmed.

(184 Pa. St. 251)

WILLOCK v. CRESCENT OIL CO., Limited. (Supreme Court of Pennsylvania. Jan. 3, 1898.) Appeal from court of common pleas, Allegheny county. Action by S. M. Willock against the Crescent Oil Company, Limited. From a judgment for less than prayed for, plaintiff appeals. Dismissed. S. D. Mitchell and J. McF. Carpenter, for appellant. J. S. & E. G. Ferguson, for appellee.

WILLIAMS, J. The appeal is from the same judgment which we have just considered on the appeal of the defendant, and in which an opinion

has now been filed. The questions raised in both cases are substantially the same, and a separate discussion of them in each case is wholly unnecessary. For the reasons given in the opinion in the appeal of the Crescent Oil Company (39 Atl. 77) the judgment has been reversed, and a venire facias de novo awarded. The appeal in this case is dismissed.

In re YORKE'S ESTATE. Appeal of KINGSLEY. (Supreme Court of Pennsylvania. March 21, 1898.) Appeal from orphans' court, Philadelphia county. Petition by Mary Kingsley for an issue devisavit vel non, to determine—First, whether Mary Yorke, a codicil to whose will had been admitted to probate by the register of wills, was at the time of the alleged execution of said instrument of sound and disposing mind, and of sufficient legal capacity to make a valid will and testament; and, second, whether said

Mary Yorke was induced to make said proper writing by undue influence of Sara Yorke Stevenson, Cornelius Stevenson, and others. From a judgment sustaining exceptions to the award of the issue, and refusing such issue, petitioner appeals. Affirmed. George Gluyas Mercer and Talcott H. Russell, for appellant. John Hampton Barnes and John G. Johnson, for appellee.

PER CURIAM. A careful consideration of the voluminous record in this case has led us all to the conclusion that the orphans' court in banc was clearly right in sustaining the exception to the order awarding an issue devisavit vel non, etc., and in refusing to grant said issue. It is not our purpose to fortify this conclusion by referring to the testimony or stating the reasons which have satisfied us that neither of the specifications of error should be sustained. To do so would consume much time to no good purpose. Decree affirmed, and appeal dismissed, at appellant's costs.

END OF CASES IN VOL. 32.

